CASE NOTE

YES, NO OR MAYBE? THE "ODD" RESULT IN *Christian v R*

Emily Blincoe*

I INTRODUCTION

It would appear to be self-evident that, as the feminist refrain goes, "yes means yes and no means no". However, given the infinite variety of human behaviour, many situations are not so neatly categorised. How should the criminal law treat sexual activity in the absence of either a "yes" or a "no"? That is the core issue in *Christian v R*, and a question to which the Court of Appeal and Supreme Court gave very different answers.

Mr Christian was convicted, following a jury trial, of three counts of sexual violation by rape.[1] The Crown case was that Mr Christian had repeatedly raped the complainant when she was between the ages of 13 and 16 while the two were living together. Mr Christian's defence was that no sexual activity had taken place. The trial Judge directed that, as neither consent nor reasonable belief in consent were at issue, the jury had to return a guilty verdict if they found that penetration had occurred in respect of each count.[2]

The first rape charge (count 2) related to an incident three or four weeks after the complainant moved in with Mr Christian. The jury found him guilty of that charge, but not guilty of an indecent assault charge (count 1) said to have occurred immediately before the rape. He was discharged on a second specific count of rape (count 3), relating to the second time he was alleged to have raped the complainant. Her evidence was that she could not remember the incident specifically. The jury found him guilty of the two representative

* BA/LLB(Hons). Solicitor with Ord Legal and Val Nisbet, Barrister and Solicitor.

1 Mr Christian was sentenced to 13 and a half years' imprisonment: *R v Tassell* DC Tauranga CRI-2012-087-1863, 25 July 2014, as cited in *Christian v R* [2017] NZSC 145 [*Christian* (SC)] at [1].

2 *Christian* (SC) at [17].

charges of rape, which related to the time they lived together, first in a house (count 4), and then in a house bus (count 5).

The verdicts on the representative charges meant the jury was satisfied beyond reasonable doubt that Mr Christian had raped the complainant at least once during the relevant time period relating to each charge.

Mr Christian appealed to the Court of Appeal, which upheld the convictions and found that there was no narrative capable of supporting a reasonable belief in consent.[3] Mr Christian appealed to the Supreme Court.[4] The majority of the Supreme Court dismissed the appeal on count 2 (the first rape charge). However, it allowed the appeal in respect of the two representative charges (counts 4 and 5), and ordered a retrial on the basis that the Judge misdirected the jury, and there was a reasonable possibility that the complainant could have consented. Chief Justice Elias, in a dissenting judgment, considered that the appeal should have been allowed in respect of all three counts, because the misdirection meant the jury had not been directed to consider all elements of the charge, which was itself a miscarriage of justice.

This case note considers three aspects of the case, contrasting the approaches taken by the Court of Appeal, the Supreme Court majority, and Elias CJ.

First, I set out the elements of rape on which a Judge must give direction, namely: penetration; lack of consent; and lack of reasonable belief in consent. I then consider the approaches each judgment took in regard to the significance of the trial Judge's failure to direct on the latter two requirements.

Second, I set out the contrasting interpretations of s 128A(1) of the Crimes Act 1961. That subsection provides that a failure to protest or resist does not in itself amount to consent to sexual activity. The Supreme Court majority agreed with the Court of Appeal that s 128A(1) also applies to reasonable belief in consent, meaning that a failure to protest or resist cannot be a basis for a reasonable belief in consent. Chief Justice Elias disagreed with this view. As to what *does* amount to consent when a complainant is silent and passive, the Supreme Court rejected the Court of Appeal's requirement for consent to be positively expressed. The Supreme Court majority found that consent, or reasonable belief

3 *Christian v R* [2016] NZCA 450 [*Christian* (CA)] at [72].

4 *Christian* (SC), above n 1.

in consent, could arise from "words used, conduct or circumstances" and that those circumstances could include "relationship expectations".

Finally, this case note considers the application of the law to the facts of the case. The Court of Appeal upheld all three convictions, on the basis that there was no credible narrative of consent or reasonable belief. The majority upheld the conviction on count 2, rejecting the challenges made to the credibility of the complainant and noting the lack of relationship expectations at that point. However, in relation to the latter counts, the Supreme Court found that there was a possibility that the jury could not have ruled out consent, albeit as a consequence of grooming. In my view, the evidence said to justify these different outcomes does not stand up to scrutiny.

