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**IN THE YOUTH COURT
AT ROTORUA**

**I TE KŌTI TAIOHI
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

**CRI-2018-269-000002
[2018] NZYC 562**

THE QUEEN

v

[MB]

Hearing: 8 and 9 October 2018

Appearances: A Gordon for the Crown
M Dorset and S Clarkson for the Young Person

Judgment: 18 October 2018

**JUDGMENT OF JUDGE M A MacKENZIE
[As to sexual violation by unlawful sexual connection]**

Introduction

[1] [MB] (“[MB]”), a young person, faces a charge of sexual violation by unlawful sexual connection. The sexual connection alleged is between her genitalia and his mouth.

[2] It is a representative charge. This means that I must be sure that the complainant, [JS] (“[JS]”), was made to lick [MB]’s vagina on at least one occasion.

Elements of the offence

[3] Sexual violation by unlawful sexual connection occurs if there is an act of oral sex between a complainant and a defendant:

- (a) Without the complainant’s consent; and
- (b) Without the defendant believing on reasonable grounds that the complainant consents to that.

[4] I can only find [MB] guilty if I am satisfied beyond reasonable doubt¹ that:

- (a) The sexual act alleged in fact happened on at least one occasion. The sexual act alleged is that [MB] made [JS] lick her vagina. This is the key issue in this trial, [MB] denying any sexual behaviour;
- (b) [JS] did not consent to being made to lick [MB]’s vagina; and
- (c) [MB] did not believe on reasonable grounds that [JS] was consenting to that sexual act.

[5] I record that no issue has been raised on behalf of [MB] relating to consent or reasonable belief in consent.

¹ Even though there is a complete denial of offending, the Supreme Court in *Christian v R* [2017] NZSC 145 at [35] has now confirmed that directions must be given on all elements of the offence. This is even if consent or reasonable belief in consent are not put in issue by the defence.

[6] “Consent” means true consent, freely given by a person who is in a position to make a rational decision.

[7] A person does not consent to sexual activity just because he did not protest or offer physical resistance to the activity. Consent cannot be inferred only from a lack of protest or physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these). This is equally applicable to the issue of reasonable belief in consent.²

[8] A person does not consent to sexual activity if this occurs whilst asleep or unconscious.

[9] If I am satisfied beyond reasonable doubt that [JS] did not consent, then I must also consider whether the Crown has proven beyond reasonable doubt that [MB] did not have a reasonable belief that she was consenting.

[10] There are two ways that the Crown could satisfy me on that subject. One would be for the Crown to satisfy me that [MB] did not, in fact, believe that [JS] was consenting. That is concerned with what [MB] herself thought at the time. If she did not believe that [JS] was consenting, that would be enough from the Crown’s point of view.

[11] The second way of satisfying me on that subject would be to satisfy me that no reasonable person in [MB]’s shoes could have thought that [JS] was consenting. That is concerned with the belief of a reasonable person placed in [MB]’s position. If no reasonable person would have thought [JS] was consenting, that too would be enough from the Crown’s point of view.

[12] The onus is on the Crown to satisfy one or other of those requirements. This is beyond reasonable doubt.

The issue

² *Christian v R* at [45].

[13] The key issue for me to determine is whether this alleged sexual offending happened. [MB] denies any sexual impropriety towards [JS].

[14] The Crown case is that [JS] and his siblings were placed in the care of [MB]'s mother, [PB], for [around 5 months in 2016]. During that period of time, on 12 or more occasions, [MB] would go into the bedroom [JS] shared with his [sibling], [DS], get into bed with [JS] and make him lick her "private". [JS] disclosed [MB]'s behaviour towards him in December 2016 when living with caregivers in [location 1 deleted].

Burden and standard of proof

[15] The starting point is the presumption of innocence. The onus of proof is on the Crown. The onus of proof rests on the Crown from beginning to end. I remind myself that there is no onus on [MB] at any stage to prove her innocence. The presumption of innocence means that [MB] does not have to give or call any evidence and does not have to establish her innocence.

[16] The Crown must prove that [MB] is guilty of the charge beyond reasonable doubt. This is a very high standard of proof which the Crown will have met only if, at the end of case, I am sure that [MB] is guilty.

[17] It is not enough for the Crown to persuade me that [MB] is probably guilty or even that she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events, and the Crown do not have to do so.

[18] What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about [MB]'s guilt after giving careful and impartial consideration to all the evidence.

[19] In summary, if after careful and impartial consideration of the evidence, I am sure that [MB] is guilty, then I must find her guilty. On the other hand, if I am not sure that she is guilty, I must find her not guilty.

Sympathy and prejudice

[20] This case involves allegations of sexual offending by a teenage female against a male child. I remind myself to put aside any feelings of emotion, sympathy and prejudice. [MB] was very emotional when giving evidence. She was emotional and upset when Detective [name deleted] sought to speak with her. [MB]'s level of distress is irrelevant to my determination as to whether the charge is proved. On the one hand, her level of distress could be because these things never happened, or on the other hand, conversely because they are true. It simply needs to be put to one side.

Approach to assessing the evidence

[21] How is evidence assessed? It is best to assess evidence by taking into account the following types of considerations:

- (a) Whether the witness's evidence is consistent with the evidence of other witnesses;
- (b) Whether the witness's evidence is consistent with objective evidence and if it is not, what explanation is offered for any inconsistencies;
- (c) Whether the witness's account is inherently plausible – does it make sense when I run the ruler of common sense over it? Is it likely that people would have acted in the way suggested?
- (d) Whether the witness has been consistent in their account over time and if not, why not?
- (e) The passage of time can affect the accuracy of memory. Not every detail will be the same. Details can be lost. The level of detail of a witness's memory may depend on various factors, including the time that has passed, the personal significance and emotional content of the event.

[22] It is important that I consider each witness' evidence in the context of all the evidence in the case.

[23] Simply observing witnesses and watching their demeanour as they give evidence is not a good way to assess the truth or falsity of their evidence. For example, a witness may not appear confident or may hesitate, fidget or look away when giving evidence. That does not necessarily mean that their evidence is untruthful. The witness may be understandably nervous giving evidence in an unfamiliar environment in front of unknown people. Or there may be cultural reasons for the way a witness presents. On the other hand, a witness may appear confident, open and persuasive, but nevertheless be untruthful. Also, an honest witness can be mistaken.

[24] Things like gestures or tone of voice may sometimes help to understand what the witness actually means, but caution needs to be applied about thinking that body language will help much in determining whether or not the witness is telling the truth.

[JS]'s evidence

[25] [JS] is a child. The evidence of children does not carry any special rules. As with any witness, it is for me to assess and decide whether to accept [JS]'s evidence, and the weight it should be given.

[MB]'s evidence

[26] [MB] gave evidence and explained her version of events. She says she did not make [JS] lick her vagina. [MB]'s mother, [PB], also gave evidence.

[27] The fact that evidence was called by, and on behalf of, [MB] does not change anything. It is for the Crown to prove the charge from beginning to end. There is no onus on [MB]. The evidence given by [MB] and her mother is to be treated like all other evidence, to be added to the total pool of evidence to be accepted or rejected (in part or in whole).

[28] As I say, [MB] says that she did not make [JS] lick her “private”. If I accept what she says, then the proper verdict is not guilty because she would not have done what the Crown say she did.

[29] If I am unsure, then again the proper verdict is not guilty, because I would have been left with a reasonable doubt. If what [MB] says seems a reasonable possibility, then Crown would not have discharged its task.

[30] If I disbelieve [MB]’s evidence, then I must not leap from that assessment to guilt, because to do that would be to forget who to prove the case. Rather, I must assess all the evidence that I accept as reliable. Does that evidence satisfy me of [MB]’s guilty to the required standard?

Assessment of the evidence

[31] [JS]’s evidence-in-chief was the evidential interview given on 2 February 2017. The evidential interview occurred following [JS]’s disclosure to his caregiver in [location 1], [TL]. After leaving [PB]’s home in [location 2 deleted], [JS] and his siblings³ were placed into the care of [TL] and her husband. In December 2016, [JS] told another child at [TL]’s home about what had happened. He did this as he was hoping the other child would go and tell [TL], because he was too shy to do so. [TL] then spoke to [JS] regarding the disclosure. [JS] said it happened when everyone else was in bed or when [MB]’s mum had left the house.

[32] [TL] reported the disclosure on 19 December 2016. This led to a child-focused interview with a social worker, [OQ]. [JS] told [OQ] that he was about five, he had just started at the “big school” when the events occurred with [MB].⁴

[33] The evidential interview was undertaken on 2 February 2017 by [UW], a very experienced specialist interviewer.⁵

³ [DS] and [KS].

⁴ Page 72 NOE.

⁵ She has conducted over 1000 interviews. Page 48 NOE.

[34] [JS] initially said that [MB] had made him lick her “private” and when her mum was not there. His [sibling], [DS], was in the lounge watching TV. He did not want [MB] to do it, but she still made him do it. She made him do it at night time too, but he did not want to.

[35] [JS] said that [MB] had made him lick her “private” about 12 or over 12 times. At another point during the evidential interview, [JS] said that [MB] made him do it every day.⁶ This was in response to a question from [UW], “Right. So did it happen like every day or some days?”

[36] [JS] was asked by [UW] to tell her all about a time that he remembered when the licking of her private parts happened. [JS] described that it was at [PB]’s house in [location 2]. [MB] was 18. [PB] was not there. That only [MB] and he were there. It took place in the bedroom he shared with his [sibling], [DS]. She just made him lick her private and that is all. It happened on the bed. He was lying down on the bed and, “she came on me, climb on me”.⁷ [MB] was in her [work uniform]. She pulled her undies down and made him lick her private. When asked about the words she used when she made him do it, [JS]’s response was “Ah I can’t remember the word but she yeah.”⁸

[37] It was during the night time and [PB] went to the shop and she came back home.

[38] After that, [UW] asked [JS] questions about frequency, location, body positions and other details, such as what [MB] was doing.

[39] [JS] said:

- (a) It happened 12 or over times;
- (b) That she made him do it every day;

⁶ Page 17, line 23 evidential interview transcript.

⁷ Page 13, line 4 evidential interview transcript.

⁸ Page 15, lines 25-27 evidential interview transcript.

- (c) That it was always in the bedroom he shared with his brother, [DS]. It did not happen anywhere else;
- (d) [DS] was in the lounge and did not know what was happening. [PB] did not know either;
- (e) [JS] gave a detailed description of how their bodies were positioned, including the use of stuffed toys to demonstrate. He would be lying in bed and [MB] would push him over and get into bed. She told him to go down but he did not and she pushed his head down. He demonstrated that with the stuffed toy by putting his head on the bottom half of [MB]'s body which was facing up. [MB] was playing on her tablet or on her phone. He pulled his head out when, and she was gone;
- (f) The first person he told about this was [TL]. Then he told his mum and then he told the kids;
- (g) He thought [MB] was 18;
- (h) [JS] was asked where [MB]'s hands and stuff were when this stuff was happening⁹ and [JS]'s response was "probably on the phone";
- (i) His tongue went in the middle of her vagina, where she put his head;
- (j) The bedroom door was always open;
- (k) [MB] never said anything to him other than, "lick my private" and that is all.

[40] When cross-examined by Ms Dorset, [JS] did not retreat from the narrative given in the evidential interview that [MB] made him lick her private. Towards the end of the cross-examination, [JS] remained firm that [MB] had made him lick her private.

⁹ Page 30 evidential interview transcript.

[41] [JS] also accepted that when he was at [PB]’s home, he swore at people, was naughty at times and told lies. The consequence for poor behaviour was that they would get sent to their room.¹⁰

[42] [JS] was asked by Ms Dorset when the last time was that [MB] made him lick her private. [JS] said it was the day before they left [location 2]. He gave a detailed description of this incident. He said it was at morning tea time. He was wearing his pyjamas. [PB] was at home and it was in [MB]’s bedroom. [MB] was wearing her [work uniform]. The most relevant parts of the exchange are set out below:¹¹

“Q. We just want to know [JS], so we’re talking about the last time you said this happened right?

A. Mhm.

Q. And so [DS] was asleep the last time this happened?

A. Yeah.

Q. And was he under the blankets or on top of his bed,

A. He was just under the blanket.

Q. Would you like a break because you are yawning a lot?

A. No thank you.

**THE COURT ADDRESSES COUNSEL – CLARIFIES BREAKS
(14:43:21)**

CROSS-EXAMINATION CONTINUES: MS DORSET

Q. And this last time, which bed were you on, was it your trundler bed or the cushions bed?

A. The last time we done it was on [MB]’s bed.

Q. Can you say that again?

A. Last time it was on [MB]’s bed.

Q. Oh the last time, so you weren’t in your room, okay, looking at the –

THE COURT:

Q. You can’t just nod in there, can you just say. [Name deleted] said you were not in your room?

¹⁰ Pages 12 and 16 NOE.

¹¹ Pages 34-36 NOE.

