

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2017-076-000218
[2018] NZDC 3256**

THE QUEEN
Prosecutor

v

ALEXANDER GORDON BEACH
Defendant

Hearing: 21 February 2018
Appearances: D Elsmore for the Prosecution
J Lovely for the Defendant
Judgment: 23 February 2018

**PRE-TRIAL RULING OF JUDGE BP CALLAGHAN
- Section 44 Evidence Act**

[1] The defendant faces 18 charges, 16 of which are sexual connection charges under s 134(1) Crimes Act, 1961. The complainant was aged [under 16] years of age at the time of the alleged offending, which took place between March 2014 and December 2016. The Defendant was aged between 33 and 36 years of age at this time.

[2] The sexual connection encompasses sexual intercourse and other forms of sexual contact. The defendant paid the complainant for her participation, generally by cash.

[3] He also faces a charge of sexual grooming between 1 March 2014 and 1 March 2015, and a charge under s22 and 23 Prostitution Reform Act 2003 of

receiving sexual services from the under 18 year old complainant. He has pleaded not guilty to all charges and elected a Judge alone trial.

[4] The defendant has pleaded guilty to four charges of possession of child pornography images, under s131, Films, Videos, and Publications Classification Act 1993, and has intimated a guilty plea to the one remaining charge which shows a close-up image of this complainant's breasts. These charges are to be dealt with separately, and do not form part of the trial for the 18 charges he has pleaded not guilty to.

[5] The defendant wants to question the complainant about her previous sexual experience pursuant to s 44 of the Evidence Act 2006. The application does not refer to s 44A, but submissions made by counsel generally cover the matters that are regulated by that section.

[6] Put succinctly, the defendant maintains he believed the complainant was aged 16 or older. He says that, in part, is based on images she sent to him of her posing in a sexualised manner, and some where she was wearing only her underwear. These images are not part of the child pornography charges. There was an issue as to disclosure of these last-mentioned images to the defence, but by consent I have made an order for their disclosure.¹ The production of these images as exhibits and any evidence relating to them, will clearly be a matter for the trial Judge.

[7] The defendant wants to question the complainant about her apparently telling him that she had been a prostitute in [location deleted]. He maintains that she told him this prior to engaging in any sexual conduct with her. He will say that as result of this he considered she would be of an age where she was legally able to engage in such behaviour, and that she was at least 16, if not older. In addition to this, I assume the defendant will give evidence of the same conversation, if he gives evidence.

[8] Mrs Elsmore for the Crown, informed the Court that the Police do have a record of the complainant at the age of [under 16], flying to [location deleted] (with a friend of a similar age) for prostitution purposes. I have no further information. So there seems to be some external confirmation of this behaviour that the defendant says the

¹ *R v Alexander Gordon Beach* [2018] NZDC 3288.

complainant told him about. Whether it is the same or not, I am not sure. Also, if the complainant was so involved at the age of [under 16] it would post date some of the alleged sexual contact between the defendant and the complainant.

[9] Mr Lovely submits that evidence will support the defendant's statutory defence under s 134A which he relies on in respect of the sexual connection charges.

[10] Section 134A provides as follows:

134A Defence to charge under Section 134

- (1) It is a defence to a charge under section 134 if the person charged proves that, -
 - (a) Before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and
 - (b) At the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and
 - (c) the young person consented.
- (2) Except to the extent provided in subsection (1), -
 - (a) It is not a defence to a charge under section 134 that the young person concerned consented and
 - (b) It is not a defence to a charge under section 134 that the person charged believed that the young person concerned was of or over the age of 16 years.

[11] Subsection (1) envisages that for a successful defence the defendant must prove that he has taken reasonable steps to find out if the young person was 16 or over, and that at the time of the relevant acts he believes on reasonable grounds this to be the case.

