ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDUTE 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

CA477/2016
[2017] NZCA 425

BETWEEN	K (CA477/2016) Appellant
AND	THE QUEEN Respondent

Hearing:	2 August 2017
Court:	Cooper, Brewer and Peters JJ
Counsel:	P K Hamlin for Appellant JEL Carruthers for Respondent
Judgment:	29 September 2017 at 11.30 am

JUDGMENT OF THE COURT

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

B The appeal is dismissed.

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

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] The appellant was tried by a jury in the District Court on 42 charges. Seventeen of the charges alleged breaches of a protection order. The remaining 25 charges alleged acts of physical and sexual violence against the appellant's partner over a period commencing in 2010 and ending in 2014.

[2] On 17 June 2016, the jury returned its verdicts. Putting to one side the charges of breaching a protection order, the verdicts were:

Convictions

Charge No	Offence	Date
2	Male assaults female	4 April 2011
3	Male assaults female	27 October 2011
6	Assault with intent to injure	9 December 2012
8	Assault with intent to injure	24 April 2013
9	Injuring with intent to injure	24 April 2013
19	Assault with intent to injure	Between 1 August 2013 and 30 September 2013
22	Injuring with intent to injure	Between 15 December 2013 and 31 January 2014
24	Male assaults female	11 February 2014
26	Assault with intent to injure	Between 11 February 2014 and 28 February 2014
28	Assault with intent to injure	Between 11 February 2014 and 18 February 2014
36	Injuring with intent to injure	18 April 2014
38	Sexual violation by rape (representative charge)	Between 1 December 2011 and 19 April 2014
41	Injuring with intent to injure (representative charge)	Between 24 September 2010 and 18 April 2014
42	Threatening to kill (representative charge)	Between 24 September 2010 and 18 April 2014

Acquittals

Charge No	Offence	Date
1	Male assaults female	Between 1 February 2011 and 28 February 2011
5	Assault with a weapon	Between 1 November 2012 and 31 December 2012
11	Assault with intent to injure	Between 1 May 2013 and 31 May 2013

13	Male assaults female	12 July 2013
15	Sexual violation by rape	Between 12 July 2013 and 15 July 2013
17	Injuring with intent to injure	Between 1 August 2013 and 30 September 2013
32	Male assaults female	6 April 2014
34	Male assaults female	16 April 2014
39	Sexual violation by unlawful sexual connection (representative charge)	Between 1 December 2011 and 19 April 2014

[3] During the course of the trial, the appellant was discharged pursuant to s 147 of the Criminal Procedure Act 2011 for insufficient evidence on charge 20 (rape) and charge 30 (male assaults female).

[4] The appellant now appeals his conviction on charge 38, the representative charge of sexual violation by rape. His notice of appeal was filed shortly out of time. Given the appellant's explanation for the delay, which was minimal, and in the absence of prejudice to the Crown, the application for an extension of time to file the notice of appeal is granted.

Background

[5] The evidence was that the appellant and the complainant had been in a relationship which began when the appellant was 14 years old and the complainant was 18 years old. The two separated for a time before resuming their relationship in 2010 when the appellant was 18 years old. The two were married in August 2012 and their relationship ended on 19 April 2014.

[6] There were periods during the relationship when the pair did not live together. The complainant gave evidence that in October of 2011, when their first son was born, she was living with her parents. Her evidence was also that in April 2012 she lived in a refuge for a time and, in July 2013, around the period of the birth of their second child, the period of separation was for some months.

[7] The relationship was a volatile one. There was evidence from the complainant and from the appellant that each used violence against the other, but each said their use of violence was in self-defence and that the other was the aggressor. There was ample corroborating evidence from other witnesses as to the presence of violence in the relationship.

[8] The complainant's evidence was that at times, and with greater frequency towards the end of the relationship, the appellant forced her to have sexual contact with him. He would ignore her objections and carry on. The complainant linked some of this aggressive sexual conduct with the appellant's use of methamphetamine. The appellant's evidence was that all sexual contact was consensual and that methamphetamine did not play a role in it.

The appeal

[9] Mr Hamlin for the appellant advanced the appeal on the basis that the verdict of the jury was unreasonable because:

(a) there was insufficient evidence to convict the appellant of a representative charge of rape; and

(b) the jury's verdict was fundamentally inconsistent with the verdicts on charges 15 (rape, between 12 July 2013 and 15 July 2013) and 39 (representative charge of sexual violation by unlawful sexual connection, between 1 December 2011 and 19 April 2014).

