

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,  
OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT  
PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.**

**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**

**CA705/2015  
[2016] NZCA 180**

BETWEEN F (CA705/2015)  
Appellant  
AND THE QUEEN  
Respondent

Hearing: 6 April 2016  
Court: Wild, Clifford and Brewer JJ  
Counsel: P E Dacre QC for Appellant  
Z R Johnston for Respondent  
Judgment: 6 May 2016 at 10.30 am  
Reissued: 17 May 2016: see minute of 16 May 2016  
Effective date  
of Judgment: 6 May 2016

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**JUDGMENT OF THE COURT**

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**A The appeal against conviction is dismissed.**

**B Order prohibiting publication of name, address, occupation or identifying  
particulars of appellant pursuant to s 200 Criminal Procedure Act 2011.**

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## REASONS OF THE COURT

(Given by Brewer J)

### Introduction

[1] On 14 August 2015, a jury in the Auckland District Court delivered its verdicts on nine charges of sexual offending by Mr F against the complainant. Mr F was found guilty on three charges and acquitted on the rest. He now appeals the convictions. He argues that, having regard to the evidence, the jury's verdicts are unreasonable or inconsistent.

### Background

[2] Mr F and the complainant were married in 2007.

[3] In the first year of the marriage an incident occurred that formed the genesis of the eventual prosecution. The complainant woke one night to find herself lying on her front and Mr F, on top of her, having vaginal sexual intercourse. He then penetrated her anus with his penis before returning to vaginal intercourse, which he continued until ejaculation.

[4] The complainant was very upset. She called "get off, get off", but apparently was ignored. She cried; but Mr F continued without a break in what he was doing. His actions seemed angry and aggressive. Anal intercourse had never been a part of their sexual intimacy and it hurt. The whole incident was "just totally out of the blue really".

[5] Mr F, having ejaculated, rolled over and appeared to go to sleep. The complainant left the bedroom and went to the lounge. Eventually she decided she had to confront Mr F before the children got up to start the day's routine. She did. To her astonishment, Mr F said he had no memory of the incident. He said he would do some research and try to find out what had happened.

[6] That evening Mr F produced an article and spoke about a condition he had discovered known as sexsomnia, otherwise known as sleep sex. It is a condition

akin to sleepwalking in that it is performed in a state of unconsciousness. Mr F said he thought it was the only explanation, and the complainant believed him.

[7] From then until the end of the marriage in 2012, by the complainant's account, there were many occasions when the complainant would wake and find Mr F engaged in some form of sexual activity, sometimes penetrative but usually some form of fondling or touching. The complainant did not like it and it became a point of contention in the marriage.

[8] As time went on, the complainant began to doubt that Mr F was acting unconsciously. At times she thought he was because his actions seemed angry or aggressive — it was not like him. But at other times she could not discern any difference from his normal sexual habit. Further, on three occasions, the evidence for which is referred to later, Mr F spoke to the complainant during sex acts.

[9] Mr F gave a lengthy interview to the police and did not give evidence at trial. His explanation was that he had no memory of most of the acts alleged against him. He did accept some memory of two incidents. He pointed to the complainant having motives to implicate him in sexual offending.

[10] The Crown called a psychiatrist, Dr Fernando, who practises in the area of sleep disorder. He confirmed that sexsomnia exists as a recognised sleep disorder. He has personally treated 10 to 15 patients who complained of it and he is familiar with the specialist literature. Dr Fernando gave evidence that someone with this type of disorder could be asleep while performing sexual acts.

[11] The following exchange between the prosecutor and Dr Fernando is relevant to the challenges to the convictions:

Q. In your experience is, from the partner's perspective, is there a difference between what might be called a normal sexual experience in the partnership or the marriage versus an incident where it's thought the person was actually asleep?

A. Yes sir. Partners most of the time will know that the event was sleep related, so a common, I remember a recent patient well the wife saying normally the patient during sex when he's awake is quite caring, is focussed on pleasuring the woman and however when he's

in his sleep sex mode it's very selfish, aggressive and just doesn't factor in the needs of the other person. And I've heard something similar with a lot of the other stories, so patient or partners can (inaudible 14:36:44) differentiate if it's sleep sex or normal sex.

Q. In terms of the, in your experience when someone's having, undergoing an incident of sleep sex so that the patient is asleep but is engaging in sexual activity. To what extent can there be or is there, in your experience, communication between the patient and the partner?

A. Again this is just based from my patients or partner's reports is that generally there's no communication. In fact the description is they're just in their own world, just totally just zoned out while in the process of sleep sex.

