NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 93/2014
[2015] NZSC 83

BETWEEN	TAGIAO AH-CHONG Appellant
AND	THE QUEEN Respondent

Hearing: 18 February 2015

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: E J Forster for Appellant
A Markham for Respondent

Judgment: 17 June 2015

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

McGrath, Glazebrook and Arnold JJ [1]
Elias CJ [92]
William Young J [144]

McGRATH, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

[1] Following a jury trial before Judge Down, the appellant was convicted of one count of assault with intent to commit sexual violation by rape, contrary to s 129(2) of the Crimes Act 1961. He had grabbed the complainant, whom he did not know, in a bear hug, pressed his erect penis into her back and tried to remove her overalls,

preparatory to having sexual intercourse with her. His defence was that he thought that the complainant wanted to have sexual intercourse with him. Reasoning by analogy from this Court's decision in *L v R* in relation to attempted sexual connection by rape (s 129(1) of the Crimes Act),[1] the trial Judge instructed the jury that they had to be satisfied beyond reasonable doubt that (among other things) the appellant had no reasonable grounds to believe that the complainant was consenting to have a sexual encounter with him.

[2] The appellant argued that this direction was wrong. He contended that the offence of assault with intent to have sexual connection by rape[2] involved two distinct mental elements, one relating to the assault and another relating to the intention to rape. In relation to assault, a mistaken belief in consent to the conduct constituting the assault would be a defence[3], even if it was unreasonable. This would be so even if the mens rea for intention to rape was met by an honest belief in consent to sexual intercourse that was unreasonable.

[3] In the circumstances of this case, we have concluded that the Judge's instruction was correct. The Judge told the jury that to convict the appellant they had to accept the complainant's account of the assault. On her version of events, there was no suggestion that the appellant in fact had a belief in consent that was independent of a mistaken belief that the complainant was consenting to sexual intercourse – there was no possibility of another mistaken belief in consent going only to the assault.

[4] On the question whether a mistaken but unreasonable belief in consent to sexual intercourse meets the mens rea required by the intention to rape element of the offence, we see no reason to depart from the approach taken by this Court in *L v R* in relation to attempted rape. Interpreted in context of the surrounding sexual violation provisions, and the underlying policy they express, s 129(2) requires the same mental element in relation to intention to rape as s 129(1).

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1 *L v R* [2006] NZSC 18, [2006] 3 NZLR 291.
2 For convenience we will refer to this offence as assault with intent to rape.
3 Strictly speaking, consent is not a defence in relation to assault but rather means that no assault has occurred. It is convenient to describe it as a defence, however, and we will do so.

[5] In any event, on the complainant's version of events, which the jury must have accepted given the Judge's instructions, there was no evidential basis for an argument that the appellant had *any* belief in consent, much less a reasonable one. The appellant's argument as to his belief in consent was based on a version of the facts that the jury rejected.

[6] For these reasons, we would dismiss the appeal.

[7] Although we consider that this case can be resolved on the basis of the statutory language, interpreted in context and in light of this Court's decision in *L v R*, we acknowledge that it engages two contentious aspects of the criminal law. The first is the tension between subjectivity and objectivity, in particular, the extent to which criminal liability may legitimately be based not on a person's subjective state of mind (ie, intention, knowledge or foresight) but on objective considerations. The second concerns liability for inchoate offences.[4] Given their potential for over-reach, such offences raise the question of the proper scope of the criminal law. Identification of the physical element and, in this case, the mental element assumes particular importance as a consequence. Although the particular offence at issue in this case, assault with intent to commit rape, is not a true inchoate offence given that it requires proof of an assault, it raises similar issues to inchoate offences such as attempted rape.

Factual background

[8] On the day that the complainant started work at a new job at a food processing factory, she was assigned for 45 minutes or so prior to the lunch break to work on the other side of a conveyer belt from the appellant, grading produce. The complainant, who was 20, did not know the appellant, a 19 year old Samoan who spoke little English. The environment was a noisy one, and both the appellant and the complainant were wearing overalls, ear protectors and head coverings in the nature of balaclavas.

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4 Inchoate offences such as attempt, conspiracy and incitement are offences which criminalise conduct whicih is incomplete or imperfect, in the sense that it has not resulted in the commission of a substantive offence: see A Simester, W Brookbanks and N Boister *Principles of Criminal Law* (4th ed, Brookers Ltd, Wellington, 2012) at [8.1].

[9] The complainant said she began to notice that, although conversation was impossible, the appellant was attempting to make eye contact with her, and was raising his eyes and whistling. She said she was "creeped out" by this and tried to ignore him and focus on her work. When it was lunch time, the complainant removed her head covering and ear protectors and tied the top half of her work overalls round her waist (she was wearing a tank top underneath). She went to the rest area to have her lunch. The appellant was sitting with some other men at a table, conversing in Samoan. As she was leaving the room, the appellant got up and said something to her in Samoan. She did not understand what he was saying and ignored him.

[10] The complainant went downstairs to the women's toilets and entered one of the cubicles. She said that when she came out of the cubicle to go the hand basin, she noticed the appellant standing at the open door to the toilets. The complainant became confused and told the appellant that this was not the women's toilet (meaning the men's toilet) and went to the hand basin to wash her hands. When she had finished, she turned round and noticed that the appellant had shut the door to the toilets and was standing in front of it. When the complainant tried to step around him to leave the toilets, the appellant grabbed her in a bear hug from behind, pinning her arms to her side. She immediately began to struggle, saying "No" several times. She said she could feel the appellant's erect penis thrusting against her bottom. The appellant then tried to remove the bottom part of the complainant's overalls, freeing one of his hands to do so. This enabled the complainant to wriggle free, open the door and leave. She was in a distressed state.

[11] The appellant gave a very different account of events in his interview with the police (he did not give evidence at trial). Through an interpreter, the appellant told the police that the complainant had been flirting with him at the conveyer belt. He asked how old she was and if she liked him, and they exchanged "thumbs up", which he interpreted to mean that she had agreed to a "quickie". He said that when they were at the conveyer belt, the complainant had winked at him and pointed towards the bathroom. He signalled for her to "take the lead" and they went into the toilets together, with him following close behind her. The appellant said that, once inside, he told the complainant by means of body language that he wanted to "get it

done". He said that he touched or grabbed her hand, pulling her towards him "to … find out what the story is". He said she pushed his hand away and left the toilets. This brought the incident to an end. The appellant denied that he had grabbed the complainant from behind, that he had tried to pull her overalls down or that he had pressed his erect penis against her bottom.

[12] In closing to the jury, defence counsel said that there was no doubt that the appellant intended to have sexual intercourse with the complainant and accepted that the complainant did not consent to that. Counsel argued that the appellant had thought, mistakenly, that the complainant was willing to have sex with him. Counsel accepted that there had to be "some type of reasonable basis for his belief" but submitted that, in the circumstances, there was such a basis.

Judge's instructions to jury

[13] In his summing up, the Judge identified the issues that the jury had to answer as follows:

> [14] There are four questions that need to be answered.
>
> (a) Did the defendant assault [the complainant]?
>
> (b) At the time did he intend to have sexual intercourse with her?
>
> (c) Did she give true consent?
>
> (d) Did he have reasonable grounds to believe that she was consenting?

[14] The Judge referred to the evidence relevant to the matters at issue by reference to a question trail provided to the jury after discussion with counsel.[5] In relation to whether an assault had occurred, the first question in the question trail asked whether the jury was satisfied beyond reasonable doubt that "[the appellant] grabbed [the complainant] from behind, pressing himself against her and preventing her from leaving". In the summing up, the Judge said:

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5 The Court of Appeal judgment records that, before it, defence counsel said that he did not agree with the form of the question trail: *A (CA814/2013) v R* [2014] NZCA 385 (O'Regan P, Goddard and Andrews JJ) [*A v R* (CA)] at n 3.

> [15] It is clear from the way that this trial has been run and the concessions made by counsel, Mr Forster, in his closing address that the first question, did he assault [the complainant] is in issue in this case because the defendant says that all he did was to take her by the hand and pull her towards him. Of course, the Crown allege … that he grabbed her in a bear hug from behind trapping her arms, that he pressed or thrust his pelvis and erect penis towards the complainant's bottom several times and that he made an attempt to pull down her pants.
>
> [16] Now although taking someone by the hand and pulling them towards you is technically an assault and you heard counsel explain what an assault is. It is not what is alleged here. What is alleged here is what the complainant says happened, the bear hug, the thrusting, the pressing and the preventing her from leaving.
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> [17] Only if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges could you answer [the first] question "yes" … .

[15] In relation to the second issue, the intention to have sexual intercourse, the Judge noted that even though that had been conceded by counsel for the defence in his closing address, the jury needed to be satisfied beyond reasonable doubt that the appellant had that intention. The Judge made a similar comment about the third issue, whether or not the complainant was consenting, which counsel had also conceded in closing.

[16] The Judge then turned to the fourth element. The question trail asked if the jury was satisfied that the appellant had no reasonable grounds to believe the complainant was consenting. In the summing up, the Judge said:

> [22] Of course, if you accept [the complainant's] account of the assault it would be difficult to conclude that [the appellant] had a reasonable basis to believe that she was consenting. However, if it is reasonably possible that his account of taking her hand and pulling her towards him and immediately stopping when she struggled and said, "No", if that is true, if you find that it is true you almost certainly could not be satisfied beyond reasonable doubt that he did not realise she was not consenting and that he had a reasonable basis up to that point for believing that she did consent.
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> [23] Of course, the Crown say that he could not have had that belief at any stage on the account he gave of these non-verbal communications. If you accept as a reasonable possibility that he desisted, that he stopped as soon as she struggled and said, "No" you could conclude that he no longer, at the relevant time, had the intent to have sexual intercourse with her. As Mr Forster submits to you, the timing of the event and the fluid developing situation is potentially very important here.

[17] In addition to setting out the questions for decision, the question trail briefly summarised the position of both Crown and defence on each question.

The Court of Appeal

[18] The appellant appealed to the Court of Appeal against his conviction. The appeal was unsuccessful.[6] Having cited *L v R*, the Court said:

> [32] Where sexual violation is an ingredient of any alleged offence, it is necessary to prove lack of consent on the intended victim's part, coupled with lack of any reasonable belief on the perpetrator's part that the victim consents. Consequentially, assault with intent to commit sexual violation necessarily incorporates the probative elements relevant to the intent required to establish a charge of sexual violation. In a charge of assault with intent to commit sexual violation, intent to sexually violate is a live issue at the time the assault is committed, not afterwards.

The Court went on to say that the argument pursued on the appeal had no grounding in the facts of the case.[7]

The issue

[19] As we discuss further below, the definition of assault in the Crimes Act potentially catches a wide range of conduct involving the deliberate touching of another person. However, its ambit is narrowed by the fact that consent may be a defence. Accordingly, in principle a person who, when deliberately applying force to another, has an honest but mistaken belief that the other person is consenting to the application of force will be protected from liability, even though the belief in consent is unreasonable.[8]

[20] However, in relation to the offence of sexual violation, whether by rape or unlawful sexual connection, where there is a mistaken belief in consent, it must be based on reasonable grounds to provide a defence.[9] Where a perpetrator uses physical force capable of constituting an assault as a prelude to sexual intercourse in the honest but unreasonable belief that the victim is consenting to the intended sexual intercourse, how is the issue of intention in respect of the two elements of assault and intent to rape to be approached? In particular, does the existence of an

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6 *A v R* (CA), above n 5.

7 At [36].

8 See *R v Lee* [2006] 3 NZLR 42, (2006) 22 CRNZ 568 (CA) at [308]. See the discussion below from [50].

9 Crimes Act 1961, s 128(2)(b) and (3)(b).

honest but unreasonable belief in consent to sexual intercourse mean there is no "assault" for the purposes of s 129(2)?

[21] We said at the outset that, on the facts as accepted by the jury, the only belief in consent possibly available to the appellant was a mistaken belief that the complainant was agreeable to having sexual intercourse with him, plainly an unreasonable belief in the circumstances. In determining what suffices to meet the mens rea of the "intent to commit rape" element of s 129(2), we see no reason to depart from the approach taken by this Court in *L v R* to the offence of attempted sexual violation by rape under s 129(1). While the issue ultimately comes down to the interpretation of s 129(2) in context, we think there is value in putting the issue in its broader context.

Subjectivity and objectivity in the context of sexual offending

[22] Generally speaking, in recent times academic criminal lawyers and common law courts have preferred a subjective rather than an objective approach to the imposition of criminal liability. The rationale for this approach was explained by Lord Bingham in *R v G*, a case concerning the meaning of "reckless" in s 1(1) of the Criminal Damage Act 1971 (UK).[10] Section 1(1) applies where a person has destroyed or damaged the property of another "intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged". The question was whether the accused had actually to appreciate the risk of damage or destruction or whether it was sufficient that a reasonable person in the accused's position would have appreciated the risk.

[23] The House of Lords held that the former meaning was intended. In the course of explaining this outcome Lord Bingham said:[11]

> [I]t is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule actus non facit reum nisi mens sit rea. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an

10 *R v G* [2003] UKHL 50, [2004] 1 AC 1034.
11 At [32].

> appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

[24] Both Lord Steyn and Lord Rodger observed that this interpretation reflected the modern tendency of the criminal law. Lord Steyn said:[12]

> This interpretation of section 1 of the 1971 Act would fit in with the general tendency in modern times of our criminal law. The shift is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant.

Lord Rodger noted:[13]

> It is no secret that, for a long time, many of the leading academic writers in English criminal law have been "subjectivists". By that I mean, at the risk of gross oversimplification, that they have believed that the criminal law should punish people only for those consequences of their acts which they foresaw at the relevant time.

[25] However, like other legislatures, the New Zealand Parliament has on occasion deliberately amended the law to depart from a wholly subjective approach to the mental element of offences by introducing an objective element. This occurred in 1985 in relation to sexual violation. Currently, the offence of sexual violation by rape contains three requirements:[14]

(a) intentional penetration of the genitalia by the penis;

(b) without the consent of the complainant; and

(c) without the accused believing on reasonable grounds that the complainant is consenting.

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12 At [55].
13 At [65].
14 Crimes Act, s 128(2) and *L v R*, above n 1, at [6].

[26] As will be obvious, there are two aspects to the offence which involve the perpetrator's mental state – the penetration must be intentional and any belief in consent must be based on reasonable grounds. Our focus is on the second of these elements, namely the objective requirement that a mistaken belief in consent be reasonable.

[27] To understand the change to New Zealand law by Parliament in 1985 it is necessary to go back to the well-known decision of the House of Lords in *Director of Public Prosecutions v Morgan*.[15] There the House of Lords considered whether a person could properly be convicted of rape where he believed the woman was consenting but his belief was not based on reasonable grounds. This was against the background that s 1(1) of the Sexual Offences Act 1956 (UK) merely declared it was an offence for a man to rape a woman. The majority held that the prosecution had to establish an intention to have non-consensual intercourse, that is, that the accused either knew that the complainant did not consent, or was reckless as to whether or not she consented, so that an honest belief that the complainant consented to sexual intercourse would negative the requisite intention, no matter how unreasonable that belief was. The reasonableness of the accused's belief went only to the fact-finder's assessment of whether it was likely that he held it.

[28] The law as articulated in *Morgan* applied in New Zealand[16] and elsewhere.[17] The fact that it gave full effect to subjectivity in relation to the mental element of rape caused much controversy. Ultimately legislation was enacted in Canada,[18] New Zealand[19] and the United Kingdom[20] to introduce an objective component into the mens rea requirements for sexual offences. In New Zealand, the requirement that an accused's belief in consent be based on reasonable grounds was introduced, so

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15 *Director of Public Prosecutions v Morgan* [1976] AC 182 (HL).

16 See, for example, *R v Walker* CA 133/79, 3 March 1980 at 2–3 and *R v Kaitamaki* [1980] 1 NZLR 59 (upheld on appeal to the Privy Council: *Kaitamaki v R* [1984] 1 NZLR 385, [1985] AC 147 (PC)). See also Criminal Law Reform Committee *The Decision in DPP v Morgan: Aspects of the Law of Rape* (Wellington, 1980).

17 See, for example, *R v McEwan* [1979] 2 NSWLR 926 (NSW CCA) and *R v Saragozza* [1984] VR 187 (VSCFC) in Australia and *Pappajohn v R* [1980] 2 SCR 120 in Canada.

18 Criminal Code, RSC 1985, c. C-46 (Can), s 273.2, which provides that it is no defence to sexual assault charges that the accused believed that the complainant had consented where the accused did not take steps that were reasonable in the circumstances known to him or her to ascertain consent.

19 Crimes Amendment Act (No 3) 1985.

20 Sexual Offences Act 2003 (UK).

that the Crown must now prove that the accused did not believe on reasonable grounds that the complainant was consenting to the relevant sexual activity.[21] Several of the Australian states have taken similar, albeit not identical, steps.[22]

[29] In addition, as we discuss further at [53] to [57] below, some legislatures (including the New Zealand Parliament) enacted statutory provisions which identify matters that do not amount to consent to sexual activity.[23]

Section 129

[30] Against this brief background, we turn to the provisions at issue in the present case. Section 129 of the Crimes Act provides:[24]

> **Attempted sexual violation and assault with intent to commit sexual violation**
>
> (1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.
>
> (2) Every one who assaults another person *with intent to commit sexual violation* of the other person is liable to imprisonment for a term not exceeding 10 years.

