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IN THE SUPREME COURT OF NEW ZEALAND

SC 86/2015
[2016] NZSC 51

BETWEEN	RICHARD JAMES CAMERON MORTON Appellant
AND	THE QUEEN Respondent

Hearing:	18 November 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A M Simperingham, C B Wilkinson-Smith and M Prinsloo for Appellant A Markham, Y Moinfar and H A Wrigley for Respondent
Judgment:	5 May 2016

JUDGMENT OF THE COURT

A The appeal is allowed.

B Permission under s 49(2)(a) of the Evidence Act 2006 is given to the appellant to adduce evidence from himself and the co-defendants in which they may give their accounts of their interactions with the complainant on the night of the offending and as to the prior sexual relationship of one of the co-defendants with the complainant.

C Permission is refused in respect of the recantation and inconsistent conduct evidence and the evidence referred to in [74] (other than that identified in [77]).

D There is no direction under s 49(2)(b).

REASONS

William Young and O'Regan JJ [1]
Elias CJ [83]
Glazebrook and Arnold JJ [119]

WILLIAM YOUNG AND O'REGAN JJ

(Given by William Young J)

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Introduction

[1] The appellant was one of five men who were tried on charges of rape arising out of a single incident involving one complainant. We will refer to the other men as the "co-defendants". The appellant and his co-defendants each faced a count alleging rape as a principal and they were all also charged with being parties to the rapes committed by the others. The indictment thus contained five counts of rape. At trial, the Crown was not able to prove that the appellant had had penetrative sex with the complainant. Accordingly the appellant and his co-defendants were discharged on the count which focused on the rape allegedly committed by him as a principal. They were all found guilty on the four remaining counts. So the co-defendants were found guilty (as principals in each case) of raping the complainant and of being parties to the rapes committed by the others and the appellant was found guilty of being a party to their offending.

[2] At trial the Crown case as to party liability relied on both aiding and abetting (s 66(1)(b) and (c) of the Crimes Act 1961) and common purpose (s 66(2)). The trial Judge left it open to the jury to find the five men guilty under s 66(2) if satisfied that they were parties to a common purpose that they should rape the complainant. The Court of Appeal, following *Bouavong v R*,[1] held that this approach was incorrect and allowed the appeals against the party convictions.[2] Retrials were directed.[3] All other grounds of appeal were rejected.[4] These included arguments based on new evidence.[5] *Bouavong* was shortly afterwards overruled by this Court[6] and we are satisfied that party convictions of the appellant and his co-defendants were safe. The judgment of the Court of Appeal nonetheless stands. The Crown elected not to proceed against the co-defendants in relation to their alleged offending as parties. This left the appellant facing a retrial on the four charges alleging that he was a party to the rapes committed by his co-defendants.

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1 *Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23. In *Bouavong*, the Court of Appeal held that s 66(2) could not be relied on by the Crown where the common purpose relied on was to commit the offence which was eventually committed. In the view of the Court of Appeal, such a case could be prosecuted only under s 66(1).

2 *Morton v R* [2013] NZCA 667 (White, Venning and Andrews JJ) [*Morton* (Conviction appeal)].

3 At [150].

4 At [150] and see the overview of the grounds of appeal at [80]–[85].

5 At [150] and see the discussion of the evidence at [86]–[124].

6 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

[3] Primarily in issue in this appeal is the extent, if any, to which the appellant may put in issue at his retrial the findings of the jury at the first trial that his co-defendants were guilty of rape. This arises by reason of s 49 of the Evidence Act 2006 which permits a conviction to be relied on as conclusive evidence that the person convicted was guilty of the offence, with contradictory evidence to be permitted only in exceptional circumstances. The most significant of the evidence which the appellant wishes to call would come from him and his co-defendants but there is also other evidence to which this argument also applies – alleged retractions and conduct on the part of the complainant said to be inconsistent with her narrative.[7] There is a secondary issue as to the admissibility of certain evidence which the appellant wishes to adduce as to the sexual experience and reputation of the complainant.[8]

[4] The procedural history of the case is convoluted. These evidential issues were addressed first, in a preliminary way, by Clifford J[9] and then by Courtney J prior to the appellant's retrial and determined by the latter in a way which broadly was in favour of the Crown.[10] An appeal by the appellant against that judgment was dismissed by the Court of Appeal but the reasons were not immediately delivered.[11] In the meantime, the appellant's second trial commenced. During it, Whata J allowed the appellant to adduce evidence from himself and his four co-defendants which was ostensibly directed to his asserted belief that the complainant consented (and as to its reasonableness) but was primarily to the effect that the complainant had consented.[12] At a late stage in the trial, after the conclusion of the defence evidence and in response to an application from the prosecutor, Whata J concluded that the appellant had been allowed too much latitude and aborted the trial.[13]

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7 The alleged inconsistent conduct involves behaviour in the aftermath of the offending or discussions about the offending said to be not consistent with having been raped.

8 The appellant also wishes to call evidence as to the physical layout of the premises in which the offending occurred. Providing this is not given in a tendentious way, we do not see it as giving rise to admissibility issues.

9 *R v Morton* [2014] NZHC 2178 (Clifford J).

10 *R v Morton* [2015] NZHC 990 (Courtney J) [*Morton* (HC)].

11 *Morton v R* [2015] NZCA 232 (White, Venning and Williams JJ).

12 *R v Morton* [2015] NZHC 1516 (Whata J) at Appendix of Evidence of Co-Accused.

13 At [39].

[5] The reasons of the Court of Appeal dismissing the appeal from the ruling of Courtney J were subsequently released.[14] There was then a further application by the appellant to Whata J as to evidence which might be led at his third trial, an application which was dismissed in a ruling to which we will return.[15]

[6] The present appeal is against the judgment of the Court of Appeal dismissing the appeal from Courtney J's ruling.[16]

Section 49 of the Evidence Act in the context of the case

[7] This section provides:

> **49 Conviction as evidence in criminal proceedings**
>
> (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
>
> (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances,—
>
> (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
>
> (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
>
> …

[8] The effect of s 49 – reading the rule in s 49(1) and the exception in s 49(2)(a) together – is that in the absence of permission under s 49(2)(a), evidence which tends to prove that the person convicted did not commit the offence in question is inadmissible and the section thus operates as an exclusionary rule for the purposes of s 7(1)(a) so as to exclude evidence which is relevant and would otherwise be admissible.

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14 *Morton v R* [2015] NZCA 322 (White, Venning and Williams JJ) [*Morton* (CA)].
15 *R v Morton* [2015] NZHC 1847 (Whata J) at [34].
16 *Morton* (CA), above n 14.

[9] Section 49(1) applies only "if not excluded by any other provision of this Act". We see this as rendering s 49 subject to more specific provisions of the Act, for instance as to propensity and veracity.[17] As well, it might also bring into play s 8 which deals with the admissibility of evidence which may have an unfairly prejudicial effect on proceedings. In this case, however, it is difficult to see how the appellant's retrial could be sensibly conducted without the jury knowing what happened at the first trial. For this reason, there has been no challenge to the admissibility of the convictions.[18]

[10] The prosecution still asserts that the appellant was a party to the offending of the co-defendants under either or both of s 66(1)(b) and (c) (aiding and abetting) and s 66(2) (common purpose) of the Crimes Act. In order to secure a conviction against the appellant in relation to the rape committed by any particular co-defendant, the Crown must prove that that co-defendant raped the complainant. Section 49(1) permits this to be established conclusively by proof of the conviction. Once the conviction is admitted, evidence to the effect that the co-defendant did not rape the complainant cannot be lead without permission under s 49(2)(a). As there was no dispute that each co-defendant had penetrative sex with the complainant, this means that evidence tending to prove that the complainant consented to the sexual activity with the co-defendants cannot be led without permission. If permission to lead such evidence is granted, the Court must address whether to give a direction under s 49(2)(b) because, in the absence of such a direction, the convictions of the co-defendant conclusively establish that the complainant did not consent.

[11] The findings of guilt against the co-defendants also represent findings not just that the complainant did not consent but also that at the time of the offending, either (a) they did not believe that the complainant was consenting or (b) if they did, such belief was not based on reasonable grounds. A claim by the appellant that he reasonably believed that the complainant consented to the sexual activity which occurred is not formally inconsistent with such findings and thus the convictions of the co-defendants. Counsel for the appellant therefore suggested that s 49 should be

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17 Evidence Act 2006, ss 40–43 and 37–39 respectively.

18 *Morton* (CA), above n 14, is the judgment under appeal and did not consider the admissibility of the convictions; rather it considered the s 49(2) issue.

construed so that permission under s 49(2)(a) is not required for a defendant to lead evidence that is relevant to his or her defence even though there is "an overlap" in that the evidence might tend to prove that a conviction was wrong (in this case in the respect that according to the appellant, the complainant consented to all sexual activity which occurred).

[12] We accept that the appellant is entitled to advance the defence that he believed, on reasonable grounds, that the complainant consented to sex with the co-defendants. He could not be precluded from giving evidence, at least in general terms, that this is what he believed and that this belief was based on her behaviour – that is, that he perceived in her behaviour what he took to be manifestations of consent. It will only be at the point when he is required to give particulars of the complainant's behaviour that it will become formally apparent that his real case is that he believed she was consenting because she did consent. This will be put beyond doubt if the co-defendants give evidence. The narrative advanced by the appellant and co-defendants at the trial before Whata J and which it is proposed will be advanced again was that the complainant consented. It was, therefore, evidence which tended to prove that the co-defendants had not raped the complainant. For the purposes of s 49(1) (when construed with s 49(2)(a)), it is the tendency of the evidence which is critical and not the issue to which it is directed. In the absence of permission under s 49(2)(a) such evidence may not be given and unless there is a s 49(2)(b) direction, the jury may have to be told that the convictions conclusively establish the falsity of the narrative of the appellant and co-defendants.

[13] It is right to acknowledge that the submission we have just rejected addresses an extremely significant, and somewhat elusive issue in the case to which we will later return but which we should identify now. The appellant's entitlement to advance a defence based on belief on reasonable grounds in consent is not excluded, *in limine*, by s 49. Rather it is his practical ability to advance that defence which is inhibited, to the point of exclusion. We see this as having implications in terms of his fair trial rights under s 25 of the New Zealand Bill of Rights Act 1990 and as well to give rise to acute trial management problems. We will explain why later.

[14] As we have noted, s 8 of the Evidence Act is an admissibility provision and therefore does not control the weight (conclusive or otherwise) to be given to evidence once admitted. In this appeal there is no issue as to the admissibility of the convictions. Therefore, the only escape from the s 49(1) prohibition on calling inconsistent evidence is via a finding of exceptional circumstances under s 49(2). In cases where there is no practical necessity for evidence to be given as to the prior conviction, s 8 might provide a mechanism for exclusion on the basis of the risk that such evidence would have an unfairly prejudicial effect on the proceedings. There is, however, likewise scope for the view that an effect which is mandated by s 49(1) should not be regarded as unfairly prejudicial if the circumstances are not exceptional. Because it is not relevant to the determination of this appeal, we leave for another day the relationship between ss 8 and 49.

[15] The primary issue in the case is therefore whether there are exceptional circumstances which warrant a grant of permission under s 49(2)(a) and, if so, whether it is appropriate to give a direction under s 49(2)(b).

What has happened to date

The first trial

[16] At their joint trial, the appellant and his co-defendants did not give evidence. Rather they relied on exculpatory statements that three of them, including the appellant, had made to the police. All were to the effect that the complainant had consented.

[17] The verdicts of guilty were not surprising. The evidence indicated that on the evening of the offending the appellant and co-defendants had planned the gang rape of another young woman whom they invited to the house occupied by two of the co-defendants.[19] When she left earlier than they had anticipated, the complainant was invited around to take her place. After alcohol was consumed and cannabis smoked, sexual activity occurred which the complainant said was non-consensual.

