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

CA586/2015
[2016] NZCA 91

	BETWEEN	MALCOLM RAYMOND CLARKE Appellant
	AND	THE QUEEN Respondent

Hearing: 2 March 2016

Court: Ellen France P, Keane and Dobson JJ

Counsel: J H M Eaton QC for Appellant
A Markham and S L Graham for Respondent

Judgment: 5 April 2016 at 2.30 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Dobson J)

Introduction

[1] In July 2015, the appellant (Mr Clarke) was found guilty following a jury trial in the District Court on two charges of sexual violation. In September 2015, he

was sentenced to two years and four months' imprisonment.[1] He has now appealed both his conviction and the sentence imposed.

Background

[2] The first charge alleged a specific instance of Mr Clarke getting the complainant to perform oral sex on him between 16 July 1990 and 16 July 1991. The second was a representative charge of sexual violation by the same form of oral sex between those same dates. A third charge alleged that Mr Clarke had permitted the complainant, being a boy under 12, to do an indecent act on him between 26 September 1988 and 16 July 1991. That charge was dismissed by Judge Crosbie for insufficiency of evidence at the end of the defence case.

[3] The alleged conduct had occurred some 25 years before trial. The complainant was the younger brother of a close boyhood friend of Mr Clarke. Both Mr Clarke and the complainant acknowledged certain forms of sexualised behaviour during an earlier period but only, on Mr Clarke's explanation, before he turned 16. The charges to which this appeal relates arose from conduct after Mr Clarke's 17th birthday on 26 September 1988. The complainant was born in mid-July 1979 and was therefore aged between 11 and 12 in the year between 16 July in 1990 and 1991. Mr Clarke was 18 and 19 in that relevant 12-month period.

[4] The complainant alleged that from a period when he was about seven, and Mr Clarke was therefore about 14 or 15, Mr Clarke would get the complainant to masturbate him. Regular activity of that type escalated after a period to Mr Clarke making the complainant suck his penis, to a point short of ejaculation. The last specific occasion the complainant recalled was where that activity continued until Mr Clarke had ejaculated in the complainant's mouth. That occasion, remembered more vividly by the complainant, was the last alleged to have occurred and was the subject of the specific charge.

[5] Mr Clarke had been living for many years in Australia when the complaints of sexual offending against him were made. Mr Clarke voluntarily returned from

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1 *R v Clarke* [2015] NZDC 18205.

Australia and agreed to be interviewed about the allegations. He denied that the alleged conduct had occurred in the relevant period. He gave evidence at his trial consistently with that denial.

Grounds of appeal against conviction

[6] Four grounds were raised in support of Mr Clarke's conviction appeal. First, that the Crown prosecutor inappropriately led evidence from the complainant as to the frequency with which the alleged sexual offending had occurred in the period to which the representative charge related, contrary to s 89 of the Evidence Act 2006.

[7] Secondly, the Judge inadequately directed the jury on the requirement for the Crown to establish that the complainant had not consented to the sexual activity, and that Mr Clarke could not have reasonable grounds for believing that the complainant had consented.

[8] Thirdly, that the Judge had permitted the Crown to attribute to Mr Clarke an assertion that the complainant had a motive to lie in his claims, when that attribution was not justified and reflected adversely on Mr Clarke. It was argued for Mr Clarke that the cumulative effect of these three errors constituted a miscarriage of justice.

[9] The fourth challenge raised was that there was a lack of evidence to establish the representative charge so that the jury's guilty verdict was an unreasonable one.

Impermissible leading questions

[10] After leading the complainant on his recollection of the last occasion on which oral sex occurred, the evidence continued as follows:

> A That was the end of it.
>
> Q So if you take the last event when you say [the family's exchange student] was there and it was the time you were moving the house —
>
> A Yes.
>
> Q — how regularly would it have occurred, this is the oral sex I'm talking about.
>
> A Yeah.

Q How regularly did that occur in the preceding, for example, 12 months prior to that?

A Once or twice a month. Could have been once a week. Could have been — I don't know. As many times as he wanted. I can vividly remember him looking at me in a certain way and I would go around and I would sit beside dad, because he was the only one that made me feel safe.

