

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA76/2022
[2023] NZCA 295**

BETWEEN	RAIHAN MOHAMMED Appellant
AND	THE KING Respondent

Hearing:	9 May 2023
Court:	Miller, Woolford and Cull JJ
Counsel:	S R Lack for Appellant J E Mildenhall and W Harvey for Respondent
Judgment:	11 July 2023 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Cull J)

Introduction

[1] Mr Mohammed was convicted of sexual violation by unlawful sexual connection,¹ and strangulation,² following a jury trial in the District Court.³ Judge Lummis sentenced Mr Mohammed to two years and 10 months' imprisonment.⁴

[2] Mr Mohammed now appeals his convictions and sentence.

Background

[3] Mr Mohammed and the complainant had known each other for a number of years prior to the offending. On the evening of 26 October 2019, they socialised at Mr Mohammed's address, where they had some drinks. Mr Mohammed tried to initiate some sexual activity but was rebuffed. The two went into town to a club and met up with Mr Mohammed's younger brother.

[4] The complainant spent time talking and dancing with Mr Mohammed's brother. They kissed at the club. They both went back to her home address. Once at the address, the complainant and brother kissed again, but there were no further acts of intimacy between them. Mr Mohammed sent the complainant messages asking where she was, appearing concerned that she had left with his younger brother.

[5] Much later, Mr Mohammed arrived at the complainant's address and made his brother leave. The complainant's evidence at trial was that she expected they would both leave, but Mr Mohammed stayed. The complainant asked Mr Mohammed to leave, but he refused.

¹ Crimes Act 1961, s 128B — maximum sentence of 20 years' imprisonment.

² Crimes Act 1961, s 189A(b) — maximum sentence of seven years' imprisonment.

³ Mr Mohammed was found not guilty of three charges of indecent assault.

⁴ *R v Mohammed* [2022] NZDC 2591 [Sentencing Notes].

[6] The Judge noted that there are “many interpretations” of the verdict.⁵ The Judge’s view was that, disregarding the activity that took place outside the house, the complainant was asking Mr Mohammed to leave when they were in the bedroom.⁶ Mr Mohammed tried to initiate sexual activity and the complainant told him that she did not want that type of relationship and asked him to leave. The door was locked. At trial, they each alleged that the other locked the door.

[7] The complainant described being grabbed by the neck and thrown onto the bed, where Mr Mohammed put his other hand on her neck. She said she felt pressure on her neck, so she stopped fighting and resisting, being in a state of shock. Two hands were placed on her neck, impeding her breathing. This forms the basis of the strangulation conviction.⁷

[8] While on top of the complainant, Mr Mohammed removed her top, so she was naked from the waist up. He then placed his penis on her face, attempting to put it in her mouth, rubbing it across and around her mouth. This formed the basis for the conviction of sexual violation.⁸

[9] Prior to trial, the Crown sought to lead evidence of the sexual encounters between the complainant and Mr Mohammed’s brother.⁹ The application focused on the moments in which she and the brother kissed consensually. Initially, both parties agreed to the Crown’s application. The trial Judge considered the application afresh and despite the defence consent, struck out portions of the complainant’s EVI.¹⁰ Just prior to the commencement of the trial, the Crown again made application and with the consent of the defence, the Crown were permitted to lead “in a very limited way” evidence of the kissing at the bar and at the complainant’s house.¹¹

[10] The defence case at trial was that the complainant was unreliable, especially on account of her patchy memory. The defence asked the jury to accept

⁵ At [5].

⁶ At [5].

⁷ At [6].

⁸ At [10].

⁹ *R v Mohammed* [2021] NZDC 14012 [First pre-trial ruling].

¹⁰ At [22]–[23].

¹¹ *R v Mohammed* [2021] NZDC 14981 [Second pre-trial ruling].

Mr Mohammed's evidence that the two had been good friends, the complainant had made some "bizarre claims", and that the appellant did not suddenly become a predatory monster.

[11] The jury returned guilty verdicts for the strangulation and sexual violation offending based on the above events.

The appeal against conviction

Parties' positions

[12] Counsel for Mr Mohammed, Mr Lack submits that the Judge erred by reversing her pre-trial decision and admitting previous sexual experience evidence relating to the complainant's sexual conduct (kissing) with Mr Mohammed's brother at trial. It was not probative in relation to an issue in dispute and did not meet the threshold for admission under s 44 of the Evidence Act 2006 (the Act).

[13] Further, the Judge directed that the Crown relied on the evidence of kissing between the brother and the complainant to show that Mr Mohammed was motivated by jealousy. Mr Lack submits that this direction purported to endorse a Crown submission, which had not been advanced by the Crown, was not available on the evidence and resulted in a miscarriage of justice.

[14] The Crown submits that the Judge was entitled to revisit her earlier s 44 ruling. The s 44 threshold was met because there was a direct link between the evidence and matters at issue that the Crown sought to address (a potential motive for the offending or nuance to this motive) *and* matters that the defence sought to address (the complainant's credibility). The Crown further submits that its introduction prevented any improper speculation by the jury as to what happened between the complainant and brother.

The pre-trial s 44 rulings

[15] In advance of the trial, the Crown applied to admit the previous sexual experience evidence relating to the kissing between the brother and the complainant.

The application was set down for a pre-trial hearing on 3 March 2021,¹² but no submissions were made on the s 44 issue as both parties agreed to the application being granted.¹³

[16] On 13 May 2021, a pre-trial teleconference convened, at which the Judge indicated her preliminary view that, “[t]he focus must remain on the incident between the [appellant] and complainant rather than what may or may not have occurred with the brother.”¹⁴ However, the Judge determined that the Crown application needed to be formally determined and set the matter down for a pre-trial hearing.¹⁵

[17] On 25 June 2021 the Judge heard the s 44 application by the Crown to admit the previous sexual experience evidence at trial.¹⁶ At the hearing, the Crown submitted that the previous sexual experience evidence was of direct relevance to the following facts in issue, specifically:¹⁷

- (a) how and why Mr Mohammed went to the complainant’s address; and
- (b) why Mr Mohammed was angry and upset when he arrived at the address.

[18] Mr Mohammed’s then counsel, who was not trial counsel, did not oppose the application, submitting that the evidence would be relevant to the complainant’s “recollection of events”, and was an example of the complainant behaving inconsistently, saying one thing, and doing another.¹⁸

[19] The decision was reserved and delivered on 16 July 2021, which was five working days before the commencement of the trial.

¹² *R v Mohammed* DC Auckland CRI-2020-004-003818, 25 September 2020 (Minute of Judge E P Paul).

¹³ See the first pre-trial ruling, above n 9, at [8]–[10].

¹⁴ *R v Mohammed* DC Auckland CRI-2020-004-003816, 13 May 2021 (Minute of Judge K A Lummis)

¹⁵ At [9].

¹⁶ First pre-trial ruling, above n 9.

¹⁷ At [16].

¹⁸ At [19].

[20] The Judge concluded:¹⁹

I am not satisfied that the sexual activity with [the brother] meets the heightened threshold required by s 44. The evidence is not of such direct relevance to the facts in issue that it would be contrary to the interests of justice to exclude it. I fail to see how [the complainant] “making out” with [the brother] (something which Mr Mohammed would have had no actual knowledge of) would be of any relevance to whether Mr Mohammed sexually offended against [the complainant] shortly afterwards. I am of the view that there should not be any exploration of the sexual activity with [the brother]. It is irrelevant to the facts in issue.

[21] The fact that the brother and the complainant went home together was admissible, not the fact that the two did any sexual activity such as kissing. The Judge directed that the complainant’s evidential interview (EVI) be edited to remove the any passages which related to the fact that the complainant and brother had kissed.²⁰

Trial ruling

[22] Before the trial commenced on Monday 26 July 2021 in the Auckland District Court, the Crown sought to revisit the pre-trial s 44 ruling,²¹ seeking that the limited evidence of kissing between the complainant and the brother be admitted because the Crown was concerned that there was a danger that the jury may speculate as to what happened between the complainant and the brother during the hour and a half when they were alone at the complainant’s address.²² The Crown also said it was relevant to Mr Mohammed’s potential knowledge and anger about what had happened, and was thus, relevant to motive.²³

[23] Mr Mohammed’s counsel supported the application and sought that evidence of text messages also be admitted. This included a text from the complainant to his brother saying: “Can you tell me what happened between us? I barely remember anything”.²⁴ The defence wished to challenge the reliability of the complainant’s recollection of what occurred with Mr Mohammed on the basis that she could not recall what had happened with the brother only hours before hand. Defence counsel

¹⁹ At [22].

²⁰ At [23].

²¹ Second pre-trial ruling, above n 11.

²² At [3].

²³ At [4].