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[19] They had indicated amongst themselves and to others that they intended to put this woman "on the block". Their position at trial was that this expression meant that they (or a significant number of them) intended to have consensual sex with her. It was open to the jury to conclude that, in context, "on the block" was a reference to a proposed gang rape.

She said that initially she resisted but stopped doing so after being punched. This account was consistent with recent injuries later revealed by medical examination of her (including marks suggesting that she had been held down). It was also consistent with injuries found on the first two men to have sexual intercourse with her. During brief breaks which occurred she sent text messages saying that she was about to be, and then had been, raped and asking for help, messages which are inconsistent with the defence case that she was a willing and enthusiastic participant in what happened.

[18] This is a very anodyne account of what happened. A more detailed version of the facts is set out in the judgment of the Court of Appeal dealing with the conviction appeals to which we now turn.[20]

The conviction appeal judgment

[19] As noted, the appeals in relation to the party convictions were allowed by the Court of Appeal on the basis of *Bouavong*.[21] All other grounds of appeal were, however, rejected.[22] These included arguments based on fresh evidence consisting of, inter alia, alleged statements by the complainant that she had not been raped[23] and complaints by the current appellant in relation to his representation.[24]

[20] The Court of Appeal heard evidence from two witnesses (B and Q), who alleged that the complainant had acknowledged not having been raped, and from the complainant who denied their evidence. The evidence was reviewed thoroughly by the Court of Appeal which concluded that it was "not sufficiently credible or reliable to be admitted".[25] The Court recorded that, as B had acknowledged, "she was quite prepared to say things about the complainant that were simply untrue" and that she was "an unreliable witness".[26] In the case of Q, the Court concluded that "the

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20 *Morton* (Conviction appeal), above n 2, at [14]–[43].
21 At [134].
22 At [113], [114], [124], [148]–[149] and [150].
23 There was also evidence to the effect that the complainant may previously have been involved in group sex – evidence which is not material in relation to this part of the case.
24 *Morton* (Conviction appeal), above n 2, at [80]–[86].
25 At [114]–[117].
26 At [115].

statements she attributed to the complainant were not made or at least were misunderstood".[27] The Court then went on:[28]

> … we found the evidence of the complainant both in her affidavit and under cross-examination to be credible and cogent. Having seen and heard the complainant give evidence, we can also understand why the jury found her evidence credible. She impressed us as a truthful witness.

[21] In dealing with the appellant's complaint about his representation, the Court of Appeal noted that trial counsel's view was that after the appellant's discharge on the count of rape:[29]

> … the all-or-nothing defence of consent still applied and there was no "second layer" or alternative defence to the party charge, particularly in light of the admissions made by Mr Morton in his statement to the police about the nature of the sexual activity he had with the complainant.

The Court then went on to say:[30]

> (a) Mr Wood was correct to consider and to advise Mr Morton that the only real defence to charges he faced was consent.
>
> (b) The defence of consent remained the only real defence after Mr Morton was discharged on the charge of rape. Mr Morton's criminal liability as a party was dependent on one or more of the other appellants being found guilty of rape. …
>
> (c) There was no relevant "second layer" defence available to Mr Morton, especially in light of the admissions in his detailed statement to the police. …

The "second layer" defences related to issues as to his own state of mind and whether his actions were sufficient to make him a party to their offending. What counsel and the Court were saying is that his defence was so bound up with the defences offered by the co-defendants that a jury which concluded that the co-defendants had raped the complainant would necessarily also conclude that he was a party to that offending.

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27 At [116].
28 At [117].
29 At [143].
30 At [148].

[22] The "error"[31] attributed to the first trial Judge based on *Bouavong* was in relation to what counsel and the Court had described as "second layer" defences – that is, whether, if the offending by the principals was established, the appellant had defences which would enable him to avoid party liability. But, as the Court recognised, no such defences were practically available to the appellant.[32] This recognition, along with the conclusion that the rape convictions of the co-defendants were safe meant that the trial Judge's "error" could not have caused a miscarriage of justice. On this basis, the appellant's conviction appeal should have been dismissed. Unfortunately, however, this line of reasoning is not referred to in the judgment of the Court of Appeal. That Court's non-engagement with this issue set the scene for the difficulties which have followed.

The ruling of Courtney J

[23] Courtney J was required to determine the application of s 49(2) to the retrial of the appellant and in particular whether he should be given permission under s 49(2)(a) to call evidence inconsistent with the convictions.[33] Her starting point,[34] was an earlier and unchallenged ruling by Clifford J that the convictions were admissible but which had not determined what if any evidence could be called under s 49(2)(a).[35] Courtney J summarised the evidence which was in issue, some of which is more relevant to s 44. The evidence included what B and Q would say, this notwithstanding that their evidence had been rejected by the Court of Appeal. It also included evidence then proposed to be called from three of the four co-defendants.[36]

[24] In the course of her ruling,[37] she referred to the Law Commission report which preceded the Evidence Act which we discuss below.[38] Then, having referred to the Court of Appeal judgment in *McNaughton v R*[39] which we also discuss below,[40] she went on:

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31 We use distancing quotation marks as the "error" attributed to the Judge was not in fact an error.
32 *Morton* (Conviction appeal), above n 2, at [128]–[134] and [148].
33 *Morton* (HC), above n 10.
34 At [17].
35 *R v Morton*, above n 9.
36 *Morton* (HC), above n 10, at [8]–[14].
37 At [18].
38 See below at [53].
39 *McNaughton v R* [2011] NZCA 588.
40 See below at [58].

> [27] As I have discussed, the fact that Mr Morton would be precluded from advancing a defence of consent cannot, in itself, amount to exceptional circumstances. It follows that the mere fact that he can point to new evidence on this issue does not constitute exceptional circumstances.
>
> [28] Nor, in my view, is there anything about the evidence that would justify … allowing the issue of consent to be re-litigated. With the exception of [B and Q] (even leaving aside the views expressed by the Court of Appeal) the description of the evidence that could be adduced is hardly compelling. …
>
> [29] Mr Morton and his co-accused had the opportunity to advance the defence of consent and reasonable belief in consent at the first trial and did so. These issues were at the forefront of the defence cases. The defendants' counsel cross-examined the complainant on them … He closed to the jury on it. It was open to any of the accused, including Mr Morton, to give evidence at the trial on the issue of consent and of reasonable belief in consent. Had the other men given evidence, Mr Morton could have relied on any exculpatory statements they made regarding consent.
>
> [30] The fact that the other men are now compellable to give evidence that they could have given at the first trial but chose not to, does not make the situation exceptional. I note, too, that only three of the four men convicted of rape are proposed as witnesses, leaving the certificate of conviction in relation to [a co-defendant] to be adduced as conclusive proof of his offending, to which Mr Morton is being charged as a party.
>
> [31] Mr Simperingham also argued that it would be unfair to restrict Mr Morton's right to a fair trial out of concern that there may be conflicting jury verdicts; the evidence at this trial, if permitted, would be different and more extensive than that presented at the original trial and it would be unjust to confine Mr Morton to a defence based on the evidence and strategy adopted at his first trial. Conflicting jury verdicts is the very outcome that the Court of Appeal expressed concern over in *McNaughton*. Whilst the risk of inconsistency will not necessarily preclude leave being give to adduce evidence on the subject matter of the conviction it is a very real factor to consider.
>
> [32] In this case, what is proposed would be an extensive re-litigation of the original trial well beyond what would be necessary if the certificates of conviction were treated as conclusive. Whilst the complainant is expected to give evidence at Mr Morton's retrial, the invasiveness and trauma associated with cross-examination on the issue of consent will be absent as a result of the certificates of conviction being adduced. If the issue of consent were to be reopened the complainant would be subjected to extensive cross-examination about events that occurred nearly four years ago and the number of witnesses would result in the trial time being substantially increased. The nature and quality of the proposed evidence does not outweigh the very real disadvantages of departing from the position under s 49(1).

[25] In the result Courtney J held:[41]

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41 *Morton* (HC), above n 10, at [47].

(a) Exceptional circumstances do not exist that would justify allowing Mr Morton to adduce evidence tending to prove that the complainant consented to the acts in respect of which [the co-defendants] were convicted or that they had a reasonable belief that she was consenting.

(b) The effect is that the issue of consent and reasonable belief of the principal offenders in consent will not be live at the trial, though Mr Morton will be able to advance the defence of his own reasonable belief in consent.

The results judgment of the Court of Appeal

[26] The Court of Appeal dismissed the appeal from the ruling of Courtney J on 10 June 2015 but did not give its reasons immediately.[42]

The ruling of Whata J as to evidence which could be given at the retrial

[27] The appellant's retrial commenced on 22 June 2015. Shortly before the trial, Whata J was required to rule on the admissibility of evidence which the appellant wished to call which, ostensibly was directed to whether the appellant may have reasonably believed that the complainant consented; an issue which he approached largely in terms of what he understood to be the scope of Courtney J's admissibility ruling.[43] He concluded that Courtney J's ruling did not operate so as to exclude evidence directed towards what the appellant saw and heard during the events in question or any other material relevant to his state of mind. He noted:

> [29] The capacity of a defendant charged as a party to present relevant evidence about his state of mind intuitively qualifies as an exceptional circumstance. It is one thing to exclude evidence about whether the convicted offenders committed the rape; it is quite another thing to remove the capacity of a defendant altogether to assert a lack of requisite knowledge based on what he says he saw and heard.
>
> [30] It seems to me therefore that the proper balance for the purpose of s 49 … is to allow evidence and cross-examination that is strictly limited to what Mr Morton observed and any directly corroborating evidence, namely the observations of the complainant's conduct by eye witnesses that coincide with his evidence about the circumstances of the offending. Evidence that is not strictly directed to this purpose, or does not coincide with Mr Morton's account of what he saw, is excluded …
>
> …

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42 *Morton v R*, above n 11.

43 *R v Morton* [2015] NZHC 1385.

> [32] … I … grant leave to Mr Morton to present evidence on his narrative of events and to cross examine the complainant on it insofar as it is relevant to his knowledge of the rape offending and or a common purpose or probable consequence. Corroborative evidence by eye witnesses that strictly coincides with Mr Morton's account is also permitted. In particular, eye witness evidence is to be strictly limited to corroborating (if they are able) what Mr Morton saw or heard on the night of the offending. For the avoidance of doubt, none of this evidence may trespass into whether she in fact consented. That issue is no longer properly before the jury.

The retrial before Whata J

[28] During the retrial the appellant and his co-defendants gave evidence which, while formally directed at whether the appellant reasonably believed that the complainant consented, was in fact to the effect that the complainant had actually consented to the sexual activity. At the conclusion of the evidence, the Judge aborted the trial.[44] In doing so he noted:

> [5] The s 49 rulings have caused major difficulties for the trial. In reality, Mr Morton's defence of reasonable belief is inextricably linked to the issue of consent and co-[defendants'] reasonable belief in consent. In short, as party liability is dependent on establishing that the defendant had knowledge of the physical and mental ingredients of the offending there must be an inquiry into whether the rape occurred, whether the complainant consented and whether or not the principal offender had a reasonable belief in consent. A corollary of this is that Mr Morton cannot mount an effective defence unless he is able to adduce eye witness testimony as to the conduct of the complainant. The only persons capable of giving such testimony, are other than Mr Morton, the co-[defendants].
>
> [6] In the result, and notwithstanding the conviction evidence, two very clearly contradictory narratives have emerged, one in which the complainant is said to have actively encouraged the involvement of all five men in the sexual acts with her and another in which the complainant says she said no immediately to the sexual assaults and initially struggled against them until she realised it was a futile exercise.

He later added:[45]

> … it has become clear that Mr Morton's defence is inextricably linked to showing that the complainant actively encouraged the sexual activity; and that the evidence of the convicted men is that encouragement occurred for the entire duration of the sexual offending. On their account there is no room for the possibility that the complainant did not consent, and it is not possible to coherently excise from their accounts evidence that directly derogates from the convictions and in particular on the issue of consent.

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44 *R v Morton*, above n 12.

45 At [27].

[29] Pausing at this point, this ruling is an acknowledgement that, as the appellant's counsel at his first trial had asserted and the Court of Appeal (in dealing with the conviction appeal) had recognised, the only defence practically open to the appellant is that the complainant consented and that there are no "second layer" defences.

[30] The aborted trial before Whata J represented the third time that the complainant has been required to give evidence.

The reasons of the Court of Appeal for dismissing the appeal from the ruling of Courtney J

[31] The Court of Appeal expressed itself in this way:[46]

> [55] We agree with Courtney J that this is in fact a paradigm case for the application of the conclusive proof rule. As the Law Commission noted in its commentary on the proposed code:
>
> > [235] The party seeking to offer evidence of the prior conviction of any person will be required to identify the issue to which the conviction is relevant. If it is relevant to truthfulness or propensity, admissibility will be governed by those rules. The propensity rules operate to give the greatest measure of protection to defendants in criminal cases. By contrast, if a prior conviction is relevant to an issue in the case, for example the conviction of a third party for theft to support a charge of being an accessory after the fact, it is likely to be admissible.
>
> [56] In addition, the facts in ... *McNaughton v R* reflect almost exactly the same scenario the appellant confronts here. At the pre-trial stage in that case, severance was granted between the principal, who was charged with homicide, and his co-offenders, who were charged as parties. The principal offender, Mr McNaughton, was convicted in the first trial. The remaining defendants were tried in a separate joint trial at which the Crown sought to admit proof of Mr McNaughton's conviction. MacKenzie J granted the Crown's application, and dismissed the defendant's application under s 49(2) to call evidence tending to prove that Mr McNaughton in fact acted in self-defence.
>
> [57] When the matter came before this Court on an appeal brought by all defendants, including Mr McNaughton, the appeal was allowed on different grounds. However, the Court specifically noted that it agreed with MacKenzie J's finding under s 49(2) that there were no "exceptional circumstances". This Court found:
>
> > In our view, the prospect that a second jury be asked to consider the same issue (self-defence) at a separate trial but on the basis of a

[46] *Morton* (CA), above n 14 (emphasis removed and citations omitted).

> different evidential foundation, leading to at least a theoretical possibility of a conflicting verdict, is unattractive.
>
> [58] The situation confronting that Court is indistinguishable in principle from the present case.

[32] The Court concluded by saying:

> [87] The effect of this judgment is that the appellant is precluded from arguing that the complainant consented or that the co-accused reasonably believed that she consented. He is also constrained in the way in which he is able to present evidence of his own reasonable belief, for that evidence cannot indirectly raise the reasonable belief of the others.

Although the judgment is primarily addressed to s 49(2)(b), the Court must also have been of the view that permission under s 49(2)(a) should be denied. This is implicit in the dismissal of the appeal from the ruling of Courtney J.

The further ruling of Whata J

[33] In a ruling delivered on 5 August 2015, Whata J dealt with another s 49(2) application by the appellant for leave to call evidence inconsistent with the convictions of his co-defendants.[47] He rejected this application on the basis that the case was controlled by the judgment of the Court of Appeal dismissing the appeal from Courtney J.[48]

[34] In the course of this judgment, he noted that the evidence the co-defendants had given was "impassioned and not inherently lacking in credibility".[49] He did, however, consider that aspects were "implausible" and that the accounts given were "remarkably detailed and coextensive … also suggesting collusion".[50]

An unhappy dilemma

[35] Two starkly conflicting solutions to the case were urged on us.

[36] The first is to conclude that the convictions conclusively establish that the complainant did not consent and no evidence to the contrary may be led. This would

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47 *R v Morton* [2015] NZHC 1847.
48 At [34].
49 At [19](b).
50 At [19](b).

mean that the appellant will not be able to present the defence he wishes to advance and, there being no "second layer" defences, he will, in the absence of perverse reasoning, be convicted if he goes to trial. Such an outcome – that is preventing a defendant advancing a defence, is not in accordance with the traditional approach of the common law. Nor does it sit easily with s 25 of the New Zealand Bill of Rights Act which provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
>
> …
>
> (c) the right to be presumed innocent until proved guilty according to law:
>
> …
>
> (e) the right to be present at the trial and to present a defence:
>
> (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
>
> …

We recognise that s 5 of the New Zealand Bill of Rights Act contemplates that these rights may be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is, however, far from obvious that so drastic a restriction on fair trial rights can be fairly seen as such a "reasonable limit".

[37] The second is to permit re-litigation of convictions (a) entered following a full and fair trial in which the appellant was an active participant and (b) upheld following careful consideration by the Court of Appeal. Such an outcome is not easily reconciled with the policies upon which s 49 is premised.

[38] On the Chief Justice's approach, which involves a grant of permission under s 49(2)(a) but no direction under s 49(2)(b), the appellant and co-defendants may give their accounts of the events on the night of the offending and the appellant will

be entitled to seek an acquittal on the basis that he believed on reasonable grounds that the complainant consented. In this way, the appellant will be able to run a defence that he believed that the complainant consented and had reasonable grounds for doing so in that she, by her behaviour, manifested apparent or actual consent. Leaving such a defence to the jury (as we think the Judge will be required to do) while at the same time explaining to the jury that the convictions are conclusive as to the absence of consent will not be easy and jurors will, we think, struggle to make sense of the associated instructions.

[39] Section 49(2)(b) permits a judge to direct that the case be addressed without reference to s 49(1). It does not, however, permit a judge to direct that the case be determined as if s 49(1) had a different effect. Thus the section does not contemplate partial displacement of conclusive effect conferred by s 49(1) on the convictions. For instance, it is not open to a judge to direct that convictions should be accorded presumptive effect.

[40] If the conclusive effect of s 49(1) is displaced, with the practical consequence that consent is in issue, there might remain some room for exclusion (effected by withholding of s 49(2)(a) permission) of some of the evidence upon which the appellant wishes to rely; for instance the retraction evidence which was rejected by the Court of Appeal in the conviction appeal. But we cannot see a principled basis upon which the appellant could be limited as to the evidence which could be adduced so as to preclude him from calling the co-defendants to say that that the complainant's behaviour was indicative of consent. And once evidence to this effect is admitted, the reality is that consent will necessarily be in issue, at least indirectly via the argument as to belief on reasonable grounds in consent.

[41] The result is that although we see the alternatives identified in [36] and [37] as unpalatable, we do not see a satisfactory alternative to them.

Section 49 of the Evidence Act in the broader context

The position before the Evidence Act 2006

[42] *Jorgensen v News Media (Auckland) Ltd*[51] established that in civil proceedings a conviction is admissible to establish that the person convicted had committed the offence (not following on this point the much criticised English case, *Hollington v F Hewthorn and Co Ltd*[52]). This was confirmed by s 23 of the Evidence Amendment Act (No 2) 1980.

[43] Whether, and if so to what extent, the rule in *Hollington v Hewthorn* applied in criminal cases in New Zealand, particularly after *Jorgenson*, was never conclusively resolved. It was always distinctly arguable that in a prosecution against an accessory after the fact, the commission of the offence by the principal could be established by proof of the conviction.[53] As well, in the 1980s and 1990s a number of judges – most notably, Cooke J in *R v Davis*[54] – expressed the view that a conviction was admissible "as a means of proving that [the person in question] had in fact committed the crimes referred to therein".[55]

The position in other jurisdictions

[44] There is no legislation in other jurisdictions which is closely comparable to s 49.[56] However, s 74 of the Police and Criminal Evidence Act 1984 (UK) ("PACE") is of some relevance. It provides that a conviction is admissible to prove that the person convicted committed the offence and will do so unless the contrary is proved.[57] This section operates in tandem with s 78(1) which permits a court to exclude evidence if it appears that:

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51 *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (CA) at 978 per North P, at 992 per Turner J and at 993–994 per McCarthy J.

52 *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 (CA).

53 See for instance *R v Vinette* [1975] 2 SCR 222; and the jurisprudence reviewed in *R v Kirkby* [2000] 2 QR 57 (QCA).

54 *R v Davis* [1980] 1 NZLR 257 (CA) at 262.

55 *R v Wilson* [1991] 2 NZLR 707 (HC) at 714; see also *R v McLeod* (1994) 12 CRNZ 305 (HC).

56 Regarding Canada see Criminal Code RSC 1985 c C-46, s 657.2 and Sidney N Lederman, Alan W Bryant and Michelle K Fuerst *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (4th ed, LexisNexis, Ontario, 2014) at 1406–1407. Regarding Australia see J D Heydon (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [5195].

57 The section has been amended from time to time since it was first enacted.

> the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[45] It appears that s 74 was primarily addressed to cases in which an element of the offence alleged against the defendant is the commission of another offence by another person – for instance, in a prosecution for receiving, that the goods had previously been stolen by someone else.[58] The courts, however, have not confined its use to such circumstances[59] and there has been much, but perhaps rather inconsistent, resort to s 78(1) to limit its use.[60] We will come back to s 74 and its application shortly.

Practicality and policy considerations

[46] Legislative provisions as to admissibility of convictions may provide for convictions to be admissible (that is without presumptive or conclusive effect), presumptive (that is able to be rebutted but on the balance of probabilities) or conclusive (as s 49 is, where exceptional circumstances do not exist) evidence.

[47] Allowing a conviction to be used to prove the commission of an offence will not give rise to difficulty where the commission of that offence is not seriously in dispute. By way of example, in a prosecution for receiving, it may be convenient for the Crown to rely on a certificate of conviction of the thief (together with linking evidence) instead of formally proving the theft (and possibly the identity of the thief, if that is relevant) in the ordinary way. In such a case the defendant (that is the person charged with receiving) is unlikely to seek, or indeed be in a position, to challenge the underlying facts associated with the theft. In this situation, the defendant on trial would not have been directly involved in the offending to which the conviction relates. The conviction would thus say nothing about the conduct of the defendant which is primarily in issue in the case.

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58 See Roderick Munday "Proof of Guilt by Association under Section 74 of the Police and Criminal Evidence Act 1984" [1990] Crim LR 236.

59 See *R v Robertson* [1987] QB 920 (CA).

60 See the discussion in Adrian Keane and Paul McKeown *The Modern Law of Evidence* (10th ed, Oxford University Press, Oxford, 2014) at 666–669; P J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2016 ed, Sweet and Maxwell, London, 2016) at [9-90]; and Michael Zander *Zander on PACE* (7th ed, Sweet and Maxwell, London, 2015) at 409–413.

[48] Save in respect of convictions based on evidence which is inadmissible against the later defendant, a presumptive admissibility provision is unlikely to cause much difficulty for a defendant in a criminal trial. A defendant who wishes to challenge the correctness of the conviction will be free to do so. If the point at issue is of sufficient significance to justify engagement on the issue, the prosecution is likely to call such evidence as may be available to show that the conviction was right. A jury which hears all available evidence is unlikely to be much affected by the certificate of conviction.[61] Thus if the end result of the present appeal is that the convictions are admissible but not conclusive as to consent, the appellant would not be precluded from – and in truth not much hindered in – running the defence he wishes to advance.