[31] Section 72(1) identifies what is required in relation to an attempt. It provides:[25]

> Every one who, *having an intent to commit an offence*, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

The language of s 72(2) and (3) indicates that the common law requirement that, to constitute an attempt, the act or omission must be immediately or proximately connected with the intended offence is part of New Zealand law and requires an initial assessment by the judge. This requirement is a mechanism to provide at least

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21 Crimes Act, s 128(2)(b) and (3)(b).

22 See, for example, Crimes Act 1958 (Vic) s 37AA, which provides that if evidence is led that an accused believed the complainant was consenting, the judge must direct the jury to consider any evidence of that belief, and whether it was reasonable in all the relevant circumstances.

23 In New Zealand, see s 128A of the Crimes Act 1961, which was introduced by the Crimes Amendment Act (No 3) 1985, s 2.

24 Emphasis added.

25 Emphasis added.

a partial solution to the problem of over-reach by limiting the actus reus of "attempt".

[32] As will be appreciated, both the s 129(1) and s 129(2) offences require an intention to commit sexual violation, in this case by rape. In the case of the s 129(1) offence, this is by virtue of the definition of "attempt" in s 72(1); in the case of the s 129(2) offence, it is by virtue of the subsection itself.

[33] Section 129 dates back to s 193 of the Criminal Code Act 1893. That section provided:

> **193 Attempt to commit rape**
>
> Every one is liable to ten years' imprisonment with hard labour, and, according to his age, to be flogged or whipped once, twice, or thrice, who attempts to commit rape, or assaults any person with intent to commit rape.

This section was carried over, in identical terms, in s 213 of the Crimes Act 1908. When the Crimes Act was enacted in 1961, s 129 read:

> **129 Attempt to commit rape**
>
> Everyone who attempts to commit rape or assaults any person with intent to commit rape is liable to imprisonment for a term not exceeding ten years.

Attempted rape and assault with intent to commit rape were not separated out into the existing subsections until s 7 of the Crimes Amendment Act 2005 came into force in mid-2005.

[34] To understand how attempted rape and assault with intent to commit rape came to be included in the same section it is necessary to go back to the Criminal Code Bill which preceded the Act of 1893. The Revision of Statutes Act 1879 provided for the appointment of Commissioners to undertake various tasks in relation to New Zealand statute law. Under s 4(7) of that Act, they were required to report on a Bill introduced into the Imperial Parliament to establish a code in relation to indictable offences. By the time the Commissioners reported in 1883, several drafts of the Bill had been introduced in the United Kingdom Parliament, the latest

being in 1880. The Commissioners prepared a draft Criminal Code Bill for New Zealand on the basis of the 1880 draft.[26]

[35] The draft Criminal Code Bill referred only to attempts to commit rape; there was no specific reference to assaults with intent to commit rape. There was a provision dealing with aggravated assault, that is, assault with intent to commit an offence. It may be that assault with intent to commit rape was specifically identified and included with attempted rape in the Criminal Code Act as enacted in 1893 to reflect the fact that in the Bill the maximum penalty for attempted rape had been increased from two years to seven years imprisonment. Because the maximum penalty for assault with intent to commit an offence under the Bill was two years imprisonment, it may have been thought necessary to make specific provision for assault with intent to commit rape so as to attach to it the same seven year maximum penalty as applied in the case of attempted rape.[27]

[36] In any event, the fact that the legislature combined attempted rape and assault with intent to commit rape in one section suggests that they were seen as having some common features, a point to which we will return.

L v R

[37] This Court considered the mental element for attempted sexual violation under s 129(1) in *L v R*. The case was unusual in that the accused was a woman and the complainant a 15 year old male. Tipping J, delivering the judgment of himself, Elias CJ, Blanchard and McGrath JJ, gave the following summary of the factual basis for the appellant's conviction:[28]

> The appellant was found guilty on the attempted sexual violation count on the following basis. The 15-year-old complainant testified that the appellant had grabbed his penis and tried to put it into her vagina. He said he would not let it go in. She tried doing it a couple of times and he then stopped her and told her he could not do it.

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26 For a history of the Criminal Code Act 1893, see Stephen White "The making of the New Zealand Criminal Code Act of 1893: A sketch" (1986) 16 VUWLR 353.

27 Although the maximum penalty for attempted rape under the Bill was seven years imprisonment, the maximum penalty under the Criminal Code Act as enacted was 10 years imprisonment for both attempted rape and assault with intent to commit rape. The maximum penalty for other aggravated assaults was two years imprisonment: see s 189.

28 *L v R*, above n 1, at [3]. Henry J delivered a separate concurring judgment.

[38] Having identified the three elements required for sexual violation by rape, the majority judgment said:[29]

> The first element requires the Crown to prove the physical act of penetration accompanied by the necessary mental state, namely the intention of the accused that there shall be penetration. The second element requires proof of the fact that the complainant did not consent to the penetration. The third element requires the Crown to prove either that the accused did not believe the complainant was consenting to the penetration; or, if the accused did or might as a reasonable possibility have so believed, that the accused had no reasonable grounds for that belief.

[39] The majority judgment then set out the provisions of s 72 of the Crimes Act dealing with attempts, set out the reasoning of the Court of Appeal and summarised the rival contentions of the parties, and its conclusion, as follows:[30]

> [Counsel] for the appellant contended that the phrase "having an intent to commit an offence" comprehended only an intent to achieve penetration without consent; or, put in a different way, an intent to effect non-consensual penetration. The Crown argued that s 72(1) required attention to be given to all aspects of the completed offence [ie, intent to have sexual connection with the complainant, without the complainant's consent, and without believing on reasonable grounds that the complainant consented]. It will emerge from the discussion which follows that we consider the answer lies essentially in the Crown's approach. There are several reasons for this, not least of which is the desirability of having symmetry between an attempt and the completed crime, save, of course, to the extent necessitated by the fact that, in physical terms, an attempt must necessarily fall short of the full crime.

[40] The appellant's counsel had attempted to draw an analogy with attempted murder, where it is accepted that nothing less than an intention to kill is sufficient to justify a conviction, even though there are other lesser states of mind that are sufficient to constitute the completed offence of murder.[31] The majority judgment rejected the analogy, explaining that the lesser states of mind that were sufficient for the completed offence of murder were not sufficient for an attempt because they did not relate to the necessary result, namely death.[32] The majority said:[33]

> The fact that in the case of attempted murder the necessary mental state of the accused is confined to the first of the statutory states of mind sufficient for the completed crime, does not, in our view, mandate the result for which

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29 At [7].
30 At [11].
31 See *R v Murphy* [1969] NZLR 959 (CA).
32 *L v* R, above n 1, at [15]–[16]. Henry J also rejected the analogy at [52].
33 At [16].

> [counsel for the appellant] contends in relation to attempted sexual violation. In relation to an attempt to commit that crime, [counsel's] submission has the effect of eliminating altogether an express ingredient of the completed crime and substituting another, which has the accused's intent wrongly focused on the complainant's lack of consent. We do not consider the analogy [counsel] sought to draw is valid in principle or sound in policy terms. To have the proposed degree of dissonance between attempted sexual violation and the full offence would be undesirable in practical terms and, in our view, the statutory regime militates against [counsel's] submission.

[41] The majority considered that assistance could be derived from the decision of the Court of Appeal in England in *R v Khan*.[34] At the time of that decision, s 1 of the Sexual Offences Act 1956 (UK) provided that a man committed rape by having sexual intercourse with a woman without her consent knowing that she was not consenting or being reckless as to whether she was consenting. The issue for the Court concerned the mental element for attempted rape. The appellant argued that recklessness as to consent was not sufficient; rather, the prosecution had to show that an accused intended to have non-consensual sex with the complainant.

[42] The Court of Appeal rejected this contention. Russell LJ said:[35]

> In our judgment an acceptable analysis of the offence of rape is as follows: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that: (a) the woman does not consent AND (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> Precisely the same analysis can be made of the offence of attempted rape: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that (a) the woman does not consent AND (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the mens rea is identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but

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[34] *R v Khan* [1990] 1 WLR 813 (CA).

[35] At 818–819.

> only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.
>
> If this is the true analysis, as we believe it is, the attempt does not require any different intention on the part of the accused from that for the full offence of rape. We believe this to be a desirable result which in the instant case did not require the jury to be burdened with different directions as to the accused's state of mind, dependent upon whether the individual achieved or failed to achieve sexual intercourse.
>
> We recognise, of course, that our reasoning cannot apply to all offences and all attempts. Where, for example as in causing death by reckless driving or reckless arson, no state of mind other than recklessness is involved in the offence, there can be no attempt to commit it.
>
> In our judgment, however, the words "with intent to commit an offence" to be found in section 1 of the Act of 1981 mean, when applied to rape, "with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent". The only "intent", giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent ie when the woman is not consenting and he either knows it or could not care less about the absence of consent.

[43] In this analysis, the Court adopted the distinction drawn by Professor Glanville Williams and others between the consequences of an act and the circumstances in which the act occurs.[36] Professor Williams considered that full intention was required in relation to the former, but recklessness would suffice for the latter.

[44] In *L v R*, the majority considered that the essence of the Court's analysis in *Khan* was applicable to attempted sexual violation by rape in the New Zealand context. Referring to the three elements of the offence previously identified, the majority judgment said:[37]

> The reference in [s 72(1)] to "having an intent to commit an offence" means that to be guilty of attempted sexual violation the person charged must intend to complete the first element of the full offence. That is the only intent necessary in the classic sense of that concept. But, as the context is an attempt to commit the full offence, the completed first element is not enough. It must be accompanied not only by the lack of consent of the victim required by the second element, but also by the lack of belief about the

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[36] See the discussion in Glanville Williams "The Problem of Reckless Attempts" [1983] Crim LR 365 and the materials referred to therein. See also Fran Wright "Reckless attempts revisited" [2006] NZLJ 208 and Kevin Dawkins and Margaret Briggs "The Mental Element in Attempt" [2007] NZ L Rev 161, who discuss the distinction in the course of their discussion of *L v R*.

[37] *L v R*, above n 1, at [21].

> victim's consent required of the accused person by the third element. That means the intent must be to complete the first element, that is, in a conventional case of sexual violation by rape, to effect penetration, in circumstances where that penetration is without the consent of the complainant and the accused does not believe on reasonable grounds that the complainant consents.

[45] The judgment concluded on this point as follows:[38]

> The approach we prefer means that the difference between an attempt and the full offence of sexual violation lies solely in the fact that the accused has tried to fulfil the first element of the completed offence but has not achieved his or her objective. In the ordinary case of attempted rape the man has tried to penetrate the woman but has not done so. The legislative policy, introduced in 1985, that any belief in consent on the part of the accused must be on reasonable grounds is maintained for the attempt consistently with what is required for the completed offence. Parliament can hardly have intended the position to be otherwise. There is a clear indication to that effect in the recently introduced s 134 of the Crimes Act in combination with s 134A, where the need for any belief about the age of the complainant to be on reasonable grounds is expressly required both for the completed offence and for an attempt. The difference between the attempt and the completed offence will, on this basis, be simple to explain to juries; much simpler than would be the case in the approach advanced by the appellant. Under that approach confusingly different tests would apply if the jury was having to consider whether the facts amounted to the full offence or only to an attempt. *The resolution of the issue presented by this case in the way outlined is thus consistent with the general policy of current sexual offences legislation, with principle, and with practical considerations*.

[46] Henry J delivered a short concurring judgment, in the course of which he said:

> [48] It is necessary therefore to ascertain the elements of the offence of attempted unlawful sexual connection. First, an act which constitutes an attempt to have sexual connection. That is the actus reus. Secondly, that the victim is not consenting to the intended connection or, depending upon the proximity in time and place of the attempt, would not have consented to the intended connection. Thirdly, that the offender did not believe on reasonable grounds the victim was consenting or would consent to the intended connection. The mens rea of the offence lies in the third element.
>
> [49] … The substantive offence [ie, sexual violation by rape] is not restricted to knowingly having non-consensual connection, and similarly an intent to commit that offence under s 72(1) is not restricted to an intent to knowingly have non-consensual intercourse.
>
> [50] There is no difference in substance between the approach to consideration of the substantive offence and the attempt to commit it. The

38 At [24] (footnotes omitted, emphasis added).

> distinction lies solely in the fact that in the case of an attempt the act of connection has not been completed.

Henry J considered that to draw a distinction between the completed offence of sexual violation by rape and an attempt on the basis suggested by the appellant would create an "illogical distinction",[39] which would create difficulties for juries. Obviously, this view accords with that of the majority.

[47] We will return to *L v R*, and to *Khan*, later in this judgment when we discuss *L v R*'s application to this case. Before we do so, however, we need to address assault and the role of consent.

Assault and the role of consent

[48] "Assault" is defined in s 2 as:

> the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose.

[49] In general, assault requires two intentional elements. First, the application of force must be intentional – an accidental or unintended application of force is not sufficient. Second, the person applying force must appreciate that the victim does not consent to the application of force, or at least be reckless as to that. This second requirement arises where the victim's consent to the application of force is a defence, so that there is no assault.[40]

[50] The circumstances in which consent can be a defence of a charge of assault were considered in some detail by the Full Court of the Court of Appeal in *R v Lee*.[41] In that case, the Court held so far as the common law of New Zealand was concerned:[42]

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39 At [51].

40 This may arise from the way particular offences are defined or from the fact that s 20 preserves common law defences to the extent that they are not inconsistent with statute.

41 *R v Lee*, above n 8.

42 This summary is based on what is said at [289]–[318]. See also *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235.

(a) The common law position in relation to consent is preserved by s 20 of the Crimes Act, except to the extent that consent is dealt with specifically in particular statutory provisions.[43]

(b) Where consent is available as a defence, an honest but mistaken belief by the perpetrator in consent will also provide a defence. The mistaken belief need not be reasonable.

(c) Consent can be a defence to an assault where no serious injury is intended and caused except in the case of fighting.[44]

(d) In relation to intentional infliction of harm that is greater than "mere bodily harm", consent may be a defence unless:

  (i) there are good public policy reasons to forbid it; and

  (ii) those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy.

(e) Where grievous bodily harm is intended, it will be rare for a court to accept that consent is available as a defence. It will be different where an activity (a contact sport, for example) involves the *risk* of serious injury. In such cases, a court is more likely to accept that consent is available, ie, that participants consent to run the risk of serious injury.

The important feature of this description for present purposes is that public policy considerations are relevant to the courts' determination of the scope of the consent defence in the context of assault.

[51] Consent may be express or implied. For example, participation in certain types of sports will involve, if not an express consent, at least an implied consent to

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[43] For example, s 63 provides that no one has the right to consent to the infliction of death upon him or herself and s 61A deals with consent in the context of surgical operations.

[44] The Court used the term "mere bodily harm" in contradistinction to "serious injury". It appears to be derived from the majority judgments in *R v Brown* [1994] 1 AC 212 (HL).

the type of physical contact that occurs as an incident of such sports and to the risk of serious injury.[45] More relevantly to the present case, the law recognises that various actions that might technically constitute assaults occur between strangers in everyday life but should not be treated as assaults. An example is touching someone on the shoulder to get his or her attention. Instances of this type are best treated as involving implied consent – people are treated as consenting to the types of touching that are incidental to everyday social living.[46]

[52] As noted previously, in general, where consent is available as a defence, an accused's honest belief that the "victim" consented to the physical contact will be a defence to a charge of assault, even if that belief is unreasonable.[47] However, this has been legislatively modified in respect of the offences of sexual violation by rape or unlawful sexual connection.[48]

[53] A further legislative modification to the law relating to consent in the context of sexual offences is found in s 128A of the Crimes Act. The heading to that section reads "Allowing sexual activity does not amount to consent in some circumstances". The section sets out a number of circumstances or situations which do not amount to the giving of consent to "sexual activity" (which is defined in s 128A(9) as sexual connection or doing an indecent act to a person that, without that person's consent, would be an indecent assault). For present purposes, it is sufficient to mention just one of the circumstances identified. Section 128A(1) provides:

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

The principle underlying this subsection appears to be that, in the context of sexual activity, mere submission does not constitute consent: consent requires some positive or affirmative words or conduct.

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45 See Simester, Brookbanks and Boister, above n 4, at [17.2.4(4)].

46 At [17.2.2].

47 See above at [19].

48 Although not in the case of indecent assault, where an honest but unreasonable belief in consent still affords a defence: see *R v Nazif* [1987] 2 NZLR 122 (CA) at 128; and *R v Aylwin* [2007] NZCA 458 at [35].

[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:[49]

> 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.

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

[56] In Canada, which has an equivalent provision to s 128A,[50] the Supreme Court has dealt with this issue by holding that an honest belief in consent based on a failure to protest reflects a mistake of law, and reliance on it is therefore prohibited.[51]

[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.

