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**IN THE YOUTH COURT
AT HUTT VALLEY**

**I TE KŌTI TAIOHI
KI TE AWAKAIRANGI**

**CRI-2019-296-000046
[2020] NZYC 77**

THE QUEEN

v

**[MM]
Young Person**

Hearing: 3 and 4 February 2020

Appearances: A Garrick for Crown
L Sziranyi for Young Person

Judgment: 17 February 2020

JUDGMENT OF JUDGE B A MORRIS

Charges

[1] [MM] faces four charges of sexual violation: the first three by rape and the fourth by oral connection. The first charge relates to an allegation on [date 1 deleted] 2018 that [MM] had sexual intercourse with his then girlfriend, [VA], when he was 15 and she was 14. This commenced, it is alleged, while she was sleeping and continued when she woke up and made it clear that she wanted him to stop.

[2] [MM] says in respect of that charge that she was awake at the commencement and when she said stop, while it took him 15 seconds to a minute to realise that, he stopped when that realisation hit him.

[3] [MM] faces a second charge of rape relating to later on that same night. The Crown says that he again had sexual intercourse with her, knowing that she did not want that. [MM] says that did not occur at all.

[4] The Crown also says there was a further time some months later in [date 2 deleted] when she told him during sex to stop as it was painful and he again continued, on this occasion saying "*wait until I've finished*". [MM] says this did not happen either.

[5] The Crown also says, in relation to the fourth charge of sexual violation by oral connection, at the end of this faltering relationship [MM] forced [VA]'s head down and made her perform oral sex on him. [MM] says that while sometimes they would engage in rougher oral sex, this was always with her consent and the occasion she described just simply did not occur.

[6] The issue in respect of all charges is whether I can rely on the complainant's evidence to form a finding of guilt to the high standard of proof beyond reasonable doubt.

Allegations

[7] [MM] and [VA] entered a relationship when they were aged 15 and 14 respectively which became sexual fairly quickly. [MM] says the relationship started in [month deleted] 2017; for [VA]'s part she cannot recall exactly what month the relationship commenced.

[8] In any event, they had a relationship for a number of months with regular sexual intercourse and there were no issues. It seems the relationship started to falter, certainly after the first allegation in [date 1] 2018. [VA] became of the view, it seems she was being used for sexual intercourse and there was little else being offered in the relationship.

Charge 1: 1st rape on [date 1] 2018

[9] On [date 1] 2018, [VA] said she and [MM] were on her bed at her father's house and [MM] was playing X-box games. He tried to use the controller as a vibrator, putting it by her genital area. She said she was not in the mood and was pushing him away multiple times. "*He just kept going*", she said, so she gave up in resignation and stopped trying to push it away, but she said she still did not want that to occur. She thought that persisted for a couple of hours. They then got undressed for bed. She slept in her bra and underwear and fell asleep facing the wall, while [MM] was still playing on the X-box.

[10] She woke up to pain, he was being really rough and had his penis in her vagina and her underwear was pulled to one side. She was saying "*no*" and tried to push him off, but he kept going. In evidence-in-chief, she said that he kept going for a period of about five minutes before he stopped. But in cross-examination it was put to her that [MM] stopped very quickly in about 15 seconds when she told him it was painful. [VA] said she was not sure about how long it was before he stopped. In re-examination she was reminded that he said it was 15 seconds. She was asked if she agreed or disagreed with that and she said, "*I feel like it was longer, but that's just guessing*"¹.

¹ Notes of Evidence (NOE) p 38 line 19

She was then asked how long it was for and she said, “*may be a minute*”. It was certainly long enough she said to say “No” on a number of occasions.

Charge 2; 2nd Rape on [date 1]

[11] [VA] said she tried to go back to sleep after this, but it happened again. He forced his penis into her vagina while she was against the wall and while she kept saying, “*No, I don’t want it and you don’t have a condom on*”. She said she was scared of getting pregnant even though she was on the contraceptive pill. While there were occasions when they had sex without a condom, it was their practice to use one for added protection. He went to sleep afterwards and she stayed awake.

[12] The next morning she said he acted as though nothing had happened and she was too scared to raise it. Later that day however she sent him a message through Face Book Messenger. Those messages said this²:

Screenshot 1:

[MM] - you ok? What’s wrong.

[VA] - Well the fact that you raped me.

[MM] - I’m so sorry ugh I still feel so bad.