[49] But while this is not particularly problematic for a defendant, it may be more so for a prosecutor who may be required to prove again – perhaps at considerable cost in time and money – something which has already been established to the satisfaction of another court. Presumptive or conclusive admissibility provisions (such as s 74 of PACE and s 49 of the Evidence Act respectively) address this concern, albeit that, as we will indicate, they give rise to other problems.

Convictions based on evidence which is inadmissible against the later defendant

[50] Say the prosecution wishes to rely on the conviction of A in a prosecution against B and A's conviction is based on evidence (perhaps a confession) which is inadmissible against B. In *R v Hayter*[62] A and B were tried jointly for murder. The Crown case was that A had committed the murder having been procured to do so by B.[63] To secure a conviction against B, the Crown had to prove that A had committed the murder but the only evidence that he had done so was to be found in his out-of-court statements which were inadmissible against B. The Judge told the jury to address first the case against A and if satisfied that he was guilty, to carry that conclusion over into its consideration of the case against B. The House of Lords,

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61 See the discussion of this problem by Turner J in *Jorgensen*, above n 51, at 991.

62 *R v Hayter* [2005] UKHL 6, [2005] 1 WLR 605.

63 There was a third man, the primary procurer, who was also involved. B had acted as a middle-man between the third man and A.

relying very much on s 74 of PACE,[64] held that this was legitimate even though it had the practical effect of allowing, through the medium of the conviction, the out-of-court statements of A to be used against B.

Convictions which directly engage with the defendant's conduct

[51] Say A and B are charged with conspiring with each other to commit a crime and A pleads guilty. Under a presumptive provision – such as s 74 of PACE – the admission of the conviction of A would serve to reverse the onus of proof with the result that the jury should convict B unless satisfied of innocence on the balance of probabilities. This was described by Sir John Smith as "a result which was surely never intended and is contrary to all principle".[65] Despite this expression of opinion, English courts have sometimes adopted this approach. We will discuss the leading case as to this shortly.

[52] In a New Zealand case of the kind postulated in [51], s 49 of the Evidence Act, if applied, would result in B having no defence unless the Judge concluded that there were exceptional circumstances warranting orders under s 49(2).

The legislative history of s 49

[53] In its 1999 report on the law of evidence, the Law Commission noted:[66]

> 233 The Law Commission considers that there are at least three policy reasons why convictions should be admissible in criminal proceedings:
>
> - Time and expense will often be saved, since making convictions admissible would avoid forcing a party to litigate a matter that has already been resolved.
>
> - It makes available evidence that is not only relevant, but also highly probative, since guilt will already have been established to the criminal standard of beyond reasonable doubt.

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64 Which did not directly apply because A and B were tried together.

65 In a comment on *R v Lunnon* [1988] Crim LR 456, a case which involved a three party conspiracy and only one guilty plea, JC Smith "Conspiracy – admissibility of plea of guilty by co-conspirator" [1988] Crim LR 456 at 456.

66 Law Commission *Evidence: Reform of the Law* (NZLC R55 Volume 1, 1999) (citations omitted).

- Not to admit such evidence would run contrary to the policy of the criminal justice system that a criminal conviction is sufficient basis to impose grave penalties.

234 The Law Commission's proposal, therefore, is that evidence of prior convictions be admissible in a criminal proceeding, but the use a party proposes to make of those convictions should govern the decision on admissibility. In particular, the Commission intends the Code provisions to control the admissibility of evidence directed at the truthfulness or propensity of a defendant in a criminal proceeding.

235 The party seeking to offer evidence of the prior conviction of any person will be required to identify the issue to which the conviction is relevant. If it is relevant to truthfulness or propensity, admissibility will be governed by those rules. The propensity rules operate to give the greatest measure of protection to defendants in criminal cases. By contrast, if a prior conviction is relevant to an issue in the case, for example the conviction of a third party for theft to support a charge of being an accessory after the fact, it is likely to be admissible.

236 Given the higher standard of proof in a criminal case, the Commission's view is that the conviction should operate to establish a presumption of guilt that is rebuttable on the balance of probabilities. Evidence offered to challenge the validity of a previous conviction may also be limited by abuse of process principles.

[54] The Commission's recommended provision was in these terms:[67]

51 Conviction as evidence in criminal proceedings

(1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Code, admissible in a criminal proceeding and, on proof of the conviction, it will be presumed, in the absence of proof to the contrary, that the convicted person committed that offence.

(2) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the judge of the purpose of offering that evidence.

It will be noted that the proposal was similar in effect at least to s 74 of PACE. In the associated commentary, the Commission observed:

C236 Examples of where evidence of a conviction may be relevant to an issue in the case are: evidence of a conviction of a third party for theft to support a charge of being an accessory after the fact; or

[67] Law Commission *Evidence: Code and Commentary* (NZLC R55 Volume 2, 1999) at 140.

> evidence of a defendant's conviction for assault in a later murder trial where the victim dies of the injuries.

[55] The last example – a "defendant's conviction for assault in a later murder trial where the victim dies of the injuries" – may have been based on *R v Hogan*, an English case in which the defendant who had been found guilty of a serious assault after his plea of self-defence was rejected was later prosecuted for murder after his victim's death.[68] Lawson J did not permit self-defence to be raised at his murder trial as he considered that the defendant was estopped by the guilty verdict at his first trial from re-running self-defence.[69] This judgment was promptly over-ruled by the House of Lords in *Director of Public Prosecutions v Humphrys*.[70] Under the Law Commission's proposals Hogan's conviction would have been presumptive proof that he had not acted in self-defence. On this basis, he would not have been estopped from raising self-defence but would have had to establish self-defence on the balance of probabilities.

[56] The Law Commission also envisaged that there might be circumstances in which an attempt to challenge the factual basis of a conviction might be ruled out as an abuse of process.[71] Unfortunately, it did not explain the circumstances in which this might happen. As *Humphrys* illustrates, the criminal law does not operate on the basis of estoppels. And abuse of process principles usually operate as a shield for defendants rather than a sword for prosecutors.

[57] Section 49, as enacted, is much more stringent than the Law Commission's proposal, as was acknowledged in the explanatory note to the Evidence Bill when it was introduced.[72] The reasons for the increased stringency are not apparent. Presumably, the conclusion was reached that the provision proposed by the Law Commission would not give sufficient effect to the policies which it had identified.

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68 *R v Hogan* [1974] QB 398.
69 At 411–413.
70 *Director of Public Prosecutions v Humphrys* [1977] AC 1 (HL).
71 Law Commission *Evidence: Reform of the Law*, above n 66, at 63–64.
72 Evidence Bill 2006 (256-1) (explanatory note) at 12.

The New Zealand jurisprudence

[58] Section 49 has been applied by the Court of Appeal in a number of cases.[73] In one of these, *McNaughton v R*, there was an issue whether the conviction of the principal for murder could be proved at the trial of those said to be accessories so as to establish conclusively his guilt and to negative self-defence.[74] The High Court Judge resolved this issue in favour of the prosecution.[75] In doing so, he referred to:[76]

> … the inherent undesirability of allowing the guilt or innocence of a person on a charge to be the subject of potentially conflicting verdicts by a different jury.

As it turned out, the conviction of the principal for murder was quashed on appeal with the result that the issue fell away. The Court of Appeal, however, endorsed the Judge's view that if the conviction had not been set-aside, evidence of it could have been tendered at the trial of the alleged parties and would have excluded any defence based on the possibility that the principal had acted in self-defence.[77] The Court was of the same view as the Judge as to the undesirability of creating a situation in which there might be conflicting verdicts.[78]

Recent English jurisprudence

[59] In England and Wales prosecutions for murder of the kind involved in *Hogan* have become more frequent.[79] The courts have thus been required to decide whether, at the later murder trial, s 74 of PACE justifies reversal of the onus of proof in respect of issues which were determined adversely to the defendant at the first trial. In the leading case, *R v Clift*, the English Court of Appeal determined two separate cases in each of which (a) the appellant had been convicted of causing grievous bodily harm with intent to do so and (b) some years later the victim had died as a

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73 *R v Walker* [2007] NZCA 558; *R v Fraser* [2009] NZCA 520; *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771; *Panchal v R* [2011] NZCA 483; *McNaughton v R*, above n 39; *R v Taniwha* [2012] NZCA 605; and *Manukau v R* [2012] NZCA 222.

74 *McNaughton v R*, above n 39, at [5].

75 *R v Cunnard* HC Nelson CRI-2010-442-26, 2 May 2011.

76 At [12].

77 *McNaughton v R*, above n 39, at [62].

78 At [62]; and *R v Cunnard*, above n 75, at [12].

79 This is in part a result of the abolition of the rule under which a count of murder could not be laid if the victim died more than a year and a day after the assault. It has no doubt been contributed to by changes in medical practice and technology.

result of that assault.[80] The Court of Appeal held that the trial Judges had been correct to admit at the subsequent murder trials evidence of the convictions and to direct the juries that, unless the contrary was proved, the appellants should be taken to have assaulted the victims with intent to cause grievous bodily harm and otherwise than in self-defence. As will be apparent, it is clear that our Law Commission envisaged that the provision it proposed would operate in the same way.

Is the exceptional circumstances test satisfied?

[60] There are some circumstances in which a court may have little difficulty in concluding that there are exceptional circumstances for the purposes of s 49(2). A natural starting point may be to consider whether there is reason to think that the conviction may have been wrongly entered. Determining whether this is so is likely to involve some analysis of the evidence upon which the conviction was based, the reasons, if any, for thinking that such evidence may have been wrong and any new evidence which may have subsequently become available (including, of course, the proposed evidence in respect of which permission is sought under s 49(2)(a)). Another (albeit related question) may be whether there is any particular reason why it might be unfair to treat a particular conviction as conclusive against a particular party.

[61] Arguments along the lines just identified were advanced by the appellant. He relied on what he contended was the cogency of the evidence which he wishes to adduce and the consideration that at the first trial the appellant was not in a position to compel the co-defendants to give evidence.

[62] The evidence in question in this case has been reviewed at length by Courtney J, the Court of Appeal and by Whata J who had the advantage of hearing most of it. They did not see it as particularly cogent. As well, the evidence upon which the co-defendants were found guilty was formidable. Looking through the s 49(1) prism, we consider that there is nothing about the convictions or the evidence proposed to be called which warrants any disquiet as to their safety and reliability. And still using the same prism, we are not much impressed by the point that the

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[80] *R v Clift* [2012] EWCA Crim 2750, [2013] 1 WLR 2093.

co-defendants were not compellable witnesses for him at the first trial. The appellant was an active participant at the first trial and able to advance everything that could usefully be said as to whether the complainant consented. As the evidence referred to by the Court of Appeal in the conviction appeal judgment indicates, the appellant and his co-defendants made a joint decision that none of them would give evidence.[81] It also shows that the appellant was well aware that the counts against him of being a party to rape would be determined by reference to whether the Crown had negatived consent.

[63] The trial management issue to which we have already alluded and to which we will revert shortly is also relevant to whether there are exceptional circumstances. Leaving that issue aside, we accept that if the case is looked at solely in terms of s 49 and the policies to which it was intended to give effect, it might appear that the exceptional circumstances test has not been met. That, however, is not conclusive, as we must also address the case in terms of ss 25 and 5 of the New Zealand Bill of Rights Act.

[64] The limitation of defences or evidence which might otherwise be available to a defendant is not necessarily inconsistent with s 25 or, if it is, may be able to be justified under s 5. For instance, the definition of an offence in terms which make it clear that absence of mens rea is not a defence is not inconsistent with s 25. A defendant has a right to advance only defences which are recognised by law. Nor is it necessarily inconsistent with s 25 for the legislature to permit some factual issues to be proved conclusively by certificate (as is the case with offences involving alcohol and driving) or to place limitations on evidence which a defendant may wish to adduce (for instance along the lines of s 44 of the Evidence Act which we will discuss later). We do not see s 25 as automatically trumping admissibility rules merely because they may operate otherwise than in the best interests of a defendant. As well, although a statutory provision reversing the onus of proof is necessarily inconsistent with the text of s 25(c) of the New Zealand Bill of Rights Act, such a provision may nonetheless be justified under s 5, as is apparent from Blanchard J's

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81 *Morton* (Conviction appeal), above n 2, at [140].

judgment in *R v Hansen*.[82] It follows from all of this that we consider that when s 25 is read with s 5, there is some flexibility to the fair trial standards which it stipulates.

[65] Against this background we consider that in many circumstances – indeed probably in most circumstances – s 49(1) will not operate in a way which is inconsistent with ss 25 and 5 of the New Zealand Bill of Rights Act. In particular:

(a) We do not accept that the exceptional circumstances test is necessarily satisfied whenever the prior conviction bears on the conduct of the defendant in connection with the offence. From the examples given by the Law Commission, which, as we have noted, may have been provided with *Hogan* in mind, the Law Commission did not see this consideration as avoiding the application of the presumptive provision they proposed. If there is a conviction for attempted murder and the victim later dies, we think it likely that such conviction could be used to establish conclusively that the defendant had attacked the victim with murderous intent and had not acted in self-defence.

(b) Nor is it critical that the person previously convicted was not the defendant. The legislative history to s 49 shows that it was always envisaged that in cases involving receiving or of being an accessory, proof of a prior conviction of a third party (for instance for theft in the case of receiving) may be used to prove the commission of that offence.

[66] Despite all the considerations we have just mentioned, we are discomforted by what would be entailed by a dismissal of the appeal. The appellant is entitled to defend the charges of rape which he faces. He cannot practically be precluded from giving evidence if he wishes to do so. As we have already acknowledged, it would be open to him to give evidence in general terms to the effect that he believed that the complainant consented and that he had reasonable grounds for that belief arising out of the complainant's behaviour. Difficulties would arise very quickly once he attempted, or was challenged, to give particulars of the complainant's behaviour

[82] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [82]–[83].

which induced him to believe that she was consenting. This is because it would become apparent that what he was really saying is that he believed that she was consenting and had reasonable grounds to do so only because she did consent. If the application of s 49(1) is carried on to its logical conclusion, the Judge would (a) stop the appellant's evidence at that point; (b) stop any other evidence adduced by the appellant which was to the same effect; and (c) tell the jury that because the convictions conclusively established a lack of consent, they must reject the defendant's evidence to the contrary (and any other evidence to the same effect). This would be tantamount to a direction to convict. As well, the whole process would give rise to acute trial management issues. Constant vigilance would be required of the Judge. The flow of evidence would be disrupted. As well, the jury would be entitled to wonder why evidence was permitted to be called if they were to be directed to disregard it.

[67] Such a course of action would involve the taking away from the jury of a defence which is not directly precluded by s 49. And it would be based on the convictions of third parties. We can illustrate the significance of these points by reference to the attempted murder/murder case previously postulated. In that situation, the prior conviction will be that of the defendant. The effect of s 49 would be to exclude defences of lack of murderous intent and self-defence. But such exclusion would be direct and not collateral and we do not see s 25(e) of the New Zealand Bill of Rights Act as conferring a right to advance a defence which is precluded by law. Here, however, there is no exclusion of the defence of belief in consent on reasonable grounds. Rather the Crown is inviting us to exercise an evaluative function – as to whether there are exceptional circumstances – so as to preclude the practical advancement of that defence.

[68] The absence of a detailed explanation for the form in which s 49 was enacted makes it impossible for us to assess whether such practical preclusion of a defence was within the legislative purpose. Given that such a result would not be arrived in any other like jurisdiction and was not adverted to in any of the legislative materials, we suspect not. In light of these considerations and the practical reality that on the Crown argument the defendant will not be able to present a defence, we are of the view that the exceptional circumstances test is satisfied. Such complete elimination

of the practical ability to advance a defence which is formally available to a defendant goes beyond what we consider can be justified under s 5.

[69] Accordingly we consider that the appeal should be allowed and s 49(2) applied so as to permit the appellant to put in issue at his retrial the question whether the complainant consented. To be more specific, we are of the view that permission should be given under s 49(2)(a) as should a direction under s 49(2)(b). We would not impose any restrictions on the defence evidence which may be called. In the case of retraction and inconsistent conduct evidence this approach is predicated on our view that a s 49(2)(b) direction should be given. As that is a minority view and given that the evidence relates to subsequent events and is at best only very indirectly material – if material at all – to what the appellant may have thought on the night we are of the view that on the approach proposed by the Chief Justice which we adopt, permission to call this evidence must be declined.

Some concluding comments as to s 49

[70] Section 49 has the potential to produce effects which we think were not envisaged by those responsible for its drafting. Say a defendant gives evidence at trial denying guilt but is nonetheless found guilty, a strict application of s 49 would mean that there would be no defence to a subsequent charge of perjury. On the same approach, the co-defendants here would have no defence if prosecuted for perjury in relation to their evidence at the trial before Whata J. In cases in which a jury agrees as to some and disagrees as to other counts, s 49(1), if applied strictly may well impose significant strictures on the ability of the defendant to give coherent evidence at a retrial in relation to the remaining counts. The exceptional circumstances test may prove not to be well-adapted to address the range of problems which will arise, if reliance on s 49 becomes routine. For these reasons we are of the view that s 49 warrants reconsideration by the Law Commission. In the meantime we can see no alternative but to determine s 49's application on a case by case basis. As is apparent, the facts of this case are very particular and this judgment should be read as providing only limited general assistance.

[71] We acknowledge that there is much force in the comments made by the Court of Appeal as to why it is undesirable for the issue of consent to be further re-litigated. It is, for instance, not fair to the complainant that she should be required to give evidence for a fourth time. It is far from satisfactory that the appellant (and indirectly the co-defendants) should be able to re-litigate the issue of consent using a strategy (that is giving evidence) which they could have, but did not, adopt at the first trial. If the appellant is acquitted, the co-defendants can be expected to rely on the not guilty verdicts as impugning the safety of their own convictions.

[72] By way of response to those concerns, we think it right to emphasise that they are very much a function of the unfortunate procedural history to which we have referred. The fairness of the first trial and the reality that the appellant's conviction appeal ought not to have been allowed do not justify a retrial which, in the sense envisaged by ss 25 and 5 of the New Zealand Bill of Rights Act, would be unfair.

Sexual experience and reputation evidence

[73] Section 44 of the Evidence Act provides:

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
>
> (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
>
> (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
>
> (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).
>
> (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

(6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

[74] The appellant wishes to call evidence as to the complainant having engaged in group sexual activities as follows:

(a) Some time (at least a year) prior to the offending, there was sexual activity in the back of a van. The details proffered in relation to the nature of activity and who participated are not consistent. One or more of the co-defendants may have been present.

(b) After the van incident but prior to the offending, there was an incident at the house of one of the co-defendants with whom the complainant is said to have had oral sex with other men present. At the time the complainant was in a relationship with that co-defendant.

(c) An incident four months after the offending in which there was unspecified group sex. On one of the accounts, one of the participants was the brother of one of the co-defendants. This incident was subject to evidence in the Court of Appeal on the conviction appeal.

(d) Evidence that the complainant had texted a man on numerous occasions asking him over for sex.

(e) Evidence that the complainant had had sex with another man and had told him that she had had sex with more than one person earlier that night.

[75] It will be noted that none of the sexual activity referred to involved the appellant. The appellant wished to adduce evidence that he had been told of some of the incidents as relevant to whether he may reasonably have believed that the complainant was consenting. But, in the particular context of this case such evidence – that is what other people had to say to him about the complainant – is simply evidence as to the complainant's reputation and is excluded absolutely by s 44(2). To the extent to which the incidents in question involved sexual activity

with a co-defendant for the purposes of s 44(5), evidence about that activity is not excluded by s 44(1). Such evidence, however, would only be admissible if relevant.

[76] We see none of the evidence identified in [74](a), (c), (d) and (e) as admissible. That the complainant may, on other occasions, have engaged in sexual activity with more than one man in the respects suggested does not sufficiently bear on the question whether she consented to sex with the appellant's co-defendants on the night of the offending to meet the heightened relevance test under s 44(1).

[77] The evidence referred to in [74](b) involves conduct with one of the co-defendants. That the complainant had had a sexual relationship with that co-defendant is a background factor which, on the case which the appellant wishes to advance, is material to, and in part explains, the particular course which he says events took. So too is the evidence that the complainant engaged in oral sex with this man with other men present. We would give permission for this evidence to be adduced. In both respects the Chief Justice concurs.

The orders of the Court

[78] On our preferred approach, permission under s 49(2)(a) and a direction under s 49(2)(b) should be given. This is on the basis that we consider that the appellant, as part of his entitlement to a fair trial, should be able to advance a defence of belief in consent on reasonable grounds even though it is likely to rest on the proposition that he believed that the complainant consented because she did consent. We consider that his fair trial entitlement is best secured, and difficult trial management issues (including a possible requirement to give explanations to the jury which the jury may struggle to understand and comply with) are most easily avoided if there is a direction under s 49(2)(b).

[79] One of our concerns is that in the absence of a s 49(2)(b) direction there is the possibility that the Judge would feel obliged to direct the jury that s 49(1) has the consequence that they must reject the narratives of the appellant and co-defendant. Another and related concern is that in the absence of s 49(2)(b) direction, evidence of the appellant and co-defendants indicative of consent on the part of the complainant would be inadmissible as inconsistent with the convictions.

[80] Elias CJ does not accept that the absence of a s 49(2)(b) direction will have the consequences just adverted to (in [79]). As well, she is not as troubled as we are by the trial management issues which we think are likely to arise. That said, however, her general approach is distinctly closer to our approach than that proposed by Glazebrook and Arnold JJ. We (that is including the Chief Justice) agree that the defendant and co-defendants should be permitted to give in evidence their narratives as to what happened on the night of the offending and that the appellant is entitled to have his defence of belief in consent on reasonable grounds addressed on the basis of, amongst other things, that evidence. Underpinning this shared view is some common ground as to the fair trial entitlements of the appellant. For these reasons, the pragmatic solution to the outcome of the case is to for us to adopt, on what we see as a second-best basis, the approach that she proposes.

[81] This means that the convictions of the co-defendants will establish conclusively that the co-defendants raped the complainant (ie she did not consent to the sexual activity with them and they did not reasonably believe she did) and the Judge will have to explain this to the jury. On the other hand, the Judge is not required to tell the jury that those convictions mean that the narratives of the appellant and the co-defendants must be rejected. The appellant's defence that he reasonably believed the complainant consented to the sexual activity with the co-defendants will have to be left to the jury on that basis so that if the jury are left with the view that there is a reasonable possibility that the appellant believed on reasonable grounds that the complainant consented, they will have to acquit.

[82] In the result the formal orders of the Court are:

(a) The appeal is allowed.

(b) Permission under s 49(2)(a) of the Evidence Act 2006 is given to the appellant to adduce evidence from himself and the co-defendants in which they may give their accounts of their interactions with the complainant on the night of the offending and as to the prior sexual relationship of one of the co-defendants with the complainant.

(c) Permission is refused in respect of the recantation and inconsistent conduct evidence and the evidence referred to in [74] (other than that identified in [77]).

(d) There is no direction under s 49(2)(b).

ELIAS CJ

[83] The appellant is charged that he aided and abetted four other men in the gang rape of a single complainant and was party to a common purpose of rape.[83] The four other men have been convicted as principals. The Crown has been granted leave to produce certificates of their convictions at the appellant's trial as a party.[84] Under s 49 of the Evidence Act 2006, their convictions are conclusive as to their commission of the offence of rape by the principals, subject to relaxation permitted by the judge in "exceptional circumstances".

[84] The appeal is against a pre-trial ruling by Courtney J,[85] affirmed by the Court of Appeal,[86] declining the appellant's applications under s 49(2)(b) that the issue whether the principals committed rape should be determined without reference to the "conclusive proof" of the commission of the offence provided for by s 49(1) when evidence of a conviction is given in evidence. The complainant contends that the ruling effectively deprives him of the opportunity to put the Crown to proof of the principal offence in respect of which he is charged as a party and deprives him of the opportunity to call evidence to challenge its commission. He says this is contrary to the presumption of innocence. He also argues that the ruling makes it difficult for him to advance his own reasonable belief that the complainant consented to the sexual contact (a matter not determined by the convictions of the principals), since the evidence on which he relies for his reasonable belief is evidence of the complainant's behaviour which suggests that she had consented to the sexual activity.

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83 Under ss 66(1)(b),(c), 66(2), 128(1)(a) and 128(2) of the Crimes Act 1961.
84 *R v Morton* [2014] NZHC 2178 (Clifford J).
85 *R v Morton* [2015] NZHC 990 (Courtney J).
86 *Morton v R* [2015] NZCA 322 (White, Venning and Williams JJ).

[85] The unfortunate procedural history of the matter is described in the reasons of William Young and O'Regan JJ.[87] The four principals were each found guilty at trial of rape but the appellant, who had also been charged as a principal, was discharged.[88] The four convicted principals had also been charged with the appellant as parties to the rapes committed by the other men. All, including the appellant, were convicted at trial of being parties to the rapes in which each was not the principal offender. The appeals by the principals against their convictions for rape have been dismissed by the Court of Appeal.[89] The Court of Appeal rejected new evidence tendered at the appeal of retraction of the complainant's allegation of absence of consent, on the basis that the evidence by two witnesses was not credible.[90] The convictions of the appellant and the principals as parties to the rapes committed by the other men were however overturned by the Court of Appeal. New trials were ordered on these charges. The Crown has since elected not to seek retrial of the four convicted principals on the charges that they were parties to the rapes committed by the others. They have each been sentenced to lengthy periods of imprisonment on the charges of rape of which they were convicted as principals. The Crown is however proceeding with the charges that the appellant is guilty as a party to the rapes for which the other men have been convicted as principals.

[86] Following the ruling of Courtney J and dismissal of an appeal against the ruling to the Court of Appeal, but before release of the Court of Appeal's reasons, the trial of the appellant as a party began before Whata J. The jury was however discharged before verdict on the application of the Crown because the three convicted principals gave evidence to the effect that the complainant had consented inconsistently with the ruling that such evidence was not admissible.[91]

[87] The present appeal is brought from the judgment of the Court of Appeal upholding the ruling of Courtney J.[92] It seeks a determination by this Court that at his trial as a party the appellant may lead evidence inconsistent with the convictions of the principals to show that the complainant consented to the sexual activity. The

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87 See above at [16]–[34].
88 *R v Weenink* [2012] NZHC 2724 (Asher J).
89 *Morton v R* [2013] NZCA 667 (White, Venning and Andrews JJ).
90 At [114]–[116]; discussed further by William Young and O'Regan JJ at [20] above.
91 *R v Morton* [2015] NZHC 1516 (Whata J).
92 *Morton v R* [2015] NZCA 322.

evidence the appellant proposes to call includes the evidence of the convicted principals. He also proposes to call the two witnesses whose evidence that the complainant retracted her allegations that the sexual activity had not been consensual was rejected by the Court of Appeal as not credible for the purposes of the appeals against conviction of the principals, as well as further witnesses with similar testimony.

[88] The appellant also appeals rulings declining his applications for leave to offer evidence as to the complainant's sexual experience, including with one of the convicted principals. Some of this evidence is relevant to his reasonable belief that the complainant consented to the sexual activity. I agree with the reasons given by William Young and O'Regan JJ for concluding that the appeal must be allowed in part on this point and the evidence relating to the complainant's prior sexual experience with the convicted principal ruled admissible under s 44 of the Evidence Act.[93] I add no additional reasons of my own. I write separately on the application of s 49 only.

[89] Although the history of the matter illustrates some difficulties in application of s 49, I do not think it affects the matters of principle and statutory construction we must determine. They turn on application of s 49 in a context where the commission of the offence of rape is an element in the party charge faced by the appellant and where evidence bearing on the distinct issues for trial not affected by the conviction of the principals (participation by the appellant and his reasonable belief in the consent of the complainant) may overlap with the issue of the complainant's actual consent which, in the absence of direction under s 49(2)(b), will be conclusively determined by the proof of the principals' convictions .

Proof of convictions in criminal proceedings

[90] Section 49 of the Evidence Act is concerned with proof of convictions in criminal proceedings. It provides:

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[93] See above at [76]–[77].

> **49 Conviction as evidence in criminal proceedings**
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> (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
>
> (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances,—
>
> (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
>
> (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
>
> (3) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the Judge of the purpose for which the evidence is to be offered.

[91] The section provides a convenient way of proving in criminal proceedings the commission of an offence which has already been established by legal process to the criminal standard of proof.[94] A policy of s 49(1) is to prevent the criminal justice system being vexed by collateral challenges to concluded determinations of criminal responsibility, with potentially inconsistent outcomes. What constitutes "exceptional circumstances" under s 49(2) is to be assessed against the text and purpose of s 49(1) itself. It is not a free-standing standard.

[92] The roots of s 49(1) lie in the inconvenience and vexation caused by the approach formerly taken in civil proceedings by which a plaintiff was required to prove the commission of an offence where relevant to the cause of action, even following criminal conviction.[95] That approach in civil proceedings was rejected for New Zealand law in *Jorgensen v News Media (Auckland) Ltd*[96] and subsequently by s 23 of the Evidence Amendment Act (No 2) 1980. Section 49 resolves doubt as to whether the same approach applied to proof of the fact that someone had committed an offence in criminal, rather than civil, proceedings.

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94 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Volume 1, 1999) at [233].

95 *Hollington v F Hewthorn and Co Ltd* [1943] 1 KB 587 (CA).

96 *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 (CA).

[93] While s 49(1) makes proof of conviction in subsequent criminal proceedings conclusive evidence that the person convicted committed the offence, s 49(2) allows the judge to ease the straitjacket of conclusiveness by permitting a party, "in exceptional circumstances", to call evidence "tending to prove that the person convicted did not commit the offence", despite proof of the conviction. Additionally, subsection (2)(b) permits a judge, where "satisfied that it is appropriate to do so", to direct that the issue of whether the convicted person committed the offence be determined in the proceeding, "without reference to [subsection (1)]". Since s 49(2) applies only if proof of a conviction is given in evidence, the direction under s 49(2)(b) to determine the commission of the offence "without reference to that subsection" allows the conviction to be taken into account but means that it is not conclusive.

[94] It should be noted that s 49 is a provision with general effect which applies in a wide range of circumstances. Its use is not confined to cases like the present one where the commission of the offence proved by the conviction is itself an element requiring proof in the criminal proceedings on foot. Proof of convictions which are unrelated in that way may, for example, be evidence of propensity or lack of veracity which is relevant to the current proceedings without constituting an element of the offence that must be proved.

[95] I do not accept that the terms of s 49 are necessarily more stringent in application than similar finality provisions in other jurisdictions which put the onus of proof on a party wishing to show that the person convicted did not commit the offence.[97] Section 49(2) provides a dispensing power to the judge where modification of the conclusiveness provided for in subsection (1) is appropriate in exceptional circumstances.

[96] The effect of a direction under s 49(2)(b) is that the conviction is not treated as "conclusive proof", so that the issue whether the person convicted committed the offence may be determined by the trier of fact in the proceedings. If the fact that the person convicted committed the offence is an element of the offence being tried (as, for example, theft is an element where the charge is receiving), proof of the offence

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[97] Compare William Young and O'Regan JJ at [44] and [57].

to the criminal standard will continue to lie with the Crown when the general rule in s 49(1) is relaxed by the judge under s 49(2)(b) "in exceptional circumstances".

[97] The effect of permission under s 49(2)(a) is less extreme. The conviction remains conclusive that the person convicted committed the offence but contradictory evidence, if otherwise relevant in the proceedings, may be offered despite the fact that it "tends" to prove that the person convicted did not commit the offence.

[98] Section 49 is concerned with proof of issues in the proceedings. Evidence which is relevant to those issues is admissible without any permission under s 49(2) even if it has already been traversed in an earlier trial or is part of a common "narrative", as long as it is not offered in order to prove that the person convicted did not commit the offence or as long as the evidence does not "tend" to prove that the person convicted did not commit the offence. Where the commission of an offence for which a person has been convicted is an element in the charge for trial (as where the person being tried is not charged as the principal), putting the commission of the offence in issue requires direction under s 49(2)(b). Where the evidence is relevant to an issue in the trial which does not entail challenge to the conviction but "tends" to prove that the person convicted did not commit the offence, the judge must first give permission for it to be called under s 49(2)(a).

[99] Under s 49(3), the person seeking to prove a conviction is required to inform the judge of "the purpose for which the evidence is to be offered", making it clear that s 49 is concerned with the purpose for which evidence of conviction is put forward. Equally, I consider that in considering the exceptions under s 49(2), the starting point is the purpose for which evidence tending to contradict a conviction or seeking directly to challenge the conviction is called.

Application of s 49 to the appeal

[100] In the present case, the commission of the crime of rape is an element of the charge that the appellant was a party to it. Proof of the convictions of the principals under s 49(1) makes it unnecessary for the Crown to prove in the trial of the appellant commission of the crime by the principals, as would otherwise be required

when proceeding against a party to the crime under s 66(1) and s 66(2) of the Crimes Act 1961. Subject to a direction under s 49(2)(b) of the Evidence Act, the convictions are conclusive proof that the principals committed the crime of rape, the essential elements of which are that the person convicted sexually penetrated the complainant without her consent and without the person believing on reasonable grounds that she was consenting.[98] If no direction under s 49(2)(b) is given at the trial of the appellant as a party, the elements of rape will be conclusively established by proof of the convictions of the principals.

[101] The additional elements the Crown will have to prove against the appellant are that he participated (making him a party under s 66 of the Crimes Act) and that he himself had no reasonable belief at the time that the complainant was consenting. Neither of these elements is proved by the convictions of the principals. There is no necessary inconsistency in conviction of the principal and acquittal of a party on the basis that the party, but not the principal, believed on reasonable grounds that the complainant was consenting. That is because it is the subjective, but objectively reasonable, belief of the appellant in the consent of the complainant that must be excluded by the Crown at his trial. Such belief and the basis on which it is reasonably held may well differ between those convicted as principals and the appellant as a party.

[102] The principal difficulty in the present case arises in relation to the distinct elements that must be proved at trial against the appellant because there is overlap in the evidence the appellant proposes to offer at his trial relating to his reasonable belief in the consent of the complainant and the evidence earlier called and necessarily rejected at the trial of the principals that the complainant had consented. The evidence to be called therefore "tends" to prove that the convicted principals did not commit the offence of which each was convicted, whether or not it is proffered for that purpose as well as to show that the appellant reasonably believed the complainant was consenting.

[103] The appellant's reasonable belief in the complainant's consent was not determined by the conviction of the principals, but because of the overlap and its

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[98] Crimes Act 1961, s 128(2).

tendency to prove that the complainant consented (a matter essential to the conviction of the principals), the evidence requires the permission of the Judge under s 49(2)(a) even if the conclusiveness of the convictions is not directly challenged.

[104] The evidence ruling in the High Court and affirmed by the Court of Appeal declined the application under s 49(2)(b). For the reasons given below at [106] to [108], I agree with that result and would dismiss the appeal against the failure to give a direction that the commission of the offences of rapes by the principals be determined without reference to the conclusiveness of their convictions under s 49(1). I consider however that the Courts below failed to deal with the effect of the inevitable overlap in this case between evidence relevant to the complainant's consent at the trial of the principals but also relevant to the issue, not determined in the conviction of the principals, that the appellant believed on reasonable grounds that she was consenting. I am of the view that it was necessary for permission to be given under s 49(2)(a) to permit the evidence to be given despite its tendency to undermine the convictions. The overlap made the circumstances exceptional, as is further discussed below at [112].

[105] Absence of permission under s 49(2)(a) put Whata J in a difficult position at the abandoned trial of the appellant as a party. The failure to address the consequences of the overlap in the ruling on admissibility meant that the evidence inevitably collided with it. The option under s 49(2)(a) of admitting the evidence as relevant to the issues not determined by the convictions while leaving the conclusiveness of the convictions in place was not identified. As is further explained at [109] to [114], I would allow the appeal to the extent of granting permission under s 49(2)(a) to permit the appellant at trial to offer evidence relevant to the question of his reasonable belief in the complainant's consent, despite its tendency also to prove that the complainant was in fact consenting.

Direction under s 49(2)(b)

[106] On the basis of the "conclusive proof" of the principal's convictions, the appellant cannot put the Crown to further proof of the principal offence, including the absence of consent by the complainant, because that is conclusively established

unless a direction is given under s 49(2)(b). I am of the view that a direction under s 49(2)(b) is required only if it is appropriate, notwithstanding the policy of s 49(1), for the convictions to be put in issue in the present proceedings.

[107] I consider that no basis for a direction under s 49(2)(b) has been made out. I agree with the Courts below that no exceptional circumstances have been shown that would justify permission under s 49(2)(b), putting in issue the commission of the offences of rape. The fact that the commission of the offence of rape is an element of the offence with which the appellant is charged as a party does not give rise to exceptional circumstances in itself. The commission of the offence has been established by jury verdict. No basis for doubting the convictions has been put forward, beyond the evidence of retraction considered and rejected by the Court of Appeal in considering the appeals against conviction by the principals (and also rejected as unreliable by Whata J in a ruling at the abandoned trial).[99] Permitting reconsideration of the commission of the offences of rape by the principals is contrary to the policy of s 49(1) in the absence of circumstances raising any doubt as to the correctness of the verdicts or questions of trial fairness. The Court of Appeal decision dismissing the appeals by the principals against their convictions rejected any such suggestion and no further argument not considered in the Court of Appeal is put forward in the present appeal to raise doubt as to the safety of the convictions.

[108] I do not agree that, in application of s 49, the court must look through the purpose for which the evidence is tendered – its relevance to a fact in issue – to the truth or falsity of the "narrative" of the accused and his witnesses (here, the convicted principals),[100] at least when it moves beyond the general to describe behaviour consistent with actual consent. I do not consider that in the absence of s 49(2)(b) direction, the jury may have to be told that the convictions conclusively establish the falsity of "the narrative" of the appellant and co-defendants. Rather, in the absence of a s 49(2)(b) direction but if permission is granted for the overlap evidence to be adduced despite its "tendency" to disprove the convictions, the jury will be told that the convictions conclusively establish that the principals penetrated the complainant without her consent and without their reasonable belief in her

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99 *R v Morton* [2015] NZHC 1385 at [21]–[25].

100 Compare William Young and O'Regan JJ above at [12] and [66].

consent. The issues for the jury will not include the commission of the offences of which the principals have been convicted, but rather the participation of the appellant and his reasonable belief in the complainant's consent, elements not conclusively established under s 49(1) by proof of the convictions of the principals.

Permission under s 49(2)(a)

[109] Restricting relevant evidence on the matters not determined by the convictions of the principals would be inconsistent with the presumption of innocence recognised as a fundamental right by s 25 of the New Zealand Bill of Rights Act 1990 and the right of the defendant in criminal proceedings to offer an effective defence, recognised both by s 25 of the New Zealand Bill of Rights Act and by s 8(2) of the Evidence Act. It would also be inconsistent with the general principles on which the Evidence Act is based that the fundamental rights contained in the New Zealand Bill of Rights Act are to be respected and that all relevant evidence is admissible.[101]

[110] The convictions of the principals, once proved in evidence, necessarily entail exclusion of the complainant's consent. But where reasonable belief in consent of a party is in issue, the evidence bearing on reasonable belief may also be evidence bearing on whether the complainant consented. The way in which the complainant behaved and what was said at the time may equally be relevant to both issues. Cases of such overlap in evidence are not uncommon. Where evidence goes to the accused's reasonable belief in consent (an issue not determined by the conviction of the principal party), the terms of s 49(1) and its policy do not in my view support exclusion of the evidence.

[111] Permission under s 49(2)(a) is necessary if the evidence sought to be adduced for the appellant "tends" to contradict an essential element in the offence of which the principals have been convicted. It is the case that the evidence the appellant wishes to call going to his reasonable belief in consent is evidence that was relied on in the earlier trial as relevant to the complainant's actual consent as well as to the reasonable belief of the other participants in her consent (whether as principals or

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[101] Evidence Act 2006, ss 6(b) and 7.

parties). It is clear from the evidence permitted to be called before Whata J in the trial that was eventually abandoned that the evidence relied on by the appellant is evidence which is also consistent with the complainant being a willing participant.

[112] In my view the appellant cannot properly be prevented from calling that evidence. It is critical for the basis of his belief that the complainant was consenting. That issue has not been determined by the conviction of the principals. That is a circumstance which is exceptional to the policy of s 49(1) and requires permission to be given under s 49(2)(a), consistently with the presumption of innocence and the need to ensure fair trial. It is for the Judge to explain to the jury that the evidence of how the complainant behaved and what she said, if accepted, was relevant to what the appellant believed, not whether the complainant was, in truth, consenting. The question of actual consent has been conclusively determined by the jury verdict.

[113] Evidence is always directed to proof of issues in a proceeding. It is admissible only if relevant to a matter in issue. Relevance, as s 7(3) of the Act makes clear, turns on "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding". Here, the evidence of the complainant's behaviour at the time was evidence with a tendency to prove whether the appellant had a basis for a reasonable belief that she was consenting. That is a critical issue and necessarily "of consequence to the determination of the proceeding". It is not an issue determined by the convictions of the principals.

[114] I consider it necessary to permit evidence to be led which is relevant to the reasonable belief of the accused in the consent of the complainant, even if it tends also to suggest that she consented. I would set no restrictions on the evidence, other than its relevance to the issue of the appellant's reasonable belief. The policy of s 49(1) is not undermined by such permission because the evidence is directed at an issue not determined by the conviction of the principals. The circumstances are therefore properly treated as exceptional. It would be inconsistent with the principles of criminal justice and the New Zealand Bill of Rights Act to prevent such evidence being called.

Conclusion

[115] While I agree with much in the reasons of William Young and O'Regan JJ, I differ from them in being of the view that there is no occasion to make a direction under s 49(2)(b), putting in issue whether the principals committed the offences. I agree with their assessment that, for reasons of fair trial (as well as because the policy of s 49(1) is not engaged), there are exceptional circumstances which mean that it would be contrary to the interests of justice not to grant permission under s 49(2)(a) to call evidence relevant to the accused's belief in the complainant's consent, even though such evidence may have a tendency to suggest that she consented in fact. In my view, the jury will have to be instructed about the purpose for which the evidence is offered – his belief, not her consent. On that approach, evidence called by the appellant at trial, if relevant to his reasonable belief in the complainant's consent, is not confined to what is "general"[102] and does not make it necessary to give a direction under s 49(2)(b). Any trial management complexities are confined to explaining to the jury the relevance of the evidence. They do not justify opening up the conclusiveness of the verdict against the principals where no proper basis for doing so has been raised.

[116] The fact that the principals did not commit the offence of rape is in issue at the appellant's trial only if he is permitted by direction under s 49(2)(b) to put the prosecution to proof on the commission of the offence by the convicted principal as an element in the offence with which he is charged as a party. For the reasons given, I find no proper basis for considering that it is appropriate to make a direction under s 49(2)(b) which would enable the question of the commission of the offence by the principals to be determined again at the appellant's trial as a party.

[117] The policy in s 49(1) is not, however, engaged if the evidence the appellant wishes to call is directed at the issue of his reasonable belief in the complainant's consent, a matter not determined by the conviction of the principals. Since exclusion of his reasonable belief in the complainant's consent is an element of the offence with which he is charged, the presumption of innocence and fair trial requirements mean that there are exceptional circumstances which require the Judge to grant

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[102] Compare William Young and O' Regan JJ at [66] above.

consent to the admission of evidence relevant to his belief in the complainant's consent, even though the evidence may tend to prove that the principals did not commit the offence. Permission under s 49(2)(a) admits relevant evidence while leaving proof of the convictions as conclusive evidence of the commission of the offence by the principals.

[118] I would allow the appeal in part. I would allow the appeal on the s 44 grounds for the reasons given by William Young and O'Regan JJ but only to the extent they permit.[103] I would grant the appellant permission under s 49(2)(a) to offer evidence relevant to his reasonable belief in the complainant's consent, notwithstanding that it may also tend to prove that the principals did not commit the offence. I would affirm the decisions of the lower Courts declining to make a direction under s 49(2)(b) that the issue whether the principals committed the offence be determined without reference to s 49(1). I agree with the orders proposed by William Young and O'Regan JJ.

GLAZEBROOK AND ARNOLD JJ
(Given by Arnold J)

[119] The appellant is facing a retrial on four charges alleging that he was a party to rapes committed by four others (the offenders) with whom he initially stood trial. The appellant and the four offenders were all charged with rape of the complainant and with being parties to rapes committed by the others. The offenders were convicted on all counts. However, the appellant was convicted only on the party count, having been discharged under s 347 of the Crimes Act 1961 on the charge of rape as a principal due to insufficiency of evidence. On appeal, the offenders' convictions for rape were upheld, but their convictions as parties were quashed, as was that of the appellant.[104] Retrials were ordered on the party charges, but the Crown has decided to proceed only against the appellant.

[120] Section 49(1) of the Evidence Act 2006 provides that proof that a person has been convicted of an offence is conclusive proof that the person committed the

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103 Above at [76]–[77].

104 *Morton v R* [2013] NZCA 667. We agree with William Young and O'Regan JJ that the Court of Appeal was in error in quashing the party convictions.

offence. Under s 49(2), however, where a conviction is proved under s 49(1), a judge may "in exceptional circumstances":

(a) permit a party to offer evidence that tends to show that the convicted person did not commit the offence for which he or she was convicted (s 49(2)(a)); and

(b) direct that the issue whether the person committed the offence be determined without reference to s 49(1) "if satisfied that it is appropriate to do so" (s 49(2)(b)).

The fact that a party is given permission under s 49(2)(a) to offer evidence tending to show that the convicted person did not commit the relevant offence does not necessarily mean that the judge should give a direction under s 49(2)(b). This is clear from the language and structure of s 49(2).

[121] In the present case the Crown has been granted leave to produce certificates of the offenders' convictions at the appellant's retrial on the party count.[105] There has been no appeal from that decision. The appellant wishes to defend the charge on the basis that he had reasonable grounds to believe that the complainant was consenting to the sexual activity with the offenders. He is, of course, entitled to raise that defence.