[58] Against this background, we turn to consider the present case.

This case

[59] We discuss the position under four headings – the competing versions of events, the operation of consent, over-reach and the application of *L v R*.

Competing versions of events

[60] We begin with the competing versions of events given by the appellant and the complainant. In essence, the appellant's account was that he grabbed or took the complainant's hand believing that she wanted to have sex with him. When she pulled her hand away and went to leave, he realised that he was mistaken and took the matter no further. By contrast, the complainant said that when she attempted to walk past the appellant to leave the toilets, he grabbed her from behind, pinning her arms. She could feel his erect penis pushing into her bottom. Although she said "No" several times, the appellant attempted to remove the bottom part of her overalls, which gave her the opportunity to wriggle free from his grasp and make her escape.

[61] The Judge instructed the jury that they had to accept the complainant's version of events to convict the appellant. If they were left with a reasonable doubt

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50 Criminal Code, RSC 1985, c. C–46 (Can), s 265(3). See also s 273.1.

51 See *R v Ewanchuk* [1999] 1 SCR 330 at [51] per Major J (delivering the judgment of himself and Lamer CJ, Cory, Iacobucci, Bastarache and Binnie JJ). Section 19 of the Canadian Criminal Code is the equivalent of s 25 of the Crimes Act (ignorance of law is no defence).

about her version, or accepted the appellant's account, they were obliged to acquit. We consider that this direction was correct. On the appellant's account, he touched or grabbed the complainant's hand with the intention of having sexual intercourse with her but when she withdrew her hand and left, he gave up. If that account is accepted, either:

(a) the touching can be seen as the type of commonplace touching covered by implied consent, so that it would not constitute an "assault"; or

(b) the appellant's decision not to pursue that matter once he realised that the complainant did not want to have sexual intercourse with him indicated that he had no intention to commit sexual violation.

On either analysis, the appellant would not be guilty of an offence against s 129(2).

[62] On the other hand, on the complainant's account, the appellant continued with his attempt to have sexual intercourse by trying to remove the complainant's overalls despite the fact that she had tried to walk around him to leave the toilets and, when he grabbed her round her arms and held her in a bear hug, had said "No" several times. There was no suggestion that the appellant had any belief that the complainant was consenting to the physical contact or to sexual intercourse on this version of events. For example, the appellant did not say that, despite the complainant's protestations, he thought she was willing to have intercourse with him.

[63] In the circumstances of this case, the Judge's instruction to the jury in relation to the competing versions of events was correct. The jury obviously rejected the appellant's account and accepted that of the complainant.[52] It follows from this that, even if we were to accept that the assault element of the offence required a separate mens rea and an honest but unreasonable belief that the complainant was consenting to sexual intercourse was sufficient to constitute a defence to that assault element (which we do not), the appellant was rightly convicted as there was nothing

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[52] We say this because the Judge instructed the jury that they had to accept the complainant's version of events before they could find the appellant guilty.

to indicate that he had any such belief. As a consequence, there is no miscarriage of justice, so that the appeal must be dismissed.

Operation of consent

[64] When considering the effect of an erroneous belief in consent, it is important to take account of what it is that consent may go to. We can illustrate the point by referring to two examples:

(a) First, assume that A and B are kissing passionately. A has it in mind that matters will progress to sexual intercourse whether B consents or not, that is, A has an intention to rape if necessary. B, however, does not intend to allow things to progress beyond the passionate kissing. Neither informs the other of what is in their minds. If they are interrupted at that point and nothing further happens, A could not be guilty of assault with intent to rape,[53] because there will have been no "assault" – the only physical contact that occurred was fully consented to. In this type of case, consent to the physical contact constituting the "assault" and consent to the intended sexual intercourse can sensibly be viewed independently.

(b) Second, assume a factual scenario of the type alleged by the complainant in this case. In this type of situation, there will be no consent to the physical contact (ie, the assault) or to the intended sexual intercourse. Because the physical contact and the intended sexual intercourse are so closely linked, there being a very brief sequence of events which, from A's perspective, were intended to culminate in immediate sexual intercourse, it makes no sense to consider consent in relation to the physical contact in isolation from consent to the proposed sexual intercourse. (This close connection between the physical contact and the intended sexual intercourse is something to which we return below at [73].)

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53 This assumes that A's intention to proceed to have intercourse whether or not B consented could be proved in some way.

[65] This analysis carries over to mistaken belief in consent. In the first type of situation, A may have a mistaken belief in consent in relation to the activity that constitutes the assault quite independently of any belief about whether or not B is ultimately willing to have sexual intercourse. But in the second type of case, the physical contact is for the immediate purpose of having sexual intercourse – A's justification for the physical contact is that A wrongly believes that B wants to have intercourse. So, in the present case, the appellant's defence was not that he thought the complainant was consenting to the assault independently of the intended intercourse but rather that he thought the complainant wanted to have intercourse with him and the physical contact was to facilitate this mistaken belief.

[66] We consider that it would be contrary to Parliament's purpose in relation to this type of offending and serve no sound principle to take an approach to mistaken belief in consent in relation to the assault element of the s 129(2) offence that undermines the proper approach to the intention to rape element of the subsection. Accordingly, assuming for the moment that an honest but unreasonable belief in consent to intercourse does constitute an "intent to commit sexual violation" for the purposes of s 129(2), that same unreasonable belief could not be used to negative the assault element on the basis that it was honestly held. We consider that this outcome is required when s 129(2) is interpreted in the context of the sexual offences provisions more generally, which includes the legislative policy which underlies them, as we explain in more detail below.

[67] In this connection, we note that in *L v R* the Court of Appeal had held that an accused must intend, at the time of the attempt, to have sexual connection without the consent of the complainant "*to the activity which amounts to attempted sexual connection, and without believing on reasonable grounds that the complainant consents to that activity*".[54] This Court disagreed with that analysis. It held that the question was whether the complainant would have consented to the conduct necessary to constitute the full offence, rather than the conduct constituting the attempt.[55] The conduct constituting the attempt in *L v R* was an assault (the charge in

54 *L v R* [2006] 3 NZLR 291 (CA) at [26] (emphasis added).
55 *L v R*, above n 1, at [23].

that case could as easily have been assault with intent to commit rape as attempted rape). We consider that this supports the conclusion just expressed.

Over-reach

[68] As we indicated at the outset, inchoate offences raise the issue of the proper reach of the criminal law. As they fall short of completed offences, inchoate offences cover a wide range of conduct that, standing alone, may appear to be innocuous or non-threatening. What makes the conduct threatening is the fact that, from the perpetrator's perspective, it was a step on the way to committing the full offence. Accordingly, intention (using the term broadly) in the context of attempts (and other inchoate offences) is particularly important.[56] However, if too much weight is given to intention, it is possible that a person will be subjected to criminal liability essentially as a result of his or her thoughts, which is generally thought to be beyond the proper scope of the criminal law. Moreover, it is always possible that someone who commences on the path to committing an offence will change his or her mind and abandon the proposed criminal enterprise, thus undermining the justification for the imposition of liability.

[69] There are two obvious mechanisms which the law might utilise to meet problems of over-reach in relation to inchoate offences. The first is through control of what it is that is sufficient to constitute the actus reus. In relation to attempt, this is achieved through the common law test articulated in s 72(2) of the Crimes Act – conduct which is "only preparation" and too remote will not be sufficient to constitute an attempt (the proximity test). Whether conduct has gone beyond mere preparation and is sufficiently proximate to the commission of the offence is a question of law for the judge. The second is through the mental element. This is illustrated by the inchoate offence of conspiracy,[57] where it appears to be accepted that the offence requires full intention to agree to commit an offence, and an intention that the conduct necessary for the offence be carried out – neither

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[56] In *R v Whybrow* (1951) 35 Cr App R 141 (CA) at 147, Lord Goddard CJ said in relation to attempt that "the intent is the essence of the crime".

[57] Crimes Act, s 310.

recklessness nor negligence is sufficient even though they may be sufficient for liability for the completed offence.[58]

[70] Such control mechanisms may not operate uniformly across all forms of inchoate offences, however. For example, Graham Virgo argues that the mental elements for conspiracy and attempt are justifiably distinct because an attempt is closer to the completed offence than conspiracy, so that conspiracy requires proof of more significant culpability.[59] Others, however, argue for a uniform approach.[60]

[71] In relation to attempted rape and assault with intent to commit rape, the Court of Appeal in *R v Hassan* said (in the context of a sentence appeal):[61]

> We accept that the two offences are separately defined under s 129 and do not necessarily contain the same elements. Frequently however they will overlap in their factual content, and what is important is for the circumstances of the particular offending to be properly analysed in the context of the particular charge. An assault with intent may fall short of an attempt, and an attempt does not necessarily involve an assault – hence the different offences, albeit with a common maximum penalty.

[72] We agree that attempted rape will not necessarily involve an assault, although many attempted rapes do. In principle, it is possible to imagine situations involving assaults with intent to commit rape that do not amount to attempts,[62] as an assault may not be sufficiently proximate to penetration to constitute an attempt.[63] On the other hand, the fact that attempted rape and assault with intent to commit rape are dealt with together in the same section may indicate that Parliament considered that both should be subject to the same restriction that the conduct involved must be sufficiently proximate to the full offence.

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[58] See Simester, Brookbanks and Boister, above n 4, at [8.3.5(3)].

[59] Graham Virgo "Criminal Attempts – The Law of Unintended Consequences" [2014] CLJ 244 at 247.

[60] See, for example, J Child and A Hunt "Mens rea and the general inchoate offences: *another* new culpability framework" (2012) 63 NILQ 247.

[61] *R v Hassan* [1999] 1 NZLR 14 (CA) at 16.

[62] See Sex Offences Review *Setting the Boundaries: Reforming the law on sex offences* (Home Office, vol 1, July 2000) at [2.15].

[63] In *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909 a Full Court of the Court of Appeal took what can fairly be described as an expansive view of proximity. The approach in the United Kingdom seems rather narrower, although it is accepted that it is not necessary to show that the accused has attempted to effect penetration in order to secure a conviction for attempted rape: see *Attorney General's Reference (No 1 of 1992)* [1993] 1 WLR 274 (CA) at 285. We express no view on which approach to proximity is to be preferred.

[73] But even if proximity is not required as a matter of law in respect of offences under s 129(2), we think that, without it, the Crown will have difficulty in proving an intent to rape. The need for the Crown to prove that there was such an intent when the assault was committed means that generally there will have to be a close connection between assault and the intended sexual intercourse (which will often be sufficient to justify a conviction for an attempt if attempt had been charged). It is likely that the prosecution will have to rely on the circumstances and nature of the assault to assist in establishing that the accused intended to have sexual intercourse with the complainant and/or that the accused had the necessary mental element in relation to absence of consent, at least in the absence of other powerful extrinsic evidence of purpose or a confession.

[74] A similar point can be made about attempts. In *R v Harpur*, the Full Court of the Court of Appeal accepted that there was a close linkage between the assessment of the actus reus of an attempt and the mens rea, so that when a court considers whether conduct that is alleged to constitute an attempt is sufficiently proximate, the strength of the evidence of mens rea will be relevant – ie, more remote conduct may meet the proximity test if the intent is clear.[64] In relation to assault with intent to commit rape, there is also a close relationship between the actus reus and the mens rea, although as a practical matter the relationship may well be the other way round – the nature of the assault will cast light on the mental element.

[75] Accordingly, as a practical matter, we think it likely that there will have to be reasonable proximity between the assault and the intended sexual intercourse before an accused will be convicted. This will significantly limit, if not eliminate, the potential for over-reach.

[76] Turning to the mens rea for attempted rape and for assault with intent to commit rape, the nature of the mental element required may widen or narrow the scope of the offences. If the mens rea required is full intention (ie, an intention to have sexual intercourse knowing that the complainant does not consent), the scope of the offence will be more limited than if a lesser mental state will suffice for conviction (ie, an unreasonable belief in consent). But if a lesser mental state is

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[64] R v Harpur, above n 63, at [25].

sufficient, that does not necessarily mean that the offence is over-broad: that will depend on a range of considerations. In this connection, it is noteworthy that the conduct at issue in this case would likely constitute the offence of sexual assault in the United Kingdom. There, sexual assault requires intentional touching that is sexual and not consented to, in circumstances where the toucher does not reasonably believe that the other person consents to the touching.[65] Whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including whether the toucher took any steps to ascertain whether the other person consented.[66] Certainly, then, the United Kingdom Parliament did not consider that liability based on an objective mental element created an over-broad offence in a comparable context.

Application of L v R

[77] As we have said, in *L v R*, this Court held that a person charged with attempted sexual violation by rape could be convicted if he or she had an honest but unreasonable belief that the complainant was consenting to sexual intercourse.[67] We see no legitimate distinction between attempt to commit sexual violation by rape and assault with intent to commit sexual violation by rape in this respect.

[78] Sexual violation by rape requires (1) penetration where (2) the victim does not consent and (3) the perpetrator does not have a reasonable belief in consent. In relation to an attempt, the only difference from the completed offence is that penetration is not effected – everything else remains the same. Similarly in the case of assault with intent to commit sexual violation by rape. The position must be assessed at the time of the assault. Apart from the deliberate physical contact constituting the assault, the Crown must establish an intention to commit sexual violation by rape, that is, that the perpetrator intended to have sexual intercourse with the victim, that the victim did not consent to sexual intercourse and that the perpetrator did not have a reasonable belief that she was consenting. In our view, this result follows from a contextual reading of the statutory language.

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65 Sexual Offences Act 2003 (UK), s 3(1).
66 Section 3(2).
67 *L v R*, above n 1, at [25].

[79] Assuming for the sake of argument that there are situations where an honest but unreasonable belief in consent to the physical contact comprising the alleged assault could operate as a defence to the assault element of the s 129(2) offence, that does not apply where the assault and the intended sexual intercourse are closely linked in time and place and the mistaken belief in consent that the accused relies upon as a defence to the assault element is a belief that the complainant was consenting to sexual intercourse. In this class of case, a belief in consent that is inconsistent with the belief required to provide a defence to the completed offence of sexual violation by rape is insufficient.

[80] In *L v R*, the Court considered that s 129(1) had to be interpreted in its statutory context, specifically, the immediate context involving other sexual violation provisions as amended in 1985 and subsequently. These changes in legislative context had the effect of changing the scope of the text in s 129(1). The concept of intent to commit rape evolved to reflect the new context. Before the amendments, the intent to commit rape element required proof of full intention or recklessness, mirroring the completed offence; after the amendments, it included (in addition to those two mental states) a mistaken but unreasonable belief in consent, again mirroring the completed offence. Precisely the same analysis applies in the case of assault with intent to commit rape under s 129(2).

[81] As we have noted, the Court in *L v R* derived assistance from the English Court of Appeal's decision in *R v Khan*. There are two points to be made about *Khan*. The first is that it was applied by the English Court of Appeal in a different context in *Attorney-General's Reference (No 3 of 1992)*.[68] That case concerned a charge of attempted aggravated arson. The appellants had thrown some petrol bombs at a car, but they had missed their target (there were people in and near the car at the time). The completed offence of aggravated arson required that a person destroy or damage property and intend or be reckless as to that destruction or damage and as to whether another's life would be endangered. The Court of Appeal identified the issue as being whether a defendant would be guilty of attempting the offence if he did something that went beyond mere preparation, intending to damage property and being reckless as to whether the life of another would thereby be

[68] *Attorney-General's Reference (No 3 of 1992)* [1994] 1 WLR 409 (CA).

endangered.[69] The Court held that the defendant would be guilty in those circumstances, saying:[70]

> If, on a charge of attempting to commit [an] offence, the prosecution can show not only the state of mind required for the completed offence but also that the defendant intended to supply the missing physical element of the completed offence that suffices for a conviction.

[82] In a subsequent decision, *R v Pace*, the English Court of Appeal distinguished *Khan* and *Attorney General's Reference (No 3 of 1992)*, albeit in a different context again.[71] The appellants were scrap merchants who were charged with attempting to conceal, disguise or convert "criminal property" under the Proceeds of Crime Act 2002 (UK). "Criminal property" was defined as property which constituted or represented the benefit of criminal conduct which the person knew or suspected constituted or represented such a benefit. The appellants had purchased "stolen" property from undercover police officers, who were conducting a "sting" operation to identify scrap merchants who were prepared to purchase stolen property. Because the goods were not in fact stolen, the accused were charged with an attempt rather than the completed offence. The issue was whether "suspicion" that the goods were stolen was a sufficient mental element for conviction of an attempt. The Court of Appeal held that it was not. Rather, the Court held that the phrase "with intent to commit an offence" in the UK equivalent of s 72(1) required, as a matter of ordinary language, an *intent* to commit all the elements of the offence.[72]

[83] In reaching its decision, the Court distinguished *Khan* on the basis that:[73]

(a) the offence in *Khan* allowed recklessness as the mens rea whereas that was not so in *Pace*;

(b) the appellants in *Khan* could have completed the principal offence whereas in *Pace* they could not as the goods they received did not in fact constitute or represent benefit from criminal conduct; and

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69 At 416.
70 At 418.
71 *R v Pace* [2014] EWCA Crim 186, [2014] 1 WLR 2867.
72 At [62].
73 At [52].

