[2018] NZLJ 47

Christian v R

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INTRODUCTION

Sexual violence offences have historically required the Crown to prove that the victim physically or verbally resisted the sexual encounter (the "resistance requirement"). The resistance requirement has been widely criticised for unfairly putting an onus on victims to object to unwanted sex, something that may not be possible during a non-consensual sexual encounter due to fear and trauma.

Section 128A(1) of the Crimes Act 1961 appears to be a response to this policy consideration. Section 128 specifies various factual circumstances that do not constitute consent to sexual activity. Subsection 1 provides:

> A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

At the time of the events the subject of the appeal in *Christian v R* [2017] NZSC 145, the section was worded slightly differently, but set out the same principle: that a complainant's passivity during a sexual encounter does not of itself constitute consent in fact. The section makes it impermissible for the fact-finder to reason that failure to verbally or physically resist unwanted sexual encounters amounts to consent, because "such reasoning flies in the face of experience about power imbalance and the ways in which complainants may be deprived of choice" (per Elias CJ, at [105]). That being so, where a non-consenting woman is passive throughout the sexual encounter, does s 128A(1) prevent the other actor from claiming that he reasonably believed she was consenting? (I of course recognise that males can be victimised sexually — I adopt male-accused/female-complainant pronouns for convenience, and to reflect the reality that the majority of sexual violence victims are female).

In *Christian v R*, the Supreme Court concludes that s 128A(1) deals not only with consent, but also with reasonable belief in consent. Accordingly, passivity alone is not a sufficient basis for consent or reasonable belief in consent; something more is required. However, the Supreme Court overruled the Court of Appeal conclusion (*Christian (CA148/2015) v R* [2016] NZA 450 (CA)) that the "something more" required is an affirmative expression of consent. Although passivity cannot of itself constitute consent, this does not mean that there can be no consent or reasonable belief in consent in the absence of affirmative consent.

FACTS

The appellant was convicted following trial by jury of three counts of sexual violation by rape under s 128(2) of the Crimes Act. At the time of the events in question, the appellant had established and was running a church in a small North Island town. The complainant's mother was an active member of the appellant's church, and worked in a second-hand shop on the appellant's property. When the complainant was thirteen or fourteen, she was sent by her mother to live in an old villa on the appellant's property. The appellant slept in a separate building on the property.

The Crown's case was that during the period when the complainant lived on the appellant's property, the appellant repeatedly raped her. The first rape (count two) was incident specific, and occurred shortly after the complainant moved onto the appellant's property. According to the complainant, the appellant came into the villa, removed the complainant's pants, pushed her legs open and raped her. She said she did not say anything because she was too scared, but that she did not consent. The other two rape counts (counts four and five) were representative charges, reflecting ongoing rapes during the subsequent three-year period. According to the complainant, these rapes occurred "heaps of times", and she was unable to say anything, so just let him do it. But she said she did not want the sexual encounters to happen, and never said "yes I wanna have sex". She also said that the appellant told her not to tell anyone, and made implied threats against her mother and her sister so that the complainant would remain on the property.

The sexual encounters came to an end when the complainant's mother became suspicious, and beat the complainant until she confessed to having regular sex with the appellant. The appellant heard what had happened, and directed the complainant to say that she had consented to the sexual activity. When interviewed by the police, the complainant said "it" was consensual, without making it clear what she was referring to. The appellant subsequently arranged for the complainant to swear an affidavit in support of an application for a protection order against her mother. In the affidavit, the complainant deposed that she had not slept with the appellant. During cross-examination at trial, the complainant said that the affidavit was what the appellant had told her to say, not her own words.

The defence case was that the appellant had never engaged in sexual activity with the complainant. The appellant did not give evidence at trial.

TRIAL

The trial Judge instructed the jury that to find the defendant guilty of sexual violation by rape, they must be satisfied, under s 128(2), that (i) the defendant penetrated the complainant's vagina with his penis; (ii) the complainant did not consent to the penetration; and (iii) the defendant did not believe, on reasonable grounds, that the complainant consented to the penetration.

However, he rejected the suggestions of trial counsel that a reasonable belief direction could be given despite the appellant's flat denial that the sexual encounters had occurred. Instead, he directed the jury that the latter two elements were not a live issue in trial. He said:

> The sole issue here, ladies and gentlemen, is whether or not there was penetration. Did it happen or not? The defence do not advance consent or belief in consent. The

complainant said that she did not consent. The defendant could not have a reasonable belief in consent when he says that there was no sexual act that took place. If there was penetration, if the defendant did these things, then your verdict will be guilty. If he did not do them then your verdict will be not guilty.

COURT OF APPEAL

Submissions and background

On appeal, the appellant argued that the trial Judge was wrong to deny the appellant the opportunity to be acquitted on the basis of reasonable belief that the sex was consensual. On the complainant's evidence, the complainant passively acquiesced to the sexual encounters, and did not say or do anything to indicate she did not consent. Accordingly, a reasonable belief narrative was available on the evidence, and the jury should have been properly directed on that issue. The appellant relied on *R v Tawera* (1996) CRNZ 290 (CA) to support the contention that passive acquiescence to sex can provide a basis for reasonable belief in consent.

R v Tawera involved a 48-year-old man who had non-consensual sex with a 16-year-old girl in his de facto guardianship. In that decision, the Court of Appeal found that because the complainant did not verbally or physically protest during the sexual penetration, there was nothing to objectively indicate she was not consenting. Therefore, absence of belief in consent on reasonable grounds had not been established beyond reasonable doubt, and the convictions were quashed. The Court acknowledged that under s 128A(1) passivity does not of itself constitute consent, but found that the section did not really bear on the issue of belief in consent.

However, in *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445, a majority of the Supreme Court questioned whether s 128A(1) permits a complainant's passivity to be the basis of a reasonable belief in consent. The Court suggested that the focus in *Tawera* on the complainant's failure to protest or resist was "arguably at odds with the principle that s 128A(1) appears to be based upon, namely, that consent to sexual activity is something which must be given in a positive way" (at [55]).

Analysis

The starting point for the Court of Appeal analysis was that the jury must be directed on consent and reasonable belief in consent if there is an evidential narrative "capable of supporting that reasonable possibility. However, there will be no miscarriage of justice unless the evidence could support a defence founded on either of these factors" (at [45]).

The Court went on to adopt the view tentatively expressed in *R v Ah-Chong* that s 128A(1) requires consent to be actively expressed. A reasonable belief in consent must therefore be based on actively expressed consent (at [49], citations omitted, emphasis added):

> … the direction in s 128A(1) to the fact-finder is that the complainant's silence by itself must not be taken as consent and nor can her failure to resist in some physical way. *It follows that consent, however it might be expressed, must be actively expressed.* Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be the *suggestion of "yes" in the complainant's words or conduct* in order for a trial Judge to be satisfied that there is a sufficient narrative for the issues of consent *and reasonable belief in consent* to go to the jury in a case where the act itself is denied. As the Canadian Supreme Court noted in *R v Ewanchuk*, "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy". The requirement for active consent in s 128A is a logical corollary of that fundamental value.

Applying these principles, the Court of Appeal concluded there was no credible narrative on the evidence of consent or reasonable belief in consent with respect to any of the three counts of rape. The complainant's evidence was that she had remained silent and passive throughout the sexual encounters. Accordingly, the Judge was not required to leave these issues to the jury, and no miscarriage of justice resulted from failure to do so (at [72]).

SUPREME COURT

The Supreme Court allowed the appeal in part by a majority of four to one (joint judgment of William Young, Glazebrook, O'Regan and Ellen France JJ; separate judgment of Elias CJ concurring in part). The Court quashed the convictions and ordered a new trial on counts four and five (Elias CJ concurring), and upheld the conviction on count two (Elias CJ dissenting).

Burden of proof

All members of the Supreme Court disagreed with the Court of Appeal that the Judge was not required to leave the issues of consent and reasonable consent to the jury.

For the majority, O'Regan J said that the proper approach is to "give directions on all elements of the offence with which the defendant is charged … even if consent or reasonable belief in consent are not put in issue by the defence" (at [35]). The majority went on to consider whether on the evidence there was scope for doubt as to absence of consent or reasonable belief in consent, reasoning that only if there was scope for doubt, the misdirection was material and led to a miscarriage of justice (at [37]).

Elias CJ agreed with the majority that the trial Judge's failure to direct the jury as to absence of consent or reasonable belief in consent was an error of law, because "it did not require that the jury be satisfied of all essential elements of the offence" (at [79]). The trial Judge effectively treated consent and reasonable belief in consent as defences, rather than essential elements for the Crown to prove. This is contrary to the presumption of innocence. Elias CJ was of the view that the error was so radical and fundamental that it was "impossible to be satisfied that a substantial miscarriage of justice [had] not actually occurred" (at [112]).

Relevance of s 128A(1) to reasonable belief in consent

As noted above, the majority took the view that the error only caused a miscarriage of justice if on the evidence there was scope for doubt as to absence of consent or reasonable belief in consent. This required the Court to consider what constitutes consent and reasonable belief in consent in cases of sexual violation. This in turn raised "an issue as to whether s 128A(1) deals with both consent and reasonable belief in consent or only the former" (at [22]).

The majority disagreed with the statement in *R v Tawera* that s 128A deals only with consent, saying (at [32]):

> [t]he word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent. …

In other words, the majority agreed with the *Ah-Chong* view that s 128A(1) precludes a reasonable belief in consent based on passivity alone. Accordingly, where a victim fails to protest or resist during a sexual encounter, "[t]here must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent" (at [45]).

On Elias CJ's approach, it was not necessary to consider the interplay of s 128A(1) and the element of absence of reasonable belief in consent because the trial itself had miscarried. However, the Chief Justice expressed reservations about the majority's approach to this question. She disagreed with the majority's "apparent premise of equivalence between s 128A and reasonable belief in consent" (at [104]), saying that while "the policy behind s 128A may itself be relevant to reasonableness of belief, it is not determinative as a matter of law" (at [105]).

Whether affirmative consent is required

Unlike the Court of Appeal, the majority declined to adopt the suggestion in *Ah-Chong* that s 128A(1) requires consent to be expressed in a positive way, finding that this interpretation was not supported by the statutory wording (at [43]). Accordingly, although a positive expression of consent could be one factor supporting the reasonableness of a belief in consent, there could be other bases for a reasonable belief in consent (at [46]):

> For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

Applying these principles to the incident specific rape charge (count two), the majority found there was no miscarriage of justice, because nothing on the evidence raised scope for doubt as to the absence of consent or reasonable belief in consent. The defence flatly denied sexual intercourse had taken place. The only available evidence of the sexual encounter was the evidence of the complainant. On that evidence, "there was no basis for the jury to be in doubt that any such belief was not reasonable, given it was based on a perceived failure to protest or resist, which cannot of itself amount to consent" (at [60]).

In relation to the representative charges (counts four and five), the majority similarly found that there were "very strong factors pointing against any reasonable possibility of reasonable belief in consent" (at [67]). These included the wide age difference, complainant's immature sexual knowledge, her vulnerable position isolated from her mother, and the appellant's position of power as church leader and de facto guardian. However, the majority held that because these counts related to sexual intercourse over a period of time, it is possible (although unlikely) that the jury may have been in doubt that the complainant was not consenting, "albeit as a consequence of [the appellant] grooming her" (at [67]).

Accordingly, in relation to counts four and five, because there was scope on the evidence for the jury to be in doubt as to whether the Crown had proved absence of consent, a miscarriage of justice occurred, and the appeal was allowed.

DISCUSSION

The Court of Appeal interpretation of s 128A(1) as requiring "the suggestion of 'yes' in the complainant's words or conduct" espouses an "affirmative consent" approach to sexual violence. Under an affirmative consent approach, consent to sexual activity must be expressed positively in words or actions, rather than being inferred from an absence of words or actions. The Supreme Court majority declined to read an "affirmative consent" requirement into the law on sexual violation. This is a sound outcome based on the statutory language. As the majority noted (SC at [43]), s 128A(1) merely provides that passivity does not of itself constitute consent. It does not go on to say that there can be no consent in the absence of some positive, external expression of consent. Indeed, when s 128A was enacted, Parliament rejected a number of submissions in favour of an "affirmative consent" approach to sexual violence (SC at [40]).

There are, however, strong policy arguments in favour of legislating an affirmative consent standard into the law on sexual violence. Consider a sexual encounter with person B initiated by person A. The affirmative consent standard puts the onus on person A to obtain some sort of external positive expression of permission from person B to each sexual encounter, whether communicated verbally or physically. But as the law currently stands, person A may reasonably assume person B is consenting based on a combination of her passivity and expectations arising from their mutual sexual history or some other factor (see SC at [46]). While this may be a safe assumption in the majority of cases, it is counter to what should be the underlying principle of sexual violence laws: in order to protect the fundamental value of autonomy over one's own body, the onus is always on the initiator to ensure sex is consensual by obtaining permission, rather than presuming consent unless non-consent is communicated.

Alternatively, the law could be reformulated to treat "reasonable belief in consent" as a defence. Again, this suggestion was rejected by Parliament when it enacted s 128A(1) (SC at [40]). As the Supreme Court made clear in *Christian*, "absence of reasonable belief in consent" is an element of sexual violation offences and must be established by the Crown. As a defence, the issue would only go to the jury if the defendant could raise grounds for a reasonable belief in consent. Assigning the burden of production as to "reasonable belief in consent" to the defendant is more consistent with the aforementioned underlying principle that the onus should be on the initiator to proactively ensure that a sexual encounter is mutually consensual. If a defendant wishes to claim that he reasonably presumed consent based on passivity and context, the burden should fall on the defendant to show why such a presumption was indeed reasonable. In cases such as *Christian*, this would have the added benefit of preventing a defendant from being able to run two logically inconsistent defences — that the sex never happened, and that he reasonably believed it was consensual. ❐