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IN THE COURT OF APPEAL OF NEW ZEALAND

CA265/2015
[2016] NZCA 465

BETWEEN	IAN EDWARD HITCHCOCK Appellant
AND	THE QUEEN Respondent

Hearing: 8 September 2016

Court: Asher, Mallon and Whata JJ

Counsel: P J Shamy for Appellant
J E L Carruthers for Respondent

Judgment: 28 September 2016 at 3.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] Following a trial before Judge DJL Saunders and a jury, the appellant, Ian Hitchcock, was convicted on 12 out of 16 charges involving allegations of sexual violation by rape and unlawful sexual connection, cannabis dealing and attempting to pervert the course of justice. The primary evidence came from two complainants,

A who was aged 13 at the time and B who was aged 14. Ultimately in relation to A Mr Hitchcock was convicted of sexual violation by rape and sexual violation by unlawful sexual connection. In relation to B, the jury found him guilty on a charge of sexual connection with a young person under 16 but was unable to reach a unanimous decision in respect of the rape charge. He was convicted of an alternative charge of sexual connection with a young person under 16. Mr Hitchcock was also found guilty of supplying cannabis to the two complainants and others, as well as of a charge of attempting to pervert the course of justice. Judge Saunders sentenced Mr Hitchcock to nine years and six months' imprisonment.[1]

[2] Mr Hitchcock was aged 26 at the time he met A, and she was 13. They did not know each other. He supplied her with alcohol and cannabis that evening and she became so intoxicated that she vomited in the back of Mr Hitchcock's car. He took her to his home and put her in the shower when she was still very drunk. Following the shower he put her in his bed while she was still naked, proceeded to tie her legs and feet and gag and blindfold her. He then had sexual intercourse with her.

[3] The facts relating to the second complainant involved a similar sequence, although the complainant was older and had known Mr Hitchcock prior to the sexual conduct, and had been involved in a text message exchange which had a sexual aspect. It is not necessary to go into the facts of the incident with her, as the jury was unable to agree on that sexual violation charge, and Mr Hitchcock was ultimately convicted of the alternative charge of unlawful sexual connection. The sex with B also involved tying and blindfolding the complainant.

[4] Mr Shamy, for Mr Hitchcock, has pursued two grounds on appeal.

First ground — error in summing-up about communication of consent

[5] Mr Shamy's criticism of the Judge's summing-up focussed on this paragraph:

> You might think that a pretty clear consent would need to be given by a female who has been either tied up or subject to handcuffs and a blindfold

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1 *R v Hitchcock* [2015] NZDC 6265.

> and that a person, a male, would need to have pretty clear consent that that was being given freely at the time if that activity was being undertaken.

[6] He submitted that, by referring to "pretty clear consent" the Judge ignored the objective standard and reversed the onus of proof. He also argued that in the statement he conflated lack of consent and absence of reasonable grounds for belief in consent.

[7] Mr Hitchcock's defence at trial was a complete denial that the incident with A took place and that there was any sexual conduct. However in his closing address to the jury, defence counsel (not Mr Shamy), had invited the jury to consider in addition, whether even on the complainant's evidence there had been reasonable consent and belief in consent.

[8] In considering Mr Shamy's submission, it is necessary to put the Judge's complained-of statement in context, and consider the summing-up as a whole.

[9] Earlier in the summing-up the Judge had set out the three elements that must be proven beyond reasonable doubt in relation to sexual violation by rape, penetration, absence of consent, and absence of belief in consent on reasonable grounds. He had done so in an entirely orthodox way making it clear that proof of each is a prerequisite to guilt. He had done the same in relation to the unlawful sexual connection. Previously he had directed the jury on question trails. He provided question trails which set out three questions reflecting the three elements.

[10] Then later, at the end of the summing-up, having been through the evidence and the defence contentions including the possibility that if there had been sexual conduct it was consensual, the Judge returned to the question trails. He referred again to the three questions including whether the Crown had proved an absence of consent and an absence of belief on reasonable grounds that the complainant was consenting. This was done in an entirely orthodox way.

[11] There was no error in the question trails, which set out the three questions including absence of consent and absence of reasonable belief, and unambiguously placed the onus on the Crown. Further, in a written synopsis the Judge handed the

jury as part of the summing-up, the onus and standard of proof were repeated, as was the need to put emotion to one side, and the need to approach each charge and its evidence separately.

[12] The effectiveness of the Judge's directions on the three elements is clear from the way the case unfolded. When considering the rape charge against the second complainant B, the jury forwarded a question in which they stated that although they had unanimously agreed on the first two questions, they were stuck on the third question. Thus they had unanimously resolved the questions of penetration and absence of consent (it seems likely that this was by concluding unanimously that the first two elements were proven), but were unable to agree on reasonable belief in consent. It can be assumed that doubt by some jurors concerning this issue led to the inability to agree. This is an indication that the jury was well aware of the obligation on the Crown to disprove reasonable belief in consent.