(c) the Court in *Khan* acknowledged that its reasoning could not apply to all offences and attempts.

The Court also distinguished *Attorney General's Reference (No 3 of 1992)*.[74] Overall, the Court placed considerable weight on the fact that the completed offence was impossible given that the goods were not in fact stolen. Indeed, this seems to have been the decisive feature in the case.[75]

[84] These cases have caused considerable controversy.[76] Academic opinion is divided. For example, *Pace* has been the subject of significant academic criticism,[77] but also has its supporters.[78] It is unnecessary for present purposes that we delve into the competing views. The Court was not asked to reconsider *L v R* or its reliance on *Khan*. We note, however, that the difference of view between the commentators seems to be influenced largely by their perceptions of the proper scope of the criminal law and therefore of the law of attempt and that, as far as New Zealand is concerned, the issue has been settled by *L v R* in respect of attempt to commit sexual violation by rape.

[85] The second point to be made about *Khan* is that, even though an objective element has now been introduced into the English law on sexual offending (that any belief in consent must be reasonable), some writers have expressed the view that the reasoning in *Khan* will continue to apply. In other words, the objective mental element in relation to mistakes as to consent applicable in the case of rape will also apply in relation to attempted rape. So, for example, *Rook and Ward on Sexual Offences: Law and Practice* says:[79]

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74 At [53].

75 See [54]–[59] and [63]–[64].

76 For discussion of *Khan* and *Attorney General's Reference (No 3 of 1992)* see, for example, A Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th ed, Hart Publishing, Oxford, 2013) at 346–353.

77 See Virgo, above n 59; and Findlay Stark "The *Mens Rea* of Criminal Attempt" [2014] 3 Arch Rev 7.

78 See Peter Mirfield "Intention and Criminal Attempts" [2015] Crim LR 142; J Child and A Hunt "Pace and Rogers and the Mens Rea of Criminal Attempt: Khan on the Scrapheap?" (2014) 78 JCL 220; and A Simester "The Mens Rea of Criminal Attempts" (2015) 131 LQR 169.

79 Peter Rook and Robert Ward *Rook and Ward on Sexual Offences: Law and Practice* (4th ed, Sweet & Maxwell, London, 2010) at [1.256] (footnotes omitted).

> The decision in *Khan* clarified the position, in that for offences of attempt it appeared that the precise requirement of the mental element will turn upon the distinction between acts (or omissions) and their circumstances. The courts are likely to follow the approach in *Khan* in applying the new law of rape, since although recklessness is no longer an element of the offence it has effectively been embraced in the requirement of absence of reasonable belief. Since an absence of reasonable belief relates to the circumstances of the offence, as opposed to the act of penetration itself, on the basis of *Khan* a defendant can be guilty of attempted rape if he intends to penetrate the complainant and does not reasonably believe the complainant is consenting at the time. It follows that the mental element of attempted rape is identical to that of rape.

[86] A similar view is expressed by Findlay Stark, who writes:[80]

> Had the law on rape then been the same as it is now, under the Sexual Offences Act 2003, presumably the Court of Appeal [in *Khan*] would have found that the *mens rea* of attempted rape (in a case where the complainant is not consenting) is present where the defendant (i) intends to penetrate the complainant's vagina, anus or mouth with his penis (conduct) whilst (ii) holding *no reasonable belief* in the complainant's consent (circumstance). Applying the logic of *Khan*, if the defendant who lacked a reasonable belief in consent succeeded in what he was intending to do (penetrate the complainant) he would, in the light of the complainant's non-consent, have been liable for rape. If he was intending to penetrate, and took a more than merely preparatory step towards that end, then the defendant should be liable for attempted rape.

[87] Moreover, we note that the Law Reform Commission of Ireland has recommended that culpability for an attempt ought to track the culpability required for the substantive offence, so that where negligence is sufficient for the completed offence it will also be sufficient for an attempt. The only exceptions to this are inchoate offences relating to murder – attempted murder, conspiracy to murder and incitement to murder.[81]

[88] This is not a universal view, however. For example, the United Kingdom Law Commission has expressed the view that, despite that reduction of the fault element for rape from recklessness to negligence, the minimum mental element for attempted rape (and for attempts in respect of other completed offences where negligence is sufficient for liability) should be recklessness.[82] This does need to be

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80 Stark, above n 77, at 7 (footnotes omitted, emphasis in original).

81 Law Reform Commission *Inchoate Offences* (LRC 99–2010) at [2.90]–[2.124] (Ireland).

82 The Law Commission *Conspiracy and Attempts* (LC 318, 2009) at [8.108]–[8.133] (United Kingdom). See also Richard Card (ed) *Card, Cross and Jones Criminal Law* (21st ed, Oxford University Press, Oxford 2014) at [14.115].

seen against the background, however, that the offence of sexual assault in the United Kingdom would apply to a situation such as that in the present case.

Conclusion

[89] Undoubtedly, the question of the mental element for attempted rape in jurisdictions where the mental element for the full offence will be met by an unreasonable belief in consent is contentious. Arguments can be advanced either way. But in New Zealand this Court held in *L v R* held that the mental element for attempted rape was satisfied by a mistaken but unreasonable belief in consent, as in the case of the completed offence. The Court reached this view on the basis of a contextual reading of the statutory language, having regard to the general policy of the sexual offences legislation, logic and principle, and practical considerations. We consider that the same analysis applies in respect of assault with intent to commit sexual violation by rape. As was the case in *L v R*, there will need to be a close connection between the assault and the intended sexual intercourse. We see no justification for adopting a different approach to the mental element for the assault offence than is adopted in relation to the attempt offence as the same reasons of statutory language, legislative policy, logic and principle, and practicality as were identified in *L v R* apply in respect of the assault offence.

[90] Finally, we note that the issue is not determinative in this case in any event. Once the jury accepted the complainant's account of what occurred, as it did, there was no basis for any suggestion that the appellant had any belief that the complainant was consenting, so that no question of a miscarriage of justice arises.

Decision

[91] For these reasons, the appeal is dismissed.

ELIAS CJ

[92] The appellant was convicted after trial by jury of the offence of assault with intent to commit sexual violation created by s 129(2) of the Crimes Act 1961. His

appeal to the Court of Appeal has been dismissed[83] and he appeals with leave to this Court.[84]

[93] The principal question on appeal concerns the intent to commit sexual violation required by s 129(2). Is it, as the appellant argues, intent to have non-consensual sexual penetration, so that an honest belief that the complainant consents to such penetration is a defence? Is it, as the trial Judge directed and as the Court of Appeal approved, intent to have sexual penetration without belief on reasonable grounds that the complainant consents to sexual penetration (applying to assault with intent to commit sexual violation the intent this Court in *L v R*[85] held to be necessary for attempted sexual violation under s 129(1))? Or is it, as William Young J suggests is the case where the intended penetration is in the future and not immediately proximate to the assault, a state of mind which is reckless of whether or not the complainant consents (an intent which falls between subjectively intending non-consensual penetration and objectively having no reasonable belief in consent)?

[94] In *L v R* this Court held that s 129(1) was to be interpreted consistently with the intent specified in s 128 in the definition of sexual violation. The Court pointed out that a charge of attempted sexual violation is often laid in the alternative to a charge of sexual violation and that it was highly unlikely that distinct intents would have been provided in the legislation given the confusion likely in application.[86] I consider the same reasoning applies to s 129(2). The definition of sexual violation provided by s 128 is properly applied in the offence of assault with intent to commit sexual violation under s 129(2). As in the case of an offence under s 129(1), a charge under s 129(2) of assault with intent to commit sexual violation may well be laid in the alternative to a charge of sexual violation.

[95] For the reasons developed in what follows, I conclude that intent to commit sexual violation under s 129(2) is intent to penetrate without reasonable belief in consent. In this way, the intent for the two offences under s 129, for which the same

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83 *A (CA814/2013) v R* [2014] NZCA 385 (O'Regan P, Goddard and Andrews JJ).

84 *A (SC 93/2014) v R* [2014] NZSC 157.

85 *L v R* [2006] NZSC 18, [2006] 3 NZLR 291.

86 At [24].

maximum penalties are prescribed, is consistent with the definition in s 128 of sexual violation (the object intended under s 129).

[96] No doubt other policy choices might have been made by the legislature about the mental element required for attempts or assaults with the object of committing the offence of sexual violation. But I consider that the structure and text of ss 128 and 129 of the Crimes Act compel consistency. Any risk of over-criminalisation (as in a technical assault with a hope of obtaining consent to sexual penetration later) is met in the case of liability under s 129(2), as it is in the case of the acts constituting an attempt under s 129(1), by the need to prove intentional application or attempted application of force which is more than preparatory to commission of the intended offence of sexual violation, as is discussed further at [113].

[97] I consider that the case turns principally on construction of the New Zealand legislation. The reference in English cases (before legislative amendment in 2003) to recklessness is distracting in the context of the New Zealand legislation. Until 1985 the New Zealand legislation required absence of actual belief in consent as the necessary mental element for rape. Since 1985 it has required absence of reasonable belief in consent.

[98] In *L v R* Tipping J, delivering the judgment of four judges[87] referred to "some conceptual analogy between the English recklessness criterion and our need for a belief in consent to be on reasonable grounds".[88] But that "conceptual analogy" was in the carrying over of the intent required for sexual violation into attempted violation. It was not to suggest the use of recklessness in place of the intent specified for sexual violation in the New Zealand legislation. The intermediate standard of recklessness as to whether or not the complainant is consenting has never applied in New Zealand legislation in cases of sexual violation and I consider should not be judicially introduced. It is contrary to the result in *L v R*, a recent decision of this Court which I would follow without equivocation in the case of assault with intent to commit sexual violation.

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[87] Elias CJ, Blanchard, Tipping and McGrath JJ.
[88] At [17].

[99] My conclusion that the Judge and the Court of Appeal were correct in rejecting both actual belief in consent and recklessness as to consent in favour of the reasonable belief in consent required by s 128 makes it necessary also to consider whether the directions given by the Judge were sufficiently explicit. For the reasons given below at [128] to [140] I have concluded that they were.

The legislation

[100] Section 129 of the Crimes Act, as amended in 2005, provides:

> **129 Attempted sexual violation and assault with intent to commit sexual violation**
>
> (1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.
>
> (2) Every one who assaults another person with intent to commit sexual violation of the other person is liable to imprisonment for a term not exceeding 10 years.

[101] Attempted sexual violation and assault with intent to commit sexual violation have been offences contained in the same provision of succeeding New Zealand criminal enactments and subject to the same penalties since 1893. In the Criminal Code Act 1893, the Crimes Act 1908, and s 129 of the Crimes Act 1961 as originally enacted they were combined in the same provision under the heading "Attempt to commit rape".[89] Section 129 as enacted in 1961 provided:

> **129 Attempt to commit rape**
>
> Every one who attempts to commit rape or assaults any person with intent to commit rape is liable to imprisonment for a term not exceeding ten years.

[102] "Sexual violation" is defined by s 128 of the Crimes Act. As is relevant in this case (where penile penetration was said by the Crown to have been intended) s 128 provides:

> **128 Sexual violation defined**
>
> (1) Sexual violation is the act of a person who–
>
> (a) rapes another person; …

89 See s 193 of the Criminal Code Act 1893 and s 213 of the Crimes Act 1908.

…

(2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis.–

(a) without person B's consent to the connection; and

(b) without believing on reasonable grounds that person B consents to the connection.

...

[103] In addition to the offence of attempted sexual violation contained in s 129(1) of the Crimes Act, s 72 of the Act provides that attempts to commit other offences are themselves complete offences:

72 Attempts

(1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

(3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[104] Section 72(2) is derived from case-law establishing that, to constitute an attempt in law, acts for the purpose of accomplishing the object intended must be immediately or proximately connected with the intended offence and not merely preparation for its commission.[90] Whether an act is preparation only and too remote to constitute an attempt is, as s 72(2) makes clear, a question of law and therefore a question for the judge rather than the jury. The offence of attempted sexual violation under the current s 129(1) equally entails acts which are more than preparatory and

[90] The wording in s 72(2) was adopted by s 93(2) of the Crimes Act 1908. As the authors of *Adams on Criminal Law* note the form of s 72 can be traced directly to Parke B's judgment in *R v Eagleton* (1855) Dears 515 at 538, 169 ER 826 (Court of Criminal Appeal) at 835: Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA72.01]. Section 72(3) was enacted in 1961 in response to the equivocality rule that was present in earlier New Zealand case law: see at [CA72.13].

which are proximately connected to the intended sexual violation, as is explained further in what follows.

Assault

[105] An assault is the act of the accused which, if committed with the requisite intent to commit sexual violation, constitutes the offence of assault with intent to commit sexual violation under s 129(2). "Assault" is defined for the purposes of the Crimes Act in s 2 as:

> ... the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and **to assault** has a corresponding meaning

An intentional touching may itself amount to the offence of common assault contained in s 196 of the Crimes Act.

[106] Although neither the definition of assault in the Crimes Act nor the offence created by s 196 refers to absence of consent, consent was a justification at common law and belief in consent, if an evidential basis was raised, was a defence.[91] These matters of justification and defence are preserved under the Crimes Act in New Zealand by s 20, even if the belief is not objectively reasonable (although its reasonableness in the circumstances is evidence from which it may be concluded the belief was not in fact held). The same approach is taken to offences of indecent assault.[92] Where an evidential basis for belief in consent has been raised, the prosecution must negate it unless the offence as defined in the legislation necessarily or impliedly excludes consent as a defence (as for example in the case of sexual conduct with a young person under 16 under ss 134 and 134A).

[107] The basis of a defence of consent in relation to the assault component of a charge of assault with intent to commit sexual violation is not directly before us on the present appeal. That is because the Judge directed the jury that the accused could be convicted only if the complainant's version of the intentional touching was

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91 At [CA196.08].

92 *R v Nazif* [1987] 2 NZLR 122 (CA) at 128.

accepted. He directed the jury that the accused's version of taking the complainant by the hand and pulling her towards him was not the assault alleged by the Crown. The complainant had described a sudden pounce from behind in which the complainant was held in a bear-hug while the accused pushed his erect penis against her and tried to pull her lower clothing down. No basis for belief that this conduct, if accepted by the jury, was consented to was laid on the evidence.

[108] Because consent to the assault identified as necessary to convict was not in issue, it is not necessary to do more than advert to the fact that consent and belief in consent may be live issues in other cases. They may require further consideration of the basis of belief required for a defence to the assault element of the offence.

[109] Cases where the matter causes difficulty may be rare. Where consent is a live issue on a charge of assault with intent to commit sexual violation, it is likely that the intentional application of force will be insufficiently proximate to the intended sexual violation to constitute the act giving rise to liability under s 129(2), as is further explained at [113] to [121].

[110] Questions of consent to assault and reasonable belief in it are distinct from the question whether an accused carries out the assault with an intent to commit sexual violation, the necessary mental element of the offence of assault with intent to commit sexual violation. The first determines whether the physical element of the offence exists (the application of force and, where an evidential foundation is raised, without consent or belief in consent). The second is the necessary mental element prescribed for the offence of assault with intent to commit sexual violation. Although belief in consent to the use of force would undermine the physical element (the actus reus), there is no conceptual inconsistency between a subjective standard in relation to justification for the use of force (which applies in other cases of assault, including indecent assault) and the objective standard which is the mental element (mens rea) of the actual offence charged.

[111] I think it likely that in most cases where there is an evidential basis for honest belief in consent to the assault the assault will in any event be insufficiently proximate for conviction. In the unusual case where there is an evidential basis for

belief in consent to the use of force in circumstances of sufficient proximity to the intended penetration to constitute an attempt, I do not think the legislative scheme permits liability under s 129(2) because an assault will not have been committed.

[112] In the present case, questions of consent to the assault alleged by the Crown did not arise and nor did the accused's belief in such consent. The matters in issue were whether the use of force described by the complainant occurred and, if so, whether at the time he used the force the accused intended to penetrate the complainant without reasonable belief that she was consenting to that sexual connection.

Proximity and assault with intent to commit sexual violation

[113] In conformity with basic principles of criminal liability, the intent in cases of attempted sexual violation and assault with intent to commit sexual violation must coincide with the acts constituting the attempt and the assault. Since these acts necessarily precede the commission of the offence intended (sexual violation), any overreach in terms of criminality is controlled by the requirement of proximity. Such overreach in the present case might arise if an accused could be convicted on the basis of an assault such as a caress because of optimism that the complainant will come to consent to penetrative sexual activity, even if at the time of the caress there could be no reasonable belief that the complainant was consenting to penetrative sexual activity. Preliminary overtures based on misjudgement as to the complainant's consent, until persevered in when lack of consent should reasonably have been appreciated may not be sufficiently proximate to the intended crime (here, sexual violation) to qualify as attempts or an assault with intent to commit sexual violation.