[10] In support of his contention that the evidence in relation to charge 38 was insufficient, Mr Hamlin submitted that the evidence was:

(a) Sparse because it was not as detailed as the complainant's evidence in relation to charge 15 (rape, between 12 July 2013 and 15 July 2013) upon which the appellant was acquitted;

(b) equivocal;

(c) elicited in part by leading questions; and

(d) insufficient to make out the elements of the offence.

[11] As to the conviction on charge 38 being inconsistent with the jury's acquittals on the other sexual violation charges, Mr Hamlin's submission was that there is no

logical explanation for the jury's verdicts. In his submission, the verdicts are logically irreconcilable and the only reasonable explanation is that the jury reached an illegitimate compromise.

[12] Mr Hamlin further submitted that the time period stated in charge 38 (December 2011 to April 2014) was too wide, and evidence of recent complaint was wrongly admitted. These two matters, individually and collectively, occasioned a miscarriage of justice.

[13] Mr Hamlin submitted that the time period specified in charge 38 was inappropriate because:

(a) the period was inconsistent with the complainant's evidence because the complainant said there were periods when she and the appellant were not living together and there was no offending in these periods;

(b) there should have been more than one representative charge with each such charge corresponding with the periods when the complainant was living with the appellant;

(c) the complainant gave evidence that the frequency of the appellant's sexual offending increased towards the end of their relationship. Therefore, there should have been a separate representative charge focusing on that period; and

(d) the period of time specified in charge 38 has led to a real risk that the outcome of the trial was affected.

[14] The recent complaint evidence referred to by Mr Hamlin came from a friend of the complainant. Her evidence was that the complainant, on an unspecified occasion, had told her "there was rape". Mr Hamlin submits that the probative value of this evidence was low because there was no evidence about the context in which the complaint was made. Therefore, he submits, the illegitimate prejudicial effect of the evidence was high.

Discussion

Insufficient evidence

[15] We do not accept that there was insufficient evidence for the jury to find the appellant guilty on the representative charge of rape.

[16] A representative charge is available where multiple offences of the same type are alleged in similar circumstances over a period of time and the nature and circumstances of the offences are such that the complainant cannot reasonably be expected to particularise them.[1] Representative charges are often brought where a complainant alleges sexual offences were committed many times over the course of a relationship. Where particular incidents are recalled, they must each be the subject of separate charges. But where there is a general course of offending that the complainant cannot reasonably be expected to particularise, then representative charges are appropriate.[2] Where different types of sexual offending are alleged, a separate representative charge should address each type. That was done in this case where there was a representative charge of rape and a representative charge of sexual violation by unlawful sexual connection relating to allegations of forced oral sexual connection.

[17] A jury may convict on a representative charge if the jurors are satisfied beyond reasonable doubt that the alleged offending occurred at least once during the period identified in the charge.

[18] We will not set out all of the complainant's relevant evidence. It has to be evaluated, as the jury would have, in the context of all the evidence as to the course and nature of the relationship between the appellant and the complainant. But these passages show sufficiency of evidence for the charge:

> Q. Now him insisting on having sex when you said you didn't want to as you've described on this occasion, was that something that ever happened on other occasions?
>
> A. Yes.

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1 Criminal Procedure Act 2011, s 20(1).

2 See generally *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8]; *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [9] *Gamble v R* [2012] NZCA 91 at [31]–[33] and *Y (CA117/2016) v R* [2016] NZCA 257.

Q. Are you able to put a number of — put a number on the number of times that happened between you?

A. I don't know.

Q. You said that he was high when this happened, you believed on methamphetamine. Was that something that in terms of the occasions that this insistence on sex against your wishes happened, was that just that time or was that on other occasions as well?

A. Other occasions.

Q. Do you or did you at the time see any link between him being high on meth and these sexual assaults?

A. Yes, it was like a pattern. It's like I said before, there was nothing like that in the beginning. He wasn't affectionate though he used to be, it was nothing like that anymore.

…

Q. That's okay. Maybe if you could — you've told us when you think roughly in the course of your relationship these sexual incidents started to happen. Can you give the jury an idea of how often that would happen? Not in terms of exact numbers but was it once every six months or can you give us an idea of the frequency?

