NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 85/2022
[2023] NZSC 33

BETWEEN	SHANE STEVEN HOLMES Applicant
AND	THE KING Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: N Levy KC for Applicant
C A Brook and L C Hay for Respondent

Judgment: 13 April 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following retrial in the District Court, a jury found Mr Holmes guilty of three charges of rape (one of which was representative), two charges of sexual violation by unlawful sexual connection, and one charge of male assaults female.[1] He was sentenced to 15 years and six months imprisonment on the lead sexual offences.[2] An

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1 At the first trial Mr Holmes had been found guilty of threatening to kill the complainant and to do grievous bodily harm to her children. He had earlier pleaded guilty to pointing a firearm at the complainant. He had also faced 12 rape and sexual violation charges. The first jury found Mr Holmes not guilty of all but the charges that were the subject of retrial. On those charges the jury had been unable to reach verdicts.

2 *R v Holmes* [2021] NZDC 7592 (Judge D J McDonald) [Sentencing notes].

MPI of nine years, two months (or approximately 60 per cent of the sentence) was also imposed. His appeals against conviction and sentence were dismissed in the Court of Appeal.[3]

Background

[2] Mr Holmes was in a relationship with the sole complainant. They had a child together. The relationship lasted around two years. The relevant events occurred during that period.

[3] According to the complainant's evidence (obviously accepted by the jury), the relationship was characterised by verbal threats and other emotionally or psychologically controlling behaviour deployed by Mr Holmes to get his way. Her evidence was that Mr Holmes bit her ear (male assaults female) during one of the incidents leading to a rape charge. At the end of their relationship, when she threatened to leave him, he held a .22 rifle to her head.[4] But, apart from the ear incident and the sexual violence, there was no evidence he was physically violent in the orthodox sense.

[4] It was in that overall context that three specific incidents occurred. In the first, he made advances to her in the kitchen of their home. She told him that she was not interested. They then went into the bathroom, he locked the door behind him and he raped her. The second event occurred on mattresses in the lounge where Mr Holmes penetrated her digitally and forcefully, after she had told him she did not want sex. The third incident occurred at the maternity hospital a few days after the complainant had given birth to their baby. They went into the shower unit of an en suite and he penetrated her vagina from behind. She had said no when he raised the subject of sex, but went with him to the shower anyway.

[5] As to the representative charge, the complainant said she was required to have sex with him "over 10 times" where the applicant knew she did not consent. She said she submitted due to his psychologically and emotionally domineering behaviour. The Crown case was that this was mere submission and not true consent, because when the

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3 *Holmes v R* [2022] NZCA 340 (Cooper P, French and Collins JJ) [CA judgment].

4 As noted above n 1, Mr Holmes pleaded guilty to this charge prior to the first trial.

complainant submitted to sex, she felt she had no choice as she wanted to avoid any further emotional and psychological abuse.

[6] The prosecution called counter-intuitive evidence from a clinical psychologist. The witness gave general evidence about the nature of abusive relationships and the fact that it is often difficult for victims to leave such relationships. While the witness' evidence was relatively extensive (and to an extent paralleled the evidence of the complainant in this case), it did not comment on that evidence or the prosecution's case more generally.

[7] The Crown also called propensity evidence in relation to offending by Mr Holmes against a former partner. It appears that the nature of Mr Holmes' relationship with the former partner was similar in terms of verbal abuse, but there was an added dimension of physical abuse. Mr Holmes had pleaded guilty to injuring the former partner with intent to injure (x2), threatening to kill her (x2) and male assaults female. Despite opposition from Mr Holmes' trial counsel, evidence of this relationship violence was admitted by the trial Judge.[5]

Proposed grounds on conviction appeal

[8] The applicant advances three potential grounds in relation to the conviction appeal. The first addresses the nature and quality of consent. The second, (related), ground challenges the content of the counter-intuitive evidence discussed above. The third ground challenges the admissibility of the propensity evidence.

True (but reluctant) consent

[9] Mr Holmes argues the bathroom and hospital incidents are examples of reluctant consent.[6] In both incidents, he argues, the complainant initially refused to consent to sex (and said so) before then going with Mr Holmes into the bathroom and the maternity ward showers to have sex with him. The same response is made to the representative count, which it is argued follows a similar pattern of reluctant acceptance to avoid friction in the relationship. Mr Holmes argues the Court of Appeal

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5 *R v Holmes* [2021] NZDC 4833.