[11] Mr Eaton QC argued that the time at which any of the sexual conduct occurred was a critical issue in the proceeding. Because Mr Clarke had acknowledged a level of sexualised behaviour with the complainant in an earlier period, and because the prosecution had elected not to charge Mr Clarke with any conduct prior to his turning 17, it was fundamentally important that the jury hear what the complainant was able to say about timing, unprompted by the terms of questions put to him.

[12] The questions set out above as to how regularly oral sex had occurred in the 12 months prior to the last occasion assumes that that activity had occurred more than once, which was an element required to be proved by the Crown on the representative charge. Mr Eaton submitted that this was the only evidence to prove the dates that were the subject of the representative charge. He criticised the form of the question as improperly assuming a fact that was in issue, namely whether there were other acts of oral sex in the 12 months prior to the last incident, and that the question particularised a time frame relevant to the representative charge. He criticised the prosecutor for not exploring with the complainant when acts of oral sex had commenced.

[13] The question objected to has to be seen in the context of the evidence that preceded it. The complainant had described, in response to conventionally expressed open questions, the circumstances in which he was made to perform oral sex on Mr Clarke in terms of a pattern of behaviour, rather than an isolated incident. In response to a question as to the transition between masturbation and oral sex, the complainant had earlier in his evidence said "I can't remember exactly what time or how it eventuated to that …". In the context of what he was describing as an ongoing course of conduct, his explanation was that "… and then he would get me to bend down and put his penis in my mouth". After describing it as a repeated pattern

of conduct, the questions turned to the last occasion on which it occurred and then attempts to identify the frequency with which the activities being described had occurred.

[14] Taken in the context of what had preceded it, we do not accept that the challenged question constituted inappropriate leading. The assumption implicit in the question that the same activity had occurred previously was readily justified by earlier answers given by the complainant. Understandably, Mr Clarke's very experienced trial counsel did not object to the question as a leading one at the time.

Directions on consent

[15] In his summing-up, the Judge dealt with the possible relevance of consent in the following terms:

> [26] It also follows that the issue of consent was not raised in this case as the charges are denied. Again it was not argued because as a matter of fact consent would not be argued as the age of the complainant at the time would rule that out. Similarly, reasonable belief in consent would be ruled out. I am going to come to those terms in a moment and that is because, despite those concessions, you are still required as a jury to work through the elements of the offences and be satisfied that they are proven to the standard of beyond reasonable doubt. You may, however, take the concessions into account in that process. As [the prosecutor] said to you, there are aspects of the charges that will not trouble you because they do not arise, but as a matter of law you are required to pay some attention to the elements.

[16] The question trail provided to the jury by the Judge included questions in the following form on the issue of consent:

> 1.1 Are you sure that Mr Clarke deliberately put his penis into [the complainant's] mouth?
>
> - If the answer is YES, move on to question 1.2
> - If the answer is NO, then STOP, find Mr Clarke not guilty on this charge and move on to charge 2.
>
> 1.2 Are you sure that at the time Mr Clarke put his penis into [the complainant's] mouth that [the complainant] did not consent to that?
>
> - If the answer is NO, (you are not sure he did not consent) then STOP, find Mr Clarke not guilty on this charge and move on to charge 2.

- If the answer is YES, (you are sure that he did not consent) then move on to question 1.3

1.3 Are you sure that at the time Mr Clarke put his penis into [the complainant's] mouth that Mr Clarke knew that [the complainant] did not consent or did not believe that he did consent?

- If the answer is YES then STOP and find Mr Clarke guilty on this charge and move on to charge 2.

- If the answer is NO (that is, he may have believed that he did consent) then move on to question 1.4

1.4 Are you sure that at the time Mr Clarke put his penis in [the complainant's] mouth that no reasonable person in his position could have believed that he was consenting to that act?

- If the answer is YES, then STOP and find Mr Clarke guilty on this charge and move on to charge 2.

- If the answer is NO then find Mr Clarke not guilty on this charge and move on to charge 2.

[17] In the Judge's summing-up, he went through those questions, without material elaboration on them.