A. It seemed, like I said before, it felt as if it was a pattern with the methamphetamine. Um, so the pattern was he'd get, well, slang terms is "fried" which is high off meth and then which makes you quite agitated and somewhat aggro, more aggro for some people, and for whatever reason it made him really sexually aggressive which is like very scary to me. Like I said earlier, like it was a huge shock considering our relationship before that had never, had never, ever been anywhere near like that, so it was, yeah, it seemed as if it was a pattern with meth. Sometimes not, but yeah, mostly, mostly with meth and it was more than — it was I would say more than twice, maybe three times, even more than that a week. It became more frequent towards the end. …

…

Q. Was there an occasion on which you tried to talk to [the appellant] about this and about him forcing you to have sex when you didn't want to?

A. Yes.

Q. And what, how did he react to that?

A. (Inaudible 14:50:35) 50 million — um, it was like at night in his sister's room, I think she was not there, only my brother-in-law at the time was in the lounge. But possibly with the door shut. We're — again I was, like "No I am tired, it's late" because I was just exhausted. I was constantly exhausted in that relationship, especially towards the

end. Where he was trying to get his way again and I put it off for as long as I could. And I — for the first time every I … I told him that, "You're like, you're pretty much you're raping me. I don't — this is — this is not fun for me" and he flipped, grabbed the collar of my shirt and smacked me straight in the nose. Just drew back and I've never had a nose bleed, not as a child, not while pregnant, never, and my nose just poured out like a tap.

…

Q. Okay, just bear with me a moment please. Is there anything else you want to say about these instances when [the appellant] insisted on having sex with you or having some sexual activity with you when you didn't want to do that. Is there anything else you want to say about that or do you think you've said everything that you want to?

A. Just that it was so uncomfortable for me being pregnant and even not — because I was pregnant a lot of the time, having had two kids together in a short amount — in a short amount of time. That I just lay there crying. Just silently crying to myself, just waiting for it to be over and sometimes if I got caught crying that would make him agro. It just, it sucked, it was just added — added to, excuse me but my shitty life at the time. But I was so — I already felt so low and so small and in such — like the worst place in — that I've ever been in my whole entire life that I just thought I was — that's all I was worth, that's all it was ever going to be. I was never going to get out so …

[19] In cross-examination, the complainant maintained her position. For example:

Q. Like I'm suggesting to you, these things did not happen. He never ripped off your clothes or held you down. The sexual intercourse was something that you mutually agreed.

A. Not always.

Q. But you didn't say to [the appellant], "Stop," did you?

A. Yes I did, on a number of occasions.

Q. You didn't say anything to him at the time did you?

A. I did.

Q. You didn't complain until much later, until after you separated from [the appellant] about this matter.

A. I complained to him. I complained to him all the time.

…

Q. Nothing of the sort was happening because you knew that it was wrong if it was what you're saying it was. You could've done something about it.

A. No not at the time. The one and only time I did try and mention I ended up with almost a broken nose and two black eyes.

Q. Injuries that no one else [saw], when you were staying at Jessie's.

A. Yeah.

Q. And that's in January 2014, you said that occurred, when you mentioned it to [the appellant].

A. That was December.

Q. December. I put to you that that didn't occur. It was just an argument.

A. No.

Q. You're saying that you never raised it with [the appellant] before that, did you?

A. Apart from saying "no", no.

Q. Suggesting to you that if you didn't want to have sexual intercourse with [the appellant], and you told him you didn't, then he wouldn't have sexual intercourse with you. What do you say to that?

A. I disagree.

[20] The jury also had one piece of evidence from another Crown witness that was consistent with the complainant's evidence in this regard. The witness was a cousin of the complainant who lived with the appellant and the complainant for a time:

Q. Okay. Now is there anything — you told us about what you saw during this period that you were all living at your address … . Was there anything else — you also mentioned a couple of things that you heard. Was there anything else that you heard during that period involving [the complainant] that caused you any concerns?

A. Do I have to say it out loud?

Q. If you would please?

THE COURT ADDRESSES WITNESS (16:40:28) — **CAN SAY ANYTHING**

WITNESS:

Sometimes what I think I heard, made things not sound so consensual if you know what I mean.

EXAMINATION CONTINUES: MR CLANCY

Q. So we do just have to be a bit careful in Court about just saying exactly what it was you heard, even if that's a bit embarrassing. So what was it that you heard?