[12] Is what the complainant is alleged to have told the defendant a step taken by him? Literally it is not, but the (a) and (b) limbs of s 134A(1) appear to conflate. Discussing the effect of a statement by the complainant to a defendant as to her age, the learned editors of *Adams on Criminal Law at CA134A.02* opine that such a statement is relevant to both limbs:²

“While an alleged statement volunteered by the complainant or some other party as to age is not a “step” taken by the defendant for the purposes of the

² Adams on Criminal Law (online loose-leafed, Westlaw, accessed 22 February 2018) at [CA134A.02].

first limb of the defence, it will still be relevant both to that limb and to the subsequent question of whether the defendant in fact believed on reasonable grounds that the complainant was of age. Both limbs are based on reasonableness and the jury must be instructed to consider all the relevant circumstances, including any statements alleged to have been made as to age, in assessing them: *Erskine v R* at [19] (“[a]ll of the circumstances may inform the question whether reasonable steps were taken, just as they may inform the question whether the belief was held honestly and on reasonable grounds”).³

[13] The above passage in *Adams* seems to suggest that both limbs of the defence require the Court to consider all the circumstances. I see no reason why the same should not apply to the type of statement said to be made here.

[14] Mrs Elsmore submits that this evidence will have to be considered in the light of other evidence from the complainant’s mother to the effect that she snapchatted the defendant when the complainant was [age deleted], i.e. in 2014 and told him that the complainant was only [age deleted] and that he was not to contact her. The defendant in his interview with Detective Constable Overend, accepted he had received such a message. At the point of the mother contacting the defendant there appeared to be no sexual contact, but the defendant had asked the complainant to provide him with some of her dirty underwear, which she did and he paid her for this.

[15] In his interview with the police it seems the defendant accepted the complainant told him between 2 – 2 ½ years beforehand she told him that she was only [age deleted]. Given the interview was held on the 14 March 2017, that would mean that he would have been aware in March 2015 or earlier that she was [age deleted], if the evidence is correct. The complainant also said in her evidential interview that she told the defendant she was only [age deleted]. I assume the defendant is likely to deny that he knew of her age before sexual contact commenced, and that he proceeded on the basis that she was 16, if not 18. Mr Lovely in his submissions says his reasoning is based on the fact that if she was being a prostitute she would be at least 16. There is likely to be some active inquiries of the defendant’s case given that Prostitution Reform Act 2003 makes the legal age 18.

[16] Notwithstanding some inconsistencies in the defence position, the defendant has a right to avail himself of a statutory defence. It might not be successful,

³ *Erskine v R* [2016] NZCA 51 (my footnote)

particularly given the other evidence that there is, but he still has the right to mount the defence if he wishes to.

[17] *R v Clode* helpfully states the relevant factors to take into account when assessing an application under s 44:⁴

“[22] It is important to emphasise that in every case the starting point is that the accused must have a fair trial and must not be precluded from putting things that are necessary to his or her defence. It is not necessary to recite here the undoubted authorities in this respect: that was the common-law position, it is the position under the New Zealand Bill of Rights Act 1990, and it is recognised by the Evidence Act 2006 itself. Section 44 recognises that the need to put to a complainant certain features of sexual experience with another person may be distinctly relevant to the defence of the particular accused, and s 8(2) of the statute specifically refers to the ‘right of the defendant to offer an effective defence. ...

[24] Section 44 of the Evidence Act (and its predecessors) were enacted to prevent the entirely reprehensible and inappropriate blackening of the characters of particularly women complainants by directly or indirectly ‘tarring’ them in the eyes of the jury. It was not, in terms, intended to preclude or somehow truncate the advancement of a full defence which is otherwise open to an accused.”

[18] Here the issue of the complainant telling the defendant she was involved in prostitution is relevant to the defendant’s belief that she was 16 or older. The evidence overall has more than a minimal probative value to the defence, and it will be up to the trier of fact to decide whether or not it is true.

[19] I accept immediately what Mrs Elsmore has to say about the effect on the complainant about being asked such questions (even in a Judge along trial) but to disallow the defendant the ability to progress his defence would effectively remove a defence is that open to him under s 134A.

[20] I therefore allow the application on the basis that the complainant can be asked by defence counsel the following:

- Did she tell the defendant that she had been involved in prostitution before she and the defendant had any sexual contact?

⁴ *R v Clode* [2007] NZCA 447 at [22] and [24]

[21] In addition to this, notwithstanding the answer given by the complainant the defendant will be able to give evidence that she told him this. I do not envisage that there will any other questions relating to this topic, but that will be a matter for the trial Judge.

[22] To that extent, the application is granted.

BP Callaghan
District Court Judge

Signed at Christchurch on 23 February 2018 at am/pm