²⁴ At [5]–[6].

accepted that the text would have also invited inappropriate speculation, if the evidence of kissing was not admitted. The Judge ruled that the text “Can you tell me what happened between us?” be edited to read “I barely remember anything.”

[24] The Judge held:²⁵

Taking into account the matters raised by both the Crown and the defence, I am prepared to revisit my earlier ruling. I am prepared to allow the Crown to lead in a very limited way that there was kissing at the club and that the extent of the sexual activity at the house between [the brother] and [the complainant] was kissing. The questions need to be tightly framed and agreed to ensure that they do not infringe the principles of s 44. In terms of the text messages, the message on page 7: “He knows we kissed,” should be reintroduced into the text messages. In terms of the messages on page 20, I had questioned why some of the earlier messages had come out and in my view they can be reintroduced in terms of: “Why he said he did not care about what happened, have you guys talked, yeah we have, why,” but the key message, the: “Can you tell me what happened,” should be limited to: “I barely remember anything.”

This will allow defence to squarely place the issues of memory before the jury without the need to get into the extent of the sexual activity that in fact took place with [the brother].

[25] The Crown’s opening statement made no reference to the previous sexual experience evidence, and a redacted version of the complainant’s EVI was produced, as the initial pre-trial ruling required.

Issues

[26] There are two issues arising on appeal:

- (a) was the Judge in error in admitting the sexual activity evidence?
- (b) did the Judge misstate the Crown’s position in her direction to the jury and if so, was there a miscarriage of justice as a result?

Was the Judge in error in admitting the evidence of kissing?

[27] Mr Lack’s submission is in two parts. First, he submits that the previous sexual experience evidence, the kissing evidence, did not meet the high threshold for

²⁵ At [9]–[10].

admission under s 44. Secondly, he submits its admission part way through the trial, having earlier been ruled inadmissible, has caused a miscarriage of justice. He says further, that the appellant did not rely on the evidence to materially advance his defence that the sexual conduct was consensual and was left in a position to seek to undermine the credibility of the complainant once it had been admitted.

[28] An agreed summary of facts (signed by both parties on Tuesday 27 July 2021) was formally produced at trial and read to the jury on Wednesday 28 July 2021. That summary included:

On 27 October 2019 while dancing at 1885 bar in Auckland Central, [the brother] and [the complainant] kissed each other.

After they returned to [the complainant's] home address, [the brother] and [the complainant] kissed each other again but there were no further acts of intimacy between them.

[29] Both counsel cross-examined on the kissing evidence but neither the Crown, nor Mr Mohammed's counsel made any reference to this evidence in their closing address.

Discussion

[30] The threshold for admission under s 44 is that the evidence must be of such direct relevance to facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it.

[31] In *B (SC12/2013) v R* the Supreme Court considered the purpose and effect of s 44 of the Evidence Act.²⁶ The Court noted that rape shield provisions control the extent to which complainants in sexual cases may be questioned about their previous sexual history and are intended to reduce the humiliation and embarrassment from a complainant's previous sexual history. Against those concerns, however, the Court reinforced that they must be balanced against the defendant's right to a fair trial and the right to present an effective defence in particular.

²⁶ *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53].

[32] This was reiterated in *Wallace v R*, where this Court reinforced the role of the Judge as gate keeper to control the scope of any previous sexual experience being admitted in a trial, bearing in mind that sexual experience evidence may be legitimately probative of a fact put in issue by the defence, where the evidence is directly relevant. The Court said:²⁷

Section 44, as the Supreme Court observed in *B (SC12/2013) v R*, substantially replicates the rape shield provision enacted in 1977 in s 23A of the Evidence Act 1908. ... That said, aspects of sexual experience may nonetheless be legitimately probative of a fact put in issue by the defence. In such a case the heightened relevance test in s 44(3) applies. The question is whether the particular evidence sought to be admitted is of such direct relevance to the fact in issue that its exclusion would be contrary to the interests of justice.

[33] In *R v Clode*,²⁸ this Court clarified that certain features of a complainant's sexual experience may be admissible if it is distinctly relevant to the accused's defence, as s 44 was not intended to preclude a full defence which would otherwise be available.²⁹

[34] In making her first ruling, the Judge considered that the kissing evidence fell into the category of sexual experience evidence and could cause unnecessary humiliation to the complainant, when it was not directly relevant.³⁰ Applying the principles in the authorities therefore, the Judge excluded the sexual experience evidence.³¹

[35] In revisiting her ruling, as requested by the Crown, the Judge allowed the admissibility of the sexual experience evidence, limited to kissing, because it was relevant to both parties, was relevant to motive, and would remove speculation as to what might have occurred in the hour and a half before Mr Mohammed arrived.³² In supporting the Crown's application and in seeking the admission of the text evidence, the defence wished to demonstrate the unreliable recall of the complainant, which was Mr Mohammed's evidence at trial.