[VA] - You should be because do you know the emotional strain you have put on me. I have so many trust issues not just for you but for other people now.

[MM] - Ugh shit Ugh.

[VA] - I feel like utter shit. I’m so depressed and in a mess. I don’t even - - -

Screenshot 2:

[VA] - ...Coulda pit up with it for me

² The first three screenshots were accepted to be at the same time and immediately after the [date 1] allegations. The fourth and final screenshot was a different day, but the complainant indicated it was in relation to the same subject matter. There was no great dispute with that by [MM], though he does not recall when it was. It was also accepted the screen shots did not capture all the content.

[MM] - I know but I felt like you don't love me any more after last night..

[VA] - Well how am I supposed to feel. I feel the same because I feel so used and feel like you are only in it for the sex.

[MM] - ☹️

Screenshot 3:

[VA] - Its seriously not ok this is with me for the rest of my life and the fact that you are my lover and you did it how does that make me feel.

[MM] - Really depressed, sad, scared and stressed.

[VA] - Yea Do you care?

[MM]- Yeah I do a lot

[VA] - I feel like you dont because you always somehow do something bad enough to make me so depressed

[MM] - I know ☹️

Screenshot 4:

[MM] - I wish I didn't do all those things to you.

[VA] - Yea. I wish that too.

[MM] - Yea.

[VA] - I've thrown up once and havnt been breathing properly and crying.

[MM] - Fuck I've been sitting here really depressed crying.

[MM] - Hey.

[VA] - Good morning.

[MM] - I can't live with what I did ugh

[MM]'s response to Charges 1 and 2

[13] After the Officer in charge first spoke to [MM] he sent an email to her saying:

So the night started with us playing X-box and we were getting frisky and feeling each other on and leading each other on and I used the controller on her as a vibrator and grinding on each other and she was awake but exhausted from the controller and I put it in, but she did not say stop for about three to

four minutes and when she did I stopped within 15 seconds, made sure she was ok and went to sleep. All other accusations and scenarios are completely false and have never happened. (So he denies the second act of sexual intercourse occurred at all.)

[14] [MM] did not wish to give a formal statement, which of course was his right, but he also gave evidence in Court. In relation to the first charge [MM] confirmed what he said in his email to the police, saying it commenced with the X-box controller and then moved to consensual sex. [VA], he said, had not gone to sleep at all, though was “*exhausted*” from the controller. After a couple of minutes of having sex she said she was experiencing pain and wanted to stop and after about 15 seconds to a minute he came to his senses and stopped³.

[15] He said he apologised, made sure she was okay and went to sleep. Nothing else happened that night. As to the use of condoms, he said that was in the earlier part of their relationship, but in cross-examination agreed there was lots of times that [VA] wanted to use a condom as well and wanted him to withdraw before ejaculation as she was particular about not getting pregnant. He also said in cross-examination that [VA] had wanted a rest after the controller for about five minutes.

[16] In cross-examination, [MM] reduced the time from when he heard “*stop*” to when he himself stopped. He said he did not fully hear her and that he did not fully understand what she said, that it was “*more like a O sort of thing*”⁴. He said what he was apologising for in the messages was the fact that she was in pain and he did not stop within a minute.

Third Charge – Sexual Violation by Rape in [date 2]

[17] [VA] said one night in [date 2] she was with [MM] in a spare room on a couch at his [relative]’s place. They started having consensual sex, it was painful and she told him to stop, but he looked her in the eye and said “*wait until I’ve finished*”. She said it continued for what felt a long time.

³ NOE p 77 line 33

⁴ NOE p 88 lines 25 - 30

[18] [MM] repeated what he said in the email that this did not happen at all and there were no other occasions when she was in pain; and if she looked like she was he checked to make sure she was alright.

Fourth Charge – Sexual Violation by Oral Connection in [date 3]

[19] [VA]’s evidence was that she was watching a movie on her bed at her father’s house with [MM]. He tried to kiss her and she pulled back and he responded by hitting her on the buttocks and then forcing her head down onto his penis telling her to “*suck it*”. He put his hand around her throat and she felt hot, as if she was losing blood and felt her face was going to “*pop*”. He then forced her, she said, to swallow the ejaculate.

[20] [MM] also denied that ever happened and said any oral connection was with her consent and at no point did he force her.

Disclosure to Others and Police Complaint

[21] [VA] had two good friends at the time of these allegations, [WB] and [XC]. She said she told them about what had happened. They both gave recent complaint evidence⁵.