[122] However, he also wishes to call evidence to the effect that the complainant consented to have sexual intercourse with the offenders, so that they were not in fact guilty of raping her. To do that he wishes to call evidence from the offenders "setting out the events on the night of the alleged rape, including the complainant's behaviour and the fact that she consented". In addition, he wishes to call other evidence (1) to the effect that the complainant's allegations against the offenders were false and (2) about the complainant's alleged participation in group sex activities, both before and after the offending.

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[105] *R v Morton* [2014] NZHC 2178.

[123] Obviously, the evidence which the appellant wishes to lead tends to prove that the offenders did not commit the offences of which they were convicted, so that the permission of the judge under s 49(2) is required. Before the judge can give permission, he or she must determine that there are "exceptional circumstances". William Young and O'Regan JJ have concluded that there are exceptional circumstances in this case. They consider that s 49(2) must be applied so as to permit the appellant to put in issue at his retrial the question whether the complainant consented to sexual intercourse with the offenders. There are two consequences. Not only must the appellant be given permission to lead the proposed evidence under s 49(2)(a), but the trial judge must also give a direction under s 49(2)(b) that whether or not the offenders raped the complainant should be determined without reference to s 49(1); that is, on the basis that proof of the offenders' convictions (the certificates of conviction) is not conclusive proof that they raped the complainant. On the approach of William Young and O'Regan JJ, then, there would be what is effectively a retrial of whether the offenders were guilty of raping the complainant.

[124] We do not agree that there are exceptional circumstances in the present case. As we see it, the appellant is entitled to give evidence going to his reasonable belief in consent. In explaining why he had a reasonable belief that the complainant was consenting to the sexual activity with the offenders, he will no doubt point to aspects of the complainant's behaviour which led him to that belief. That evidence may have a tendency to indicate that she was consenting given the natural overlap between evidence going to consent and evidence going to reasonable belief in consent in sexual violation cases. But the appellant cannot advance the proposition that the complainant did in fact consent to sexual intercourse with the offenders, or that the offenders had a reasonable belief that the complainant was consenting, by calling the offenders and other witnesses to give evidence directed at those issues rather than directly at his reasonable belief in consent.[106] Those issues have been conclusively determined through court processes and there are no circumstances which justify their re-examination.

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[106] It follows that evidence can be called from other witnesses but only if relevant to Mr Morton's reasonable belief.

[125] Whether there are "exceptional circumstances" must be decided in terms of the particular circumstances of the case and the values at issue. However the test of "exceptional circumstances" in s 49(2) is a high one. The Court of Appeal in the present case identified four policy considerations that underpin the conclusive proof rule in s 49(1) and justify the high test in s 49(2):[107]

(a) The saving of the time and expense that would be involved in re-litigating matters that have already been resolved.

(b) The availability of relevant evidence (the convictions) that is highly probative given the high standard of proof required for conviction of a criminal offence.

(c) The fact that it would be inconsistent with the policy of the criminal law if such evidence were to be excluded given that convictions are a sufficient basis to impose grave penalties.

(d) The need to avoid having the question of a person's guilt or innocence subject to potentially conflicting decisions by different juries.

[126] In a case such as the present, there is a further relevant consideration, namely the position of the victim of the offending. In principle, it is highly undesirable that a victim of sexual offending such as the complainant, who has undergone the ordeal of a trial and subsequent appeal, should again have to confront issues which have been rigorously examined in the earlier proceedings and determined in her favour.[108]

[127] The key issues in the trial of the offenders and the appellant were whether the complainant consented to sexual intercourse with each of the offenders and, if not, whether they had a reasonable belief that she was consenting. As Courtney J said:[109]

> These issues were at the forefront of the defence cases. The defendants' counsel cross-examined the complainant on them, including on the van incident and other incidents of group sex. He closed to the jury on it. It was open to any of the accused, including [the appellant], to give evidence at the

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107 *Morton v R* [2015] NZCA 322 (White, Venning and Williams JJ) at [47]–[48].
108 See *Manukau v R* [2012] NZCA 222 at [15].
109 *R v Morton* [2015] NZHC 990 at [29].

> trial on the issue of consent and of reasonable belief in consent. Had the other men given evidence, [the appellant] could have relied on any exculpatory statements they made regarding consent.

As noted, none of the offenders or the appellant gave evidence, although the appellant and two of the offenders made statements to the police to the effect that the complainant consented to what took place. Nevertheless, the question of whether the complainant consented and whether the offenders had a reasonable belief in consent was squarely in issue at the trial.

[128] Similarly, these issues were to the forefront of the conviction appeal.[110] Among the grounds advanced by all appellants were the following:[111]

(a) there was fresh, credible and cogent evidence available from two further witnesses as to the credibility of the complainant's account of the rapes that affected the safety of their convictions; and

(b) there was credible and cogent medical evidence available from a doctor other than the doctor called at trial regarding the injuries sustained by the complainant that was capable of affecting the safety of the rape convictions.

[129] The Court of Appeal rejected these contentions. For present purposes, the first ground is of particular relevance. Focussing on that, in support of their challenge to the complainant's credibility, the appellants provided affidavits from two witnesses. The complainant provided an affidavit in response (as did a number of other deponents for the Crown). All three were cross-examined before the Court of Appeal. The Court held that the evidence of the two witnesses was not sufficiently credible or reliable to be admitted. The Court described one as an unreliable witness who, as she had herself acknowledged, was "quite prepared to say things about the complainant that were simply untrue".[112] The Court also found the other witness to be unreliable, although by reason of mistake or misunderstanding

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110 *Morton v R*, above n 104.
111 At [82].
112 At [115].

rather than deliberately.[113] By contrast, the Court considered the complainant to be a truthful witness.[114]

[130] Accordingly, in both the trial and the appeal there was a sustained challenge to the complainant's credibility in denying that she consented to have sexual intercourse with the offenders. Both the jury and the Court of Appeal rejected that challenge, with the result that the offenders' convictions for rape have been confirmed. We agree with William Young and O'Regan JJ that if fresh evidence had emerged subsequently which cast real doubt on the validity of the offenders' convictions, that may well constitute "exceptional circumstances" for the purposes of s 49(2).[115] But there is no fresh evidence. The appellant simply wishes to re-run a challenge to the complainant's credibility that has already been run and rejected in proceedings in which he participated.[116] We do not consider that this meets the "exceptional circumstances" requirement.

[131] We accept that in many rape cases evidence in relation to consent and evidence going to reasonable belief in consent will overlap.[117] We also accept that in the particular factual circumstances of this case, the appellant will find it more difficult to establish a defence if he is unable to challenge the finding that the complainant did not in fact consent. But we do not see that as constituting an exceptional circumstance. The purpose of s 49 is to provide that convictions are conclusive in most instances. As a consequence, some defendants will be unable to advance defences that might otherwise have been available to them, particularly in the context of party or other derivative liability. In this case, the appellant will not be permitted to lead evidence which effectively challenges the validity of the offenders'

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113 At [116].

114 At [117].

115 See William Young and O'Regan JJ at [60] above. We differ from Courtney J in this respect: see *R v Morton*, above n 109, at [27].

116 We leave open the question whether the position may be different if the appellant had not participated in the earlier proceedings. It may be that there would be exceptional circumstances if a defendant wished to raise an issue or evidence that had not been considered in the earlier trial.

117 The existence of this overlap suggests an alternative analysis to the one which we prefer. It is that a person in the appellant's position needs the permission of the judge under s 49(2)(a) if he wishes to identify features of the complainant's conduct which are consistent with consent (albeit accepting that she did not consent) and which caused him to have a reasonable belief that she was consenting. Had permission been required, we would have given it, but, as is apparent from our judgment, not a s 49(2)(b) direction.

convictions but may still explain to the jury why it was that he had a reasonable (albeit mistaken) belief that the complainant was consenting and call evidence going to that contention, including evidence of her conduct towards him (some of which may be indicative of consent).

[132] We acknowledge that s 25 of the New Zealand Bill of Rights Act 1990 (NZBORA) is engaged by s 49, especially the right to present a defence (s 25(e)). Although it is arguable that the restriction contained in s 49 is a reasonable limit on the right that can be demonstrably justified in a free and democratic society under s 5 of NZBORA, we agree with the Crown's submission that the meaning of s 49 is clear and that there is no reasonably available alternative meaning[118] – whether there are "exceptional circumstances" must be determined in the particular circumstances of the case but it is not an elastic term capable of different shades of meaning. Accordingly, whether or not the limit can be justified under s 5, we are obliged by s 4 of NZBORA to apply the clear language of s 49(2).

[133] William Young and O'Regan JJ place considerable weight in their reasons on the difficult trial management issues that they say will arise if any restriction is placed on the appellant's ability to lead evidence to the effect that the complainant consented to sexual intercourse with the offenders.[119] These issues relate to management of the trial by the judge in terms of evidence and management of the issues for the jury. We make two points.

[134] First, we do not see the trial management issues as being as difficult as they suggest. In terms of evidence, because of the overlap between evidence going to consent and reasonable belief in consent, the judge will have to allow the defence witnesses, and the appellant in particular, a reasonable degree of latitude. But the offenders are not entitled, through the guise of giving evidence in support of the appellant's reasonable belief in consent, to mount what is in effect an attack on their convictions; nor are other witnesses. The line may not be an easy one to draw, but,

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118 See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

119 See William Young and O'Regan JJ at [66] above.

against the background that a reasonable degree of latitude must be allowed, we think it will be workable.[120]

[135] Turning to the jury, there is in principle no inherent inconsistency between a principal being convicted of rape and an alleged party to his rape being acquitted in a case where the alleged party's mental element is in issue. A jury could plausibly find that a complainant did not consent to sexual intercourse with the principal, and the principal did not have a reasonable belief that she was consenting, but also find that the alleged party did have a reasonable belief that she was consenting. The particular factual circumstances of this case make that outcome less likely, but not, we think, impossible. The jury would simply be instructed that the four offenders have been convicted of raping the complainant and that their convictions establish conclusively that she did not consent to sexual intercourse with them and they did not believe on reasonable grounds that she was consenting. The question for the jury is whether the appellant was a party to the offending by the other four. Given that he admits participation, that depends on whether the Crown has established beyond a reasonable doubt that the appellant did not believe on reasonable grounds that the complainant was consenting. The jury should be instructed to determine that question solely by reference to the evidence they have heard. If there is a reasonable possibility that the appellant did believe on reasonable grounds that the complainant was consenting, the jury must acquit.

[136] Second, we consider that the approach of William Young and O'Regan JJ will pose its own challenges for the jury. On their approach, the jury will have heard evidence that indicates that the convictions were wrongly entered against the four offenders and will have been given a direction by the judge that the convictions are not conclusive proof that the offenders were guilty of raping the complainant. But at the same time they will have certificates of conviction indicating that the four offenders have been convicted of rape. Presumably, the jury will be entitled to consider the certificates alongside other relevant evidence. It is not at all obvious how the jury can be expected to make sense of all this, in particular, the fact that another jury has been satisfied beyond reasonable doubt that the offenders committed rape.

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[120] The latitude to which we have referred applies not only to the defendant but also to the Crown.

[137] In summary, then, we consider that there are no exceptional circumstances justifying the giving of permission under s 49(2)(a). It follows that the question of a direction under s 49(2)(b) does not arise. That said, given the overlap between issues of reasonable belief in consent and the existence of consent we would allow the appellant a reasonable degree of latitude in the way he presents his evidence. Any evidence called in support of his defence must be principally directed to his reasonable belief in consent. The offenders are not entitled to give evidence that the complainant consented to sexual intercourse with them, as the appellant proposes. Nor may the other witnesses be called to say that the complainant's allegations of rape are false, as the appellant also proposes.

[138] As a consequence of our holdings in relation to s 49, it is unnecessary that we address the s 44 issues; although on the approach we take, it is unlikely that any of the proposed evidence would be admissible.

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