A. Yeah. I was in [MB]'s room.

CROSS-EXAMINATION CONTINUES: MS DORSET

Q. We're just talking about the last time before you left, the day before you left, is that right?

A. Yeah.

Q. Right, now you said it was daytime, is that right?

A. Yeah.

Q. That [DS] was there sleeping?

A. Yeah.

Q. In the room with you?

A. Mhm.

Q. Is that right?

A. Yeah.

Q. That [PB] was there, you were there, [DS] was there, [MB] was there and [KS] was there, all in the house?

A. Yeah.

Q. And [MB] was wearing what?

A. Her day clothes.

Q. And you were wearing your pyjamas is that right?

A. Yeah.

Q. And what kind of day did you say it was?

A. The day before we left?

Q. Yeah.

**THE COURT ADDRESSES MS DORSET – REPHRASE QUESTION
(14:46:04)**

CROSS-EXAMINATION CONTINUES: MS DORSET

Q. What was the weather like that day.

A. It was hot, sunny.

Q. It was hot and sunny.

A. Yeah and clouds.

Q. Okay, and [MB] was playing on her [cellphone] or her tablet when you were licking her private parts?

A. Yeah.

Q. So was it her tablet or her [cellphone]?

A. Tablet.

Q. And you said that she was on Facebook you thought?

A. Yeah.

Q. Right, so did [MB] have her clothes on or her clothes off?

A. Off.

Q. So tell us about that?

A. Well she, I was on the bed and that, she got on, she came in and she tried to tickle me but she didn't she came into the room and um, she told took me to move over so she could jump in and I said, 'No,' (inaudible 14:47:30) so she pushed my (inaudible 14:47:33) and the sheet on the bed and then she put the blanket over her and then she pulled down her undie and then she pulled me on top and yeah. And she pushed my head down under the blanket, pulled my head by her vagina.

Q. And what room do you say this happened in?

A. In her, [MB]'s room.

Q. And where was [PB]?

A. In the lounge.

Q. And how long did it take for you to lick her private parts?

A. Was about a minute oh, ten minutes?

Q. Ten minutes?

A. Yes.

Q. Is that a long time or a short time?

A. Kind of like a long time.

Q. It's a pretty weird thing to do in the daytime –

**THE COURT ADDRESSES MS DORSET - NOT A QUESTION
(14:48:56)**

CROSS-EXAMINATION CONTINUES: MS DORSET

Q. Why were you in your pyjamas in the daytime like that?

A. Well, I was supposed to have a shower and go to bed.

Q. Why was [DS] asleep like that in the daytime?

A. I don't know, probably tired. Yeah.

Q. If it was hot, why were you all under blankets?

A. Like all kinda in the morning (inaudible 14:49:53)

Q. So did [MB] go to work at [employment details deleted] in the morning did she?"

[43] The evidence establishes that [JS] told lies about various things. He accepted that himself. [MB] and [MB]'s evidence confirms that. Does that however mean that he is lying about what happened with [MB]? It would be an impermissible reasoning process for me to say that because he has lied about other things, he must be making up the allegations in respect of [MB]. As Ms Gordon put to [MB], [JS]'s reputation for telling lies could provide a cover for her behaviour, on the basis that [JS] would not be believed because of his lies in other contexts.

[44] In the evidential interview, [JS] provides a credible narrative of [MB] making him perform oral sex on her. His description was a matter of fact, was not embellished and he gave a description of his tongue being on [MB]'s vagina in the middle and body positions.¹² There is also no evidence before the Court to suggest that [JS] had acquired knowledge about oral sex, other than these events having taken place; for example, viewing television, the internet or seeing adults engaged in this type of activity.

[45] The way [JS]'s disclosure unfolded adds weight to the credibility of his evidence. Whilst [JS] did not speak up immediately and delayed making a complaint, he did so once he was living with other caregivers in [location 1]. It is a misconception that a child would promptly complain about abuse at the first opportunity. It is not uncommon for victims of sexual abuse to delay reporting the abuse for a considerable period, even though they may have the opportunity to disclose the abuse to members of their family or others whom they trust. I assess the delay in complaining to be

¹² Page 30 evidential interview transcript.

entirely explicable. He did not have a good relationship with [PB], so it is unlikely that he would say anything to her.

[46] Whilst [JS] acknowledged that he did not like [PB] or [MB], I cannot accept that was a motive for his disclosure. The circumstances of the disclosure have a ring of truth. He told another child, who in turn told [TL], because, as [JS] said, he was too shy to tell her. By this stage, [JS] was in [location 1] in the care of [TL] and her husband. There is no suggestion in the evidence that there was any realistic prospect that [JS] and his siblings were to return to [PB]'s care. Whilst perhaps sparse on detail, what he told [TL] is consistent with the evidential interview.

[47] On the other hand, [JS]'s evidence in cross-examination about the incident the day before he left [PB]'s care is fresh detail, and gives pause for thought. Firstly, because of the level of detail as compared with the overall tenor of what he said in the evidential interview. Secondly, it is inconsistent with [JS]'s evidence that the abuse always occurred in the bedroom he shared with [DS], and thirdly, is confusing and improbable.

[48] In the evidential interview, [JS] was asked by [UW] to tell her about a time he remembered. He gave a cogent description of that incident. Not surprisingly, given his young age, he did not appear to specifically recall the detail of other incidents; for example, saying, "She only made me lick her private, that's all I can remember"¹³ and "Yeah, I couldn't remember others, like I can't remember, I don't know how to like what she done to me."¹⁴ Yet now he provides a detailed account of an incident.

[49] Secondly, as I have said, in the evidential interview, [JS] was clear that the alleged abuse always happened in the bedroom he shared with [DS].¹⁵ He was asked whether there was anywhere else that had happened and he said that it only happened in that bedroom. The evidential interview was undertaken a matter of months after these alleged events. Well over a year after the evidential interview for the first time, [JS] said that the last incident took place in [MB]'s bedroom. That is inconsistent with

¹³ Page 8 evidential interview transcript.

¹⁴ Page 12 evidential interview transcript.

¹⁵ "Well she always made me do it in um in my and [DS]'s room" – page 17 of evidential interview transcript.

his earlier evidence in the evidential interview it always occurring in the bedroom he shared with [DS].

[50] I assess the evidence about the incident also to be confusing and improbable. The photographs and floor plan show that it was a small house. [JS] said it was at morning tea time and that he was in his pyjamas. He was asked about that and said he was supposed to have a shower and go to bed, and [DS] was asleep in bed. I find it implausible that [MB], on this occasion, would make [JS] perform oral sex on her, midmorning in a small house, in the bedroom she shared with her mother, who was present in the house, and would be looking at Facebook on her tablet at the time that this was all happening.

[51] [JS] confirming in his evidence that he was five at the time this all happened is also inconsistent with the evidence that he celebrated his seventh birthday during the period of time he was in the care of [PB]. This in and of itself would not cause me to call into question the credibility or reliability of [JS]'s evidence, because I regard that as something of a peripheral detail.

[52] The way the disclosure unfolded, that there clearly was opportunity, and the matter of fact, credible narrative established in the evidential interview are factors which point to the charge being established.

[53] However, the fresh detail and evidence about the incident the day before [JS] left lead me to be less sure, for the reasons I have outlined. Primarily, that the description of that event is inconsistent with what he said in the evidential interview that the abuse always happened in the bedroom he shared with [DS] and, additionally, because of the implausible aspects of what he had to say about the incident.

[54] This is a situation where it is likely that something happened as described by [JS]. His narrative was credible and there was opportunity. As I have said, the evidence does not establish how [JS] could know about and describe oral sex other than if it had actually happened as he described. I cannot accept that he was maliciously motivated towards either [PB] or [MB] in making the disclosure either. I think something probably or likely happened. I consider that [MB] is probably guilty

of making [JS] lick her private. If the standard of proof was the civil standard of “more likely than not”, I would have found the charge proved. However, that is not sufficient.

[55] I cannot be sure that [MB] made [JS] lick her private on at least one or more occasions because I cannot accept [JS]’s evidence about the last incident. That in turn leads me to have a reasonable doubt. It is not a situation where the fresh detail is so inconsequential or explicable in its context, after considering all of the evidence before the Court that I can put it to one side. It does impact on the credibility assessment, given that [JS]’s evidence is critical to the Crown case. Therefore the charge must be dismissed.

[56] For the sake of completeness, I have not considered the second and third elements of the charge, given the findings in respect of the key issue.

It is important that [JS] continues to receive therapeutic assistance. As I have said, I assess that it is likely that something happened as [JS] has said, at times that [PB] was not around. The charge is not proved because “beyond reasonable doubt” is a high standard of proof. I would also encourage [MB] to consider obtaining some therapeutic assistance, given these findings.

M A MacKenzie
District Court Judge