NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA452/2015
[2016] NZCA 212

BETWEEN	DEAN JAMES CHARLTON Appellant
AND	THE QUEEN Respondent

Hearing: 5 April 2016

Court: Stevens, Asher and Williams JJ

Counsel: L L Heah for Appellant
S K Barr for Respondent

Judgment: 20 May 2016 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] In April 2015, the appellant, Mr Charlton, faced trial before Nation J and a jury in the High Court at Christchurch in relation to seven charges of violent and sexual offending against two complainants. We will call them complainant A and

complainant B. He was convicted on three charges in relation to complainant B only. He was acquitted on all other charges.

[2] In light of his offending history, the appellant was sentenced on those three charges to preventive detention.

[3] The appellant now appeals against his conviction for two of the three charges: charge 6 — sexual violation of complainant B by rape on 25 May 2014; and charge 7 — indecent assault of the same complainant on the same occasion.

[4] No appeal is brought against charge 5 — injuring with intent to injure. Nor is there any appeal against sentence.

The facts

[5] It is unnecessary to rehearse the facts in relation to complainant A in any detail as the jury returned not guilty verdicts in relation to all three charges relevant to her. It is sufficient to note that the allegations were of historical offending relating to a single incident alleged to have occurred in late September or early October 2001. The charges were indecent assault, sexual violation by unlawful sexual connection (digital penetration), and sexual violation by rape. Complainant A struggled to give coherent and consistent evidence in relation to the incident and the jury returned not guilty verdicts accordingly.

[6] As to complainant B, she and the appellant were in a brief relationship lasting only a few weeks from the beginning of May 2014. The offending reflected in charges 4 to 7 was alleged to have occurred on two dates — 18 May 2014 and 25 May 2014.

[7] Charge 4 alleged that the appellant raped complainant B on the evening of 18 May 2014. The allegation was that the pair were in bed together and complainant B, who at the time had no interest in sex, turned to the wall to sleep. The appellant then forced himself on her and had sexual intercourse with her despite her crying and repeatedly making it clear that she did not want to have sex with the appellant. On this charge, the prosecution depended entirely on complainant B's evidence. There

were difficulties with that evidence, not least of those being the fact that complainant B sent the appellant a series of text messages the following day declaring her love for him and asking that he not end the relationship. The jury subsequently returned a verdict of not guilty in relation to this charge.

[8] We note also that two further digital penetration charges were included on the original charge list. These related to allegations of further offending on two separate occasions in the period between 18 and 25 May 2014. On each occasion, it was alleged, the offending followed a similar pattern. The appellant and complainant B were under the covers in the appellant's bed and he put his hands down the complainant's pyjama pants. The complainant said she asked him to stop and said that what he was doing was wrong. She said he simply ignored her request. The appellant, it was alleged, inserted two fingers into the complainant's vagina and proceeded to masturbate her. According to the original summary of facts "the victim kept saying "no", but eventually gave up and lay there knowing that whatever she did or said would not stop the defendant's actions".

[9] Nation J discharged these counts before the jury was empanelled, presumably on the basis that there was insufficient evidence in complainant B's allegations as reflected in the summary of facts for a reasonable jury, properly directed, to convict. A fresh charge list was then presented to the jury containing only the remaining seven counts.

[10] We mention these matters here because although the appellant was discharged on them, they feature in argument in relation to charges 5 to 7. We explain why and how below.[1]

[11] Charges 5, 6 and 7 related to the evening of 25 May 2014. Complainant B alleged that the two were in bed in the appellant's bedroom watching TV, when he became angry and aggressive. The appellant grabbed her breasts and squeezed them with considerable violence (charge 7). He punched her upper chest area four to five times and then placed his hands around her throat strangling her for a brief period (charge 5).

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[1] At [47] below.

[12] Complainant B indicated she did not want to have sex but despite this the appellant pulled down her underwear forcibly, placed her arms above her head pinning them there and proceeded to rape her. Throughout, complainant B said she cried and said "stop I don't like this." (charge 6).

[13] The jury returned guilty verdicts on all three charges. During the trial, the appellant did not deny injuring the complainant with intent to injure (charge 5). There is no appeal against that charge. Crucially in respect of the 25 May charges, the convictions were supported by independent evidence. There was evidence of bruising and redness around complainant B's chest, breasts, legs, back and right arm.

Grounds of appeal

[14] The appellant advanced three grounds of appeal:

(a) The guilty verdicts in relation to the rape and indecent assault on 25 May 2014 were unreasonable in light of the evidence.

(b) The trial Judge wrongly admitted inadmissible hearsay evidence.

(c) In relation to the rape count, the trial Judge gave the jury inadequate directions on the meaning of consent.

[15] None of these grounds has merit. We will address each in turn.

Unreasonable verdict

[16] In advancing this ground of appeal, Ms Heah for the appellant sought to draw parallels between the likely factual basis for the acquittal on the alleged 18 May 2014 offending and the presence of similar facts in the context of the 25 May 2014 offending of which the appellant was found guilty. Ms Heah argued that the jury, in acquitting the appellant, must have relied on complainant B's behaviour towards the appellant on 19 May 2014, which was inconsistent with her having been raped the day before. Ms Heah pointed out that on that day complainant B made 15 phone calls to the appellant and sent numerous text messages. They included the following:

- "I love u but it seem like u dont love me."
- "Plz hun need to work this out."
- "Can u come see me I was bissy y end it."

These texts, Ms Heah, submitted undermined the Crown case in relation to the 18 May 2014 rape charge.

[17] Ms Heah argued that there was similar text activity from complainant B in the period after 25 May 2014. These, she submitted, made the guilty verdicts in relation to the 25 May offending untenable.

[18] The second tranche of texts was sent by complainant B on 27 May and 29 May. On 27 May 2014, shortly after 11 pm, complainant B sent the following three texts to the appellant's number:

- "Hi hay i of to sleep now i am tied."
- "Hi hay i of to sleep now i am tied."
- "I told u i going to sleep."

[19] On 29 May 2014, just after 7 pm, complainant B sent the following two texts to the appellant's number:

- "I told u. I am going to sleep how can I fuck u of u had me awake tell 2 last nty."
- "I miss u." (Transmitted a little over six minutes later).

[20] Complainant B sought to explain these post-25 May texts to the appellant by saying she sent them to the appellant by mistake. They were in fact, she said, meant for other recipients. The admissibility of evidence in relation to that issue forms a separate ground of appeal (the hearsay ground of appeal), and is addressed below.[2]

[21] The flaw in Ms Heah's unreasonable verdict argument is that the texts on 27 May and 29 May did not (unlike the 19 May texts) undermine the Crown's case

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2 At [32]–[45] below.

in relation to the 25 May offending, even if, contrary to complainant B's evidence, the jury concluded they were in fact intended for the appellant.

[22] First, they were not at all like the anxious and imploring texts of 19 May. Even if intended for the appellant, they showed complainant B maintaining contact in an ambivalent way. There were no expressions of ongoing affection. They were thus likely to have been seen by the jury as a red herring even if the appellant was the intended recipient.

[23] The second and more important reason is that there was independent evidence in relation to the 25 May incident that complainant B had been assaulted. At the complainant's initial interview on 29 May 2014, the interviewing detective noted that complainant B's neck was tender and marked, and that she found neck movement difficult. A police photographer was brought in to photograph the complainant's injuries. The photographs showed extensive bruising to the upper chest area and abrasions around complainant B's breasts. There was also evidence of bruising to her right arm that was consistent with complainant B's evidence that the appellant held her arms firmly above her head when raping her. A specialist sexual abuse doctor subsequently assessed the photographs and gave evidence confirming that complainant B had been injured through "forceful contact with her arms, her legs, her chest and her back." This independent evidence was a crucial difference between the acquittal for the 18 May alleged offending and the guilty verdicts for the 25 May offending.

[24] In addition, the appellant having originally denied the physical assault, then admitted it during trial. This admission advanced the prosecution case considerably in relation to the sexual elements of the 25 May incident, as well as the violence count.

[25] Thus, there was no irrational inconsistency between the verdicts in relation to 18 May and 25 May. On the contrary, the 25 May guilty verdicts were well available to the jury on the evidence, indeed unsurprising.

[26] Delay in making a complaint was also advanced as an argument in support of the unreasonable verdict ground and it is necessary to address that. Complainant B first went to the police on 29 May 2014, shortly after the 25 May offending. She subsequently swore an affidavit on 9 June 2014 in support of an application for a without notice protection order against the appellant.

[27] Ms Heah emphasised that complainant B did not mention that any sexual offending occurred on 25 May in the first police interview or the 9 June affidavit. Complainant B did mention being assaulted and injured but said nothing of the indecent assault or the rape. Sexual offending on 25 May was not mentioned until her evidential video interview on 18 June 2014.

[28] Ms Heah submitted that this delay also made the verdict unreasonable.

[29] This argument, whether alone or in combination with other arguments, cannot provide support for a conclusion of unreasonable verdict. Indeed, it would have been inconsistent with the trial Judge's own direction to the jury:[3]

> Much has also been made by the defence in relation to there being no reference in a written statement to the police taken on 29 May 2014 as to [complainant B] being sexually assaulted on the occasion of 25 May 2014 and the fact that she only told the police about this when she was involved in the video interview of 18 June 2014.
>
> You have heard explanations from [complainant B] as to why there were such delays.
>
> I can tell you, and do tell you, there can be good reasons a victim of an offence of this sort that is alleged here delays making or fails to make a complainant in respect of that offence.

[30] Such direction was orthodox and correct. It was for the jury to decide whether delay undermined complainant B's veracity, bearing in mind the Judge's caution. It cannot be said in that respect that the jury's conclusion was unreasonable or irrational.

[31] This ground of appeal is rejected.

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[3] *R v Charlton* HC Christchurch CRI-2014-009-5160, 21 April 2015 [Summing-up] at [28]–[30].

Hearsay

[32] The second ground of appeal argues that the trial Judge wrongly admitted two categories of inadmissible hearsay evidence and caused a miscarriage of justice thereby. The first category of evidence was from complainant B and related to the intended recipients of her texts on 27 May and 29 May 2014. We have discussed the contents of these texts above.[4] The second category was evidence from Constable Tara Newton. She gave evidence that she had received misdirected texts from complainant B.

[33] As we have said, complainant B's evidence was that the text messages had been sent to the appellant on 27 and 29 May by mistake. She said the first 29 May text was for a friend, N, who had wanted to come over that night. Her evidence was in these terms:

> I was texting a friend called [N] and we were texting the night before and he wanted to come over and sleep with me and I didn't want him to come over and I really didn't want to tell him what I'd been through, so I was telling him in the text and it went to Dean's phone and then I never put that wrong number, I just left it, like I just did the same thing, texting to the wrong number again.

[34] The second admissibility complaint related to the second 29 May text "I miss u". Complainant B said this was meant for her son:

> That was meant to go to my son [T], I was texting my son [T] at the same time and I went to put "I miss u." and it went to Dean and then I never replied back to that.

[35] Ms Heah submitted that complainant B's evidence as to what N said in his text messages to her was hearsay and inadmissible without compliance with the procedural requirements of s 22 of the Evidence Act 2006.

[36] A hearsay statement is a statement made by a non-witness that is offered in the evidence to prove the truth of its contents.[5] What N might have texted to complainant B was not offered in evidence to prove that N really did want to visit complainant B. Whether that was true was irrelevant in the trial. It was background

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4 At [16]–[19] above

5 Evidence Act 2006, s 4.

only. All that was relevant was that N sent it, because it explained why complainant B replied. Complainant B (if her story was to be believed) texted N back to say she did not want him over as she was tired and needed to sleep. N's intentions toward complainant B as contained in his texts were not material. It must follow that this passage of complainant B's evidence was not hearsay and was therefore admissible.

[37] As to the text allegedly meant for her son, T, Ms Heah suggested that the inference that T had been texting complainant B was a hearsay statement in the nature of non-verbal conduct.

[38] It is not clear what is meant by the submission, or what specifically the non-verbal conduct complained of might be. Complainant B's evidence was simply that she regularly texted her son with endearments such as that allegedly sent on the evening of the 29 May. There was no suggestion of a statement by the son whether verbal or by conduct in any of the evidence, let alone a statement by him, the truth of which was relevant in some way to the trial.[6] That argument too must be rejected.

[39] As to the second category of evidence, Constable Tara Newton said that she had been involved in text communications with complainant B, and had received texts from her that were clearly sent in error.

[40] The constable's evidence was that she texted complainant B to organise a telephone call. The conversation took place at 2 pm as scheduled. However, the constable said that she then received two further texts from complainant B at around 2.30pm:

- "Did you get my text, my phone playing up."
- "I come see you after 5."

[41] The constable said that the texts did not make sense and must have been intended for someone else. This evidence was called after complainant B had

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[6] The issue of conduct-based assertions that may amount to statements within the definition of statement in s 4 of the Evidence Act 2006 is considered fully in *R v Holtham* [2008] 2 NZLR 758 at [38]–[45]. This decision provides no assistance to the appellant.

finished giving evidence and none of this material was put to complainant B. The defence objected vociferously on fairness grounds.

[42] Nation J twice ruled on the admissibility of such evidence during the trial.[7] In brief reasons he noted these issues had not been traversed by the Crown with complainant B herself when she gave evidence and that there was an element of unfairness created thereby. The Judge ruled nonetheless that the evidence was relevant and the constable could be cross-examined on it. The weight to be attached to it, the Judge said, was a matter for the jury.[8]

[43] In our view, this evidence was not hearsay evidence — complainant B was available as a witness and had indeed given evidence.[9] She could have been recalled if defence counsel felt an application to recall necessary. No such application was made. The evidence was in fact propensity evidence about a matter of peripheral relevance in the proceeding.[10] That is, the evidence demonstrated complainant B's propensity to send text messages to unintended recipients. This was somewhat relevant to a matter in issue in this trial, but its probative value was marginal at best. Technically, a probative value/prejudicial effect assessment was required and was not undertaken. Had it been so undertaken in accordance with s 8 of the Evidence Act, we rather doubt that the evidence would have been admitted without the defence being afforded an opportunity to recall complainant B.

[44] However, we do not consider that this flaw was so significant that it was productive of a miscarriage of justice. As we have said, it is likely that the jury had come to the view that the texts themselves were a red herring because they did not in fact undermine the Crown case. The most compelling evidence for the Crown was that relating to complainant B's injuries together with the appellant's admission of the injury assault. Misdirected texts were of peripheral relevance and marginal probative value, and as noted, the defence did not apply to recall complainant B.

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7 *R v Charlton* [2015] NZHC 773 [Ruling 4] and *R v Charlton* [2015] NZHC 773 [Ruling 5].

8 Ruling 4, above n 7, at [4].

9 This Court in *M (CA663/2008) v R* [2010] NZCA 302 at [24] considered that, although the question of past-testifiers and definition of witness is not without controversy, a past-testifier could fit within the definition of "witness" under s 4 of the Evidence Act.

10 Propensity evidence being evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being acts, omissions, events or circumstances with which a person is alleged to have been involved: Evidence Act, s 40(1)(a).

[45] We reject this ground accordingly.

Consent directions

[46] The third ground of appeal alleges that the Judge directed the jury inadequately on the question of consent. Ms Heah made two points. First, she submitted that the trial Judge should have included a direction that consent given reluctantly, hesitantly or irrationally is still consent so long as it is full, voluntary, free and informed. Second, Ms Heah submitted that the Judge should have directed on the appellant's belief on reasonable grounds that complainant B consented.

[47] Ms Heah submitted that the context suggesting that such directions were required could be found in aspects of complainant B's evidence in relation to the alleged rape on 18 May 2014 and in respect of the two separate allegations of sexual violation by digital penetration that allegedly occurred in the period between 18 May and 25 May 2014.[11] These were the incidents in which complainant B alleged the appellant masturbated her with two fingers. As we have said, these counts were discharged by the Judge before the jury was empanelled. We have no record of why this step was taken, but we infer from the summary of facts that was before the Judge at commencement of the trial in respect of these counts that he must have taken the view that no properly directed jury could convict on such a factual foundation.

[48] On the first point, complainant B was questioned during cross-examination on why she sent texts expressing love for the appellant after the (alleged) 18 May rape. She replied that she had come to believe her predicament was her own fault and that men mistreated her because she somehow deserved it.

[49] As to the second matter raised, Ms Heah pointed to the fact that in respect of one of the alleged incidents of digital penetration, complainant B admitted in evidence that, although she did not consent to the penetration, she thought she may have climaxed.

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[11] We refer to these at [8]–[10]above.

[50] A direction that consent may be reluctant, regretted or irrational will not be required in every case.[12] Rather, the requirement will depend on the factual narrative available to the jury in the particular case.[13] Much will depend too on the approach taken by a defendant to their defence at trial. As this Court said in *S (CA71/2014) v R*, the omission of a direction on reluctant or hesitant consent will not be material where the defence was never based on such a proposition.[14]

[51] We acknowledge that the matters raised by the appellant suggest that complainant B's poor self-esteem and tendency to resign herself to ill-treatment by men might, in other circumstances, have supported a reluctant consent narrative. They might also have supported a reasonable belief in consent. But the complainant's past ambivalence about the appellant's sexual advances quickly becomes irrelevant when account is taken of the context of their encounter that evening. It was eclipsed by the appellant's violent physical attack on complainant B at the time of the indecent assault and rape. He admitted punching her several times on the upper chest and briefly strangling her. Furthermore, complainant B's evidence was that she indicated to the appellant she did not want sex and twice said "[s]top I don't like this." She was crying throughout. There is no basis upon which reluctant, hesitant or irrational consent, even on the part of a person with complainant B's characteristics, could remain a reasonable possibility in a context so completely contrary to the very idea of consent.

[52] This case is thus distinguishable from *R v Adams* upon which Ms Heah relied.[15] In that case, as this Court pointed out, there was "a sufficient evidential basis" to make such a direction necessary.[16] In this case, there simply was not.

[53] As to reasonable belief in consent, the applicable principles are also well settled and clear.[17] There must be an evidential basis upon which to found reasonable belief in consent before a direction in that respect is required. In this

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12 *R v Chronis* CA40/01, 24 May 2001.
13 At [21].
14 *S (CA 71/2014) v R* [2014] NZCA 478 at [40].
15 *R v Adams* CA70/05, 5 September 2005.
16 At [44].
17 See *R v Somerfield* [2009] NZCA 231 at [17]–[18].

case, and for the reasons we have already traversed, the context of the encounter does not establish such a narrative.

[54] This ground is rejected accordingly.

Result

The appeal against conviction is dismissed.

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