A. "Just no, I don't want to do it." Just repeatedly. Just, "No."

Q. And where would [the appellant] and [the complainant] be when you heard that?

A. The wall opposite mine in their room.

[21] In re-examination there was this passage:

Q. So what — you couldn't be sure exactly what they were talking about. What was it that made you use the word "consensual" or "not sound so consensual" when you were giving evidence on Wednesday?

A. There was just — there was a tone in her voice that, you know that that's what that's meant for. It's hard to explain. I just —

Q. But you didn't —

A. — I had a feeling that that's what was happening. And then when I walked out of my bedroom they were lying in bed so I knew straight away that's what — exactly what I thought I heard was what I heard[.]

Q. So did you see them lying in bed?

A. Yes.

[22] The appellant, in his evidence, denied that any of the circumstances of the relationship alleged by the complainant as going to non-consensual intercourse ever happened.

[23] We accept that the Crown prosecutor asked leading questions. But these did not, in the overall context of the complainant's evidence, elicit answers that could be seen as passive acceptance of counsel's propositions.

[24] We do not accept Mr Hamlin's submission that the complainant's evidence was sparse and equivocal. It was evidence about a relationship which lasted some years during which two children were born. It was a volatile relationship, and the complainant made it clear that not all their sexual encounters were non-consensual. But she was also clear that, particularly towards the end, there were occasions of forced sexual connection in circumstances where there could be no belief on reasonable grounds that she was consenting. The question for the jury was whether it

could be sure that, during the period stated in the charge, sexual intercourse took place, on at least one occasion, in circumstances amounting to rape. There was sufficient evidence upon which the jury could reasonably conclude that it had.

Inconsistency with acquittals

[25] We turn now to Mr Hamlin's submission that the conviction is fundamentally inconsistent with the acquittals on charges 15 (rape) and 39 (representative charge of sexual violation by unlawful sexual connection relating to forced oral connection).

[26] As this Court explained recently in *Mahupuku v R*:[3]

> [32] An appeal against conviction must be allowed if the Court, having regard to the evidence, is satisfied that the jury's verdict was unreasonable. An inconsistent guilty verdict can be a reason for setting aside a jury verdict on this basis. The burden is on the appellant to demonstrate that the only explanation for the inconsistency can be that the jury was confused or adopted the wrong approach, making the verdict unsafe. A prima facie inconsistency is never enough to set aside a verdict. Once a prima facie inconsistency is established, the Court must inquire whether there is a rational or logical explanation for the inconsistent verdict.

[27] The role of the jury must be borne in mind when verdicts are examined for inconsistency. The jury is instructed to decide each charge separately. It is entitled to find a witness credible and reliable on one point, but not on another. It is entitled to find one charge proved and another not proved. Even if verdicts appear to be inconsistent, that will not necessarily make a conviction unreasonable. An inconsistency will be unreasonable "when the evidence on one count is so wound up with the evidence on the other that it is not logically separable".[4]

[28] In cases where multiple acts of sexual offending are alleged to have taken place over a period of time, a jury will be alert to the nuances of human behaviour possible within a relationship. And, where the onus of proof is on the Crown and the standard of proof is beyond reasonable doubt, it can be unsurprising that verdicts are a mixture of "guilty" and "not guilty". As the Supreme Court has said:[5]

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3 *Mahupuku v R* [2015] NZCA 510 (footnotes omitted).
4 *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [8], cited in *Mahupuku v R*, above n 6, at [35].
5 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [83] (footnote omitted).

> In sex cases where sexual incidents are alleged to have occurred on separate occasions, inconsistency will not arise simply because the jury accepted part of a complainant's evidence but was not sure about other parts. It may be different, however, where the various offences are "simply different facets or acts in the course of a single sexual encounter".

[29] In this case, having examined the evidence, we are satisfied that the conviction on charge 38 and the acquittals on charges 15 and 39 are not inconsistent verdicts. Rather, they show a conscientious jury having proper regard to the onus and standard of proof. The pattern of convictions and acquittals on the charges of physical violence also demonstrate this.