[18] Mr Eaton criticised the Judge for not dealing more fully with the issue of consent, where the denial that the relevant conduct had occurred at all was qualified by the admission that lesser forms of sexualised conduct had occurred when Mr Clarke was younger. The defence opening put it in terms that whatever had occurred was before Mr Clarke turned 17. Mr Eaton criticised the Crown for not establishing the earliest date from which the conduct relevant to the two charges had started. He argued that the jury might have found that some forms of earlier sexualised conduct as acknowledged by Mr Clarke were either consented to, or occurred in circumstances where Mr Clarke could reasonably believe that consent existed. Accordingly, the prospect of consent, or Mr Clarke's reasonable belief that the complainant consented, arguably should have been put to the jury in the context of that earlier conduct. Whatever view the jury took as to the existence of consent, or a reasonable basis for Mr Clarke's belief in consent, during the earlier period may well have carried over or affected the issue of consent in the period to which the charges related.

[19] Mr Eaton did not take issue with the Judge's statement at [26] of his summing-up that, as a matter of fact, the complainant's age ruled out the prospect of his consenting to the alleged sexual conduct. We doubt that it was correct for the Judge to make that comment, but we are satisfied that any error did not give rise to a miscarriage of justice. The Judge did leave consent to the jury and he also made it clear that questions of fact were for the jury.

[20] The terms in which a Judge should direct a jury on consent, where the defence has not positively been run, is a matter for the judgement of the trial judge in all the circumstances of the case after the close of the evidence. This Court has recognised in *R v Stojanovich* the tension that exists where the defence is a denial of the conduct alleged, and the inherent inconsistency with the alternative that any conduct found to occur was nonetheless consented to.[2] Giving any measure of prominence to the latter proposition risks undermining the defence's primary position.

[21] Here, Mr Clarke's defence did not raise the prospect that the complainant's consent to earlier, less serious, sexualised conduct could reasonably be treated by Mr Clarke as also applying to the later, more serious, conduct that was the subject of the charges. Understandably, any suggestion of that alternative defence would jeopardise the credibility of his claim that all activity ceased before he turned 17. On those facts, there was no obligation on the Judge to raise a transposed belief in consent from earlier activity in his summing-up. Importantly, the Judge did leave the issue of consent to the jury, directing them to address it in the sequence of questions quoted at [16] above.

[22] Mr Eaton sought to distinguish the predicament recognised in *Stojanovich* because that involved a straight denial rather than a denial of conduct of greater seriousness in a later period. However, we are satisfied that the same approach applies in this case. A real risk of compromising the primary defence would arise if the Judge went beyond the directions he gave on consent, to direct the jury that if they rejected Mr Clarke's denial of the relevant forms of unlawful sexual connection,

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2 *R v Stojanovich* [2009] NZCA 210 at [33]–[36].

they nonetheless had to assess the prospect that Mr Clarke thought such conduct was consented to by virtue of the pattern of prior sexual contact between the two.

Complainant's motive to lie

[23] Mr Eaton criticised the extent to which the police and Crown counsel pressed Mr Clarke on why the complainant might lie about the sexual activity between them. When Mr Clarke was asked in his interview about any motive the complainant would have to lie, he suggested it was likely because a complaint of this nature could be used by the complainant to make a claim for accident compensation. In cross-examining the complainant, defence counsel asked whether the complainant had ever made an ACC claim in reliance on the alleged sexual activity with Mr Clarke. Once the complainant denied making any such claim, the topic of a possible motive for the complainant to lie was not addressed further.

[24] When Mr Clarke was cross-examined at the trial, he responded that having heard the complainant's evidence, he was not so sure about the motive he had suggested in the earlier interview.

[25] In the Crown's closing address, a reference was made to a suggestion that the complainant was motivated by money, but that there was no evidence before the jury that money was the driver of the complaint.

[26] The Judge gave conventional and unobjectionable directions on the onus and standard of proof. He emphasised that a defendant electing to give evidence did not do anything to transfer the onus of proof and that the defendant did not have to prove anything. The Judge did not specifically address the manner in which the jury should consider the existence of any motive for the complainant to lie.