[114] There are statements in some of the cases which suggest that the offences of attempt to commit sexual violation and assault with intent to commit sexual violation are distinct and contain elements which are "different",[93] although an overlap between the two offences is acknowledged in other cases.[94] *R v Hassan* appears to be the origin of the statement that the offences "do not necessarily contain the same

93 *R v Hassan* [1999] 1 NZLR 14 (CA) at 16.
94 See *R v Lualua* [2007] NZCA 114 at [26].

elements".[95] It was acknowledged in *Hassan* that the two offences could overlap "in their factual content" but that "[a]n assault with intent may fall short of an attempt, and an attempt does not necessarily involve an assault".[96]

[115] These remarks were made in the context of a sentencing appeal where the Court rejected an argument that any such differences in the elements of the offending would justify departure from sentencing tariffs set in relation to one of the offences. *Hassan* is not authority for the view that the elements of the offending differ in relation to the need for equivalent proximity between the acts constituting the attempt and the assault on the one hand and on the other the offence intended in both cases. I consider that equivalence in the requirement of proximity is required on proper construction of s 129.

[116] First, the terms of the offences themselves point equally to proximity since at the time of the acts constituting the attempt or the assault both must be undertaken by the accused "with the intent to commit sexual violation". Sexual violation must be the accused's purpose in the assault or the acts constituting the attempt.

[117] Secondly, it is of significance that the legislative history of s 129 shows that the offence is derived from the composite offence first enacted in New Zealand in 1893. Although now separated into subsections, until amendment in 2005 both provisions were contained in a section then headed (before introduction of the term "sexual violation" in 1986)[97] "Attempt to commit rape". Throughout, both have been subject to the same penalty. There is no indication that the reforms in 2005 were intended to change the effect of the earlier legislation by which assault with intent to commit rape was treated as a subset of an attempt to rape. Indeed, the explanatory note to the bill said that the amended s 129 "is to the same effect as the present section".[98]

[118] Thirdly, quite apart from the legislative history, assault with intent to commit rape is I think rightly seen as an offence of attempt, for reasons which have already

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[95] *R v Hassan* [1999] 1 NZLR 14 (CA) at 16.
[96] At 16.
[97] By the Crimes Amendment Act (No 3) 1985, s 2 which came into effect on 1 Feb 1986.
[98] Crimes Amendment Bill (No 2) 2003 (104–1) (explanatory note) at 9.

been canvassed. An attempt to sexually violate may not include an intentional application of force and may not therefore include an assault (as a completed sexual violation will do except where the complainant is unable to give consent to sexual penetration by reason of age but is able to consent to the assault). But an assault with intent to commit sexual violation will always amount to an attempt to sexually violate. This interpretation does not mean that s 129(2) is redundant because s 129(1) occupies the field. Whether acts constitute an attempt may require the exercise of judgment which adds complexity to a trial. That uncertainty is removed by the legislative judgment contained in s 129(2) that an assault with the requisite intent amounts to an attempt to sexually violate and is a completed offence.

[119] An offence which builds on another offence but with the addition of a specific intent describes aggravated offending, attracting higher penalties. An example is the offence of assault with intent to injure contained in s 193 of the Crimes Act, in which the intent specified is to bring about injury. Where the intention prescribed is also one to commit another offence, the aggravated offending usually amounts to an attempt to commit the intended offence, which is the object of the accused in the actions taken. That is consistent with the intention requirement in the general attempts provision, s 72(2) which uses the same language of "with intent to commit an offence" as is used, specifically of the further offence of sexual violation, in s 129(2). It is also consistent with the prescription of aggravated assault in s 192(1)(a), which requires assault "with intent ... to commit … any imprisonable offence" and assault with intent to rob under s 236. The latter provision is treated in *Adams on Criminal Law* as providing offences "essentially designed to provide a more serious punishment for unsuccessful attempts at aggravated robbery than does the general law of attempts or offences such as s 192".[99]

[120] The equivalent penalty for the two parts of s 129 indicates assessment of equivalent culpability. Whether other acts with intent to commit sexual violation constitute an attempt may depend on their nature and require assessment. But an assault with intent to commit sexual violation is identified as an offence in itself by

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[99] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA236.01]–[CA236.02], in which s 236(1) and 236(2) are treated as alternatives, respectively, to attempted aggravated robbery under s 235 and s 72 and attempted robbery under s 234 and s 72.

the legislation. The distinct treatment removes some factual complexity by ensuring that assault with the requisite intent is itself treated as an attempt. But it does not alter the need for the judge to ensure, as a matter of law, that the assault is not too remote to constitute an attempt to sexually violate.

[121] On the complainant's account (the only basis for conviction, as the Judge made clear), the actions of the accused were immediately and proximately connected with the intended offence. Whether actions are sufficiently proximate to constitute the offence charged when undertaken with the necessary intent is a question for assessment in each case. In some cases of elaborate and deliberate planning, both the conduct relied on as an attempt or the assault may be more removed from the intended sexual violation. I do not think it is appropriate to try to identify such cases in advance. In particular, I would not want to be taken to approve the approach taken by the Court of Appeal in *R v Harpur*[100] (both in relation to remoteness and in relation to the linkage between actus reus and "the strength of the evidence of wrongful intent")[101] without hearing argument in a case where it arises. Nor do I express any view on the correct approach in the lying in wait case postulated by William Young J at [187]–[191].

Intent to commit sexual violation

[122] The intention specified by s 129(2) is an intention to commit the offence which is defined by s 128 of the Crimes Act. It requires proof that the accused has no reasonable belief in the consent of the complainant. The Supreme Court in *L v R* held that exactly the same intent was required of an attempt to commit sexual violation.[102]

[123] The Court in *L v R* was clear that the element of futurity at the time of the acts constituting an attempt did not warrant adjustment to the standard of intent. It remained exactly the same in a case of sexual violation or a case of attempted sexual violation.[103] The Supreme Court adopted that principle of equivalence from the

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100 *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.
101 At [25], quoting the Nova Scotia Court of Appeal in *R v Boudreau* (2005) 193 CCC (ed) 449 (NSCA).
102 *L v R* [2006] NZSC 18, [2006] 3 NZLR 291.
103 At [24] per Tipping J, and at [50] per Henry J.

decision of the English Court of Appeal in *R v Khan*.[104] It did not of course adopt the standard of recklessness then required in English law, and applied in *Khan* equally to the offences of rape and attempted rape.[105] As has been indicated, recklessness has never been the standard applied for the intent required for sexual violation in New Zealand law.

[124] The Supreme Court in *L v R* made it clear, overturning *Shepherd v R*[106] (which had required intention to have non-consensual penetration), that the same intent which applied to sexual violation and attempted sexual violation was that provided in the definition in s 128: an intention to penetrate without reasonable belief in consent. The difference between the offence and an attempt lay in the acts constituting the offence, not the mental state of the defendant which remained "the same".[107]

[125] As Henry J put it in his concurring opinion:

> [49] In my respectful view, the fallacy in *Shepherd* is in relating the necessary mens rea element to para (a) of s 128(3), namely, the absence of consent on the part of the victim. Paragraph (a) is directed solely to the position of the victim. Paragraph (b) must therefore come into play in order to determine whether the statutory mens rea element for an attempt has been satisfied. The substantive offence is not restricted to knowingly having non-consensual connection, and similarly an intent to commit that offence under s 72(1) is not restricted to an intent knowingly to have non-consensual connection.
>
> [50] There is no difference in substance between the approach to consideration of the substantive offence and the attempt to commit it. The distinction lies solely in the fact that in the case of an attempt the act of connection has not been completed.
>
> [51] This construction gives consistency, and also avoids what otherwise would be an illogical distinction. There may well be an issue for jury determination whether there was in fact penetration or whether the intimacy fell short of that and constituted only an attempt. In that situation, on the *Shepherd* approach, the anomalous situation would arise where the jury was directed that if they found penetration was proved it also had to be proved that there was an absence of belief in consent based on reasonable grounds. But if they were not satisfied penetration was proved, then an unreasonably based belief as to consent would be a defence, and it would be necessary for

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104 *R v Khan* [1990] 1 WLR 813 (CA).
105 At 818–819.
106 *Shepherd v R* HC Auckland T192/91, 20 February 1992.
107 *L v R* [2006] NZSC 18, [2006] 3 NZLR 291 at [20] citing *R v Khan* [1990] 1 WLR 813 (CA).

> the Crown to establish that the offender knew that the victim was not a consenting party.
>
> [52] I also agree that the well-established position regarding attempted murder as made clear in *R v Murphy* is not analagous.[[108]] The actus reus in the extended definition of murder necessarily requires an act which in fact causes death. So for an attempt there must be an intention to commit an act which will cause death – which equates to an intent to kill. But for attempted unlawful sexual connection, as earlier noted, the only *actus reus* is the act constituting the attempted connection. The distinction is highlighted in another way. It is the essence of an attempt that if the object of the accused was to be accomplished then the substantive offence would have been committed. In respect of an attempt under the extended definitions of murder, if the accused's object is accomplished (for example, causing grievous bodily harm being reckless whether or not death ensues) the offence of murder may still not have been committed because death is not a necessary part or consequence of the object. For attempted unlawful sexual connection, the object is sexual connection. If that were to be accomplished, then the substantive offence results, providing the other separate elements of absence of consent and absence of a reasonably based belief in consent are present.

[126] I consider that the reasoning in *L v R* applies equally to s 129(2) as it does to s 129(1), as the Court of Appeal in the present case held. The same element of "futurity" is present in cases of attempted sexual violation (and was indeed the reason Anderson J in *Shepherd* departed from the s 128 intent in the case of the attempt there in issue) as it is in cases of assault with intent to commit sexual violation. Section 129(2) is subject to the same requirement of proximity as applies under s 129(1). And the requirement of proximity in the case of both offences is sufficient answer to fears of over-criminalisation. This result does not mean that the Crown "loses the opportunity to persuade the jury" of a "perfectly respectable but not overwhelming case" under s 129(2)[109] any more than the requirement of proximity as assessed by the judge as a matter of law deprives the Crown of a respectable case under s 129(1) or s 72 or any other attempt provision.

[127] It means that the intent held at the time of the assault by the accused is an intention sexually to penetrate without reasonable belief that the complainant consents to sexual penetration.

108 An intention to kill is required for attempted murder: See *R v Murphy* [1969] NZLR 959 (CA).
109 Compare William Young J at [191].

The adequacy of the directions given

[128] The trial Judge instructed the jury that it was only if the complainant's account of the physical incident constituting the assault relied on by the Crown was accepted that it need consider his intent.[110] In effect, this entailed the Judge's determination that, as a matter of law, the physical interaction described by the accused, if accepted, was insufficiently proximate to constitute the offence even if done with the necessary intent.

[129] The Judge explained that the case could be broken down into "four simple questions" and that these would be highlighted in a written question trail that would be provided at the end of the summing up which would "help you to make your decisions logically and on the evidence".[111] The "four questions that need to be answered" were:[112]

> (a) Did the defendant assault [the complainant]?
>
> (b) At the time did he intend to have sexual intercourse with her?
>
> (c) Did she give true consent?
>
> (d) Did he have reasonable grounds to believe that she was consenting?

[130] The Judge explained to the jury that only the first and the last questions were in issue in the case. The accused accepted that he intended to have sexual intercourse with the complainant.[113] His evidence was that he believed she was inviting him to join her in the women's lavatory for that purpose. It was also accepted by the accused that he now appreciated that the complainant was not consenting to sexual intercourse so that the third question was not in issue.[114]

[131] I have some doubts as to whether it was necessary at all for a direction on question (c) relating to the complainant's consent to sexual penetration in a case of an attempt or assault with intent to commit sexual violation. In a case where the violation has not occurred, such focus may in many cases be unnecessary

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[110] *R v Ah-Chong* DC Napier CIV-2013-020-533, 23 August 2013 (summing up) (Judge Down) at [17].
[111] At [13].
[112] At [14].
[113] At [18].
[114] At [20].

complication. But since in the present case it is common ground that consent to penetration was not in issue, it need not be considered further here.

[132] The offence charged required use of intentional force without consent (the assault which was the physical act constituting the offence) with the specified intent of committing sexual violation by the accused (the mental element of the offence).

[133] In relation to the assault, the Judge pointed out however, that the technical assault admitted by the accused (pulling the complainant by the hand) was not what was alleged by the Crown.[115] It was only if the jury accepted the complainant's version of the assault that the accused could be convicted.[116] The complainant's evidence and the Crown case was that the accused had grabbed the complainant suddenly from behind in a bear hug and attempted to pull down her overalls. The Judge put it this way:

> [15] It is clear from the way that this trial has been run and the concessions made by counsel, Mr Forster, in his closing address that the first question, did he assault [the complainant] is in issue in this case because the defendant says that all he did was to take her by the hand and pull her towards him. Of course, the Crown [alleges] and you have heard evidence from the complainant … herself that he grabbed her in a bear hug from behind trapping her arms, that he pressed or thrust his pelvis and erect penis towards the complainant's bottom several times and that he made an attempt to pull down her pants.
>
> [16] Now although taking someone by the hand and pulling them towards you is technically an assault and you heard counsel explain what an assault is. It is not what is alleged here. What is alleged here is what the complainant says happened, the bear hug, the thrusting, the pressing and the preventing her from leaving.
>
> [17] Only if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges could you answer this question "yes", so the question – at the time – I am sorry – did the defendant assault [the complainant]? The first question. You can only answer that "yes" if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges.

[134] In relation to the appellant's intention at the time of the assault, the Judge explained:

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[115] At [16].
[116] At [17].

> [21] The final question – did he have reasonable grounds to believe she was consenting is in issue.
>
> [22] Of course, if you accept [the complainant's] account of the assault it would be difficult to conclude that he had a reasonable basis to believe that she was consenting. However, if it is reasonably possible that his account of taking her hand and pulling her towards him and immediately stopping when she struggled and said "No", if that is true, if you find that it is true you almost certainly could not be satisfied beyond reasonable doubt that he did not realise she was not consenting and that he had a reasonable basis up to that point for believing that she did consent.
>
> [23] Of course, the Crown say that he could not have had that belief at any stage based on the account that he gave of these non-verbal communications. If you accept as a reasonable possibility that he desisted, that he stopped as soon as she struggled and said, "No" you could conclude that he no longer, at the relevant time, had the intent to have sexual intercourse with her. As Mr Forster submits to you, the timing of the event and the fluid developing situation is potentially very important here.

[135] The question trail provided to the jury by the Judge, grounding the elements of the offence in the facts as presented in the cases for the Crown and the defence, and to which the Judge referred in his oral summing up, as is relevant to the two live matters in issue, was:

> *Count 1: Assault with intent to commit sexual violation under s 129(2) of the Crimes Act 1961*
>
> ***Note: On all issues the burden of proof beyond reasonable doubt lies on the Crown.***
>
> 1.1 Are you satisfied beyond reasonable doubt that Mr Ah-Chong grabbed [the complainant] from behind, pressing himself against her and preventing her from leaving?
>
> **If yes, go to question 1.2.**
>
> **If no, find Mr Ah-Chong "not guilty".**
>
> *Crown case: Mr Ah-Chong grabbed [the complainant] from behind, prevented her from leaving by binding her arms, pressed his penis against her bottom several times and tried to pull down her pants.*
>
> *Defence case: Mr Ah-Chong did not assault her as alleged.*
>
> …
>
> 1.4 Are you satisfied beyond reasonable doubt that Mr Ah-Chong had no reasonable grounds to believe that [the complainant] was consenting?
>
> **If yes, find Mr Ah-Chong "guilty".**

If no, find Mr Ah-Chong "not guilty".

> Crown case: *[The complainant] made it clear by her words and actions that she did not want a sexual encounter with Mr Ah-Chong.*
>
> Defence case*: [The complainant's] behaviour during the morning led him to believe she would consent to sexual intercourse and his grounds for believing that she would consent were reasonable.*

[136] As will be apparent from the discussion above about the need for proximity between the assault and the intended sexual violation, I do not think the Court of Appeal was correct to suggest that, since the offence as charged was "complete upon the commission of the assault with the necessary intent and absent any reasonable belief in consent", the appellant's evidence that he had stopped when repulsed by the complainant and that his touching of her was "trying his luck" and a "prelude to a hoped sexual encounter" overlooked "the fact that the offence had been completed at the time the assault occurred".[117] I consider the correct approach is that a touching, even if an assault, which was a "prelude" to a hoped-for consensual encounter was relevant both to the question of law for the Judge of proximity and as evidence of intent for the jury to consider.

[137] The directions given by the trial Judge however did not fall into error. His instruction that the jury could convict only on the basis of the complainant's account of the assault removed any doubt about sufficient proximity.

[138] On the evidence given by the complainant, this was not an overture but force directly connected to achieving penetration. The assault described in the question trail was that the appellant's grabbing of the complainant "preventing her from leaving." Evidence that the accused desisted when told to do so or when he was resisted might have indicated that he lacked the requisite intent at the time of the assault. And indeed the Judge instructed the jury that if it was reasonably possible that he had immediately desisted when the complainant struggled and said "No" they could not be satisfied of guilt.[118] The complainant's evidence was that she had to break away from the appellant's grip to escape. The jury clearly accepted that evidence in convicting him.