[30] Charge 15 alleged that the appellant raped the complainant in July 2013 when she was pregnant and had an appointment with her midwife. The following passages of the complainant's evidence capture the essence of her account:

> Q. So he'd gone into that room and he was asking you to go in —
>
> A. With him.
>
> Q. — with him. What happened then?
>
> A. That's where he forced me to have sex with him.
>
> Q. Was that something that you wanted to do at that time?
>
> A. No.
>
> Q. You told us that you were heavily pregnant. Did that factor in in any way to how you were feeling, what you wanted to do or not do that day?
>
> A. Somewhat but no, was — no. I had an appointment. I just, I didn't want to.
>
> Q. So what happened when you went into the room? Who did what and where was … the furniture, you know, what can you remember about what happened in the room.
>
> A. I can't remember which way the bed was. I can't remember which way the bed was but it was basically like — all he said was like, "Come in," and I said, "What are you talking about? We've got to go. I thought you were going to have a shower." He said, "You know what I'm talking about. Come on." It was like, "No. We're going to my appointment," and he was like, "We're not leaving until we do this. Like stop fucking around and get on with it" but I still persisted, "No I've got to go to my appointment, this pregnancy has been shocking throughout and I can't miss my appointments." We were already under high risk but besides that I just didn't want to, I didn't

want to. I didn't want to be intimate with him and just wouldn't take no for an answer, so it was just like sit down, shut up, get your clothes off and let's do this and I just refused for as long as I could but it didn't — it didn't work.

Q. How clear do you think you made it, that you didn't want to have sex with him that day?

A. Extremely.

Q. So you said you refused as long as you could. What happened after that?

A. He got his way as usual.

Q. And I know it's difficult to talk in detail about these things but can you help us to understand what actually happened and how things went from you saying you didn't want to do it, how things went from there?

A. I didn't take my clothes off because I wanted to be as distant from him as possible. So I only took off, I did or he did, undergarments and then I just laid there in pain. Usually crying. While he did what he did. Which was basically have sex with himself 'cos I just wasn't — I wasn't there mentally, emotionally. Was just a shell.

Q. What were you thinking by that stage, what was on your mind, what was your thinking around what was happening?

A. I was a bit horrified and disgusted. I just wanted — I just wanted to get out of there, I wanted it to be over.

Q. And why did you — you told us at the beginning you were telling him verbally that you didn't want to do it and you were refusing. What was on your mind at the time that you stopped saying anything out loud about not wanting to do it?

A. That if I just get it over and done with I can just get out of the house and go to my appointment. And have a distance from him.…

Q. Again I'm sorry to have to ask you these question but can you describe how he was acting when he was having sex with you. Was he — how was he doing that if you understand my question?

A. Just in another zone. He was high. (inaudible 14:35:17) was clammy and cold, distant. There was (inaudible 14:35:28) gentle or affectionate like he used to be. Sorry. There's nothing of the sort of how he once was.

Q. So you said he was high and he was, did you say clammy?

A. Yeah, clammy, cold, hands like cold to the touch but sweaty. Glassy eyed.

Q. What was he high on?

A. Meth I think at the time.

Q. Was there any hugging or kissing or anything of that mutual type between the two of you?

A. No.

Q. What happened after he finished?

A. I think he just got up. I don't know if he had a shower or just got dressed, and I wasn't able to go and shower. Never was. Just had to get up and go. I just was — it felt awful.

[31] By its verdict, the jury did not feel sure that this evidence proved a rape. It is not for us to speculate as to the reason. The jury might have accepted the appellant's denial that the incident happened. It might have been left in doubt as to whether, in the context of this volatile relationship, the appellant did not believe, on reasonable grounds, that the complainant was consenting. The point is that it was open to the jury to find the appellant not guilty on this specific charge but to be sure on the representative charge that on at least one occasion there was rape.

[32] Charge 39 rested on evidence which was not accepted by the jury as proving that on at least one occasion there was non-consensual oral connection where the appellant did not believe, on reasonable grounds, that the complainant was consenting.

[33] The complainant's evidence-in-chief on this charge was very brief and lacked detail:

Q. Were there other types of sexual activity other than sexual intercourse that he would insist on, on these sorts of occasions?

A. Yes.

Q. And again, and sorry to have to ask you to go into these details, but can you tell us what other types of sexual activity were involved?

A. I don't even know how to put it, but —

Q. Just use whatever words you want to.

A. Just any way to get him to his whatever. I don't know, just like it — whatever he, like, you know, whatever he wanted it's — sorry, it's really uncomfortable.

Q. If you want to just use sort of casual language or slang that's absolutely fine. Just to — so that the Court can understand what types of sexual activity we're talking about here.

A. Just basically to get him off whichever way, by whatever, by any means necessary, so by oral or other body parts, whatever he wanted he got.

Q. Okay, so when you say "oral" you're talking about his — him putting his penis into your mouth?

A. Yes.

Q. And would that occur in the sort of circumstances you've been telling us about when he was fried on meth —

A. Yeah.

Q. — and was insisting that that happen?

A. Yes.

[34] In cross-examination, the complainant's evidence was:

Q. Likewise, you've suggested that there are occasions where he made you do oral sex?

A. Yeah.

Q. Now that was some — that was an activity that you both enjoyed on a consensual basis during the relationship wasn't it?

A. Not towards the end, we used to.

Q. You say that you didn't enjoy it, it's not the same thing as not consenting to it.

A. No, like is said, in the beginning just — well just before, that not — the whole relationship wasn't unconsensual. The same with what you just asked. In the beginning it was.

Q. Well during the honeymoon period?

A. Yeah, didn't last long.

Q. Well, I'm just saying as I suggested to you that this is something now that you're looking back on, that you're now saying that you didn't enjoy with [the appellant], but at the time you were having consensual sexual intercourse with [the appellant].

A. In the beginning yes, to put it, to put it quite frankly, in the beginning that was our main attraction. It was physical attraction, both of us, so it was — I don't mean to put it like too out there, but it was — we were extremely, in the beginning, extremely attracted to each other,

> so that's something we did all the time. Like I said, I'm not being rude or trying to be out there but it's which is why it shocked me, and I don't know why it had to turn out like that because we used to enjoy each other so much. So I don't know where that went wrong.

[35] Later, in cross-examination the complainant disagreed with the proposition that "if you didn't want to give [the appellant] oral sex then you wouldn't do it".

[36] Again, it is not for us to speculate on why the jury acquitted. However, the evidence in support of the charge was sparse to the point of being bare allegation. The acts alleged would have required the participation of the complainant and there was insufficient evidence as to how that participation was coerced. This can be contrasted with the complainant's evidence of how the appellant forced sexual intercourse on her.

Charge period and recent complaint

[37] Finally, we address Mr Hamlin's submissions that the time period specified in charge 38 was too long, that recent complaint evidence was wrongly admitted, and that individually or collectively those matters occasioned a miscarriage of justice.

[38] The period of charge 38 was 1 December 2011 to 19 April 2014. The fact that during this period there were times that the complainant and the appellant were not living together does not invalidate the charge. Nor does the fact that the complainant's evidence was that forced sexual connection occurred more frequently towards the end of the relationship.

[39] A representative charge is appropriate where, as here, a complainant alleges that offending occurred multiple times over the course of a relationship. Her evidence was that the offending was similar and she could particularise only the event that formed the basis of charge 15. The Crown did not have to break the charge up into shorter periods. The complainant's evidence was general and addressed the period of the relationship. It was her account of what happened during the relationship that mattered given that she was unable to particularise incidents and could give only general evidence of frequency.

[40] The recent complaint evidence does not give rise to a risk of miscarriage of justice. It was a single phrase that came unexpectedly during evidence of physical injuries and complaints about them:

> Q. Now, you've told us about this specific time in 2013 that you saw these injuries and took photographs of them, and you've told us something about what [the complainant] said to you on that night about how those injuries were caused. Can I just ask you in more general terms, over the course of your friendship with [the complainant], during the period that she was in a relationship with [the appellant], did she say anything else to you about things [the appellant] would do or his behaviour that stick in your mind or caused you any concern at that time?
>
> A. Yeah, yes.
>
> Q. What did she say?
>
> A. There was rape. Um, the beatings. Her head — I believe her head had a lot of, or was a target, because it was covered by her hair. One of the things she said after they had separated from each other was that she can brush her hair, and I was like, "What do you mean?" and she was like, "It's not sore anymore, it's awesome!", you know. Um, it was very painful to watch her go through that.

[41] There was no elaboration of what was meant by "rape". Cross-examination was limited to whether the allegation had been made. In any event, given the direct challenge to the complainant's veracity on her allegations of forced sexual connection, evidence of a prior consistent statement by the complainant during the relationship was admissible to counter the implication of recent invention.[6]

Result

[42] The application for an extension of time to file the notice of appeal is granted.

[43] The appeal against conviction is dismissed.

[44] To protect the identity of the complainant 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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6 Evidence Act 2006, s 35.

Solicitors:
Crown Law Office, Wellington for Respondent