[27] There were two components to Mr Eaton's criticism. First, that the prosecution had unjustifiably sought to attribute to Mr Clarke a claim that the complainant had a motive to lie when that proposition had not been initiated by Mr Clarke or on his behalf at any stage. Mr Eaton complained that the Crown had put the defence up to suggesting a motive for the complainant to lie, had destroyed

the basis for any such theory and then held against Mr Clarke his unsuccessfully raising a motive to lie as a matter that could be taken into account against him.

[28] Secondly, Mr Eaton argued that the issue had assumed sufficient prominence to require a specific direction to the jury that any suggestion on behalf of the defendant that the complainant had a motive to lie did not affect the onus of proof at all. Accordingly, if the jury took the view that any suggested motive for the complainant to lie was not established, it was not a matter that could be taken into account in determining whether the Crown had proven the elements of the charges against Mr Clarke.

[29] In *Tuhaka v R*, this Court reviewed the extent of the obligations on trial judges to direct on a complainant's motive to lie.[3] After a review of other cases,[4] the Court summarised the position as follows:

> [18] There is no "hard and fast rule" that a Judge must always direct a jury on this topic. *R v Tennant* is not to be read as suggesting an "invariable requirement".[5] Such directions are not required every time the absence of a motive to lie is mentioned.[6] Context is important. The critical issue is always whether there is a risk the jury may view the burden of proof as being shifted from the Crown to the defendant. Where it is clear from the addresses and the summing-up as a whole that the burden of proof rests with the Crown, no such direction may be required.[7]

[30] Mr Eaton's criticisms on this point were somewhat overstated. Mr Clarke did volunteer the theory that the complaint had been made to justify a sensitive claim to accident compensation, and that prospect was raised in the cross-examination of the complainant. In cross-examination of Mr Clarke, he did acknowledge that it was his opinion. The reference to the prospect of a motive for the complainant to lie was only touched on lightly in the Crown closing address, as a passing comment. Overall, it was unlikely to be a major issue that the jury would dwell on.

[31] Given that the issue was unlikely to arise as a significant one for the jury, we are not persuaded that there was a requirement for the Judge to specifically

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3 *Tuhaka v R* [2015] NZCA 540.
4 At [15]–[17].
5 *P (CA672/2013) v R* [2015] NZCA 96 at [35] citing *R v Hayman* CA478/05, 23 June 2006 at [32].
6 See for example *R v Adams* CA70/05, 5 September 2005 at [74].
7 *P (CA672/2013) v R*, above n 5, at [35].

emphasise that there was no reversal of onus involved. The core direction on the onus of proof and the tripartite direction were given in very clear terms that jurors ought readily to have applied to any consideration that they gave to the prospect of the complainant having a motive to lie.

Sufficiency of evidence on the representative charge/jury verdict unreasonable

[32] Mr Eaton characterised the question he objected to and the witness's answer, which are set out at [10] above, as the only evidence that there had been any other occasions of oral sex in the period from July 1990 up to the last instance of which specific evidence was given. He therefore argued that there was no sufficient evidence to make out a representative charge that such conduct had occurred on another occasion, and the jury's guilty verdict was therefore unreasonable.

[33] On a review of all the evidence, it is tolerably clear that the last occasion on which oral sex was performed was in late 1990 or very early 1991, placing it in the middle of the one-year period to which both the relevant charges related. Given that, Mr Eaton raised the additional criticism that the question could not assist the Crown in making out a further occasion of the offending behaviour in the preceding six months. The complainant may have been responding to the question about occurrences in the last 12 months by reflecting on conduct in the first six months of that period.

[34] We are satisfied that the last response in the complainant's evidence quoted at [10] above is a sufficient foundation for a finding that there had been another occasion or occasions of the same conduct in the six months before the last one. Mr Eaton suggested that because a component of that answer was that the complainant did not know how regularly it had occurred, the remaining content of his answer had to be disregarded. Treated overall, the effect of the evidence is that he was describing an ongoing course of relatively regular conduct.