[22] [XC] remembered in [date 1] a messenger chat between her, [WB] and [VA] in which [VA] said she was at her Dad’s house close to 1.00 am in the morning and that [MM] had raped her. She told her that she had originally been asleep when he started having sex with her. She seemed upset but “*conflicted*” and did not know whether to end the relationship. They met up for dinner, but [XC] said [VA] did not really talk about it there.

[23] She said there was another occasion when [VA] told her [MM] removed his condom, that she did not want to have sex, but that he continued anyway. Sometime after that [WB], unbeknown to [VA], told [VA]’s mother about the alleged rapes. At that point they received threatening texts from [MM] when he found out that they had gone to the police on [date deleted].

⁵ It is accepted that the provision in s 35 of the Evidence Act was triggered.

[24] [WB] also gave evidence. She was more vague in her recollection of what occurred as compared to [XC]. She could not remember when the conversation was, but recalled [VA] saying he forced her to have sex without a condom. There was not much she remembered about the conversation other than that, but revealed she was frustrated that she and [XC] were told a number of times about this and they tried to support her, but it would get brushed off as nothing. She recalled a number of conversations, though without details, and was not sure how many different events these conversations related to. When pressed she said she thought somewhere between four and 10. It all ended with the last conversation on [date deleted] and she told [VA]'s mother [the next day]. She too received threatening texts from [MM] after that.

[25] After the disclosure [VA]'s mother spoke to [VA]. She told her mother she had not been raped at all and she confirmed the same to Oranga Tamariki when they made inquiries. Later still, [VA] wrote a letter to [MM]'s [relative] who [MM] lived with. She told her that [MM] had raped her at least three times, but that when her friends went to the police she chose not to follow up the complaint. She made reference to the fact that she lied to Oranga Tamariki and to her mother about the rapes, but after counselling she wanted to write to [MM]'s [relative] and tell her about this so he would not do it to someone else. She indicated the counsellor wanted her to go to the police, but she did not think she wanted to do that to him.

[26] [VA] eventually did go to the police after, she said, her counsellor encouraged her to do so.

The Law

General principles and directions

[27] The burden is on the prosecution to prove these charges to the high standard of beyond reasonable doubt. It is not enough that I am suspicious about the events having occurred. It is not enough that I consider these have occurred on the balance of probabilities. I must be sure.

[28] Each of these charges must be considered separately, but I consider pursuant to s 43 of the Evidence Act 2006 they are capable of being mutually supportive of each

other. As an example, if I find the first charge proved that [MM] continued to have sexual intercourse with [VA] despite knowing she was saying no, that is relevant as to whether he would be more likely to do that on another occasion. A person who is prepared to ignore “no” on one occasion is more likely to do so again in the same relationship than someone who has never done that in the past.

[29] It is therefore relevant and in a Judge-alone trial I would find it more probative than prejudicial in relation to the other charges. While the charges of rape are less probative to the allegation of oral sex, they are nevertheless probative in terms of demonstrating a propensity to disregard a partner’s wishes in sexual relations in general.

[30] I find therefore the charges are capable of being mutually supportive of each other and I direct myself as to the propensity direction. I must not reason, of course, if I find one charge proved that if he has done it once he must have committed the others.

[31] I also direct myself on the effect of a defendant giving evidence. If I accept that evidence, unless it is an admission of any of the charges, then the Crown would have not proved the charges and I would dismiss them. If it leaves me in a position of being unsure, then the same result would occur. If I reject any of his evidence I must consider all of the evidence I do accept and determine if the Crown has proved the charge based on all that evidence.

[32] As to the evidence of [VA]’s friends of recent complaint I direct myself that of course the fact someone repeats an allegation does not in itself prove what they are saying is true. That evidence however can refute an allegation of recent invention and can assist in general credibility if there is consistency in the accounts.

What must be proved?

[33] In respect of the rape charges the Crown must prove [MM]’s penis penetrated [VA]’s genitalia. There is no dispute about that. The Crown must prove that she either did not consent to that at the outset or changed her mind during the act of sexual

intercourse. Section 2 of the Crimes Act 1961 defines sexual connection as including “the continuation of the connection”.

[34] Thirdly, the Crown must prove that [MM] knew she was not consenting, or had changed her mind about that consent, and continued with sexual intercourse notwithstanding that knowledge. If a female changes her mind during sexual intercourse, then of course, there must be a reasonable time period for a male to stop. However, if they continue in the knowledge that consent has been withdrawn, then they will have committed this offence.