²⁷ *Wallace v R* [2018] NZCA 2 at [12] (footnotes omitted).

²⁸ *R v Clode* [2007] NZCA 447.

²⁹ At [22] and [24].

³⁰ First pre-trial ruling, above n 9, at [12], in reliance on *Wallace v R*, above n 27, at [12].

³¹ First pre-trial ruling, above n 9, at [22].

³² Second pre-trial ruling, above n 11, at [9].

[36] We consider that it is also relevant that it was Mr Mohammed's trial counsel who put the sexual experience evidence in issue. The first time that the evidence was addressed is in his cross-examination of the complainant, which was as follows:

Q. And isn't it fair to say when you got to your house, [the brother] went into your bedroom with you?

A. Yes.

Q. And you kissed again?

A. (no audible answer 14:56:04)

Q. You both kissed?

A. Sorry, am I supposed to answer this question?

THE COURT:

Q. Yes, you can answer that one.

A. I can answer that question?

CROSS-EXAMINATION CONTINUES:

A. Yes, yes, we did.

[37] The defence then specifically put to the complainant that she had told Mr Mohammed that she had kissed his brother:

Q. Now, we spoke about before [Mr Mohammed] left you said there was a disagreement, I said to you why he said there was a disagreement and you said why you say there was a disagreement, but you remember that you told [Mr Mohammed], just before he left, that you had kissed his brother [the brother]?

A. I don't remember when I told him but I do remember I told him that night that I did kiss [the brother].

...

Q. ...how did [Mr Mohammed] know that you'd kissed?

A. Mmm, that night when it was just me and [Mr Mohammed] in the flat after [the brother] had left, [Mr Mohammed] said: "Did you do anything with my brother?" And I said: "We kissed."

Q. When did that conversation happen in relation to events which you have talked about, in terms of what make up the charges?

A. I can't recall if it was before or after the assault.

[38] Mr Mohammed, who gave evidence, was then cross-examined by the Crown on that evidence:

Q. Now you say your brother was in the bar?

A. Yes.

Q. Did you see the two of them, your brother and [the complainant] interacting?

A. Yeah, they were talking quite a bit.

Q. Did you see them kissing?

A. No.

...

Q. Okay. Now we heard evidence that [the complainant] accepts that she told you that she had kissed your brother?

A. Yep.

Q. Do you know when she told you that?

A. This was at the end of the night when I was about to leave her house.

[39] In closing, the Crown did not refer to the kissing evidence but relied on Mr Mohammed's knowledge that his brother went home with the complainant, as the motive for Mr Mohammed's offending. In his closing address, the Crown prosecutor said:

When he knew [the complainant] had gone with his brother instead of him he was overcome with jealousy which resulted in him assaulting her. He got his way, or as [the complainant] put it, he got what he came for.

[40] We consider that the admission of the evidence of previous sexual experience was not in error. The defence agreed to the admission of the kissing evidence as both the text messages and the kissing evidence formed a critical part of Mr Mohammed's defence. It was a trial strategy that was permissible under s 44(1), as the evidence fell within the ambit of Mr Mohammed's right to present an effective defence, as the Courts in *B v R* and *Clode* emphasised. The jury however, did not accept his defence.

[41] We consider that no miscarriage has occurred here.

Did the Judge err in misstating the Crown's position in the Judge's direction?

[42] In her direction to the jury as to the legitimate use of the previous sexual experience evidence, the Judge told the jury that they heard the evidence of kissing because the Crown said it was relevant to Mr Mohammed's behaviour when he arrived at the complainant's home and he found out about the kissing:

I want to make the point here too that you have heard evidence in this trial about [the complainant] kissing [...], the defendant's brother. And it is wrong to suggest and look at that evidence of her kissing [the brother] to say because she consented with [the brother], that means that she would consent with [Mr Mohammed]. The fact that she consented to [the brother's] kissing says nothing about the activity later with [Mr Mohammed]. *You have heard that evidence simply because the Crown says that it was relevant to [Mr Mohammed's] behaviour when he got to the house that he found [out] about the kissing and that he was motivated by jealousy.* And the defence position is of course that that is not how it went down at all, and that everything was very consensual.

