



## Supreme Court of New Zealand

19 December 2013

### **MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**B (SC12/2013) v THE QUEEN  
(SC 12/2013)  
[2013] NZSC 151**

### **PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).**

The appellant faced trial in the District Court on two counts of sexual violation, one by oral connection and one by rape. The counts arose from a single incident concerning the same female complainant. The jury found the appellant guilty of rape but not guilty of sexual connection by oral connection.

There are two issues on this appeal. The first is whether the trial judge was wrong to exclude certain evidence relevant to the appellant's defence that the sexual activity was consensual. The second is whether the two verdicts were inconsistent, making the appellant's conviction on the rape charge unsafe.

On the first ground of appeal, the appellant said that the complainant had asked him to go to her house to deal with a (dead) mouse problem, an allegation which the complainant denied. The appellant proposed calling a male witness who would

testify that, some months before the incident, the complainant had asked him to come her house to deal with a mouse problem. The witness would say that when he arrived at the complainant's house in the middle of the day, she was dressed in nightwear and had alcohol on her breath. He dealt with the mouse problem and left: nothing of a sexual nature occurred. Counsel for the appellant at trial said that the relevance of this evidence was to show that the complainant had used the mouse problem in the past as a pretext to invite men to her home in order to have sex with them.

Both the trial Judge and the Court of Appeal held that the evidence was inadmissible under s 44 of the Evidence Act 2006. In particular, the Court of Appeal held that the proposed evidence went indirectly to the complainant's reputation in sexual matters and so was absolutely prohibited by s 44(2).

The Supreme Court has held that the trial Judge was right to rule that the proposed evidence was inadmissible but for different reasons.

A majority of the Supreme Court (comprising McGrath, Glazebrook and Arnold JJ) has held that the proposed evidence was presumptively inadmissible under s 44(1) because it related directly or indirectly to the complainant's sexual experience with another person. The fact that no sexual conduct occurred did not take the incident outside the scope of "sexual experience" with another. The evidence did not meet the test for admissibility of sexual experience evidence under s 44(3) because it was not of such direct relevance to the facts in issue that it would be contrary to the interests of justice to exclude it. The trial Judge could have permitted the leading of evidence of the fact that the complainant had, on a previous occasion, asked a person other than the appellant, to deal with a mouse problem in her home. But the evidence was of little or no relevance in fact, given the complainant's acknowledgement that she did not deal with the mice herself but asked others to come to her house to dispose of them. As a result, the inability of the defence to adduce this aspect of the evidence did not create any risk of miscarriage of justice.

The Chief Justice and William Young JJ would also have excluded the evidence but for different reasons.

On the second ground of appeal, that the guilty verdict was unreasonable as it was inconsistent with the acquittal given the nature of the evidence, the Supreme Court has upheld the Court of Appeal's decision that the jury's verdicts were not inconsistent. It was open to the jury to conclude, in light of the evidence, that the appellant reasonably believed that the complainant consented to the oral connection but that by the time the appellant had intercourse with her, she had expressed her lack of consent unequivocally, such that he could not possibly have had a reasonable belief that she was consenting.

In addition, a majority of the Supreme Court (comprising McGrath, Glazebrook and Arnold JJ, with William Young J concurring) has accepted that this is one of those relatively rare cases where the jury might have thought that a conviction on the rape count sufficiently captured the appellant's culpability for what was in substance a single sexual interaction of relatively brief duration.

Accordingly, the appeal is dismissed.

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