6 This was also his argument in the Court of Appeal.

failed to engage with the evidence that supported the proposition that the complainant had truly but reluctantly consented.

[10] The essential argument is that an intimate partner's psychological bullying cannot turn true consent reluctantly given (with the agency inherent in that proposition) into mere submission without consent. The Judge's summing up had to make that clear. The applicant focuses in particular on a comment by the trial Judge in his discussion of the meaning of consent:[7]

> Consent has a very specific meaning in our Crimes Act, and the Crimes Act also sets out circumstances where of themselves certain actions do not amount to consent. Now, this question relates to what is in her mind, what was she thinking, *did she want it or not*, so I have set out in the question trail reasonably fully what consent means.

[11] Mr Holmes says "did she want it or not" is not the test for consent, and is a misdirection.

[12] The Court of Appeal found that that the trial Judge made no error when he directed that the jury must be satisfied the complainant's consent had been given truly, freely and rationally.[8] In this case, whether the complainant wanted sex or not was "highly relevant" to that question.[9] The Court also noted that the trial Judge had directed the jury that "true consent can be given reluctantly and regretted afterwards" and had repeated the same in the question trail.[10]

[13] While the difference between true but reluctant consent and mere submission without consent may warrant consideration by this Court in the future, it does not squarely arise in this case. As the Court of Appeal noted, the complainant's evidence was that she had rejected Mr Holmes' advances on all three specific occasions.[11] In the first (bathroom) incident, the complainant's evidence at trial was that Mr Holmes had pulled her into the bathroom and that she had cried throughout the encounter. In the second (lounge) incident, the complainant said no and tried to push his hand away. In the third (maternity hospital) incident, the context of the complainant having so

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7 Emphasis added.
8 CA judgment, above n 3, at [52].
9 At [49].
10 At [36]–[37].
11 At [50].

recently given birth is likely to have been at the forefront of the jury's assessment of whether she truly but reluctantly consented. It was open to the jury to accept those narratives and draw the inferences available.

[14] "Did she want it or not?" is plainly not the test for consent. But the Judge did not leave it there. He directed on true but reluctant consent in his oral comments and in writing. In the wider context of the summing up, we are not satisfied that this case warrants a further consideration of the principles set out in *Christian v R.*[12]

Counter-intuitive evidence

[15] The challenge to the counter-intuitive evidence also relates to the nature and quality of consent. The evidence suggested that sometimes emotional or physical abuse can remove a woman's agency in relation to the sexual demands of a dominant partner. Mr Holmes once again presses the point that there is a fundamental difference between being unable to refuse, and reluctantly consenting.

[16] For the same reasons as those discussed in relation to the first ground, this case does not present an appropriate factual context for consideration of this issue.

Propensity evidence

[17] Mr Holmes argues that the introduction into evidence of his multiple convictions for violence against a former partner (against whom there was no sexual offending) was highly and illegitimately prejudicial.

[18] Both the District Court and the Court of Appeal assessed the argument carefully against the requirements of s 43 of the Evidence Act 2006. We see that assessment as one very much related to the particular facts of the two relationships and groups of offending involved.

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12 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315.

Conclusion on conviction appeal

[19] We are not satisfied that a question of general or public importance arises or that there is a risk of miscarriage on any of the grounds advanced.[13]

Sentence appeal

[20] The District Court Judge sentenced Mr Holmes on the basis that "there were at least 13 occasions when [he] raped [the complainant], probably well more than that".[14] This assessment was based on the complainant's EVI in which she referred to having had non-consensual sex with Mr Holmes "over 10 times".

[21] Mr Holmes argues that, since he was acquitted of four rape charges in the first trial, there was no proper basis for concluding that the third representative rape charge comprised at least 10 rapes. He argues that a sentence "much closer to 10 years" would be appropriate for the three rape charges.

[22] Given the wider context of the relationship, and the clear advantage the trial Judge had in presiding over both trials, we do not see any issue of principle or risk of miscarriage arising from the sentence imposed.

Result

[23] The application for leave to appeal against conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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13 Senior Courts Act 2016, s 74.
14 Sentencing notes, above n 2, at [21(a)].