[Emphasis added]

[43] From Mr Mohammed's answers in cross-examination, he did not become aware of the kissing between the complainant and his brother until after the offending. Mr Lack submits that therefore, the Judge's direction on the Crown's position in summing up, that the evidence of sexual activity was relevant to Mr Mohammed's behaviour and jealousy when he got to the house, misstated the evidence established and the Crown's position.

[44] We accept the Judge misstated the Crown's position, as the Crown in closing did not rely on the kissing evidence to establish motive despite its earlier application. However, irrespective of when Mr Mohammed knew of the kissing, he knew the

complainant and his brother had been together at her house for some time before he arrived and before the offending occurred. His text to the complainant that night, “Oi I swear to go_, he better not be there?”, illustrates his reaction to the situation and his brother’s presence at her home.

[45] The actual timing of when Mr Mohammed knew about whether the complainant and his brother had kissed therefore was irrelevant in the overall context of the facts.

[46] We conclude the Judge’s misstatement of the Crown’s position on timing was immaterial and no miscarriage of justice has occurred.

The appeal against sentence

[47] Mr Lack submits that the starting point of four years’ imprisonment was too high; and that the sentence of two years’ and 10 months imprisonment is manifestly excessive.

[48] The Crown submits that, in light of the available starting points for each offence as well as the totality principle, a global starting point of four years was reasonable and available. We agree.

[49] *R v AM* sets the sentencing bands for rape, which apply to “penile penetration of the mouth”.³³ The starting point for rape band one is six to eight years’ imprisonment.³⁴ The unlawful sexual connection offending relates to Mr Mohammed placing his penis on the complainant’s face, attempting to put it in her mouth, and rubbing it across and around her mouth. This Court in *D (CA95/2014) v R*, contemplated the situation where the activity involved fell short of penetration as is the case here, noting:³⁵

Penetration is more serious than contact with the lips, but that can be reflected in sentencing. We observe that this Court drew attention to this very point in *R v AM*. The sentencing guidelines established there distinguish between penetrative and non-penetrative connection, and the Court accordingly noted

³³ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [5].

³⁴ At [90].

³⁵ *D (CA95/2014) v R* [2015] NZCA 171 at [63] (footnote omitted).

that when sentencing for oral sexual violation trial judges need to be clear what activity is involved.

[50] The lower Court Judge considered the activity involved and held that an unwanted penis to the face is egregious, and much more serious than digital penetration.³⁶ However, the Judge was conscious of the use of the word “penetration” in relation to applying the rape bands and concluded that it would sit at the very top of band one of the unlawful sexual connection bands, or just outside the rape bands.³⁷

[51] The Judge referred to *D (CA95/2014) v R*, where this Court found that the connection of the mouth and lips with a penis going across the face in a similar manner to the current case falls within the description of sexual connection.³⁸ Band one for unlawful sexual connection attracts a starting point of two-five years.³⁹ However, this Court said, in *R v AM*, where one or more aggravating factor is present to a low or moderate degree, a starting point closer to the top of the band would be required.⁴⁰ The Crown submits that the degree of violation and the impact on the complainant in this case are two aggravating factors which justify a higher starting point within band one. We see no error in this approach.

[52] We consider four years was available taking a global approach to the sexual connection and strangulation convictions. This Court has recently held that lower level strangulation can attract a starting point “perhaps as low as two years.”⁴¹ Both Mr Lack and the Crown submit that two years would have been an appropriate starting point for the strangulation offence here.

[53] The appellant takes no objection to a global approach. However, Mr Lack submits that a global starting point of no more than three years was appropriate. We consider that in light of the applicable starting point for unlawful sexual connection, being two to five years in the upper of band one, and the accepted starting point for strangulation of two years, four years is available and appropriate in this case.

³⁶ Sentencing notes, above n 4, at [22].

³⁷ At [23].

³⁸ At [20] citing *D (CA95/2014) v R*, above n 35, at [63].

³⁹ *R v AM*, above n 33, at [113].

⁴⁰ At [114].

⁴¹ *Shramka v R* [2022] NZCA 299, [2022] 3 NZLR 348 at [54].

[54] No objection is taken to the 29 per cent discount applied for the appellant's personal mitigating factors, resulting in an end sentence of two years and ten months imprisonment.

[55] We are satisfied that the sentence imposed was not manifestly excessive.

Result

[56] The appeal against conviction is dismissed.

[57] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent