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IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2016
[2017] NZSC 145

BETWEEN	CYRUS CHRISTIAN (AKA WILLIAM JOHN TASSELL) Appellant
AND	THE QUEEN Respondent

Hearing:	29 March 2017 Further submissions received 23 June 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	N Levy for Appellant A Markham and M L Wong for Respondent
Judgment:	26 September 2017

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The convictions on counts 4 and 5 are quashed.

C We order a retrial on counts 4 and 5.

D The conviction on count 2 stands.

E We invite submissions on sentence as set out at [78] of the Reasons.

F **An order is made prohibiting publication of the judgment and any part of the proceedings (including the result) in any news media or on the internet or on any other publicly available database until final disposition of the retrial. Publication in a law report or law digest is permitted.**

REASONS

WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

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Introduction

[1] The appellant was convicted after a jury trial of three counts of sexual violation by rape. He was acquitted on one count of indecent assault. He was

sentenced by the trial Judge, Judge Bidois, to a term of imprisonment of 13 and a half years.[1]

[2] The Crown case at the trial was that the appellant had repeatedly raped the complainant during a period when she was living at the same address as he was. He denied any sexual activity occurred between him and the complainant. The trial Judge directed the jury that neither consent nor reasonable belief in consent was in issue and that if they found penetration had occurred their verdict would be guilty.

[3] The appellant appealed against conviction and sentence to the Court of Appeal, but his appeal was dismissed.[2]

[4] There were a number of grounds of appeal in the Court of Appeal, but the ground of relevance in the present appeal relates to the contention of the appellant that the Judge should have directed the jury that they had to be satisfied beyond reasonable doubt that the complainant did not consent to the sexual activity between him and the complainant (if the jury found such activity occurred) and that he did not reasonably believe she did.[3]

Issues and summary of conclusions

[5] The issues that arise and our conclusions on those issues are:

(a) The first issue is whether the Judge erred by not directing the jury on the need to be satisfied that the Crown had proved that the complainant did not consent and that the appellant did not reasonably believe that she did. We conclude that the Judge was in error.

(b) Having concluded that the Judge was in error, it is then necessary to determine whether that error led to a miscarriage of justice. We

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1 *R v Tassell* DC Tauranga CRI-2012-087-1863, 25 July 2014. The appellant was discharged on another count of rape. This was a specific charge relating to the second time the appellant was alleged to have raped the complainant. The complainant's evidence was that she could not remember the occasion specifically.

2 *Christian v R* [2016] NZCA 450 (Stevens, Asher and Williams JJ) [*Christian* (CA)].

3 Leave to appeal was granted by this Court in general terms (whether the Court of Appeal was correct to dismiss the conviction appeal): *Christian v R* [2016] NZSC 170.

conclude that a miscarriage resulted in relation to two of the three charges.

(c) Determining whether a miscarriage occurred requires the Court to determine what constitutes consent in cases of sexual violation. The Court of Appeal concluded that a positive expression of consent is required.[4] We conclude that this overstated the position. While a failure to protest or offer physical resistance does not, of itself, constitute consent and something more is required, that "something more" may be something other than a positive expression of consent.

(d) Having determined that a miscarriage occurred and that two of the convictions must be quashed, it is necessary to determine:

(i) Whether a new trial should be ordered or indecent assault convictions should be substituted. We determine that a new trial should be ordered.

(ii) If any of the convictions remain, what effect on sentence there should be. We seek submissions on that issue.

[6] The determination of this appeal is governed by s 385 of the Crimes Act 1961, as the commencement of the proceedings predated the coming into force of the Criminal Procedure Act 2011.[5]

Facts

[7] At the time of the events leading to the charges against the appellant, he ran a church, founded by him, in a small provincial town. The complainant's mother became a member of the church. When the complainant was aged 13 or 14, she moved to live on the appellant's property in an old house. The appellant slept in a different building on the same property.

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4 *Christian* (CA), above n 2, at [49] and [60].
5 Criminal Procedure Act 2011, s 397.

[8] Three to four weeks after the complainant moved to live in the appellant's property, the first rape occurred. The complainant said she thinks she was about 13. The appellant came into the house in which she was living. She said he first lifted her upper clothing and sucked her breast (this was the basis of count 1, an indecent assault charge on which the appellant was acquitted). The complainant also said the appellant removed her pants and raped her. This was the basis of count 2, a charge of rape. She said she did not say anything to the appellant because she was too scared and did not know what to say. However, she said she did not consent and did not know what the word consent meant.

[9] The other two counts of rape, counts 4 and 5, were representative charges.[6] These charges both related to the period between September 1996 and September 1999 but the complainant's evidence was that the events leading to count 4 happened in the earlier part of that period and those relating to count 5 in the later part.

[10] In relation to count 4, the complainant's evidence was that, while she was living in the house on the appellant's property, he had sex with her repeatedly. She said she did not consent to these encounters.

[11] Count 5 related to a period after the appellant sold his property and purchased a house bus and moved it on to the property of the complainant's mother. The complainant said she "might've been about 14 by then". She lived in the house bus with the appellant and during that period he also had sex with her on a number of occasions without her consent. She said she did not want these sexual encounters to happen, but could not say anything so just said nothing and let him do it. But she said she never once said "yes I wanna have sex".

[12] In late 1999, shortly after the complainant turned 16, her mother became suspicious about what was happening between her and the appellant. The complainant's mother beat her until she confessed to having regular sex with the appellant. Her mother then took her to the police to make a statement about the matter. The appellant was forewarned of this and directed the complainant to tell the

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6 As noted above at n 1, the appellant was discharged on count 3, another specific count of rape.

police that the sexual activity between him and the complainant was consensual. Her evidence was that, when she was interviewed by the police, she said "it" was consensual, but did not make it clear what "it" referred to.

[13] Later, in early November 1999, the appellant arranged for the complainant to see a lawyer and to swear an affidavit in support of an application by the complainant for a protection order against her mother. In that affidavit, the complainant deposed that her mother had had an argument with the appellant over a rumour that the appellant was sleeping with the complainant, but "that is absolutely not true". During cross-examination at the trial, the complainant said that the affidavit was not her own words but what the appellant had told her to say.

[14] In March 2000, the appellant was sentenced to a term of imprisonment on charges involving the possession of drugs. The complainant had no further contact with him after that date, although part of the Crown case against the appellant was evidence that the appellant wrote inculpatory letters to the complainant from prison.

The trial

[15] As mentioned earlier, the defence case at the trial was that none of the sexual encounters ever happened. The appellant told the police when interviewed in November 2012 that it was not true that the complainant had lived with him and he denied that he had ever had sex with her. He also denied authorship of the inculpatory letters. He did not give evidence at the trial.

[16] The Judge directed the jury that the defendant could be found guilty of sexual violation by rape only if the jury were satisfied that:

(a) the defendant penetrated the complainant's vagina with his penis;

(b) the complainant did not consent to the penetration; and

(c) the defendant did not believe, on reasonable grounds, that the complainant consented to the penetration.

[17] However, he then directed the jury that neither consent nor reasonable belief in consent was a live issue. He said:[7]

> The sole issue here, ladies and gentlemen, is whether or not there was penetration. Did it happen or not? The defence do not advance consent or belief in consent. The complainant said she did not consent. The defendant could not have a reasonable belief in consent when he says there was no sexual act that took place. If there was penetration, if the defendant did these things, then your verdict will be guilty. If he did not do them then your verdict will be not guilty.

Court of Appeal decision

[18] The Court of Appeal found that a direction on consent and reasonable belief in consent was required if there was a narrative capable of supporting the possibility of consent or reasonable belief in consent.[8] It concluded there was no such narrative in relation to any of the counts on which the appellant had been convicted.[9] It therefore found that the Judge was not required to direct the jury on consent or reasonable belief in consent in the present case and no miscarriage of justice arose from his failure to do so.

Legal background

[19] Before beginning our analysis, we discuss the statutory context and the cases that were the focus of the argument before us.[10]

Statutory context

[20] Section 128A of the Crimes Act addresses the issue of consent in cases involving allegations of sexual violation. At the time of the offending in the present case, that section provided:[11]

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7 The Judge adopted that approach despite a request by the appellant's trial counsel that the summing up include a direction on reasonable belief in consent.

8 *Christian* (CA), above n 2, at [45].

9 At [61]–[72].

10 There is no statutory definition of consent, but the standard direction to juries is "a true consent, freely given by a person who is in a position to make a rational decision".

11 This version of the section was in force from 1 February 1986 to 19 May 2005.

128A Matters that do not constitute consent to sexual connection

(1) The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of section 128 of this Act.

(2) The following matters do not constitute consent to sexual connection for the purposes of section 128 of this Act:

(a) The fact that a person submits to or acquiesces in sexual connection by reason of—

(i) The actual or threatened application of force to that person or some other person; or

(ii) The fear of the application of force to that person or some other person:

(b) The fact that a person consents to sexual connection by reason of—

(i) A mistake as to the identity of the other person; or

(ii) A mistake as to the nature and quality of the act.

(3) Nothing in this section shall limit the circumstances in which there is no consent to sexual connection for the purposes of section 128 of this Act.

[21] Section 128A was amended in 2005 and now reads as follows:[12]

128A Allowing sexual activity does not amount to consent in some circumstances

(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(2) A person does not consent to sexual activity if he or she allows the activity because of—

(a) force applied to him or her or some other person; or

(b) the threat (express or implied) of the application of force to him or her or some other person; or

(c) the fear of the application of force to him or her or some other person.

(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

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12 Crimes Amendment Act 2005, s 7.

(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

(6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

(7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

(8) This section does not limit the circumstances in which a person does not consent to sexual activity.

(9) For the purposes of this section,—

allows includes acquiesces in, submits to, participates in, and undertakes **sexual activity**, in relation to a person, means—

(a) sexual connection with the person; or

(b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

[22] The complainant's evidence in the present case was to the effect that she did not consent to the sexual encounters she had with the appellant but did not protest or physically resist. This means the principal focus of the analysis of consent and reasonable belief in consent in this appeal is on s 128A(1). In particular, there is an issue as to whether s 128A(1) deals with both consent and reasonable belief in consent or only the former. That issue has been the subject of conflicting statements in earlier cases, which we now discuss.

Ah-Chong v R

[23] In their judgment in *Ah-Chong v R*, McGrath, Glazebrook and Arnold JJ questioned whether passive acquiescence by a complainant was capable of founding a reasonable belief in consent by a perpetrator.[13] They said:

[13] *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445.

> [54] Consider the situation where a person charged with sexual violation argues that he or she honestly believed that the complainant was consenting to sexual intercourse or some other form of sexual connection simply because the complainant was entirely passive and did not protest in any way. The failure to protest could not amount to consent in fact; but could it provide a legitimate basis for an accused's honest belief in consent? It might be said in such a case that the accused's belief was not based on reasonable grounds given that lack of protest cannot, by law, constitute consent, so that the accused could not rely on it. But even if this analysis does apply where the charge is sexual violation, it may not where an accused is charged with indecent assault, because a belief in consent in that context need only be honestly held to provide a defence – the reasonable grounds requirement does not apply.
>
> [55] It is arguable that to allow an honest belief in consent based simply on the complainant's passivity or failure to resist to operate as a defence would undermine significantly the policy that underlies s 128A(1). However, in *R v Tawera* where the complainant had not protested or resisted sexual activity, the Court of Appeal said:[14]
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> > Having read the whole of the relevant evidence … we find it difficult to see how on an objective appraisal it can be said absence of belief in consent on reasonable grounds has been established beyond reasonable doubt. On analysis, there is nothing in the complainant's evidence, the surrounding circumstances, or the appellant's evidence which objectively indicated that the complainant was not consenting … It may be that the jury became unduly concerned about the direction (correctly given) on s 128A and the fact that a failure to protest or offer physical resistance does not by itself constitute consent. That kind of consideration may of course be highly relevant to whether there was consent, but it does not really bear on the critical issue of belief in consent.
>
> The Court's focus in this passage on there being nothing to indicate that the complainant was not consenting is arguably at odds with the principle that s 128A(1) appears to be based upon, namely, that consent to sexual activity is something which must be given in a positive way.
>
> …
>
> [57] This is not an issue on which we need to express a view in the present case. The point of mentioning it is simply to emphasise that both the common law and statutory law as to consent are substantially influenced by policy considerations, and that this may carry over, to some extent at least, to defences based on mistaken belief in consent.

[24] In the present appeal, Ms Markham for the respondent submitted that this Court should confirm the tentative view expressed in the above remarks made in *Ah-Chong* that consent must be positively expressed. Ms Levy for the appellant

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[14] *R v Tawera* (1996) 14 CRNZ 290 (CA) at 293.

argued that to do so would effectively be legislating: she said if such a change in law is to be made, it must be made by Parliament.

R v Tawera

[25] The appellant's counsel relied on *Tawera* in the Court of Appeal, but not in this Court.

[26] The facts of *Tawera* had some similarities to those of the present case. The complainant was 16 years old, and was living with a 48-year-old male relative, whom she referred to as "uncle" and whom she regarded as a guardian. One evening when Mr Tawera's partner and her daughter were absent from the house, Mr Tawera got into the complainant's bed and engaged in sexual activity that began with kissing, then touching and kissing the complainant's breasts, licking her vagina and finally having sexual intercourse with her. Mr Tawera admitted that sexual activity took place but said it was consensual.

[27] When the kissing occurred the complainant tried to move her head towards the wall, but was unable to do so because Mr Tawera was holding her cheeks. The complainant had not requested Mr Tawera to stop any of the activity, although she tried to push her thighs together when he was engaged in oral sex. Her evidence was that she did not attempt to remove herself from the appellant before the act of sexual intercourse was completed, nor did she give any overt indication that Mr Tawera should desist.

[28] That was the factual basis for the Court's conclusion, set out in the quotation from *Ah-Chong* above.[15] The Court in *Tawera* also referred to s 128A and indicated that, while it was highly relevant to consent, it did not really bear on the issue of belief in consent.[16]

[29] The Court of Appeal has adopted a similar approach to that taken in *Tawera* in some cases. Examples are: *R v Herbert*[17] and *R v Annas*.[18]

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15 Above at [23].
16 At 293. The extract is quoted above at [23].
17 *R v Herbert* CA81/98, 12 August 1998 at 5.

[30] There are, however, a number of other decisions of the Court of Appeal which are difficult to reconcile with *Tawera*. We agree with counsel for the Crown, Ms Markham, that the observation in *Tawera* is not consistent with the statutory language, as well as being inconsistent with those other cases. The cases to which Ms Markham referred were *R v Fotu*,[19] *R v Allison*,[20] *R v C*,[21] *R v Hollander*,[22] *R v Colquhoun*[23] and *R v S*.[24]

[31] All of these cases involve complainants who did not give any positive indication of consent but also did not give any overt indication that they were not consenting to the sexual activity that took place. The Court in each case did not treat this as leading to a conclusion that lack of consent and/or absence of reasonable belief in consent had not been proven beyond reasonable doubt.

[32] The observation made in *Tawera* that s 128A did not really bear on reasonable belief in consent is difficult to reconcile with the obvious purpose of s 128A, as noted in the extract from *Ah-Chong* quoted above.[25] The word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent. It is also consistent with the decision in *R v Keremete*, where the Court found that, in a case of a rape said to have taken place when the complainant was asleep, reasonable belief in consent was not a viable issue on the evidence before the jury.[26]

[33] It follows that we disagree with the statement in *Tawera* that s 128A does not really bear on the issue of reasonable belief in consent. The practical effect of the difference between our view and that expressed in *Tawera* may be limited, however, given that in most cases the issue of a reasonable belief in consent will involve

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18 *R v Annas* [2008] NZCA 534 at [30]–[39].
19 *R v Fotu* CA50/95, 15 June 1995.
20 *R v Allison* CA489/95, 21 February 1996.
21 *R v C* [1995] 2 NZLR 330 (CA).
22 *R v Hollander* CA440/97, 25 February 1998.
23 *R v Colquhoun* CA446/98, 13 September 1999.
24 *R v S* CA232/02, 11 February 2003.
25 Above at [23].
26 *R v Keremete* CA247/03, 23 October 2003 at [17].

consideration of evidence of a belief based on something more than just a lack of protest and lack of resistance by the complainant. The question for the jury will involve an evaluation of all aspects of the evidence of defendant's belief and of its reasonableness.

Directions on consent and reasonable belief in consent

[34] As noted earlier, the Court of Appeal said a trial Judge is required to direct on consent and/or reasonable belief in consent in a sexual violation trial if there is an evidential foundation for it.[27]

[35] Although there is some support for the Court of Appeal's approach in earlier case law, the proper approach is that trial Judges should, in cases involving sexual offences, give directions on all elements of the offence with which the defendant is charged.[28] This will ensure that the jury knows the matters on which they must be satisfied beyond reasonable doubt for a guilty verdict to be entered. Such directions should be given even if consent or reasonable belief in consent are not put in issue by the defence. Adopting such an approach would avoid the issues that have arisen in the present case. Any written directions provided to the jury should follow the same approach.

[36] The directions do not need to be elaborate but need to ensure that the jury is clear that a guilty verdict can be returned only if the Crown has proved beyond reasonable doubt that the complainant did not consent and the defendant did not believe on reasonable grounds that the complainant consented. For example, it would be sufficient in a case where the defendant does not raise consent or reasonable belief in consent as issues for the Judge to outline those elements of the offence, record that the defendant has not raised an issue with those elements but

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27 *Christian* (CA), above n 2, at [45]; citing *R v S (CA64/06)* [2007] NZCA 243; *R v Somerfield* [2009] NZCA 231; *R v Gaelic* CA56/03, 4 December 2003; and *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627.

28 This approach does not differ from the practical position adopted in earlier cases by the Court of Appeal. As long ago as 2003, the Court of Appeal referred to the need for trial Judges to be "very cautious indeed" before withdrawing from the jury the possibility that an essential element of the Crown case is left unproven and observed that the "safer course" is to direct on all elements of the offence: *Keremete*, above n 26, at [13]. Nor does it differ from the practice usually adopted in sexual offending cases: Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA128.03]; citing *Somerfield* above n 27; *R v Adams* CA70/05, 5 September 2005; *S (CA64/06)*, above n 27; and *Bian*, above n 27.

make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did. The Judge's summary of the evidence should draw the jury's attention to any evidence relevant to those elements. Of course, in outlining the evidence, the Judge must not invite the jury to disbelieve the defendant's defence of complete denial that any sexual encounter occurred.

[37] Because the Judge did not give directions in this case on the basis we have outlined above, it is necessary for us to assess whether his failure to do so has led to a miscarriage of justice. In order to do this, we go on to address whether, on the evidence, there was scope for the jury to be in doubt as to the absence of consent or the absence of a reasonable belief in consent. If not, the misdirection is immaterial and does not lead to a miscarriage of justice. In order to assess whether there was scope for such doubt on the evidence, we need first to address the main point of law in issue in this appeal, namely what is required to constitute consent and reasonable belief in consent.

Consent and reasonable belief in consent

[38] In the present case, the Court of Appeal adopted the position tentatively taken in the extract from *Ah-Chong* (quoted above at [23]) that, in the absence of actively expressed consent, there could not be a reasonable belief in consent. The Court added:[29]

> Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be the suggestion of "yes" in the complainant's words or conduct in order for a trial Judge to be satisfied that there is a sufficient narrative for the issues of consent and reasonable belief in consent to go to the jury in a case where the act itself is denied.

[39] Later, the Court said:[30]

> A lack of protest or resistance will not, on its own, suffice. There must be some evidence of positive consent, either by words or conduct, to provide a narrative capable of supporting the possibility of a reasonable belief in consent.

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29 *Christian* (CA), above n 2, at [49].
30 At [60].

The submissions

[40] Ms Levy argued that the Court of Appeal's approach, requiring a positive expression of consent, amounted to changing the law by judicial decision, in circumstances where Parliament had decided not to enact a requirement for a positive expression of consent when passing s 128A. She referred us to a number of the submissions that were made to the Select Committee considering the Crimes Amendment Bill (No 2) 2003,[31] which, when enacted in 2005, substituted a new s 128A for that which had been enacted in 1986.[32] In a number of those submissions, the point was made that there should be a requirement for a positive expression of consent or a requirement that an accused person prove that there were grounds for a reasonable belief in consent. These submissions were rejected by Parliament.

[41] She argued that s 128A(2), which refers to a person submitting to or acquiescing in sexual connection, contemplates that submission or acquiescence can amount to consent, except in the particular circumstances set out in s 128A(2)(a)(i) and (ii) (as they were prior to the 2005 amendment). She also argued that a requirement that consent be expressed positively would negate the need for s 128A(1) because, if a positive expression of consent is required, it is obvious (and does not need to be stated) that a failure to protest or resist could not amount to consent. Similarly she argued that under s 128A as it currently stands, all of s 128A(1), (3) and (4) would be redundant. This argument is reinforced by the heading of s 128A as it currently stands (that is, following the 2005 amendment), which refers to "allowing" sexual activity not amounting to consent in some circumstances. It can be argued that this contemplates that allowing sexual activity could amount to consent in other circumstances. Section 128A(9) of the current version of the provision defines "allows" as including acquiesces in, submits to, participates in, and undertakes.

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31 Crimes Amendment Bill (No 2) 2003 (104-1).

32 Crimes Amendment Act, s 7. Section 128A was inserted as from 1 February 1986 by the Crimes Amendment Act (No 3) 1985, s 2.

[42] Ms Markham disputed this. She pointed out that current s 128A(8) makes it clear that s 128A is not exhaustive, and that it does not limit the circumstances in which a person does not consent to sexual activity. She argued that s 128A confirmed earlier common law and operated to avoid doubt. It did not (and did not seek to) define "consent". And she noted that the term "allow" is defined to include active participation, so must be seen as extending the normal meaning of that term. The word "allow" appears only in s 128A(2), (6) and (7). It means that those provisions apply whether the complainant "submits" to, or actively participates in, the sexual activity. She argued that there was nothing in s 128A that indicated that consent meant something less than a positively expressed consent.

Our assessment

[43] With respect to the Court of Appeal, we think it went too far in stating that consent must be expressed in a positive way, as if that was a requirement regardless of the circumstances. We acknowledge that the indication given in *Ah-Chong* was a factor in the Court of Appeal doing this.[33] However, we think the Court of Appeal took more out of the statement in *Ah-Chong* than was warranted. The questions of consent and reasonable belief in consent are often nuanced and fact-specific. The analysis in each case needs to be firmly grounded in the statutory wording. The statutory wording at the relevant time said a failure to protest or resist did not, of itself, constitute consent. But it did not go on to say that there can be no consent in the absence of evidence of positive consent.

[44] The same applies to s 128A(1) as currently worded. The "just because" wording can be contrasted with s 128A(2)–(7), which are statements that the situations they describe do not amount to consent. While s 128A(1) in its current form provides that it is not legitimate to infer consent from evidence of lack of protest and lack of resistance (and nothing more), s 128A(2)–(7) set out statements of law that define consent by excluding particular actions or omissions from the scope of the concept of consent.

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[33] *Ah-Chong*, above n 13.

[45] In our view s 128A(1) (in both its pre-2005 form and its current form) means that consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent. As mentioned earlier, we see this as equally applicable to the evaluation of the issue of reasonable belief in consent.[34]

[46] One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

On the evidence, was there scope for the jury to be in doubt as to the absence of consent or as to the absence of a reasonable belief in consent?

[47] The case for the appellant is that there was a "credible narrative" of both consent and reasonable belief in consent in relation to all of the counts on which the appellant was convicted. In that respect the argument advanced for the appellant in this Court differed slightly from that advanced in the Court of Appeal, where the focus was on reasonable belief in consent, though the Court of Appeal also addressed itself to the question of actual consent.

[48] We propose to deal with count 2 (the first time the appellant sexually violated the complainant) separately from counts 4 and 5, which were the representative counts of repetitive rapes at different properties over a period of over two years. We will address both consent and reasonable belief in consent, because the argument in this Court for the appellant was that there was evidence putting both in issue.

[49] The defence theory of the case at trial was that the appellant never had sexual intercourse with the complainant and that the complainant had not, contrary to her version of events, resided with the appellant. The appellant maintained this version of events in his statement to the police. The jury must have found that account was

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[34] See above at [33].

untrue. Because the appellant maintained that version of events, he did not say anything to the police about consent or belief in consent.

[50] The defence challenge to the complainant's evidence related to the version of events that was put forward by the defence. She was not challenged at all on her evidence in relation to consent. There was nothing in the appellant's statement to the police that could support either the existence of consent or a reasonable belief on his part that the complainant was consenting. The only witnesses called by the defence gave evidence that did not relate to the issues of consent or reasonable belief in consent. So the only available evidence in relation to consent and reasonable belief in consent is the evidence given by the complainant herself.

Count 2

[51] The evidence given by the complainant about count 2 was brief. After describing the appellant pushing open her legs and putting his penis in her vagina, she was asked whether she had said anything to him. Her evidence in chief was as follows:

> Q: Did you say anything to him?
>
> A: I was too scared. I didn't know what to say.
>
> Q: I have to ask you this [complainant's name] but was that something that you wanted to happen?
>
> A: No.
>
> Q: Did you consent to that?
>
> A: No. I didn't even know what that word meant.

[52] A little later she was asked whether the appellant had said anything to her afterwards and she answered "I think he might have told me not to tell anyone but I'm not sure if that was the first time or the second time".

[53] In the absence of any evidence contradicting the complainant's description of the events leading to the first count (or any challenge to the evidence she gave) there was nothing before the jury to provide scope for doubt on the part of the jury as to the absence of consent. Given that she was 13 or 14 years old at the time and

effectively in the care of the appellant, who claimed to be a minister in the church he founded, there is an inherent lack of plausibility in the suggestion that she consented. There was no cross-examination on her statement that she did not consent and the appellant's trial counsel did not mention either consent or belief in consent in his closing address.

[54] Ms Levy said the credibility of the complainant was in issue in the trial and, although there was no evidence indicating consent, it was open to the jury to disbelieve the complainant's evidence that there was no consent. She pointed out that:

(a) There was a not guilty verdict on count 1, the indecent assault charge. The complainant's evidence was that this assault (the appellant sucking her breast) occurred just before the first rape. The jury was not satisfied beyond reasonable doubt that it occurred, even though they must have been satisfied that the immediately following penetration that was the subject of count 2 did occur. She said an obvious explanation for this was that the jury did not accept the complainant's evidence, indicating a concern by the jury about the complainant's credibility and reliability.

(b) The complainant said in evidence that she told the police in 1999 that "it" was consensual. She did not elaborate as to what acts were consensual. We note that the complainant disavowed that statement on the basis that it was made on the appellant's instructions. Neither the prosecution nor the defence suggested the statement was true: the prosecution because of the complainant's evidence that she lied about consenting, following instructions from the appellant and the defence because the defence case was that the events never happened so there was no sexual act to consent to.

(c) In the affidavit filed on 5 November 1999 in support of the proposed protection order, the complainant deposed that she was at the time in a domestic relationship with the appellant but denied the rumour that

there was a sexual relationship between them. It does not bear on the issue of consent, but it was, Ms Levy submitted, an example of the complainant making a sworn statement that, on her evidence, she knew to be untrue. She said that also provided a basis for the jury to find her evidence at trial about consent to be untrue.

[55] Ms Levy said the fact that the jury accepted the complainant's evidence that she resided with the appellant and that there was a sexual relationship between them (contrary to the denials of the appellant and the defence witnesses and despite extensive cross-examination) did not necessarily mean the jury accepted her evidence as to the absence of consent. She said the complainant's evidence as to a sexual relationship was supported by the evidence of her mother and also the contents of the letters written to her by the appellant from prison. In contrast, there was no evidence supporting the complainant's evidence that she did not consent. Ms Levy argued that it would have been open to the jury to reason that the appellant's denials of having resided with the complainant and of having a sexual relationship with her could be lies based on a wish to avoid admitting that he was in a sexual relationship with a young girl.

[56] Ms Levy did not point to the prior inconsistent statements as evidence that the complainant did consent, but said they could be seen as undermining all her evidence, including her evidence that she did not consent. She argued that, while both sides disavowed reliance on the truth of the statement the complainant made at the police station, it could have been seen by the jury as evidence of the complainant making an untrue statement, justifying the jury finding that her evidence as to consent was also untrue.[35] That argument is problematic. As the jury must have found the sexual encounters between the appellant and the complainant happened, they must have rejected the defence proposition that the statement was untruthful because there was no "it" that could be consensual. That means that, in order to conclude that the statement to the police was untruthful (and to call into question the credibility of the complainant as a consequence), the jury would have to have

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[35] The complainant said the statement was untrue and she had made it at the appellant's request. The defence case was it was untrue because no such request was made and no sexual activity occurred to which the complainant could have consented: see above at [54](b).

determined that the truth was that "it" was not consensual. In any event, given the context (that is, where the issue had arisen because of the mother finding out that the appellant and the complainant were having sex regularly) we do not consider "it" could possibly be interpreted as referring to the offence in count 2.

[57] The Court of Appeal found there was no evidence putting in issue consent or reasonable belief in consent in relation to the first incident because the only evidence before the jury was that the complainant said nothing during the incident and did not offer any encouragement.[36] This, coupled with the reality that she was a young girl and the appellant was not only older but also had a dominant position in her life and a position of trust and power provided context for the complainant's description of what happened on the first occasion.[37] The jury accepted that the sexual act between the appellant and the complainant took place, and the only evidence on which they could have based that conclusion was the complainant's evidence of what happened.

[58] Although the Court of Appeal's conclusion relied on its finding that there must be a positive expression of consent, we consider that the same conclusion arises on the approach we have outlined above.[38] The most that can be taken from the complainant's evidence is that she did not protest or resist, which, under s 128A(1) is not, of itself, sufficient to constitute consent. This was the first sexual encounter between the appellant and the complainant, so there was no background relationship in respect of which some expectations of the kind described above could have arisen nor was there any dialogue between them before the sexual encounter occurred. Accordingly, there was nothing to provide the basis of a finding of anything more than failure to protest or resist on the part of the complainant.

[59] We do not see that there is any air of reality about the argument advanced by Ms Levy that the jury may have found that the complainant's description of the sexual encounter was true in all respects other than her evidence as to her lack of any positive indication of consent, or her actual consent to the sexual activity. That would have required the jury to conclude there was a reasonable possibility the complainant consented as opposed to failed to protest or resist, when there was no

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36 *Christian* (CA), above n 2, at [61]–[64].
37 At [63].
38 Above at [43]–[46].

evidence on which to base such a conclusion. In other words, such a conclusion could be based only on speculation.

[60] We also consider that the above considerations lead to the conclusion that there is no evidence providing scope for doubt on the part of the jury as to the absence of a reasonable belief in consent on the part of the appellant. There was no evidence from the appellant and nothing in his police statement as to his belief in consent. Nor was there anything in the letters he wrote to the complainant from prison that suggested she consented to the first sexual encounter or that he reasonably believed she did. On the only evidence of the sexual encounter, the most that could be said is that there was a basis for the jury to find there was a reasonable possibility that the appellant had a belief that the complainant was not protesting or resisting, and was therefore acquiescing in the sexual act. At best, that could be a belief in a failure to protest or resist, which does not of itself constitute consent. And even if there was a basis for the jury to be in doubt about the Crown's contention that the appellant did not honestly believe that the complainant was consenting, there was no basis for the jury to be in doubt that any such belief was not reasonable, given it was based on a perceived failure to protest or resist, which cannot of itself amount to consent.

[61] Accordingly, we conclude that although the Judge ought to have directed the jury on consent and reasonable belief in consent, the failure to do so in this case did not lead to a miscarriage of justice in relation to count 2. The appeal in relation to count 2 therefore fails.

Counts 4 and 5

[62] The evidence of the complainant in relation to count 4 was that on all of the occasions on which she and the appellant had sex at the time she was living on the appellant's property, "he jumps on me and has sex with me and then gets off". When asked if she had consented to this on any of the occasions she answered no and when asked whether she wanted it to happen she also answered no. She said that the appellant told her not to tell anybody and that "he knows heaps of people", which

she said referred to members of gangs. He also told her she would get a hiding if she told her mother.

[63] In relation to count 5, she said of the sexual encounters that occurred in the house bus that "he used to just come and have sex with me". When asked whether she wanted it to happen she answered "I never wanted it to happen, but I know by the time we were in the bus out there that I felt like I couldn't say anything about it, or do anything about it, so I just said nothing and let him do it. But I never once said to him 'yes I want to have sex'". She said that the appellant told her that they were "married in the eyes of the Lord". She said she could not leave because "if I left him then he'd tell me that he'd kill my mum and my sister". When asked about returning to live with the appellant after the police interview, she said she had been brainwashed into relying on him, being dependent on him.

[64] In order to find the appellant guilty on counts 4 and 5, the jury had to be satisfied that on at least one occasion in the time period covered by the charges the appellant had penetrated the complainant's genitalia with his penis without her consent and without his reasonable belief in consent. The jury by their verdicts must have been satisfied of penetration but we do not know the timing of the act or acts of penetration. Further, the jury were not directed by the trial Judge to consider consent or reasonable belief in consent.

[65] The Court of Appeal contrasted the present case with *R v Annas*.[39] In that case a young complainant had said "yes" to the first sexual encounter with a much older family friend and had acquiesced in later encounters. The Court of Appeal in that case was troubled by the manipulation of the young and naïve complainant by Mr Annas, but found it could not exclude the reasonable possibility that the appellant reasonably believed she was consenting to the sexual encounters with him.[40] The Court of Appeal in the present case said the fact the complainant in *R v Annas* said "yes" to the first encounter differentiated that case from this case.[41]

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39 *Annas*, above n 18.
40 At [30]–[38].
41 *Christian* (CA), above n 2, at [65].

[66] The Court of Appeal highlighted a number of factors supporting the proposition that there was no evidence providing scope for the jury to be in doubt as to the absence of consent or as to reasonable belief in consent. Those factors included the wide difference in age between the appellant and the complainant, the complainant's immature knowledge of sexual matters at the relevant time, the complainant's vulnerability because of isolation from her mother and lack of any other support person, the appellant's status as church leader and de facto guardian, the evidence of the implicit threats made by the appellant to the complainant and the fact that the appellant gave the complainant money and drugs such as cannabis.[42] The Court analysed the significance of the evidence of the false statement made to the police and the false affidavit, but found that neither supported the reasonable possibility of consent or reasonable belief in consent.[43] The Court made a similar finding in relation to the letters sent to the complainant from prison.[44]

[67] We agree that these are very strong factors pointing against any reasonable possibility of reasonable belief in consent. As regards consent, however, we see the position in relation to counts 4 and 5 as different from count 2. Unlike count 2, they relate to sexual interactions over a period of time. Although the complainant said she never said she wanted to have sex, it is possible the jury may have, if properly directed, concluded that they could not rule out the reasonable possibility that the interactions between the complainant and the appellant involved her consenting, albeit as a consequence of his grooming of her. We accept this was not the most likely outcome but it was a decision that needed to be left to the jury to decide. We also note that the jury would have had to consider whether, at least in the later stages, there was a reasonable possibility that her statement to the police that "it was consensual" was true. As mentioned earlier, she referred in her evidence to being brainwashed into depending on the appellant.

[68] We consider the Judge's failure to direct on consent and (possibly) reasonable belief in consent has occasioned a miscarriage in relation to counts 4 and 5. We see

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42 At [66].
43 At [68]–[70].
44 At [71].

no scope for the application of the proviso in s 385(1) of the Crimes Act.[45] We therefore allow the appeal in relation to counts 4 and 5.

Substitution of charges?

[69] Ms Levy submitted that, if the appeal was allowed, a retrial should be ordered. As it turns out, the appeal has been allowed in part only, but we do not see that as undermining Ms Levy's submission. On the other hand, Ms Markham submitted that the better course would be to exercise the power under s 386(2) of the Crimes Act to substitute convictions under s 134(1) or s 134(2)(a) of the Crimes Act, as they stood at the time of the offending. Section 386(2) provided:

> Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal or the Supreme Court that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed as may be warranted in law for that other offence, not being a sentence of greater severity.

[70] At the time of the offending, s 134 relevantly provided:

> **134 Sexual intercourse or indecency with girl between 12 and 16**
>
> (1) Every one is liable to imprisonment for a term not exceeding 7 years who has or attempts to have sexual intercourse with any girl of or over the age of 12 years and under the age of 16 years, not being his wife.
>
> (2) Every one is liable to imprisonment for a term not exceeding 7 years who—
>
> (a) Indecently assaults any such girl; or
>
> (b) Being a male, does any indecent act with or upon any such girl; or
>
> (c) Being a male, induces or permits any such girl to do any indecent act with or upon him.
>
> …

[45] The text of s 385(1) of the Crimes Act is set out in the judgment of the Chief Justice at [83]. The proviso says an appellate court "may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

> (5) Except as provided in this section, it is no defence to a charge under this section that the girl consented, or that the person charged believed that the girl was over the age of 16 years.
>
> …
>
> (7) No one shall be prosecuted for any offence against this section, except under paragraph (a) of subsection (2) thereof, unless the prosecution is commenced within 12 months from the time when the offence was committed.

[71] We accept that the offences under s 134(1) and s 134(2)(a) are offences to which the s 386(2) power could be applied, subject to the following qualification. The time bar in s 134(7) would prevent a prosecution under s 134(1) being commenced against the appellant now.[46] While the time bar does not apply to s 134(2)(a), the decisions of the Court of Appeal in *R v Blight* and *R v Hibberd* support the proposition that a prosecution under s 134(2)(a) cannot be commenced after the expiry of the 12-month period referred to in s 134(7) in a case involving intercourse, that is, conduct that would constitute an offence under s 134(1).[47] Applying those cases by analogy to the present situation, it is arguable that substituting convictions under s 134(1) would be contrary to s 134(7) and substituting convictions under s 134(2)(a) would be against the reasoning in *R v Blight* and *R v Hibberd*.[48]

[72] It is not necessary for us to determine whether those arguments are correct or, if they are, whether *R v Blight* and *R v Hibberd* should be overruled, though we acknowledge the cogency of the arguments advanced by Ms Markham in favour of overruling them.[49] The reason for that is that we are satisfied that the appropriate course in this case is to quash the convictions on counts 4 and 5 and order a new trial. The appellant does not consent to the substitution of convictions and we consider that a retrial in which the jury is instructed to address the issues of consent and reasonable belief in consent is appropriate given the focus of the appellant's case has been on those elements.

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46 The time bar was removed in 2005 by s 7 of the Crimes Amendment Act 2005.

47 *R v Blight* (1903) 22 NZLR 837 (CA); and *R v Hibberd* [2001] 2 NZLR 211 (CA). These cases dealt with provisions containing similar time bars to that in s 134(7).

48 In two cases involving s 134(7) or an analogous provision, *R v Cassidy* [2007] NZCA 573 and *Maguire v R* [2012] NZCA 141, the Court of Appeal did substitute convictions for indecent assault, contrary to *Blight* and *Hibberd*. Neither case addressed *Blight* or *Hibberd*.

49 However, as already noted, *Blight* and *Hibberd* are unlikely to have ongoing significance, because the time bar in s 134 has been removed.

Result

[73] The appeal is allowed in part. The convictions on counts 4 and 5 are quashed and a new trial is ordered. The conviction on count 2 stands. For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in any news media or on the internet or on any other publicly available database until final disposition of the retrial. Publication in a law report or law digest is permitted.

Sentence

[74] Judge Bidois sentenced the appellant to a term of imprisonment of 13 and a half years on each of the two representative charges of rape (counts 4 and 5) and 10 years' imprisonment on the specific rape charge (count 2), such sentences to be served concurrently. The representative counts were the lead charges for sentencing purposes. The imposition of the concurrent sentence of 10 years' imprisonment for count 2 is not the subject of separate reasoning. The sentences for counts 4 and 5 are now quashed, which, in the absence of any further consideration, would leave the 10 year sentence for count 2.

[75] Section 386(1) of the Crimes Act provided:

> **386 Powers of appellate courts in special cases**
>
> (1) If on any appeal under section 383 it appears to the Court of Appeal or the Supreme Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the indictment on which the court considers that the appellant has been properly convicted.

[76] Unlike its successor provisions ss 236 and 241 of the Criminal Procedure Act, it did not provide for the case to be remitted to the trial court for re-sentencing.

[77] We have not heard from counsel on sentence. Given the outcome of the appeal, we will provide an opportunity for counsel to make submissions as to the sentence that should be imposed in relation to count 2, in particular, whether the

10 year sentence imposed by the Judge should stand. Once we have received and considered those submissions we will determine the sentence that should apply in relation to count 2.

[78] Submissions should be filed and served as follows:

(a) The appellant: by 13 October 2017.

(b) The respondent: by 20 October 2017.

ELIAS CJ

[79] Before convicting Mr Christian at his trial on three counts of sexual violation by rape,[50] the jury had to be satisfied beyond reasonable doubt on the evidence of the three elements of the offence: that sexual penetration occurred; that it was without the complainant's consent; and that it was without the defendant's believing on reasonable grounds that the complainant consented.[51] The Judge was obliged to direct the jury accordingly. Trial counsel submitted as much, even though the defence case was that there had been no sexual contact between the appellant and the complainant. The Judge rejected the request to direct the jury as to the need for it to be satisfied about the elements of absence of consent and absence of reasonable belief in consent. Instead, he told the jury, "[t]he sole issue here … is whether or not there was penetration":

> The defence do not advance consent or belief in consent. The complainant said she did not consent. The defendant could not have a reasonable belief in consent when he says there was no sexual act that took place. If there was penetration, if the defendant did these things, then your verdict will be guilty. If he did not do them then your verdict will be not guilty.

This was a direction for a verdict of guilty if the jury was satisfied that sexual penetration occurred. It constituted material error of law because it did not require that the jury be satisfied of all essential elements of the offence prescribed by s 128 of the Crimes Act 1961 and was therefore capable of affecting, and indeed likely to have affected, the verdicts. The jury convicted on the three counts.[52] An appeal to the Court of Appeal was dismissed.[53] Mr Christian now appeals to this Court.

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50 The first related to an incident when the complainant was 13 or 14. It occurred a few weeks after the complainant had come to live in a dwelling on a property occupied by Mr Christian. The other two counts were representative charges during the period September 1996 to September 1999 (when the complainant turned 16), differentiated between an earlier period when the complainant stayed in the dwelling after the first incident and a later period when she and the defendant moved into a house bus on the complainant's mother's property after the defendant had sold his property in about March 1999.

51 Crimes Act 1961, s 128(2).

52 Mr Christian was acquitted however of a charge of indecent assault based on an allegation that he had sucked the complainant's breasts immediately before the first incident of sexual violation.

53 *Christian v R* [2016] NZCA 450 (Stevens, Asher and Williams JJ).

The appeal

[80] The Court of Appeal dismissed Mr Christian's appeal against the three convictions. It held that there was no need for the Judge to direct the jury as to absence of consent or reasonable belief in consent unless there was a "narrative" on the evidence capable of raising issues of consent or reasonable belief in consent.[54] As explained below at [96]–[99], I consider this approach was wrong. It treated absence of consent and absence of reasonable belief in consent as if defences, rather than essential elements of the offence which the Crown had the onus of establishing irrespective of the conduct of the defence. Such approach is contrary to the presumption of innocence.[55]

[81] I therefore agree with the other members of this Court that the Judge erred in his direction to the jury.[56] They consider however that the error did not occasion any miscarriage of justice in relation to the first specific count of rape, although they accept that it did in relation to the later two representative counts. I disagree. I consider the effect of the error was that the jury was not properly directed on all counts as to the essential elements of the offence and as to its task. That amounts itself to material error of law, an error "*capable* of affecting the result of the trial" and not merely "an inconsequential or immaterial mistake or irregularity".[57] In considering whether an error of law such as occurred here in the misdirection is capable of affecting the result of the trial, I do not agree with the approach taken by the majority in assessing materiality against the safety of the verdict. I consider that to be the subsequent inquiry under the proviso to s 385 of the Crimes Act by which an appellate court may allow a verdict to stand despite material error if of the view that no substantial miscarriage of justice has actually occurred.[58]

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54 *Christian v R* [2016] NZCA 450 at [45], [64] and [72].

55 New Zealand Bill of Rights Act 1990, s 25(c); see also *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL).

56 See above at [5](a).

57 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31] and [30] (respectively) per Blanchard J for the Court (original emphasis). Although in *Matenga* the Court was concerned with the "miscarriage of justice" ground contained in s 385(1)(c) of the Crimes Act rather than with error of law under s 385(1)(b), the approach taken is also apt in considering whether an error of law is significant enough "that the [conviction] should be set aside on the ground of the wrong decision". See further at [84] below.

58 I deal with application of the proviso from [107] below.

[82] Because I have had the advantage of reading in draft the reasons delivered by O'Regan J for the other members of the Court, I do not need to repeat the facts and the history of the appeal.[59] In what follows, I deal in turn with four matters, already foreshadowed:

(a) the different approach I take to the majority in relation to an appeal under s 385 of the Crimes Act;

(b) the significance of the error of law in failing to direct the jury that it had to be satisfied of the elements of the offence;

(c) the impact of s 128A on reasonable belief in consent (important in the majority reasons that the error in the direction is not material); and

(d) application of the proviso (not reached in relation to the first count of rape by the majority but accepted to be inappropriate in respect of the representative counts on which they find material error).

Approach

[83] As is relevant to the appeal, s 385 of the Crimes Act provided:

> **385 Determination of appeals in ordinary cases**
>
> …
>
> (1) On any appeal [against conviction], the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—

[59] For this, see above at [7]–[18].

> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

…

[84] A misdirection on the legal elements of an offence is a wrong decision on a question of law within s 385(1)(b)[60] but may also be treated as a general "miscarriage of justice" under s 385(1)(c).[61] Not every inconsequential error requires the verdict to be set aside. As has already been noted and as *R v Matenga* affirmed, the error must be material, in the sense that it is no mere irregularity or inconsequential mistake but one that is "*capabl*e of affecting the result of the trial".[62]

[85] In the present case, the jury was wrongly directed that it did not have to be satisfied of two of the three elements of the offence. That is a direction all members of this Court accept was wrong. It cannot be characterised as "certainly … immaterial to the guilty verdict".[63] It was a misdirection as to the function the jury was required to perform.

[86] The majority in this Court however take the view that there was no error capable of affecting the verdict in respect of the first rape count because, on the evidence, there was no "scope for the jury to be in doubt as to the absence of consent or the absence of a reasonable belief in consent".[64] Although it is accepted that the Judge should have directed the jury as to all elements of the offence, the approach treats the failure to do so as immaterial unless there is a narrative of consent or reasonable belief in consent available on the evidence. The effect is difficult to distinguish from the effect of the approach taken by the Court of Appeal, despite the acknowledgement that a direction as to all elements of the offence should have been given.

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60 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [10]; see also Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA385.06].

61 As it appears to be treated in the reasons of the majority.

62 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31] (emphasis in original); see also at [10].

63 At [10].

64 See above at [37] and [60]–[61].

[87] I consider the approach taken by the majority to be inconsistent with s 385 and with the approach in *Matenga.* The error removed essential ingredients of the offence from jury consideration, despite the presumption of innocence and the onus borne by the Crown to establish guilt. It was substantial error of law which bore directly on the jury function and the verdict. The majority approach in my view fails to acknowledge the radical nature of the error of law in the misdirection. The approach seems to me to focus not on materiality of the error itself and whether it is one capable of affecting the trial, as s 385(1) requires, but rather on whether a miscarriage of justice has actually occurred by reference to whether there was sufficient "air of reality" about the questions of consent and reasonable belief in consent on the evidence.[65] I consider that to be a question in application of the proviso.

[88] In my discussion of the proviso I touch on some of the points relied upon by the majority as supporting their conclusion that there was "no evidence providing scope for doubt on the part of the jury" as to the absence of consent or as to reasonable belief in consent.[66] There is necessary overlap in the circumstances giving rise to materiality of error on the majority approach (that materiality of error turns on whether conviction was inevitable on the evidence) and the circumstances to be considered on the approach I take in applying the proviso (that a substantial miscarriage of justice has actually occurred and the appellate court cannot be sure of guilt). I mention some of these circumstances not to engage with the analysis of the majority on materiality (which I consider adopts the wrong approach) but because they arise in my consideration of application of the proviso.

[89] On the majority approach, the same error of law in the misdirection is material error in relation to the representative counts (in respect of which application of the proviso is accepted to be inappropriate), but is not material (that is to say is treated as incapable of affecting the verdict) on the specific count of rape. I consider that result to be odd. It comes about I think because materiality of error of law in the misdirection is effectively assessed in the reasons of the majority against the proviso measure of whether in substance a miscarriage of justice has actually occurred

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65 See above at [59].

66 See above at [58]–[60].

notwithstanding the acknowledged inadequacy of the direction as a matter of law. In my view the same error in misdirection is equally material in relation to all counts and recourse to the proviso in dismissing the appeal is equally inappropriate in respect of all counts unless the appellate court can be sure of guilt.

[90] Where an error of law is an error which is not inconsequential irregularity but is capable of affecting the verdict (as I consider a misdirection on the elements of the offence inevitably was), s 385(1) requires the appeal to be allowed and the verdict set aside unless, in application of the proviso, the court can be sure the verdict is safe. As is explained later I do not think this Court can be sure of guilt when the primary trier of fact was directed not to engage with two elements of the offence at all and the appellate court has not heard the evidence. I take the view that such radical error is not capable of being cured on appeal through the proviso.

Direction on elements of the offence

[91] The Court of Appeal took the view that there was no adequate evidential narrative for consent or reasonable belief in consent to warrant a direction to the jury that it must be satisfied of these elements. It considered that the only relevant evidence came from the complainant. Because the defence case was a "flat denial of sex" the complainant was not cross-examined as to her evidence of lack of consent: "Thus, whether there was an evidential basis for a reasonable belief in consent that should have been left to the jury depends wholly on the complainant's evidence of the offending".[67]

[92] In connection with the first occasion of sexual violation by rape, the Court of Appeal pointed to the complainant's evidence of not having said anything during the incident and that the appellant had forced himself on her.[68] This was in the context of the young age of the complainant and the fact that the appellant was much older and was in a position of trust in relation to her. In those circumstances, the Court considered there was "no credible narrative of consent or reasonable belief in consent" on the facts.[69] It concluded "given the lack of evidential foundation, there

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67 *Christian v R* [2016] NZCA 450 at [61].
68 At [63].
69 At [64].

was no requirement for the Judge to direct the jury on consent or reasonable belief in consent" on the first rape count[70] and that "[t]he verdict in respect of [the first rape count] was therefore safe".

[93] In respect of the two representative counts, the Court of Appeal considered that the complainant's evidence "shows passivity or silence rather than active consent and the appellant proceeded to use his physical and emotional power to force her to have sex on a continuous basis": "The complainant was very clear that she 'never once said to [the appellant] 'yes I wanna have sex'".[71] The Court of Appeal identified as "other relevant contextual factors" which supported "the absence of any credible narrative of active consent and thus a lack of a basis for a reasonable belief" as including:[72]

> (a) the wide difference in age;
>
> (b) the complainant's immature knowledge of sexual matters;[73]
>
> (c) the complainant's particular vulnerability because of isolation from and a poor relationship with her mother or any other support person;
>
> (d) the appellant's status as a church leader and de facto guardian;
>
> (e) the evidence of the appellant's implicit threat to the complainant that she was not to tell anyone about the offending as he knew "heaps of people", which the complainant took to refer to his gang connections. The complainant also said in evidence that if she tried to leave the appellant would tell her that he would kill her mother and sister; and
>
> (f) the appellant gave the complainant money and drugs such as cannabis.

[94] The Court of Appeal rejected as a basis for a contrary "credible narrative for consent or reasonable belief" the fact (admitted by the complainant in her evidence) that the complainant had earlier told the police that the sex had been consensual and that she had also, inconsistently, signed an affidavit (in support of a protection order

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70 The first rape count was in fact count 2 in the indictment. Count 1 was the charge of indecent assault referred to above at n 52 on which the appellant was acquitted.

71 *Christian v R* [2016] NZCA 450 at [65].

72 At [66].

73 It is not clear what the Court of Appeal was referring to in this connection. Consistently with s 44 of the Evidence Act 2006, the complainant was not questioned about her general sexual experience. The Court of Appeal cites only her young age and her evidence that she did not know what "consent" meant: see at [63].

application against her mother) that the rumours of a sexual relationship were "not true".[74] The appellant had also written letters (which he later said were "forged") suggesting a consensual sexual relationship. This evidence was said by the Court to be either explained by the circumstances, lacking in detail and of low probative value as an indicator of consent or reasonable belief in consent, and undermined by the fact that both the Crown and defence contended that much of it was untrue.[75]

[95] Because there was "no evidence capable of supporting the reasonable possibility either that the complainant consented or that there was a reasonable basis for belief in her consent", as the Judge "correctly recognised", "[a]ccordingly the Judge was not required to leave consent to the jury, and no miscarriage of justice has arisen from the failure to do so".[76]

[96] In the case of a potential defence, reference to the need for sufficient "narrative" on the evidence may be unremarkable. Even so, it may be noted that where an evidential threshold is required to support a defence, the conduct of the case for the defendant is not determinative of whether there should be a direction by the Judge. In such cases the Judge has to consider whether the defence is raised by the evidence.[77]

[97] It is entirely misconceived however to suggest that the Judge must assess whether there is sufficient "narrative" on the evidence before he or she is obliged to direct the jury it must be satisfied of the essential elements of the offence itself. And in such cases even if the defendant says he is not responsible for the physical act of an offence (receipt, penetration, a blow, or whatever act is prescribed) that does not take away the obligation of a Judge to direct and a jury to determine that the further distinct elements required by the definition of the crime, including the mental elements, are proved beyond reasonable doubt. The conduct of the defence cannot affect the burden of proof. Nor does absence of cross-examination of the complainant on consent or the absence of mention of consent or belief in consent in

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74 At [67].
75 At [69]–[71].
76 At [72].
77 *R v Tavete* [1988] 1 NZLR 428 (CA).

the closing address of counsel for the defendant affect the presumption of innocence and the need for the jury to be satisfied of all elements of an offence.[78]

[98] That this is axiomatic was re-emphasised in 2014 by the Privy Council. It pointed out that "[t]he case in which a defendant advances a defence which may well be disbelieved imposes a particularly acute duty [to direct] on the trial judge" because the defence will not be able to raise the distinct elements of the offence if they are inconsistent with the defence he advances.[79] The Privy Council gave as an example the need for directions on intent where a defence of alibi (a denial of the act) has been run to a charge of murder. The example is directly comparable to the present case where the defence denial of penetration should not have been treated by the Judge as obviating the need for a direction on the need for absence of consent and on the prescribed mental element of absence of reasonable belief in consent.

[99] In agreement with the conclusion of the other members of this Court, I take the view that the Court of Appeal was wrong to hold that the Judge was not required to leave consent or reasonable belief in consent to the jury. I agree with the majority view that material error occurred in respect of the representative counts and that the application of the proviso to those counts is inappropriate.

[100] In addition, however, I consider that the direction given to the jury in respect of the first count of rape constituted material error of law which was capable of and indeed necessarily affected the verdicts in the case. The effect of the direction is that the jury was misdirected as to its function. It was told that, if satisfied there was penetration, it must find the defendant guilty without need to be satisfied on the evidence as to lack of consent and lack of the defendant's reasonable belief in consent. As already indicated, I consider that was contrary to the presumption of innocence. And for the reasons given in the last section of these reasons, I consider that it is impossible to exclude actual miscarriage of justice.[80]

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78 Compare the view expressed by the majority above at [53], discussing whether the Judge's misdirection was material.

79 *Holt v Attorney-General* [2014] UKPC 4, [2014] 2 All ER 397 at [24].

80 See below at [107]–[112].

Reasonable belief in consent and s 128A

[101] Section 128A (as applicable here) is set out above at [20]. Subsection (1) makes it clear that absence of protest or physical resistance to sexual connection does not by itself constitute consent to sexual connection. The effect of s 128A is important in the conclusion reached by other members of this Court that the acknowledged misdirection by the Judge did not put the safety of the verdicts at risk. On the approach I take the error was such that the trial itself miscarried. It is not strictly necessary therefore for me to consider whether s 128A affects the evidence that might have been relied on by a jury properly directed to suggest that reasonable belief in consent had not been excluded. Because I have reservations about the approach to s 128A adopted in the majority reasons, however, I make some brief comments on the topic.