Q. So they're asleep?

A. Parts of their brain's asleep in terms of the communication connection aspect but the other part of the brain involved in mechanical sexual movement is engaged. And I think it's one of the reasons partners can differentiate if the behaviour is sleep related or normal sex, because of the communication if it occurs or doesn't occur.

### **The convictions**

[12] The three charges on which Mr F was convicted are the charges where the complainant reported some communication from Mr F.

#### *Charge 4*

[13] Charge 4 is a charge of rape, said to have occurred between 7 March 2007 and 31 December 2008. The complainant's evidence was that she woke to find herself lying face down and Mr F on top of her engaged in vaginal sexual intercourse. She heard him say "I'm going to come", which she said is something Mr F typically said when having sexual intercourse. The complainant said Mr F then ejaculated and rolled off her. The complainant went on to say that she felt that nothing Mr F did on that occasion was abnormal or outside his usual behaviour. In particular, it was not like the first time where his actions seemed quite aggressive and angry.

[14] The complainant went on to give evidence that she confronted Mr F about this. Eventually Mr F accepted that he did have some memory of the occasion. He

said that he could remember saying “I’m going to come” and that he guessed that he woke up part way through the act but was not awake enough to stop. To the police, he accepted that he has a fuzzy memory of waking up just before the point of ejaculation. He described it as a few seconds’ memory.

#### *Charge 8*

[15] This is a charge of indecent assault, said to have occurred between 1 November 2011 and 31 August 2012. The particulars are that Mr F moved the complainant’s hand towards his penis.

[16] The complainant gave evidence of three similar incidents that took place over three consecutive nights in early 2012. She said candidly that she was quite vague in her recollection of the first two incidents (and the jury acquitted in respect of them). However, for the charge 8 incident, the complainant’s evidence was that she woke to find herself lying on her side. Mr F was lying on his side also with his back to her and one of her arms was draped over him. The complainant said that she could just hear him saying, in a quiet voice, “are you awake?” She decided not to respond and to pretend to be asleep to see what he would do. This was prompted by her memories, vague as they were, of the two previous nights. The complainant said that, bit by bit, Mr F began to move her hand down the front of his body to his lower belly, to the edge of his pubic hair. Further, it seemed to her that Mr F was starting to make movements of the sort that he made when he was sexually excited.

[17] The complainant said that she confronted Mr F about this incident. At first he said that he had no memory of it, but later admitted to her that he lied about that. He admitted that it was not sleep sex but explained that he felt emotionally distant from her and this was his way of making the complainant close to him. She described him as being quite defensive and that he maintained that the complainant needed to be more emotionally close to him and then he would not feel like he had to do these things.

[18] Mr F, in his interview with the police, accepted that he lied to the complainant initially about this incident and accepted that potentially he acted with a sexual motive.

### *Charge 10*

[19] The third charge on which Mr F was convicted is also indecent assault. It is alleged to have occurred between 7 March 2007 and 31 August 2012 and the particulars are that Mr F rubbed his penis against the complainant. It is a representative charge but the complainant focused on a particular occasion.

[20] The complainant's evidence was that on this occasion she woke to find Mr F rubbing his erect penis against her bottom. This was at a stage when the complainant was "just trying things to either be able to tell if he was asleep or awake or to get him, you know — I was trying to find ways to stop it happening". She had read somewhere to ask something. So, she asked Mr F "what's the time?" His response, she said, was to look over, check the clock and tell her the time. He then rolled away from her. But, after a little while, he rolled back to her and began to rub himself against her again.

[21] Mr F was asked generally about rubbing himself against the complainant. His answers were to the effect that the complainant told him about rubbing incidents but he did not remember them and, if they occurred at all, they were part of his condition.

### **Analysis**

[22] When an appeal is brought on the basis that a jury's verdicts are unreasonable, the Court examines the evidence to determine whether the verdicts were, as a matter of law, open to the jury to return. The Court does not substitute any view it might form of the merits of a case for that of the jury.

[23] Whether a verdict is unreasonable means just that:<sup>1</sup>

The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

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<sup>1</sup> *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

[24] Verdicts can be unreasonable if they are inconsistent. A submission that verdicts are inconsistent means that they are not capable of logical reconciliation, either on the law (legal inconsistency) or on the facts (factual inconsistency).<sup>2</sup>

[25] In this case, the jury had evidence of a married relationship of some five and a half years where, quite frequently on the complainant's evidence, the wife woke to find her husband engaged in some form of sexual activity. The husband was not diagnosed with *sexsomnia* (as Mr Dacre QC explained it, he could not be diagnosed because that would have required him to have been observed while still in a relationship with the complainant). However, it was common ground that after the first incident he said he thought, through his research, that that is what he had. For quite some time, the complainant accepted that. It was really only in 2012, in relation to the incident forming charge 8, when Mr F admitted that he had lied about that being a product of sleep sex, that the complainant came to re-evaluate previous incidents.

