

**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

**CA214/2019
[2019] NZCA 640**

BETWEEN EDWARD RAWIRI HERBERT
Appellant

AND THE QUEEN
Respondent

Hearing: 18 November 2019
Court: Collins, Brewer and Gendall JJ
Counsel: A J Holland for Appellant
J E Mildenhall for Respondent
Judgment: 12 December 2019 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Herbert was found guilty by a jury on one charge of sexual violation by rape.¹ He was sentenced by Judge N R Dawson to seven years and 10 months' imprisonment.² Mr Herbert now appeals his conviction.³

Background

[2] Judge Dawson set out the essential facts of the case in his sentencing notes:⁴

[2] On 15 July 2017 you were at an address in Glen Innes. Also at that location was a 16 year old girl. Prior to the incident neither of you were known to each other. At about 8.00 pm she arrived at her friend's address at Glen Innes where there was a small gathering of friends and relatives taking place. During the night she consumed a large amount of alcohol, causing her to vomit and fall unconscious. At about 10.00 pm she was carried by friends from a car parked outside the address to a spare bed in the house. They turned off the light, left the room and shut the bedroom door. There was no one else in the room with her.

[3] Sometime between 10.00 pm and 11.30 pm you entered the bedroom where she was sleeping. You removed your shorts and underwear and removed her underwear and skirt and proceeded to climb on top of her. You were kissing and sucking her neck. She responded by saying, "No," and, "Stop," on many occasions. You inserted your penis into her vagina. During the course of the incident your aunty knocked on the door to check on the complainant. She tried to push the door open but you moved to the door and held it closed with your hands, preventing her from getting inside. She asked, "Why can't I open the door?" to which you responded from inside saying, "No Aunty, it's all right." Your uncle woke from all the noise and forced the bedroom door open. You were then removed from the address naked from the waist down. As a result of what you did, the complainant received a large bruise known as a hickey on her neck.

¹ Crimes Act 1961, ss 128(1)(a) and 128B. The maximum penalty is 20 years' imprisonment.

² *R v Herbert* [2019] NZDC 8812.

³ Mr Herbert also appealed his sentence. At the hearing before us that appeal was formally abandoned.

⁴ *R v Herbert*, above n 2.

Appeal

[3] Under s 232(2)(a) of the Criminal Procedure Act 2011, this Court must allow Mr Herbert's appeal if we are satisfied that, having regard to the evidence, the jury's verdict was unreasonable. The threshold is high. The Court will not simply substitute its own view of the evidence.⁵ Juries are well placed to decide the appropriate weight to be given to each piece of evidence as well as to assess the honesty and reliability of witnesses.⁶

[4] An essential element of the crime of rape is that the complainant's genitalia were penetrated by the defendant's penis.⁷ Mr Holland submits there was insufficient evidence of that essential element in this case. Accordingly, he says the jury's verdict is unreasonable.

[5] Mr Holland's submissions have two main points:

- (a) The complainant did not give evidence that Mr Herbert's penis penetrated her genitalia. Therefore, the jury would have had to draw an inference of penile penetration from the other evidence.
- (b) The other evidence of most relevance to the issue of penile penetration was that Mr Herbert's semen was found on swabs taken from the complainant's vagina. However, that evidence was equivocal on the issue.

[6] Mr Holland submits that with only equivocal scientific support for penile penetration and no direct allegation from the complainant, the jury should not have found the charge proved.

⁵ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

⁶ *R v Owen*, above n 5, at [13].

⁷ Crimes Act, s 128(2).

Discussion

[7] The issue is whether there was evidence overall which could properly found an inference of penetration.

[8] We accept the complainant did not give direct evidence of penile penetration of her genitalia.

[9] We accept also the evidence of the presence of Mr Herbert's semen on the vaginal swabs is not by itself able to found an inference of penile penetration:

(a) The semen sample analysed had very few sperm present and there were low levels of acid phosphatase, an enzyme strongly present in the male ejaculate.

(b) The Crown's expert witness, Ms Vintiner, gave evidence that the finding of very few sperm could be because they came from a male with a low sperm count. Or, they could have originated from pre-ejaculate. Ms Vintiner then said:

A. I think it's important to also consider, given my understanding is that there was a reasonably short timeframe between the alleged act and the medical examination, that it's possible that semen was introduced into the vagina by some other means.

Q. And by that you mean what?

A. Well, an example would be liquid semen, say for example on a finger.

Q. And when you say "liquid semen" would it have to be wet for that transference to take place?

A. It's my opinion that it would need to be wet.

(c) In re-examination Ms Vintiner was asked to comment on the acid phosphatase test result. Ms Vintiner said:

A. On consideration of that piece of information which as you appreciate I'm only learnt now, it is not what I would expect from penile penetration and ejaculation

because a man may have a low sperm count but the liquid, the seminal fluid –

Q. Yes.

A. – which contains this enzyme will be active and my expectation would've been from a vaginal swab taken a few hours after an alleged act that the semen on that swab would have had a strong acid phosphatase reaction.

Q. So again does it come back to you couldn't rule it out but it's not what you expect?

A. It's not what I expect.

Q. So again to go back to the evidence you gave both to me and to my learned friend, could be a low sperm count but that wouldn't be what you'd expect, could be pre-ejaculate?

A. Yes it could.

Q. It could be some other means of it getting there?

A. Yes, a similar amount introduced.

[10] Nonetheless, the scientific evidence is a powerful piece of circumstantial evidence when considered in conjunction with the other evidence of what happened.

[11] The complainant was drunk. She was put to bed fully clothed. The appellant, a stranger to the complainant, went into the room. He removed the complainant's lower clothing. He removed his own lower clothing. Both were then naked from the waist down. The appellant lay on top of the complainant. He put his mouth on her neck and bruised it by applying suction (a "hickey"). He was interrupted by his aunt coming to the bedroom door. His semen was found in the complainant's vagina.

[12] The physical element of rape, penile penetration, is complete when part of the penis is within the labia.⁸ Whether the offender ejaculates is irrelevant. Here, Ms Vintiner's evidence is entirely consistent with penile penetration which ended without Mr Herbert ejaculating but after he had deposited his DNA through pre-ejaculate fluid.

⁸ See *R v N (T90/92)* (1992) 9 CRNZ 471 (HC); and *Goodwin v R* [2012] NZCA 87 at [48]–[49].

[13] The issue of whether the Crown could prove penile penetration was squarely before the jury. Crown counsel addressed it, defence counsel emphasised it, and the trial Judge clearly identified the issue in his summation.

[14] In our view, the jury was entitled to find proved the physical element of penile penetration having regard to all the evidence. It was open to the jury to decide that introduction of Mr Herbert's semen into the complainant's vagina by, say, transfer from his fingers was not a real possibility in the circumstances.⁹ The weight to be given to individual pieces of evidence is essentially a jury function.¹⁰

Decision

[15] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁹ For completeness, we note that Mr Herbert gave evidence, denied penile penetration and said that he touched the complainant's vagina.

¹⁰ *R v Owen*, above n 5, at [13].