[13] Returning to the sentence in the summing-up to which Mr Shamy objects, this can be seen as part of a general comment on an aspect of the evidence made by the Judge, rather than a direction as to elements of proof. It is not expressed in terms of the onus or standard of proof. In these circumstances we see the comment as unobjectionable. A person who is bound, gagged and blindfolded would have to have given or give some clear signal of consent to sexual intercourse. The Judge was saying the obvious.

[14] The jury's approach had to be governed by s 128A(1) of the Crimes Act 1961 which provides that "a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". This issue must be seen in the context of the recent statement of the Supreme Court in *Ah Chong v R* where it was held that a complainant's silence by itself must not be taken as consent.[2] Neither silence nor inactivity can provide a basis for an inference of consent. Consent, however it may be expressed, must be actively expressed.

[15] Judges must, of course, be cautious in making any statement to a jury about what could constitute consent and the communication of consent on the facts.

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2 *Ah Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [44]–[45].

However, this remark cannot be criticised given the full specific directions, and the particular facts.

[16] This ground of appeal fails.

Second ground of appeal — failure to direct on the need for knowledge in relation to the cannabis offending

[17] Mr Shamy submitted that the Judge had omitted to direct the jury on the need for the Crown to prove knowledge of Mr Hitchcock that he was supplying cannabis. Mr Hitchcock was found guilty on five counts of supplying cannabis to persons under the age of 18, one count of selling cannabis and one count of offering to supply cannabis. Some of the counts are representative. Some related to supplies made to the two complainants who made the sexual violation complaints, and a friend of one of the complainants (C), while the remainder related to offers and supplies made generally. The evidence against Mr Hitchcock was that of A, B and C, together with text messages retrieved from the appellant's cellphone and discovery of cannabis plant material in his bedroom.

[18] A considerable quantity of synthetic cannabis was found at Mr Hitchcock's premises. Also, a very small amount of apparently old cannabis was found in a bag. The defence strategy at trial was not to dispute the presence of the cannabis or synthetic cannabis, and to suggest to the relevant witnesses that the material that they received was in fact the synthetic cannabis and not actual cannabis. Those witnesses rejected the suggestion.

[19] The Judge summed up the issue in relation to all the cannabis counts as follows:

> [28] So the defence pretty clearly has pitched its defence in relation to this as saying well there is some evidence that he had synthetic cannabis at his place and packaging that's been referred to is more consistent with him dealing with synthetic cannabis, or you cannot be sure beyond reasonable doubt that it was a class C controlled drug. On the other hand the Crown has said to you you've got people like [C] who, despite the criticisms the defence might make about him, is pretty upfront about knowing the differences between synthetic and natural plant and his description was that the synthetic tasted like a science lab whereas the – and it was different in its whole texture and the buzz that you got from it. So those are matters for you.

> They are jury issues and you will determine the facts according to which witnesses you accept or which parts of their evidence you accept.

[20] The Judge directed the jury that they had to be sure that Mr Hitchcock had supplied or sold cannabis as alleged. As Mr Shamy noted, he did not direct the jury that they had to be sure that the Mr Hitchcock knew that he was supplying cannabis. In assessing Mr Shamy's submission, we note that the Judge was careful to refer the jury to the texts sent by the appellant, and to ask the jury to consider whether the texts referred to cannabis or synthetic cannabis material. The Crown had said to the jury that they showed that the appellant was selling cannabis. In considering this the jury had to reach a conclusion on whether the texts showed that the appellant was dealing in cannabis. A positive answer could be seen as involving a conclusion that the appellant knew he was dealing in cannabis.

[21] However, in our view the Judge, out of caution, should have set out as an element in the question trail, the element of proof of the knowledge of Mr Hitchcock that he was supplying cannabis. While we take this into account, in the circumstances we do not think there was an error which has led to any miscarriage of justice. The approach to the defence had been that Mr Hitchcock had indeed been dealing in a substance, but that it was synthetic cannabis. There was no evidence of, or basis for, any suggestion that Mr Hitchcock mistakenly believed he had been supplying synthetic cannabis and not cannabis.

[22] It was not suggested in cross-examination or in closings or at any stage of the trial that Mr Hitchcock mistakenly believed he was dealing in synthetic cannabis. None of the witnesses who received the cannabis suggested that Mr Hitchcock was operating under a misapprehension that the cannabis was synthetic cannabis. Their evidence was that he was supplying them with cannabis and that this was what they received. Mr Hitchcock did not give evidence.

[23] There was therefore no credible narrative available that Mr Hitchcock did not believe that what he was supplying was cannabis. It had to follow, the jury being satisfied that the material being supplied was cannabis and not synthetic cannabis, that Mr Hitchcock, as an experienced dealer, knew what he was supplying. There was no credible narrative that he was mistaken on such a fundamental issue.

[24] Therefore there is no possibility of a miscarriage of justice. This ground of appeal also fails.

Result

[25] The notice of appeal was filed out of time. The Crown does not oppose an extension of time to appeal and an extension is granted accordingly.

[26] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent