EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TAURANGA

CRI-2016-070-003124
[2017] NZDC 16857

THE QUEEN

v

[GEORGE CARSON]

Date of Ruling:	1 August 2017
Appearances:	R Jenson for the Crown A Rickard-Simms for the Defendant
Judgment:	1 August 2017

RULING 1 OF JUDGE P G MABEY QC

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[1] In the course of cross-examination of the complainant by Mr Rickard-Simms he sought to put to her two pages of text messages received by his client into his Facebook account. They are dated 10 July 2016.

[2] The issue in this case is consent. The defendant is charged with rape and denies rape on the basis that sexual intercourse took place with the complainant's consent. He said to the police that he had a relationship with the complainant, that they were active sexually, including sexual intercourse, and that when sexual intercourse took place it was always by consent.

[3] The content of the two pages of Facebook messaging is suggestive of past and anticipated sexual activity. The words are sexual in content and the female in the conversation asserts that she is "wet, horny" and refers to the male, that is Mr [Carson],

as “getting his dick wet”. He refers to her as “sexy” and makes a comment that the female said that she would “ride him the third time”. The general tone of the content will be obvious. If admissible the Facebook communications would be relevant to the issue at trial, that is consent. The complainant herself has said that whilst she had a relationship of sorts with Mr [Carson], it was a fling, but not a relationship, they would not hold hands, they would not kiss, they may cuddle, as people do, and if they slept together their clothes would always be on. There was never any sexual intercourse. The only sex that she said occurred was on [date deleted] July 2016 when she says that he raped her.

[4] Mr Jenson objected to the putting of the two Facebook pages on the basis that there was no proof that the incoming messages into the defendant’s account came from the complainant. On that basis the messages would be hearsay. Mr Rickard-Simms wishes to prove the truth of the contents of the messages. He would invite the jury to infer that there was sexual activity between the complainant and his client, as he told the police, and that the messages are consistent with that and that, Mr Rickard-Simms would say, was entirely inconsistent with rape.

[5] I convened a voir dire to enable the messages to be put to the complainant to determine if she accepted that she is the author of the messages. In other words, she is the female participant in the conversation. The messages are under the name [name deleted] and Mr Rickard-Simms says that the photograph which accompanies each message sent by the female participant in the conversation is of the complainant.

[6] When the messages were shown to her she denied that. She said she did not write them. The photograph is hers, the name is hers, but under no circumstances did she send the messages to the defendant. It must have been someone else. She said that she did become aware at some point, although when it was not clear, that somebody had effectively cloned her account, set up a separate parallel account with her photograph and her name. She had gone to the police to complain about that, but was told there was nothing that could be done.

[7] At that point in the evidence the messages were hearsay on the basis that they could not be attributed to the complainant or any witness in this case. They were out

of Court statements by a non-witness admitted to prove their truth. Under s 17 Evidence Act 2006 they were inadmissible and did not fall within any of the exceptions.

[8] Mr Rickard-Simms explained that his client has been in custody in [name deleted] Prison. Despite efforts he was unable to get his client here to take further instructions and that it was only in the lunch-time yesterday that he was able to access his client's Facebook account on his own cellphone and then was able to have these two pages produced by a colour photocopier. He wanted time to look further into the Facebook account to determine if the issue of attribution raised by Mr Jenson could be overcome. That time was given. The issue is important and could become central to the case and his difficulties in obtaining instructions are well understood.

[9] Court convened at 9.30 am this morning, Tuesday 1 August, when Mr Rickard-Simms handed me a sheaf of papers containing messages which he said were from his client's Facebook account. They commenced on 24 June and go for 60 pages until 29 July 2016. He wanted to put these messages to the complainant in pursuit of attribution of the contentious messages to her. She was re-sworn and the voir dire continued.

[10] Mr Rickard-Simms, focusing on the content of the messages that would be relevant to attribution, took the complainant through a number of them. Some of them refer to people by name that are known to her, for example a flat-mate, a person that she stays with, a cousin and others. When questioned the complainant, on a number of occasions, admitted sending the messages, but at times said that she did not recall sending particular messages, but accepted they may have been sent by her.

[11] When it came to the issue of the contentious messages referred to yesterday she said that they were not from her, she did not address people in that way and, particularly, did not address the defendant, Mr [Carson], in that way. Those messages must have been from someone else. She said that she logs into her account by using her name and a password and the password is known to the person [name of friend deleted] (a friend) and possibly to the defendant, Mr [Carson].

[12] The sheaf of papers of 60 pages from Mr [Carson]'s Facebook account are entitled "[Name of complainant deleted] Facebook" and they carry the same photograph as appeared on the two pages referred to yesterday. As the evidence went on the complainant said, more repeatedly, that she actually had no recollection at all of sending the messages, despite the fact that she accepted she must have sent some and did send some and explained that a particular illness she has called microcephaly affects her memory.

[13] When disputing the authorship of the contentious messages of 10 July and despite having no memory of sending them her cornerstone in identifying them as not being hers was the accuracy of the spelling of two words; the words "course" and "means". A particular message which contains those words and comes from the female end of the conversation is, "Of course it das it means u can get ur dick wet." She says she would not spell "course" or "means" that way. It is too accurate spelling and therefore cannot be hers. In addition, I add that she said also that she does not speak in that way and would not have spoken in a sexually explicit way to Mr [Carson].

[14] At the end of counsels' questions I asked some questions directed at aspects of other messages which were not touched on by Mr Rickard-Simms or Mr Jenson. The messages purportedly from her in the 60 pages produced today by Mr Rickard-Simms, contain references of endearment to Mr [Carson], such as "hun". She said at one point that she would not use that term, but when it was pointed out to her on one of the messages she said it may have been a mistake, but when the repeated references were pointed out she appeared to accept that it may have been a word regularly used.

[15] Another word, the word "tonight", was shown to her as being a correct spelling and she said that she would not have spelt "tonight" in that way because she does not hear the silent "g" and it would be left out. That word appears in the messages with other references which are connected to her. On page 18 of the Facebook pages there is a message on 30 June where Mr [Carson], the defendant, asks, "Bout four my love." There is a response, "Okay what u doing tonight?" The answer, "Coming to you," and then the response, "Okay [name deleted] is with me." [Name deleted] is her cousin and the complainant had accepted Mr Rickard-Simms' proposition that she wrote that particular message. However, when it came to the correct spelling of "tonight" her

answer was that, "It must have been written by [name of cousin deleted]." She says perhaps she was in the shower at the time or had asked her to write it on her phone. There is another reference to "tonight" on another page, 25, where a similar answer was given. She says it cannot have been her because the spelling is correct, it may come up automatically.

[16] I refer to this particular questioning to demonstrate the difficulty that the complainant has in avoiding the reality that many of these communications are patently personal to her and matters are referred to, as are people, that are consistent entirely with her knowledge of those people and Mr [Carson]'s knowledge of them. I accept that she does have difficulties with her memory as a result of conditions which she has had for some time, but I am left with an overwhelming impression and I am entirely satisfied that the Facebook communications of which she is alleged to be a party under her name, [name of complainant deleted], and carrying her photograph are hers. I am satisfied that there is evidence that attributes all of the communications to her, including the contentious sexual content from yesterday.

[17] Mr Jenson maintained his objection after the evidence saying that because others, including [cousin's name deleted] and possibly Mr [Carson], may have her password therefore either of those people may be the author of the sexually explicit content. That is a submission he is entitled to make, but I do not accept it on the evidence. It would be entirely unrealistic for me to conclude that these particular communications did not come from the complainant and quite unreal to take the view that whilst many of the messages do, some of them do not and have been inserted by an unknown stranger. I am satisfied that there is evidence of attribution and that the communications in their entirety are not hearsay because they are the statements of a witness who is giving evidence. They are admissible.

[18] If the complainant continues to deny that she wrote the messages which the defence will say are consistent with a sexual relationship and inconsistent with consent then, of course, she must do so and is entitled to do so, but that issue is a jury issue. I am determining at the moment issues of admissibility. The Facebook messages are admissible and may be used in cross-examination by the defence. There is a large bundle. Mr Jenson indicated earlier that he is quite content for the jury to have them

all. In fact, I understand that his position might be that the last few messages might be of assistance to the Crown. Of course, that is a matter for him. Mr Rickard-Simms has black and white copies of the messages ready to give to the jury, as I understand it, and that can be done when he so chooses.

P G Mabey QC
District Court Judge