[35] Even if [MM] believed [VA] was consenting, then he would be guilty of the offence if the Crown can prove beyond reasonable doubt that a reasonable person would have known she was not consenting.

[36] Insofar as the oral connection charge is concerned, the elements are exactly the same other than the sexual connection to be proved is the connection between [MM]’s penis and [VA]’s mouth.

Defence Case

Charge 1

[37] The Defence say [MM]’s email and evidence is acknowledging only that it took him time to realise she was in pain and saying no. Once he realised that, came to his senses, he stopped immediately. That is not, the defence emphasised, rape. He did not deliberately continue in the knowledge she had withdrawn consent. In the screenshot of the Facebook messenger [VA] used the word “*rape*” but she did not clarify what she meant by that. The replies by [MM] were simply an acknowledgement that he did not stop as soon as she would have liked him to do. They are not an admission he continued to have sex knowing she was not consenting. They are simply an acknowledgement he feels sorry she was in pain and that he did not notice and stop in time from her perspective.

[38] The defence emphasised too that [MM] disputes that [VA] was asleep at the time, and essentially this is one word against another. There is nothing to support that version of events.

Decision – Charge 1

[39] I am satisfied to the high criminal standard of beyond reasonable doubt that [VA] told [MM] she did not want to have sexual intercourse, that he heard that, knew that she had withdrawn her consent and continued on anyway for a period well past when he could have, and should have, stopped. He continued to have sexual intercourse with [VA] when he knew she was not consenting and is therefore guilty of rape. My reasons for that finding are these.

[40] [VA] was consistent in her allegation and she did not waiver. She gave evidence that was not consistent with someone lying to get him into trouble, or trying to make him look bad. She acknowledged he apologised immediately after. She said it felt like it continued for a long time, and while emphasised it was long enough for her to say no repeatedly, possibly a minute, she said she could not be sure on timing. That concession is not consistent with someone trying to make something worse for someone.

[41] The content of the Facebook messenger supports her account of events and not [MM]'s, in my view. Those responses by [MM] are consistent with someone who knew that they had continued when they simply should not have. They are consistent with a person who knew that their partner wanted them to stop but they ignored that.

[42] She said how she was feeling because he had “*raped her*”. He did not say, as you might expect, something to the effect of “*I stopped as soon as I knew you wanted me to and I’m sorry if I didn’t pick up earlier that is what you wanted*”. He would not have said “*I’m so sorry I still feel so bad*” to the response of “*you raped me*”, if it had been a genuine mistake. Nor would he have expected her to have such a huge emotional response to this if he had stopped when he thought she wanted him to. Her response was “*... this is with me for the rest of my life and the fact you are my lover and you did it how does that make me feel*”. His response would not have been “*really depressed, sad, scared and stressed*”. He would not have, in my view, said “*I wish I*

didn't do those things to you" and "I can't live with what I did Ugh". Nor "I felt you don't love me any more after last night".

[43] All that, in my view, is far more consistent with a person knowing they had done something very wrong, that is, they continued to have sex knowing that there was no consent and accepting a characterisation of it as rape. It is not consistent with someone who may have briefly misread signs but stopped as soon as they knew.

[44] I find, in contrast to [VA]'s evidence, [MM] tried to navigate an increasingly narrow pathway attempting not to cross the middle culpability line. When these allegations came to light, I have no doubt [MM] would have been conscious of the fact there had been conversations committed to Messenger on this topic, including his apology. They needed explaining and I find his attempt at doing so involved increasing minimalization designed for mitigating effect.

[45] The fact [VA] went to her friends and told them very soon thereafter also supports her evidence, particularly where it was in circumstances of secrecy when she did not want that revealed. She did not want to get [MM] into trouble and I find she was not motivated by malice. Quite the reverse. She was trying to keep it away from adult knowledge and trying to work out for herself what this meant in terms of the relationship. There can be no suggestion given the timing of that, that these allegations were born out of the fact [MM] ended the relationship.

[46] It fits too with the fact that she wrote to [MM]'s [relative], again at a time when she was not intending to make any formal complaint. I find it is consistent and credible that it was after a period of counselling with encouragement to complain that she ultimately did so.

Counter Intuitive Arguments

[47] It is often argued in cases such as this that if someone had been raped they would not continue on with the relationship. I note the experienced defence counsel, Ms Sziranyi, did not make these type of submissions that are often made and ill-founded. But I should deal with them. It is far too simplistic view of human nature and behaviour to make the claim that if someone had been raped in a relationship they

would not have continued on with it. There are some beliefs that real rape is the “*stranger danger*” type and we would always expect people to respond as people would in that circumstance. However, rape is not rape by a stranger, or a stereotype rape, it is simply sexual intercourse without consent that can occur in many different contexts and in a relationship responses can be complex. It is sometimes argued also that someone would yell out to someone nearby and this occurred in [VA]’s home where her father was. Again, that kind of argument is simplistic and not borne out by many cases of “*real rape*” in these types of situations.

[48] I compliment defence counsel for not making those simplistic submissions, but I deal with them given they are often made. I should say the submissions that Ms Sziranyi did make were on point and very helpful.

Did [MM] commence intercourse knowing [VA] was asleep?

[49] [VA] said she woke to [MM] having sexual intercourse. If [MM] knew that then clearly he would have known she had not consented to penetration. I cannot be sure however to the high standard of beyond reasonable doubt that he knew that when commencing. There had been previous sexual contact with [VA] shortly before this and she had reluctantly agreed to that in a resigned sort of way. This could, on the facts, follow on from that. Clearly [VA] says she was asleep and I do not find she was not, but I cannot be sure [MM] knew that, or a reasonable person would have known that. In any event such a finding is not necessary to make a finding of guilt on this charge. I do find him guilty of the charge on the basis already set out.

Remaining Charges

Crown Contentions

[50] The Crown say I can be sure of guilt beyond reasonable doubt on each of the remaining charges. The Crown says the second rape was on the same night as the first and that too is supported by the Facebook message and her complaints to her friends. The charges are mutually supportive of each other and consistent with the disrespecting conduct in [date 1]. [MM] demonstrated a preparedness to have sexual

relations with her regardless of consent. The Crown says [MM] got carried away with sexual excitement and ignored the clear direction to stop.

[51] The complainant's evidence, the Crown says, forms a credible platform upon which I can walk safely to beyond reasonable doubt on all charges as she was consistent, made reasonable concessions, and disclosed events not in her interests. It could not be said she made these allegations up to get [MM] into trouble. It was quite the opposite. When they made the adult light of day, not at her behest, she said they did not occur to protect him. Nor could it be said they were made as a response to him ending the relationship as she told her friends at the time and well before the break up.

[52] It would be odd, Mr Garrick for the Crown competently emphasises, if this complainant was making it up to get [MM] into trouble that she would then try and protect him from the allegations from adults such as her mother or those in Social Welfare agencies. The fact that she lied to them about not being raped is consistent with a conflicted young girl coping with mixed emotions in a first relationship, in circumstances where she was having difficulties herself with all the associated insecurities and independences that that can cause.

[53] The Crown says I can rely on this young woman's evidence, coupled with the messenger statements and the evidence of her friends and the email, to come to the view that all charges have been proved beyond reasonable doubt.

Decisions on Remaining Charges

[54] This is not a case where on these remaining charges I disbelieve [VA] or firmly believe [MM]'s evidence. However, this is a criminal trial which is far more about proof than truth and I must be sure beyond reasonable doubt on the evidence presented before I can convict.

[55] On the remaining charges, while accepting there is no legal requirement for corroboration, there is insufficient for me in the face of adamant denials to be sure beyond reasonable doubt these events occurred. If this was a civil trial on the balance of probabilities, there may well have been a different result. There are no admissions as to the events that could assist. The complaint evidence does not tie in tightly as it

did for the first basis of the first charge; and of course, there are adamant denials these events occurred in the way described. There is insufficient evidential pointers that allow me to safely say there is no reasonable possibility the denials are correct.

[56] I emphasise this is not a message to [VA] that she has been disbelieved. It is not a message to [MM] that he has been firmly believed. It is simply a case of when I stand back and look at the evidence presented that I cannot be sure to the high standard required.

Conclusion

[57] Accordingly, on the first charge I find [MM] guilty.

[58] On charges 2, 3 and 4, I find they have not been proved to the high standard of beyond reasonable doubt and therefore the appropriate verdict is not guilty on those charges.

[59] I thank both counsel for their competent assistance and I compliment them on the high standard of advocacy.

B A Morris
Youth Court Judge