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117 *A (CA814/2013) v R* [2014] NZCA 385 at [34].

118 *R v Ah-Chong* DC Napier CIV-2013-020-533, 23 August 2013 (summing up) (Judge Down) at [22].

[139] The Judge did not need to instruct the jury that consent was a defence to the assault acknowledged by the accused (pulling the complainant by the hand) because he had told the jury that it was only the complainant's version of the assault that could lead to a conviction. This was beneficial to the accused and fitted the cases as they were put. Once the accused's account of the assault was rejected, the only remaining issue under s 129(2) was whether the accused reasonably believed the complainant to be consenting to sexual penetration. That is how the Judge directed the jury, as appears from [135]. It was consistent with *L v R*. For the reasons given, I consider it was correct.

[140] The Judge correctly instructed the jury that the appellant could not be convicted unless the Crown had excluded his reasonable belief that the complainant was consenting. In context, it is clear from the directions and the question trail that this consent was directed to the intended sexual penetration. As I have indicated, I consider there was no occasion for the Judge to direct the jury as to any belief in consent to the use of force because no evidential ground for such belief arose on the only factual basis on which the assault was identified for the jury.

Result

[141] The risk of over-criminalisation in the context of a charge under s 129(2) is addressed by the requirement of proximity between the assault and the intended sexual violation, as is the case in relation to attempted sexual violation under s 129(1). The trial Judge's direction that the jury could convict only if it accepted the complainant's view of the assault removed any risk of conviction on the basis of a preliminary overture which could have been abandoned if the complainant did not consent. The only basis of conviction on the directions given was that the appellant was restraining the complainant and removing her clothing to facilitate penetration and despite her objection.

[142] There is no occasion to depart from the approach taken in *L v R* to intent under s 129(1) when applying s 129(2). To be guilty of assault with intent to commit sexual violation the accused must intend to penetrate the complainant without any

reasonable belief at the time of the assault that she consents to the penetration intended. The Judge correctly directed the jury on the question of intent.

[143] The Judge instructed the jury that if it was reasonably possible that the appellant had immediately desisted when the complainant struggled and said "No", they could not be satisfied of guilt. The complainant's evidence was that she had to break away from the appellant's grip to escape. The jury, properly directed, clearly accepted that evidence in convicting him.

WILLIAM YOUNG J

The issue on appeal

[144] Following his trial before Judge Down and a jury the appellant was found guilty on a charge of assault with intent to commit sexual violation laid under s 129(2) of the Crimes Act 1961. That section provides:

> **129 Attempted sexual violation and assault with intent to commit sexual violation**
>
> (1) Every one who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years.
>
> (2) Every one who assaults another person with intent to commit sexual violation of the other person is liable to imprisonment for a term not exceeding 10 years.

In the course of these reasons I will, for ease of reference and because this usage makes sense in the context of this case, refer to the offences created by s 129 as attempted rape and assault with intent to rape.

[145] In summing up to the jury as to the mens rea elements of the s 129(2) offence, Judge Down broadly applied[119] the approach taken in respect of the s 129(1) offence by this Court in *L v R*.[120] Primarily in issue in the appeal is whether he was correct to do so.

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[119] *R v Ah-Chong* DC Napier CRI-2013-020-000533, 23 August 2013 [District Court summing up].
[120] *L v R* [2006] NZSC 18, [2006] 3 NZLR 291.

[146] Under s 72(1) of the Crimes Act, an attempt to commit an offence is complete when the offender who has "an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object". Given the legislative history referred to by Arnold J,[121] it would be unrealistically precise to require prosecutors to rely on the s 129(2) offence where there has been assault and to prosecute under s 129(1) where the "act" relied on is not an assault. It follows that when the "act" relied on is an assault, charges of attempted rape (under s 129(1)) and assault with intent to rape (under s 129(2)) will both be available. It also follows that it would not be logical to differentiate between the two offences as to what constitutes an intention to commit the crime of rape.

[147] For the reasons just given, that the appellant was charged under s 129(2) and not s 129(1) does not in itself provide a reason for not applying *L v R*. On the other hand, the facts of the present case differ appreciably, at least to my way of thinking, from those in *L v R* and, as I will explain, this raises the issue whether the approach adopted by the Judge was correct. As well, as the charge against the appellant was laid under s 129(2), the Crown was required to prove an assault by the appellant on the complainant and, as will become apparent, there is also an issue as to how the Judge summed up on this aspect of the case.

[148] In succeeding sections of these reasons I am going to discuss what must be established to prove an intention to rape, the mens rea component of the assault element of the s 129(2) offence, the way in which the Judge left the case to the jury and whether there was a miscarriage of justice.

What must be established to prove an intention to rape

Mens rea and attempts generally

[149] Where the substantive offence in issue requires full mens rea (being intention and knowledge as to the actus reus), a prosecutor alleging an attempt will usually be required to prove that the defendant had correspondingly full mens rea. Where difficulties arise is where the mens rea component of the substantive offence is not,

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[121] Above at [33]–[35].

in that sense, full. Where this is the case, there is much debate as to what the mens rea for an attempt should be.

[150] Sometimes the law requires a higher level of mens reas for the attempt than for the substantive offence. Thus, although the substantive offence of murder can be committed even though the offender did not intend to kill the victim,[122] it is well established that where attempted murder is alleged, the Crown must prove an intention to kill.[123]

[151] Whether so exacting a standard should be required in other instances has given rise to differences of judicial opinion and much academic debate and consideration by law reform institutions. To my mind what emerges from the material is that doubtful cases must be determined having regard to the way in which the actus reus and mens rea for the substantive offence are defined, the commonsense of the situation (as has perhaps been the case with attempted murder), any relevant statutory policies (a consideration which has influenced the approach in relation to attempted rape), risks of over and under-criminalisation and, importantly to my way of thinking, the practicality of explaining what may be difficult concepts to juries.

The mens rea for attempted rape and assault with intent to rape: a starting point

[152] In terms of both s 72(1) (which is applicable to the crime of attempted rape) and s 129(2) (in the case of assault with intent to rape), the Crown must establish an intention to commit the offence of rape. The actus reus of rape being non-consensual sexual intercourse,[124] it might be thought to follow that proof of an intention to commit rape requires proof of an intention to have non-consensual sexual intercourse. This approach is consistent with the general preference of the criminal law for a subjective approach to the imposition of liability in respect of criminal offences. It also has the advantage of being consistent with the statutory text in that it brings into account all the elements of the actus reus of rape. That such an approach would result in the mens rea for attempted rape differing from that required

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[122] Providing the offender's state of mind meets the requirements set out in s 167(b) or (d) or s 168 of the Crimes Act 1961.

[123] See *R v Murphy* [1969] NZLR 959 (CA).

[124] See Crimes Act, s 128.

for the completed offence[125] is not in itself a reason for rejection, as the attempted murder example illustrates.

[153] What is entailed by an intention to have non-consensual intercourse warrants brief examination. In many, and perhaps most instances of rape, the offender is merely indifferent to whether the complainant consents. Given this, it would be very limiting of the scope of the offences to conclude that liability for attempted rape or assault with intent to rape depends upon the defendant having wanted or intended that the victim not consent, something which in any event would often be incapable of proof. For this reason, it seems to me that an intention to have non-consensual sexual intercourse is made out if it is established that the defendant intended to proceed irrespective of consent, on the basis that (a) such an intention encompasses an intention to have sexual intercourse if consent is not forthcoming and (b) a conditional intention of that kind suffices for these purposes. Such an intention can also fairly be described as involving recklessness. And at this point it is worth noting that there is considerable, albeit by no means universal, academic support for the view that, as a general proposition, the mens rea for attempts should encompass, as a minimum, recklessness.[126]

Other considerations

[154] The starting point I have just identified is just that and there are, of course, other considerations which must be taken into account.

[155] Section 128 of the Crimes Act relevantly defines rape in this way:

> **128 Sexual violation defined**
>
> (1) Sexual violation is the act of a person who—
>
> (a) rapes another person; …
>
> …

[125] The full offence requires the absence of belief on reasonable grounds of consent: see s 128(2)(b) of the Crimes Act, set out below at [155].

[126] See for instance Peter Mirfield "Intention and Criminal Attempts" [2015] Crim LR 142 at 145 and the authorities cited therein.

> (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

[156] Charges of attempted rape often involve conduct which all but amounts to the completed offence. Indeed sometimes where there is an issue whether there was penetration, a jury may be invited to consider a charge of attempted rape as an alternative to a charge of rape. In such circumstances, it would be odd, and at least slightly awkward, to explain to a jury a requirement to address mens rea in relation to the complete offence under s 128(2) and in relation to the attempt in terms of recklessness, as I have defined it.

[157] Another and very important consideration is that s 128(2) reflects a policy decision by the legislature by way of response to *Director of Public Prosecutions v Morgan*.[127] The background to this is discussed fully in the reasons prepared by Arnold J.[128] There is obviously a question whether a recklessness approach, as suggested above, would be appropriately faithful to the legislative policy. As will be apparent, the view of the majority is that a recklessness approach would not be consistent with that policy.

[158] It is, however, important to recognise that just as there are practical and policy considerations which support a s 128(2)(b) approach, rather than a recklessness approach, there are other considerations which point in the other direction.

[159] Where the allegation is one of rape, the application of s 128(2)(b) is straight-forward. Section 128(2)(b) is only engaged where there has been non-consensual sexual intercourse. In this situation, the jury can apply s 128(2)(b) in a concrete, and not abstract, way: that is, in the particular context of something which has actually happened. Section 128(2)(b) can also be applied in a similarly

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127 *Director of Public Prosecutions v Morgan* [1976] AC 182 (HL).
128 At [27]–[28].

concrete way in cases which involve attempted penetration, a proposition which is illustrated by some of the cases which I am about to discuss.

[160] It must be borne in mind that liability for attempted rape is not confined to cases of attempted penetration. Indeed there have been convictions for attempted rape where there was no contact between the defendant and intended victim. Where the actions of the defendant did not get as far as attempted penetration and particularly where the intended sexual intercourse was not going to occur without some or further interaction between the defendant and complainant, I regard the s 128(2)(b) approach as less straight-forward. In such circumstances, there may be a reasonable possibility that the defendant would have desisted once it became apparent that the complainant was not consenting. Indeed, such a defendant might truthfully maintain that his intention was not to have sexual intercourse unless the complainant consented but be faced with the argument that because there were no reasonable grounds for believing that she would consent, he must be held to have intended to rape her. More generally, I have some difficulty with what is meant by an intention to have sexual intercourse without belief on reasonable grounds in consent. Does the "intention" extend to – in the sense of an appreciation of – the absence of reasonable grounds for belief in consent? If so, this would require proof that the defendant intended to have sexual intercourse despite recognising that when the act of intercourse occurred there would be no reasonable grounds for belief in consent. Such a test would, in effect, come down to recklessness along the lines already discussed. Or alternatively, should the jury look at whether, at the time of the act constituting the actus reus of the attempt, there were reasonable grounds for believing that the complainant would consent to sexual intercourse? Such an approach may have a distinct over-criminalising tendency in circumstances where there was a reasonable possibility of desistance and where, as postulated, the defendant's actual intention was not to have sexual intercourse unless the complainant consented. I will refer to all of this as the futurity problem.

[161] There may be other policy issues as well. Later in these reasons, I will discuss how proximity principles have been applied in the case of attempted rape. It seems to me that if the mens rea requirement for attempted rape is relaxed, the result may be a tighter approach to proximity. In the context of the arguments which we

have heard in this case, we are not well-placed to form a judgement whether a tighter approach is appropriate. In this policy-rich context it seems to me to be significant that the s 128(2)(b) approach to mens rea was not expressly applied by the legislature to attempts. Nor did the legislature extend the s 128(2)(b) approach to other offences involving non-consensual sexual conduct, in particular indecent assault. Given this I think it well open to question whether the courts should take it upon themselves to apply the s 128(2)(b) mens rea requirement to offences other than rape.

The leading cases

[162] In this section of my reasons, I discuss in chronological sequence what I consider to be the four cases which are most material to the present appeal.

[163] *R v Khan*,[129] an English case, concerned offending in which a number of men had sexually assaulted the complainant in the course of a single incident. All defendants had attempted to have sexual intercourse with the complainant. Those who succeeded were charged with rape. Those who failed were charged with attempted rape. At the time, the mens rea for rape in England and Wales required knowledge of lack of consent or recklessness as to consent. For those who were charged with rape, it was thus sufficient for the prosecution to prove that they were reckless as to consent. The Court held that this was also so in relation to the charges of attempted rape:[130]

> ... the words "with intent to commit an offence" to be found in section 1 of the Act of 1981 mean, when applied to rape, "with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent." The only "intent", giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent – i.e. when the woman is not consenting and he either knows it or could not care less about the absence of consent.

[164] The result reached in *Khan* could have been arrived at on the basis of my approach to recklessness – that is an intention to have sexual intercourse with another irrespective of consent – because recklessness of this sort encompasses a

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129 *R v Khan* [1990] 1 WLR 813 (CA).
130 At 819.

conditional intention to have sexual intercourse without consent should consent not be forthcoming. But while the result in *Khan* is consistent with this approach, the reasoning, which focused heavily on the mens rea of the substantive offence of rape, is not.

[165] The next judgment is that of Anderson J in *Shepherd v R*, in which he held that on a charge of attempted sexual violation the Crown was required to show an intention to have non-consensual sexual connection:[131]

> … [I]f one combines the elements of s. 72 and s. 128 an accused must intend to have proscribed sexual activity with a person and intends that *at the time such activity shall occur* it shall be carried out:
>
> (a) without that person's consent, and
>
> (b) without the accused believing on reasonable grounds that the alleged victim is consenting.
>
> As a matter of logic, of course, if one intends to have proscribed sexual activity with a person without that person's consent *at the time it shall occur, one's mind must be directed to a future situation where the intended conduct will be carried out* with the offender knowing that the victim is not consenting. Thus, the second limb of the definitions of rape and unlawful sexual connection specified in s. 128(2) and (3) have no practical application when considering a charge of attempted sexual violation. It follows that in order to obtain a conviction for attempted sexual violation or assault with intent to commit sexual violation pursuant to s. 129 [of the] Crimes Act 1961, the Crown must prove beyond reasonable doubt that the accused intends to commit the proscribed sexual activity and intends that it will be carried out without the consent of the victim.

[166] The passages which I have emphasised indicate that Anderson J saw a difficulty in applying the extended s 128(2)(b) concept of mens rea to conduct which was to occur in the future. He considered that an intention to have sexual intercourse in the future without reasonable grounds for belief in consent implies an awareness that there is no consent and therefore in practice could only be established by showing that there was an intention to have non-consensual sex. This is an aspect of the futurity problem to which I have already referred.

[167] In *Shepherd*, the defendant had broken into the home of the complainant whom he did not know. He had then sexually assaulted her in circumstances which

[131] *Shepherd v R* HC Auckland T192/91, 20 February 1992 at 3–4 (emphasis added).

were consistent with an intention to have sexual intercourse, albeit that the defendant's conduct did not amount to attempted penetration. There was little if any scope for arguments as to consent and reasonable belief in consent. Indeed, the only realistic issue, at least as I see it, was whether in light of the fact that defendant eventually desisted, an intention to have sexual intercourse could be safely inferred.

[168] Against this background, Anderson J's discussion of mens rea was not directed to any live issue in the case. Perhaps for this reason it was formulated in the slightly awkward terms of the defendant intending that the sexual activity "will be carried out without the consent of the victim". As I have noted, this will sometimes be an apt description of the intention of an offender. But often the offender is simply indifferent to whether the complainant consents. As I have explained, I see the strictest plausible view as to the mens rea required for attempted rape as recklessness as to consent (in the sense of an intention to engage in sexual activity whether the other party consents or not).

[169] In *L v R* this Court over-ruled *Shepherd*.

[170] In their reasons, Elias CJ, Blanchard, Tipping and McGrath JJ rejected the analogy with attempted murder in this way:[132]

> The fact that in the case of attempted murder the necessary mental state of the accused is confined to the first of the statutory states of mind sufficient for the completed crime does not, in our view, mandate the result for which [counsel] contends in relation to attempted sexual violation. In relation to an attempt to commit that crime, [counsel's] *submission has the effect of eliminating altogether an express ingredient of the completed crime and substituting another, which has the accused's intent wrongly focused on the complainant's lack of consent.* We do not consider the analogy [counsel] sought to draw is valid in principle or sound in policy terms. To have the proposed degree of dissonance between attempted sexual violation and the full offence would be undesirable in practical terms and, in our view, the statutory regime militates against [counsel's] submission.

They then discussed *Khan*. After referring to the passage from the judgment of *Khan* set out above at [163], they went on:

> [21] We regard the essence of this analysis as equally appropriate to the ingredients of sexual violation in combination with the ingredients of an

[132] *L v R*, above n 120, at [16] (emphasis added).

> attempt, as specified in our s 72. The reference in that section to "having an intent to commit an offence" means that to be guilty of attempted sexual violation the person charged must intend to complete the first element of the full offence. That is the only intent necessary in the classic sense of that concept. But, as the context is an attempt to commit the full offence, the completed first element is not enough. It must be accompanied not only by the lack of consent of the victim required by the second element, but also by the lack of belief about the victim's consent required of the accused person by the third element. That means the intent must be to complete the first element, that is, in a conventional case of sexual violation by rape, to effect penetration, in circumstances where that penetration is without the consent of the complainant and the accused does not believe on reasonable grounds that the complainant consents.

[171] In the judgment under appeal in *L v R*, the Court of Appeal had linked consent to the activity which was said to amount to attempted sexual connection in this way:[133]

> Thus, in the context of an attempt the accused must intend at the time of the attempt to have sexual connection with the complainant, without the consent of the complainant to the activity which amounts to attempted sexual connection, and without believing on reasonable grounds that the complainant consents to that activity.

Elias CJ, Blanchard, Tipping and McGrath JJ disagreed with that:[134]

> [23] We consider that this formulation has the subject-matter of the complainant's consent wrongly identified. It is focused on conduct which necessarily precedes penetration. The question is not whether the complainant consented to the conduct of the accused which constituted the attempt. Rather it is whether the complainant would have consented to the conduct which was necessary to constitute the full offence. In this respect, as a matter of principle, the focus must be on the prohibited act. The circumstances are unlikely to be such as will cause any practical difficulty for a jury.
>
> [24] The approach which we prefer means that the difference between an attempt and the full offence of sexual violation lies solely in the fact that the accused has tried to fulfil the first element of the completed offence but has not achieved his or her objective. In the ordinary case of attempted rape the man has tried to penetrate the woman but has not done so. The legislative policy, introduced in 1985, that any belief in consent on the part of the accused must be on reasonable grounds is maintained for the attempt consistently with what is required for the completed offence. Parliament can hardly have intended the position to be otherwise. There is a clear indication to that effect in the recently introduced s 134 of the Crimes Act in combination with s 134A, where the need for any belief about the age of the complainant to be on reasonable grounds is expressly required both for the completed offence and for an attempt. The difference between the attempt

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133 *L v R* [2006] 3 NZLR 291 (CA) at [26].

134 *L v R*, above n 120 (footnotes omitted).

> and the completed offence will, on this basis, be simple to explain to juries; much simpler than would be the case in the approach advanced by the appellant. Under that approach confusingly different tests would apply if the jury was having to consider whether the facts amounted to the full offence or only to an attempt. The resolution of the issue presented by this case in the way outlined is thus consistent with the general policy of current sexual offences legislation, with principle, and with practical considerations.

[172] In separate reasons, Henry J supported the approach taken by the other Judges, commenting:

> [51] This construction gives consistency, and also avoids what otherwise would be an illogical distinction. There may well be an issue for jury determination whether there was in fact penetration or whether the intimacy fell short of that and constituted only an attempt. In that situation, on the *Shepherd* approach, the anomalous situation would arise where the jury was directed that if they found penetration was proved it also had to be proved that there was an absence of belief in consent based on reasonable grounds. But if they were not satisfied penetration was proved, then an unreasonably based belief as to consent would be a defence, and it would be necessary for the Crown to establish that the offender knew that the victim was not a consenting party.

[173] It will be noted that Elias CJ, Blanchard, Tipping and McGrath JJ were of the view that, "[i]n the ordinary case of attempted rape the man has tried to penetrate the woman but has not done so". *L v R* did not exactly fit that paradigm as the appellant was a woman, but the facts were nonetheless susceptible to analysis as an attempted penetration which failed only because her victim resisted and would not "let it go in".[135] The conduct constituting the actus reus of the attempt was thus so closely associated with the substantive offence that there was no conceptual difficulty with an inquiry into whether the appellant had believed on reasonable grounds that the victim was consenting to sex.

[174] As far as I am aware, the approach taken in *L v R* has not attracted critical commentary. Indeed it has been praised by commentators as having produced a "logical and workable solution to a complex issue".[136] As I have already acknowledged, the s 128(2)(b) approach to cases of attempted penetration, such as

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[135] *L v R*, above n 120, at [26].

[136] See Kevin Dawkins and Margaret Briggs "Criminal Law" [2007] NZ L Rev 131 at 165. See also Fran Wright "Reckless attempts revisited" [2006] NZLJ 208 at 209 where the author, although critical of what she perceives as this Court's failure to elaborate on the principles underpinning its reasoning, concludes that the decision reached accorded with the underlying principles of attempt liability.

L v R and *Khan*, avoids the practical problem adverted to by Henry J and, as well, does not give rise to any practical difficulties as to application. On the other hand, I think it unfortunate that the case was decided solely by reference to conduct amounting to attempted penetration and in a context in which the opposing contention was the implausible and impractical proposition that the mens rea for attempted rape encompasses an intention (presumably in the sense of a wish) that the complainant not consent, rather than recklessness of the kind which I have discussed.

[175] I note very much in passing that the emphasised sentence in the passage cited in [170] does not squarely address the obvious point that the approach favoured in *L v R* has the effect of "eliminating altogether" what is, by reason of s 128(2)(a) an "express ingredient" of the actus reus of rape, namely that the sexual intercourse be non-consensual. To be very literal, the majority held that a defendant can be held to have intended to commit the offence of rape when that defendant's intentions extended to only one of two elements of the actus reus of that offence.

[176] The recent judgment of the English Court of Appeal in *R v Pace*[137] is the fourth case which warrants attention. In *Pace* the appellants who worked in a scrap metal yard had received from undercover police officers goods despite indications that they had been stolen. Under the inapt heading of "Money Laundering" the Proceeds of Crime Act 2002 (UK) provides for an offence of converting criminal (in this case stolen) property.[138] The mens rea relevantly is knowledge or suspicion that the property has been stolen.[139] Because the property had not been stolen, it was impossible for the appellants to have committed the substantive offence and accordingly they were not charged with it. Instead they were charged with attempted conversion of criminal property. Section 1 of the Criminal Attempts Act 1981 (UK) is relevantly very similar to s 72 of the Crimes Act and the case thus turned on whether the defendants had acted with the intention of committing the offence alleged.

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137 *R v Pace* [2014] EWCA Crim 186, [2014] 1 WLR 2867.
138 Proceeds of Crime Act 2002 (UK), s 327.
139 Section 340 provides that property is criminal property when it constitutes or represents a benefit from criminal conduct and the alleged offender *knows or suspects* as such.

[177] The trial Judge instructed the jury that they could find the defendants guilty if, at the times they converted the goods, they suspected that they were stolen.[140] On appeal the Court of Appeal concluded that suspicion was insufficient for the relevant count of attempt. In delivering the judgment of the Court, Davis LJ said:[141]

> … [W]e consider that, as a matter of ordinary language and in accordance with principle, *an "intent to commit an offence" connotes an intent to commit all the elements of the offence.* We can see no sufficient basis, whether linguistic or purposive, for construing it otherwise.

Then after reviewing the mens rea required to be established where conspiracy to commit an offence is committed, Davis LJ went on:[142]

> Overall, then, [the authorities considered establish] that a conspiracy to commit an offence … can require a higher level of mens rea than that applicable to the actual commission of the substantive offence itself. … Accordingly it makes it, in our view, all the more principled to conclude that likewise in the case of attempt a higher level of mens rea may be required under [s 1 of the Criminal Attempts Act] than is applicable to the substantive offence itself: and thus that, in the present case, proof of suspicion will not suffice on a count of attempted money laundering.

The Court felt able to distinguish *Khan* on the basis that it was not an impossibility case and the relevant mens rea for the substantive offence in *Pace* was suspicion, as opposed to recklessness in *Khan*.[143]

[178] *Pace* has had a mixed reception but, whether they approve or not, commentators have treated the judgment as putting back in play the principles apparently established in *Khan*.[144] Since *Khan* was decided the law of rape in England has been changed by the Sexual Offences Act 2003 (UK) so that it

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140 The simplest way of presenting the case to the jury would have been on the basis that, believing the goods to have been stolen, the appellants had converted them, and therefore had attempted to convert stolen property. Presenting the case on that basis would have been possible under s 1(3) of the Criminal Attempts Act 1981 (UK) which provides that an intent to commit a crime is established where, "if the facts of the case were as [the defendant] believed them to be", the defendant would have had the necessary intent to commit the offence. This however, would have required proof that the defendants believed, and not just suspected, that the goods were stolen.

141 *R v Pace*, above n 137, at [62] (emphasis added).

142 At [74].

143 At [52].

144 See for instance, M Dyson "Scrapping *Khan*?" [2014] Crim LR 445; Findlay Stark "The Mens Rea of a Criminal Attempt" [2014] 3 Arch Rev 7; Mirfield, above n 126; G Virgo "Criminal Attempts – the Law of Unintended Circumstances" [2014] CLJ 244; and J Child and A Hunt "*Pace and Rogers* and the Mens Rea of Criminal Attempt: *Khan* on the scrapheap?" (2014) 78 JCL 220.

corresponds broadly with s 128 of the Crimes Act.[145] Accordingly, this debate is of some interest in the present context.

[179] Professor Mirfield, who is attracted to a recklessness approach to mens rea (essentially as a minimum requirement), has discussed its application in the context of attempted rape:[146]

> One should be aware of what might be seen by some as an unacceptable result of applying such a minimum mens rea requirement [that recklessness be established] with complete rigour. Under s.1(1) of the Sexual Offences Act 2003, the accused can now be guilty of rape, even if they genuinely believed that the complainant was consenting, as long as that belief was not reasonable. That is certainly not advertent recklessness. Therefore, the logical effect of a minimum mens rea requirement for attempt [of recklessness] would be that, to be guilty of attempted rape, the accused must have been aware of the risk that the complainant was not consenting to the intercourse, even though that state of mind would not have been required had the intercourse eventuated. Such a position would not, it may reasonably be supposed, be found appealing, in policy terms, by everyone; some will say that an accused who has taken no proper care to ensure that the other person is consenting should no more escape conviction of attempted rape in the absence of (intended) intercourse than they would had it taken place. However, to follow that policy line would entail embracing the untenable proposition that advertent recklessness must be the minimum requirement for circumstances in attempt cases, *except* as regards lack of consent to intercourse in attempted rape.

[180] A different view was taken by Findlay Stark:[147]

> Admittedly, in *Khan*, recklessness as to the circumstance of the complainant's non-consent was viewed as being sufficient fault for attempted rape, when it was coupled with an intention to penetrate the complainant. Recklessness as to the absence of consent was the lowest acceptable form of *mens rea* at the time. Had the law on rape then been the same as it is now, under the Sexual Offences Act 2003, presumably the Court of Appeal [in *Khan*] would have found that the *mens rea* of attempted rape (in a case where the complainant is not consenting) is present where the defendant (i) intends to penetrate the complainant's vagina, anus or mouth with his penis (conduct) whilst (ii) holding *no reasonable belief* in the complainant's consent (circumstance). Applying the logic of *Khan,* if the defendant who lacked a reasonable belief in consent succeeded in what he was intending to do (penetrate the complainant) he would, in light of the complainant's non-consent, have been liable for rape. If he was intending to penetrate, and took a more than merely preparatory step towards that end, then the defendant should be liable for attempted rape.

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145 See Sexual Offences Act 2003 (UK), s 1.

146 Mirfield, above n 126, at 146 (emphasis in original).

147 Stark, above n 144, at 7–8. (footnotes omitted, emphasis in original).

> (It might be worried that a defendant who possesses an honest, yet unreasonable, belief in consent can in no way be described as "trying" to rape the complainant, and "trying" might be viewed as the ordinary language equivalent of "attempting". The defendant with an honest yet unreasonable belief in consent will take himself to be trying to have consensual sex, and so it might be thought odd for the law to view him as *attempting* to commit rape. If it is accepted, however, that the defendant is *trying* to bring about the mix of conduct and circumstances that *the law* would describe as rape (if he achieved penetration), then there is a sense in which he *is* trying to bring about the wrong of rape by intending to penetrate the complainant. There is nothing wrong, in principle, with holding that attempted rape is made out where the defendant takes more than merely preparatory steps towards penetrating the complainant, intends penetration, and honestly, yet unreasonably, believes she is consenting.)

[181] As the reasons of Arnold J show, the Law Commissions of England and Wales and of Ireland have taken up different sides on this controversy, with the former supporting a recklessness approach and the latter adopting an approach which is more consistent with that of the majority in the present case.[148]

Proximity and futurity

[182] Section 72 of the Crimes Act is in these terms:

> **72 Attempts**
>
> (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
>
> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
>
> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[183] As I have stressed, in *L v R* and *Khan*, the offending involved conduct which was closely proximate to sexual intercourse. Such a high level of proximity is, however, not a prerequisite for liability under s 72. That this can be so in relation to attempted sexual violation is illustrated by two judgments of the Court of Appeal.

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[148] See above at [87]–[88].

[184] In one of these cases, *Johnston v R*,[149] the unsuccessful appellant had been found by night on a back section, crouching near a sleep out in which a 16 year old girl was present. He was wearing dark clothing and a beanie and gloves and carrying a torch. On the basis of what the jury plainly saw as cogent propensity evidence, he was found guilty of attempted rape and his appeal against conviction was dismissed. This was on the basis that his actions as just described were sufficiently proximate to the complete offence of rape to amount to an attempt. Because it is possible that this case may come before this Court, I will leave my discussion of it at that and will instead focus on the second case, *R v Harpur*.[150]

[185] *Harpur* arose out of a texting relationship between Mr Harpur and a young woman who was acting in conjunction with, and the under the guidance of, the police. Mr Harpur and the young woman agreed to meet at a particular location and for her to be accompanied by a four year old niece (who in fact did not exist) whom Harpur intended to sexually violate. Mr Harpur arrived at the agreed location where he was arrested. In issue in the appeal was whether Mr Harpur's acts were sufficiently proximate to the intended offence to meet the s 72 proximity requirement so as to render him guilty of attempted sexual violation. Mens rea was not a problem from the point of view of the Crown given that Mr Harpur intended to have sexual connection with a four year old child as no question of consent or belief on reasonable grounds in consent could arise. As well, the unequivocal nature of Mr Harpur's intentions was material to whether his actions were sufficiently proximate to the intended offence to constitute an attempt.

[186] The Court reviewed the jurisprudence as to attempts. It noted that s 72(3) reversed the unequivocality requirement which had been adopted in *R v Barker*.[151] It also discussed at length and then over-ruled *R v Wilcox*,[152] a controversial earlier judgment of the Court of Appeal as to proximity. As the judgment indicates, proximity is a flexible concept:[153]

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149 *Johnston v R* [2015] NZCA 162; see also *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19.
150 *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.
151 At [15]. See *R v Barker* [1924] NZLR 865 (CA).
152 *R v Wilcox* [1982] 1 NZLR 191 (CA).
153 *R v Harpur*, above n 150, at [16].

> … Parliament painted a very broad canvas, leaving the Courts to apply the underlying concepts on a case by case basis, as justice demanded. Parliament did not lay down a detailed set of criteria to assist in determining whether particular conduct did or did not amount to an attempt.

In concluding that the proximity test was satisfied, the Court said this:[154]

> In our view, the Crown evidence, if accepted, showed a clear intent to commit a sexual violation of the 4-year-old girl Mr Harpur believed [the young woman] could provide. He performed a number of acts which, taken together, constituted an attempt to commit sexual violation. He had moved beyond mere preparation and, at the time of his arrest, was lying in wait for his victim. His conduct was not too remote to constitute an attempt; it was proximately connected with the intended offence.

[187] As I have noted, the age of the supposed victim meant that no practical issue as to mens rea arose in *Harpur*. But in other situations, there may be mens rea problems. Let us assume that a man who was obsessed with his former partner lay in wait for her with a view to confronting her and having sexual intercourse. As *Harpur* indicates, such conduct – that is lying in wait – can be sufficiently proximate to satisfy s 72(2) and (3). Let us also assume that the man believed, irrationally, that she would consent to sex once he confronted her and that he was detected before the intended confrontation occurred. Did he, by lying in wait for her, commit the offence of attempted sexual violation?

[188] As a matter of first impression, it might be thought that his liability for attempted sexual violation should involve at least some assessment of how he would have behaved if the intended confrontation had occurred and it had become apparent to him that, contrary to his irrational expectation, his former partner did not wish to have sexual intercourse with him. If the Court is satisfied that, while he at least hoped that his former partner would consent to sex, he intended to have sexual intercourse whether or not she consented, a conviction for attempted sexual violation would be appropriate. But say the man, although obsessed, is not of a violent disposition, and would probably have abandoned his intention once his former partner made it clear that she would not consent to sex. If so, labelling him an attempted rapist might be thought to be criminalising him more for his thoughts than for what he did.

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[154] At [44].

[189] In such a case, a literal application of *L v R* would require the judge to sum up on the basis that liability of the defendant depended on whether, as he lay in wait, he had reasonable grounds for believing that his former partner would consent to sex. The likelihood that he would have desisted once his former partner made it clear that she did not consent would be irrelevant. Indeed, even if he was able to maintain truthfully that he would never have had sexual intercourse unless it was clear that his former partner consented, it is at least arguable that he nonetheless should be held to have intended to rape her if there were no reasonable grounds for believing that she would consent.

[190] The resultant risk of over-criminalisation could be partially mitigated by the judge's ability to determine whether the man's actions were sufficiently proximate to the offence. In *Harpur*, the evidence as to Mr Harpur's intention to sexually violate the supposed four year old girl was unequivocal and this was material to the conclusion that proximity was established. In the example I am discussing, a judge might conclude that, in the absence of proof of an unequivocal intention to have sexual intercourse regardless of consent, the man's actions in lying in wait for his former partner were insufficiently proximate to the intended offence to satisfy s 72(2) and (3).

[191] As will become apparent, I see a role for the s 72(2) and (3) proximity analysis in this context. I do not, however, see it as a complete answer to the problem I have posed. Let us say that the Crown has a perfectly respectable but not overwhelming case for the proposition that the man intended to have sex with his former partner irrespective of consent. If the judge nonetheless rules that there is insufficient proximity, the Crown loses the opportunity to persuade the jury that the man did in fact intend to have sex irrespective of consent. If, conversely, the judge is satisfied that proximity is established, a strict application of the *L v R* approach would dictate that the case is left to the jury on the over-criminalising basis I have just described.

My approach

[192] As is apparent I have distinct reservations about the approach taken in *L v R*. My preference would be to hold that the elements of the offence of attempted rape encompass an intention to commit the crime of rape; and, because absence of consent is part of the actus reus of rape, this requires proof of an intention to have non-consensual intercourse. This has the not inconsequential advantage of being consistent with the statutory text. And although I accept that there are some considerations which support the view that s 128(2)(b) should be held to apply to attempted rape (the underlying legislative policy and the practical difficulty where rape and attempted rape are charged in the alternative), these are at least balanced by considerations which go the other way (the futurity problem and the desirability for caution before applying s 128(2)(b) in circumstances not provided for by the legislature given the policy issues I have discussed).

[193] My preference is therefore to conclude that an intention to rape is only established if it is shown that the defendant intended to have sexual intercourse irrespective of consent. This would be a little more favourable to defendants than the position adopted in *L v R*, but I doubt whether there would be many cases which would turn on the difference.

[194] My preference notwithstanding, I accept that in cases such as *L v R* and *Khan* where the substantive offence is all but completed, the conduct of the defendant is broadly within the policy of s 128(2)(b). There is no practical problem with applying the extended s 128(2)(b) mens rea to the defendant's conduct because it is so closely associated with the actus reus of the substantive offence. And, as well, because the defendant will have got past the point where desistance as a result of the victim's response is a plausible possibility, there is no risk of over-criminalisation. For these reasons, in such cases the futurity problem does not arise.

[195] On the basis that *L v R* is right (which is plainly the view of the majority), it follows that the mens rea for attempted rape is an intention to have sexual intercourse without belief based on reasonable grounds in consent. But, as I have explained, even on this basis there remains scope for argument as to how such an

intention can be made out. As well, and importantly, there is a real question as to how this element of the offence should be explained to the jury. In cases where the futurity problem arises I see the combination of the subjective ("an intention to …") and the objective ("on reasonable grounds") as quite awkward and as giving rise to difficulties of explanation. As I will later explain, I think that this is illustrated by aspects of the way in which the Judge summed up in this case.

[196] As to all of this, it seems to me to be not inconsistent with *L v R* to conclude that where the intended sexual intercourse is to take place in the future, an intention on the part of the defendant to have sexual intercourse without belief in consent on reasonable grounds is only established if the defendant appreciated that there would not be reasonable grounds for belief in consent when the sexual intercourse was to occur. This could be best and most simply explained to the jury as requiring proof that the defendant intended to have sexual intercourse irrespective of consent, in other words, by showing that the defendant was reckless in the sense I have discussed.

The mens rea component of the assault element of the s 129(2) offence

"Assault" in the Crimes Act

[197] Assault is defined in the Crimes Act, relevantly, as including the intentional application of force.[155] Assault is an offence under s 196. It is also an element in a large number of other offences. Although this is not explicitly provided for in the Act, consent is in general a defence to a charge of assault,[156] as is an honest and not necessarily reasonable belief in consent.[157] So in the case of indecent assault where the complainant is over 16 years of age, an honest belief in consent is a defence.[158]

[198] On the facts of the present case, a charge of indecent assault may well have been proffered, either instead of the s 129(2) charge or as an alternative in case the

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155 Crimes Act, s 2.

156 See *R v Barker* [2009] NZCA 186, [2010] 1 NZLR 235. For circumstances where this is not so, see *R v Lee* [2006] 3 NZLR 42 (CA).

157 See for instance *R v Nazif* [1987] 2 NZLR 122 (CA).

158 See *R v Norris* (1988) 3 CRNZ 527 (HC) at 530 where Tipping J said: "A person charged with indecent assault if able to establish that he honestly believed that the complainant was consenting is entitled to be acquitted, even though objectively considered the grounds for his belief were unreasonable."

jury were not satisfied that there had been an intention to commit sexual violation. As well, given the way the charge was laid, assault was an included offence. So if the jury were not satisfied as to the intention to commit sexual violation, a verdict of guilty of assault would have been possible. It is perfectly clear that if the jury had been required to address whether the appellant was guilty of indecent assault or assault, the Judge would have been required to direct that honest belief in consent was a defence.

Does L v R *dictate that a special approach be taken to the mens rea for assault in relation to s 129(2)?*

[199] The view expressed in *Adams on Criminal Law* is that the ordinary principles as to mens rea apply to the assault component of a s 129(2) charge:[159]

> Assault with intent to commit sexual violation requires proof of an assault, ie the use or threat of force … There is no requirement that the assault be indecent, and the defendant will have a defence if the actions that constitute the assault were consented to, no matter what his or her ultimate intention was at the time. So long as the assault is one to which consent would ordinarily provide a defence, a mistaken belief in consent on the part of the defendant will also provide a defence whether or not it was reasonable in the circumstances.

[200] The countervailing argument is that consistency with *L v R* requires that a special approach be taken to assault for the purposes of s 129 and perhaps that we should adopt judicially the approach taken by the United Kingdom Parliament to sexual assault in England and Wales.[160]

[201] I consider that there is no principled basis for departing from orthodox principle in respect of the assault component of a charge under s 129(2). There would also be practical problems if the jury dealing with a charge under s 129(2) was also required to deal with an alternative charge of indecent assault or the included charge of assault. In the latter case particularly it would not be possible to give an explanation which a jury would regard as logical as to why honest belief in consent to the assault is a defence to the included charge but not the assault component of the charge as laid.

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159 Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA129.03].
160 See the reasons given by Arnold J at [76].

The way in which the Judge left the case to the jury

The Judge's approach

[202] In his summing up, the Judge identified the issues that the jury had to answer as involving four questions:[161]

> [14] There are four questions that need to be answered.
>
> (a) Did the defendant assault [the complainant]?
>
> (b) At the time did he intend to have sexual intercourse with her?
>
> (c) Did she give true consent?
>
> (d) Did he have reasonable grounds to believe that she was consenting?

[203] These questions formed the basis of a written question trail:

> 1.1 Are you satisfied beyond reasonable doubt that Mr Ah-Chong grabbed [the complainant] from behind, pressing himself against her and preventing her from leaving?
>
> **If yes, go to question 1.2.**
>
> **If no, find Mr Ah-Chong "not guilty".**
>
> <u>Crown case</u>: *Mr Ah-Chong grabbed [the complainant] from behind, prevented her from leaving by binding her arms, pressed his penis against her bottom several times and tried to pull down her pants.*
>
> <u>Defence case</u>: *Mr Ah-Chong did not assault her as alleged.*
>
> 1.2 Are you satisfied beyond reasonable doubt that Mr Ah-Chong intended to have penetrative sexual intercourse with [the complainant]?
>
> Sexual Intercourse involves the penetration of a person's genitalia with the penis of another.
>
> **If yes, go to question 1.3.**
>
> **If no, find Mr Ah-Chong "not guilty".**
>
> <u>Crown case</u>: *The combined effect of his actions in the toilet infer an intention to have sexual intercourse.*

[161] District Court summing up, above n 119.

<u>Defence case</u>: Mr Ah-Chong did not behave in the way alleged.

1.3 Are you satisfied beyond reasonable doubt that [the complainant] did not consent to sexual intercourse with Mr Ah-Chong?

Consent means true consent freely given by a person who is in a position to make a rational decision. There is no presumption of law that a person is incapable of consenting to sexual connection because of age. Lack of protest or physical resistance does not, of itself, amount to consent. There are some circumstances where allowing sexual activity does not amount to consent, including the application of force to the complainant or the threat or fear of such application of force.

If yes, go to question 1.4.

If no, find Mr Ah-Chong "not guilty".

<u>Crown case</u>: [The complainant] made it clear by her words and actions that she did not want a sexual encounter with Mr Ah-Chong.

<u>Defence case</u>: This element is not in dispute; although as a matter of law you must still be satisfied beyond reasonable doubt.

1.4 Are you satisfied beyond reasonable doubt that Mr Ah-Chong had no reasonable grounds to believe that [the complainant] was consenting?

If yes, find Mr Ah-Chong "guilty".

If no, find Mr Ah-Chong "not guilty".

<u>Crown case</u>: [The complainant] made it clear by her words and actions that she did not want a sexual encounter with Mr Ah-Chong

<u>Defence case</u>: [The complainant's] behaviour during the morning led him to believe she would consent to sexual intercourse and his grounds for believing that she would consent were reasonable.

[204] In summing up, the Judge spoke generally of what the Crown had to prove:[162]

> The Crown has to prove, beyond reasonable doubt … Firstly, that the defendant assaulted the complainant intending to sexually violate her by rape; and secondly, at the time that he did so the defendant intended to have sexual intercourse with the complainant where she did not consent and he had no belief on reasonable grounds that the complainant consented to the intended sexual intercourse.

[162] At [12].

[205] When dealing with the first question in the question trail, the Judge directed as follows:[163]

> Now although taking someone by the hand and pulling them towards you is technically an assault and you heard counsel explain what an assault is. It is not what is alleged here. What is alleged here is what the complainant says happened, the bear hug, the thrusting, the pressing and the preventing her from leaving.
>
> Only if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges could you answer [the first] question "yes" … You can only answer that "yes" if you are satisfied beyond reasonable doubt that he assaulted [the complainant] in the way that she alleges.

[206] On the second question, the Judge said:[164]

> The second question – at the time did he intend to have sexual intercourse with her is not in fact in dispute. It is clear from the evidence and it was conceded by counsel, Mr Forster, in his closing address, that that was his intention to have sexual intercourse with her.
>
> Although it is not in dispute you still need to be satisfied beyond reasonable doubt that that was his intention.

[207] On the third question, the Judge recorded that the defence conceded the complainant was not in fact consenting, by which he meant consenting to sexual intercourse.[165]

[208] On the fourth question, the Judge said:[166]

> … if you accept [the complainant's] account of the assault it would be difficult to conclude that [the appellant] had a reasonable basis to believe that she was consenting. However, if it is reasonably possible that his account of taking her hand and pulling her towards him and immediately stopping when she struggled and said, "No", if that is true, if you find that it is true you almost certainly could not be satisfied beyond reasonable doubt that he did not realise she was not consenting and that he had a reasonable basis up to that point for believing that she did consent.
>
> … If you accept as a reasonable possibility that he desisted, that he stopped as soon as she struggled and said, "No" you could conclude that he no longer, at the relevant time, had the intent to have sexual intercourse with her. As Mr Forster submits to you, the timing of the event and the fluid developing situation is potentially very important here.

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163 At [16]–[17].
164 At [18]–[19].
165 At [20].
166 At [22]–[23].

The directions on an intention to rape the claimant

[209] As will be apparent from what I have said in the earlier part of my reasons, I am of the view that the Judge should have summed up on this part of the case by directing the jury that they could only find the appellant guilty if satisfied that he assaulted the complainant with the intention of having sexual intercourse irrespective of whether she consented. As well, I consider that the way in which the Judge did sum up illustrates the difficulties of applying a s 128(2)(b) approach in circumstances which do not amount to attempted penetration in the *L v R* sense.

[210] It is perfectly clear that the complainant did not consent to the appellant's actions. And at least in a broad sense it is likewise perfectly clear that her conduct did not amount to consent to sexual intercourse. But on the approach taken in *L v R*, issues of consent and reasonable belief in consent must be addressed to the intended sexual intercourse rather than the actions said to amount to the attempt (and thus, in this case, the assault). In cases of the kind I have postulated earlier in these reasons – where the actus reus of the attempt does not involve interaction between the defendant and the complainant – a question whether the complainant consented to sexual intercourse would be devoid of meaning. And although this is not such a case, the appellant's conduct was not so proximate to sexual intercourse as to amount to attempted penetration in the *L v R* sense. I therefore see this question as at best something of a distraction for the jury.

[211] It will be recalled that the question trail asked:

> 1.4 Are you satisfied beyond reasonable doubt that Mr Ah-Chong had no reasonable grounds to believe that [the complainant] was consenting?

This formulation might be thought to raise the further question, "Consenting to what?", a question which is also raised by the Judge's formulation of the issues in [14](c) and (d) of his summing up as set out above at [202]. From my view point and in the context provided by question 1.3 in the question trail, it is obvious that the Judge meant "consenting to sexual intercourse". But given the tense – "was consenting" – what the Judge said might be thought more readily to refer to the actions of the appellant which constituted his assault on the complainant. This

involved a diversion from what, on any view, was the fundamental issue in the case, namely the state of mind of the appellant as to whether the complainant would consent to sexual intercourse.

[212] There was also this supplementation in the summing up, which despite the further repetition, is worth setting out again:[167]

> However, if it is reasonably possible that his account of taking her hand and pulling her towards him and immediately stopping when she struggled and said, "No", if that is true, if you find that it is true you almost certainly could not be satisfied beyond reasonable doubt that he did not realise she was not consenting and that he had a reasonable basis up to that point for believing that she did consent.

There is an awkwardness of expression as to the standard of proof. As well, the tense used in relation to consent very much suggests a focus on the complainant's reaction to the appellant's assault on her rather than the appellant's state of mind as to whether or not she would consent to sexual intercourse.

[213] On these directions, the jury could have been forgiven for addressing the case by reference to whether (a) the appellant intended to have sexual intercourse with the complainant and (b) whether he continued his assault after the point when he could have had no reasonable grounds for believing that she consented to his actions. But there was no direction to the effect that he could only be found guilty if his intention to have sexual intercourse with the complainant persisted after the point when she struggled.[168] This problem would have been resolved if the Judge had added to his supplementary direction something along these lines:

> If you are sure that the complainant struggled and that after she did so the appellant continued to restrain her and did so with the intention of having sexual intercourse with her, you could be [or even would be] satisfied beyond reasonable doubt that he assaulted her with the intention of having sexual intercourse with her and did so without a belief on reasonable grounds that she was consenting.

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167 At [22].

168 A careful analysis of what the Judge said as to the first and second questions in the question trail might suggest that the accused should only be convicted if he intended to have sexual intercourse at the time when he carried out the acts referred to by the Judge as amounting to the assault, "grabb[ing] [the complainant] from behind, pressing himself against her and preventing her from leaving" but the discussion as to this was too diffuse to bring the relevant point sufficiently to the attention of the jury.

[214] For the reasons just given, it seems to me that even on a s 128(2)(b) approach to mens rea, the summing up was defective. This discussion also illustrates the more general point that there are real problems for judges in directing juries in a simple and concrete way in the manner proposed by the majority where the defendant's conduct did not amount to attempted penetration.

Mens rea for assault

[215] In his question trail, the Judge did not treat honest belief in consent in relation to the assault component of the charge as a defence. On the other hand, in the passage set out in [208] and repeated in part in [212] he indicated that the appellant should be acquitted if he stopped the assault as soon as the complainant started to struggle and say "no". Although what the Judge said in this part of his summing up was, at least in context, addressed to belief on reasonable grounds in consent in relation to sexual intercourse, it could be taken as a direction to the jury to acquit unless satisfied that the appellant continued the assault after the complainant began to struggle. At this point the appellant could not have believed that the complainant was consenting.

[216] All of that said, I remain uneasy about this aspect of the case. This is for three reasons:

(a) The passage set out in [208] was not very clearly expressed, in particular as to the standard of proof.

(b) This supplementation was in effect an add on to the question trail. It was not addressed to question 1.1 or the assault element of the offence. It was also very closely tied to the appellant's narrative as to what had happened in the bathroom which the jury may have rejected without necessarily accepting everything that the complainant said.

(c) The point made in [213] is material because there was a failure by the Judge to ensure that there was a precise focus on the appellant having simultaneously the states of mind required to meet the mens rea

requirements for both assault and the intention to rape the complainant.

A miscarriage of justice

[217] On my approach to what was required, there was a miscarriage of justice because:

(a) the direction as to what constitutes an intention to rape was wrong in that the Judge should have directed as to recklessness; and

(b) in any event, there were failures in the respects identified in [213] and [215]–[216] to give directions as to the state of mind of the appellant which were sufficiently precise.

I would allow the appeal and order a new trial.

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