[102] In *Ah-Chong v R*, McGrath, Glazebrook and Arnold JJ tentatively suggested that the policy of s 128A would be undermined if passivity or failure to resist was able to be treated as evidence that the defendant had a reasonable belief in consent and that it was consistent with the principle on which s 128A is based that consent to sexual activity must be "given in a positive way".[81] In the present case the Court of Appeal relied on this suggestion:[82]

> [49] We adopt the suggestion in *Ah-Chong* that (in either format)[83] the direction in s 128A(1) to the fact-finder is that the complainant's silence by itself must not be taken as consent and nor can her failure to resist in some physical way. It follows that consent, however it might be expressed, must be actively expressed. Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be the suggestion of "yes" in the complainant's words or conduct in order for a trial Judge to be satisfied that there is a sufficient narrative for the issues of consent and reasonable belief in consent to go to the jury in a case where the act itself is denied. …
>
> [50] It is unsurprising therefore that the New Zealand Supreme Court in *Ah-Chong* should suggest that if lack of protest cannot, by law, constitute consent, it is illogical and inconsistent to hold nonetheless that silence or [physical] passivity can still provide a sufficient platform for a reasonable belief in the same consent.

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81 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [54]–[57].

82 *Christian v R* [2016] NZCA 450 (footnotes omitted).

83 A reference to the fact that s 128A was amended in 2005. The version applicable to this case is that in force between 1986 and 2005.

[103] After reviewing four of its recent decisions,[84] the Court of Appeal concluded:[85]

> [60] As the cases we have traversed show, the required process is one of isolating relevant features of the available evidence that may point one way or the other. A lack of protest or resistance will not, on its own, suffice. There must be some evidence of positive consent, either by words or conduct, to provide a narrative capable of supporting the possibility of a reasonable belief in consent.

[104] Other members of this Court take the view that, since s 128A(1) provides that consent is not proved "just because" there is absence of protest or resistance, "a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent".[86] Their position in relation to the specific count of rape is that, "at best", the defence case here was one of "belief in a failure to protest or resist, which does not of itself constitute consent",[87] even if there was a basis for the jury to be in doubt about whether the appellant honestly believed the complainant to be consenting. The majority takes the view that any such "honest" belief could not be "reasonable" because it is "based on a perceived failure to protest or resist, which cannot of itself amount to consent". I do not agree with this view. The apparent premise of equivalence between s 128A and reasonable belief in consent is, I think, suspect.

[105] Section 128A is concerned with consent, not with reasonable belief in consent. It makes impermissible reasoning that absence of protest amounts to consent because such reasoning flies in the face of experience about power imbalance and the ways in which complainants may be deprived of choice. Section 128A does not suggest that lack of objection or resistance is not relevant to reasonable belief in consent or indeed that it is not relevant to the question of consent in context. It provides that a person does not consent "just because" no objection or physical resistance is made. Whether the defendant reasonably believes in consent remains a question of fact on the evidence as a whole. There will always be a wider context in which absence of protest or resistance must be considered when assessing

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84 *R v Hollander* CA440/97, 25 February 1998; *R v Annas* [2008] NZCA 534; *Kumar v R* [2014] NZCA 58; and *R v Pakau* [2011] NZCA 180.

85 *Christian v R* [2016] NZCA 450.

86 See above at [32].

87 See above at [60].

the fact of consent and the fact of reasonable belief in consent. Although the policy behind s 128A may itself be relevant to reasonableness of belief,[88] it is not determinative as a matter of law. A reasonable belief in consent may exist even though s 128A makes it clear that the complainant's actual consent is not given "just because" of failure to protest or resist. Whether the defendant has a reasonable belief that the complainant consents turns on what he believes and whether it is reasonable in context (in which the policy of choice behind s 128A may well be relevant[89]). It does not depend on the meaning of consent.[90]

[106] I acknowledge that on the approach of the majority in this Court the assessment of the reasonableness of the belief in consent is contextual[91] and that the difference between us may not be significant in application. But search for "something more"[92] distracts from the inquiry as to the defendant's belief and may be misleading, as the Court of Appeal decision in the present case illustrates. Just as the policy of s 128A is not undermined if there is no "positive" expression of consent (as the Court of Appeal thought it was), it is not undermined because the jury must still exclude reasonable belief in consent by the defendant on all the available evidence.

Application of the proviso

[107] The direction given by the Judge effectively took away from the jury the issues of consent and reasonable belief in consent. This is not a case where the jury can be accepted to have addressed its task. On the directions it was given this jury was told that it was unnecessary for it to be satisfied as to absence of consent and absence of reasonable belief in consent by the defendant. It was not asked to assess the evidence, including the evidence of the complainant, on these matters.

[108] Other members of the Court take the view that there is no "air of reality" about the submission that the jury, properly directed, might have reasoned that the

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88 As is discussed at n 89.

89 I consider the Court of Appeal suggestion in *R v Tawera* (1996) 14 CRNZ 290 that the policy of s 128A "does not really bear on the critical issue of belief in consent" overstates the matter if it suggests lack of relevance (although I am not sure that it does, read in context): see at 293.

90 Compare the view taken above at [32].

91 Above at [33].

92 Above at [5](c) and [45].

complainant's evidence as to the first rape count was to be accepted as to the fact of intercourse but not as to the questions of consent and reasonable belief in consent.[93] They suggest that there was no evidence other than the general context and the evidence of the complainant of her absence of protest or resistance. It is said that the complainant's evidence cannot in law provide a foundation for a reasonable belief in consent under s 128A. It is said that the context of age disparity and the position of responsibility assumed by the appellant towards the complainant as well as absence of evidence of an existing relationship at the time of the first incident (in which expectations of or misunderstandings as to consent might arise) indicate "inherent lack of plausibility in the suggestion that [the complainant] consented"[94] or that the appellant believed her to be consenting. To reason otherwise is, they suggest, to invite "speculation" without evidential foundation.[95]

[109] I am not convinced that the evidence as to the background to the relationship is as spare as is suggested. The defence pointed to the complainant's different accounts of the nature of the relationship. And there was other evidence from witnesses as to the circumstances in which the complainant came to be living with the appellant and which might have been relevant to questions of consent and reasonable belief in consent. Questions of credibility were live in the case and would have been directly relevant had the jury been directed to consider consent and reasonable belief in consent. It is not clear that the jury's conclusion that penetration had occurred (the only issue it was directed to consider) means, as seems to be suggested by the majority in this Court, that it would have accepted the complainant's evidence in relation to consent and reasonable belief in consent. I accept that age disparity and the role assumed by the appellant are circumstances which the trier of fact could properly have been invited to take into account in deciding whether to accept the complainant's account and reject any doubt as to the appellant's belief. Indeed, in that assessment the jury would have been entitled to accept the evidence given by the complainant as sufficient in itself. But it was not left with that assessment and was told that consent and reasonable belief in consent were not in issue. In the end, however, I do not consider that assessment of the

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93 See above at [59]–[60].
94 See above at [53].
95 Above at [59].

strength of the evidence is appropriate on the appeal because the error meant that the jury was precluded from considering the elements of the offence.

[110] In *Matenga*, this Court held unanimously that if something has gone wrong at trial which is capable of affecting the result (including an incorrect direction by a trial judge), a defendant's appeal must be allowed unless the appellate court comes to the view that "the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict".[96] Given the direction of the Judge, the question is not whether the jury had "scope for doubt" on the evidence as to consent and reasonable belief in consent.[97] The convictions cannot stand unless this Court is sure of the appellant's guilt.

[111] I do not think this Court can be satisfied that the convictions are safe. Without there having been any assessment by the jury of the evidence on the essential issues of consent and reasonable belief in consent and without this Court having the advantage of hearing the evidence, I am not convinced beyond reasonable doubt of guilt on the basis of the probabilities identified in the reasons of the majority in support of their conclusion that the error was not material.

[112] More importantly, I consider that the misdirection as to the elements of the offence and the jury's task was fundamental error in the conduct of the trial. The error here touched on fair trial and other fundamental procedural rights. It deprived the appellant of a jury verdict on the basis of the elements of the offence. In such circumstances I consider it is not possible to apply the proviso. What happened was radical error. It is not possible to conclude that a guilty verdict was the only reasonable verdict. In my view it is impossible to be satisfied that a substantial miscarriage of justice has not actually occurred.

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96 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31]. See also at [10]. The approach was followed by the Privy Council in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [149]–[150], where the Privy Council noted that it was consistent too with English and Australian practice.

97 Compare above at [37].

Conclusion

[113] I agree with the reasons of the other members of the Court that it would not be appropriate to substitute convictions for indecent assault for the rape counts.[98] But I would allow the appeal and order a retrial of the appellant on all counts.

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[98] See above at [72].