[35] Further, as Ms Markham argued for the Crown, dates of offending are generally not required to be precisely proven as an element of a charge. The terms of this charge did not explicitly reserve a measure of latitude such as arises where a charge is of offending "on or about" a specified date, but in the present context a

measure of latitude would nonetheless be reasonable.[8] Mr Eaton argued for precise proof of activity within the dates specified in the charge as being necessary because of the prosecution decision to charge Mr Clarke only with conduct occurring after he turned 17. However, there is a gap of nearly two years between Mr Clarke's 17th birthday on 26 September 1988 (which was the beginning of the period to which the earliest charge, on which Mr Clarke was discharged, was alleged to have occurred) and the start of the year-long period to which the representative charge related. Mr Clarke's age at the time of the offending cannot trigger a requirement for proof of the precise timing of offending, where such precision was not otherwise warranted.

[36] Accordingly, this concern cannot raise a tenable challenge to the reasonableness of the jury's verdict.

Result – appeal against conviction

[37] For all these reasons the appeal against conviction is dismissed.

Sentence appeal

[38] Mr Eaton's submission on the sentence appeal was that the Judge had rated Mr Clarke's culpability more seriously than it deserved, given the context of an ongoing relationship between the complainant and Mr Clarke that had progressed over a number of years from relatively innocuous sexual contact to the offending of which Mr Clarke has now been convicted. Mr Eaton submitted that where learned childhood behaviour continued unabated over several years, subsequent offending ought to be regarded as less criminally culpable than simple adult offending.

[39] He also argued that insufficient credit was given for the period that had elapsed since the offending when Mr Clarke had been 18 or 19. By the time of his trial, he was a happily married 43 year old father of three children who had been based in Australia for some 15 years. He had voluntarily returned to New Zealand and had co-operated at all stages of the inquiry. Mr Eaton submitted that if correct weight was given to these mitigating circumstances, an end sentence of less than two years' imprisonment should have been arrived at. At that point, a substitute sentence

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[8] Compare *R v Wae Wae Uatuku* [1948] NZLR 648 (CA).

of home detention ought to have been considered. The Crown submissions on sentencing had acknowledged that if that point was reached, home detention would not be opposed.

[40] On sentencing, Judge Crosbie appreciated that he had to construct a sentence consistent with those imposed for similar offending in 1990 and 1991. No guideline judgment established parameters for such convictions and the Judge assessed a number of sentencing decisions for offending around that period that provided indications.[9] The maximum penalty for such offending prior to 1993 was 14 years, as opposed to the 20-year maximum that currently applies.

[41] The Crown contended for a starting point of three and a half to four years' imprisonment, with a discount of 20 per cent for mitigating circumstances. Trial counsel on Mr Clarke's behalf contended for a starting point of three years less 40 per cent discount, that would have led to a sentence of less than two years.

[42] The Judge adopted a starting point of three years and six months' imprisonment. We are satisfied that that was clearly in range for offending of this relative seriousness in the early 1990s. A significant feature in assessing the relative seriousness is the age difference of nearly eight years. That reflects a circumstance of abuse of trust and the exploitation of a materially younger boy in a quasi-extended family situation.

[43] Mr Eaton argued that the conduct should have been seen as less criminally culpable because it arose out of "learned childhood behaviour [that] continued unabated over a course of several years …". We do not accept that the circumstances of the offending should be seen as less serious because it followed on from a course of conduct when Mr Clarke was an adolescent which made the opportunity for offending more likely. This was not a case, as sometimes arises, where either the appellant or the complainant had been conditioned by participating in similar activities with a third person at a younger age.

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[9] Judge Crosbie made comparisons with *R v Harris* CA320/93, 15 November 1993; *R v Shepherd* HC Palmerston North CRI-2009-454-13, 15 September 2010 and *R v Parata* CA72/01, 21 June 2001.

[44] Subject to receiving a credit for his relative youth, Mr Clarke's offending as an adult is to be seen for what it is. It is not any less serious because it followed on from a course of less serious conduct with the same complainant when Mr Clarke was significantly younger.

[45] From the starting point, the Judge recognised Mr Clarke's relative youth, the period of time since the offending during which Mr Clarke had remained offence-free, and the hardship that the convictions would cause, given the disruption to his family life and work in Australia. The Judge applied a combined discount of 35 per cent, bringing the starting point down to the end sentence of two years and four months' imprisonment. Again, that approach was clearly open to the Judge and Mr Eaton could not make out a case for any greater discount than was allowed.

Result – sentence appeal

[46] Accordingly, the appeal against sentence is also dismissed.

Solicitors:
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