[26] The evidence of Dr Fernando, called by the Crown, established for the jury that *sexsomnia* is a recognised form of sleep disorder. His evidence about some partners of *sexsomnia* recognising the difference between sleep sex and normal sex by uncharacteristic angry or aggressive behaviour is congruent with evidence by the complainant, particularly in relation to the first incident. Dr Fernando also told the Court that *sexsomnia* typically are light sleepers and sleep apnoea<sup>3</sup> can contribute to the condition. Again, this evidence is congruent with evidence from the complainant about Mr F.

[27] As quoted in [11] above, Dr Fernando also gave evidence that generally there would be no communication from the *sexsomnia* during sleep sex.

[28] In our view, there was sufficient evidence to raise the real possibility, even probability, that Mr F had the sleep disorder known as *sexsomnia*. Against this background we turn to the charges.

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<sup>2</sup> *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68].

<sup>3</sup> A sleep disorder characterised by pauses in breathing or instances of shallow breathing during sleep.

#### *Charge 4*

[29] On charge 4, the charge of rape, Mr Dacre submits that the jury could not have been satisfied beyond reasonable doubt that Mr F was not acting unconsciously through sexsomnia. The fact that Mr F, close to ejaculation, said “I’m going to come”, and later admitted a brief and fuzzy memory of that incident, is not enough. In other words, that evidence is not sufficient to found a conviction for rape when elements of that offence require conscious action against a lack of belief in consent.

[30] In our view, and looking at the evidence as a whole, the jury might well have decided to give Mr F the benefit of the doubt that most of the incidents charged against him could be excused by sexsomnia. However, for charge 4, the jury was entitled to accept the complainant’s evidence that Mr F acted normally and just as he would during conscious sex. The phrase “I’m going to come” was typical of his normal sexual practice. His admission that he had some memory of saying that and of the incident, coupled with Dr Fernando’s evidence that generally there is no communication during an act occasioned by sexsomnia, could be relied on by the jury.

[31] We do not accept that the conviction on this charge is inconsistent with the jury’s verdicts on other charges. The jury was entitled to find that the factors we have mentioned negated the reasonable doubt that might otherwise arise from the sexsomnia evidence.

#### *Charge 8*

[32] Charge 8 does not involve sexsomnia. Mr F admitted that he lied to the complainant about that. The point raised by Mr Dacre on appeal is that it was unreasonable for the jury to find that the act complained of was indecent. The context was of a married couple sleeping in the marital bed. Mr F was trying to bridge the emotional distance between the two and there was nothing overtly sexual in the act.

[33] In our view, it was clearly open to the jury to find that the act was indecent. First, on the complainant’s evidence the act had clear sexual overtones and Mr F



admitted to the police that potentially he acted with a sexual motive. Second, this was a marriage where sleep sex was a point of real contention. Mr F was in no doubt as to how the complainant felt about it.<sup>4</sup> Third, and importantly, whether an act is indecent is judged by the standards of right-thinking people. The jury is the arbiter of those standards. It is not for this Court to gainsay a jury's decision on this ground unless the decision could not have been made by a reasonable jury properly directed.

### *Charge 10*

[34] Charge 10 is similar to charge 8. The main difference is that Mr F does not admit that he remembers the incident. However, for similar reasons, we conclude that the jury was entitled to find proved beyond reasonable doubt that the rubbing was deliberate and indecent. The complainant gave clear evidence of an act that the jury was entitled to find was indecent in the circumstances, as well as clear evidence of Mr F responding to a question about the time and then ceasing the act for a while before resuming it.

[35] It is not inconsistent with other verdicts of acquittal that the jury took the evidence of the communication from Mr F to be a distinguishing feature sufficient to negate a reasonable doubt that might otherwise be raised by the evidence of sexsomnia.

### **Result**

[36] The appeal is dismissed.

[37] In order to protect the complainant, whose name and identifying particulars are automatically suppressed, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act.

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<sup>4</sup> Mr Dacre submitted that the complainant did not clearly prohibit Mr F from making sexual advances to her while she was asleep until late in the marriage and likely after the charge 8 incident. But sex while the complainant was sleeping had been an issue from the first year of the marriage.

Solicitors:  
Crown Law Office, Wellington for Respondent