II JURY DIRECTIONS: THE ELEMENTS OF RAPE

The trial Judge correctly told the jury in his Honour's summing up that the defendant could only be guilty if the jury was satisfied that: the defendant penetrated the complainant's genitalia with his penis; the complainant did not consent to the penetration; and the defendant did not believe, on reasonable grounds, that the complainant consented.[5] These are also the elements of rape as set out in s 128 of the Crimes Act. However, the Judge then said:[6]

> [17] The sole issue here, ladies and gentlemen, is whether or not there was penetration. Did it happen or not? The defence do not advance consent or belief in consent. The complainant said she did not consent. The defendant could not have a reasonable belief in consent when he says there was no sexual act that took place. If there was penetration, if the defendant did these things, then your verdict will be guilty. If he did not do them then your verdict will be not guilty.

The Judge took this approach despite a request from defence counsel that the summing up include a direction on reasonable belief in consent.

Mr Christian appealed on the basis that the Judge should have directed the jury to consider consent and reasonable belief in consent, notwithstanding his defence that no sexual contact occurred. The Court of Appeal approached this issue on the basis that:[7]

5 *Christian* (SC), above n 1, at [16].

6 *R v Tassell,* above n 1, as cited in *Christian* (SC) at [17].

7 *Christian* (CA), above n 3, at [45] (emphasis added).

> [45] The authorities are clear that in sexual violation cases where the defence is the all-or-nothing "it never happened" defence, the jury must still be directed on consent and reasonable belief in consent if the evidence *contains a narrative capable of supporting that reasonable possibility*. However, there will be no miscarriage of justice unless the evidence could support a defence founded on either of these factors.

The Court of Appeal found that there was no such credible narrative in relation to any of the charges (the reasons for which are discussed in detail below) and that accordingly, the trial Judge was "not required to leave consent to the jury".[8]

Both the majority in the Supreme Court and Elias CJ (who, in other respects, dissented from the majority decision) found that although some earlier Court of Appeal decisions approached this issue on the basis outlined by the Court of Appeal, this approach was in error because, as Elias CJ said, it "treated absence of consent and absence of reasonable belief in consent as if defences, rather than essential elements of the offence".[9] Chief Justice Elias stated that the presumption of innocence requires the Crown to prove all elements of the charge, regardless of how the defence is conducted.[10] The majority said that in cases where consent or reasonable belief are not put in issue by the defence, it would be sufficient for the Judge:[11]

> … to outline those elements of the offence, record that the defendant has not raised an issue with those elements but make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did.

The majority added that, in outlining the evidence relevant to consent and reasonable belief, the Judge must be careful not to invite the jury to disbelieve the defendant's defence that no penetration occurred.[12]

The majority found that, as the Judge had erred, it was required to consider whether the failure to direct the jury led to a miscarriage of justice.

---

8 At [64] and [72].

9 *Christian* (SC), above n 1, at [80].

10 At [80].

11 At [36].

12 At [36].

This decision turned on the majority's analysis of whether there was "scope for the jury to be in doubt as to the absence of consent or the absence of a reasonable belief in consent".[13] If there was no such scope, the misdirection was, according to the majority, immaterial.[14]

Chief Justice Elias, on the other hand, considered that the misdirection itself was a material error of law because "the jury was not properly directed on all counts as to the essential elements of the offence and as to its task."[15] She considered that the error was a radical one, because "it removed essential ingredients of the offence from jury consideration, despite the presumption of innocence and the onus borne by the Crown to establish guilt".[16] This was an error "capable of affecting the result".[17] On this basis, Elias CJ considered that the appeal must be allowed unless "the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict".[18] She considered that, in this case, the convictions could not be safe because the jury had not made any assessment on the issues of consent and reasonable belief.[19]

III WHEN CAN AN ABSENCE OF A "NO" AMOUNT TO CONSENT?

Section 128A of the Crimes Act provides that a failure to protest or resist does not amount to consent.[20] Does it follow that there can be reasonable doubt as to the absence of consent or reasonable belief in consent when a complainant is silent and passive, not protesting or resisting, but also not indicating any desire or agreement to engage in sexual activity? Prior to 2005, Section 128A(1) provided that:[21]

> The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the

13 At [37].

14 At [37].

15 At [81].

16 At [87].

17 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31], as cited in *Christian* (SC), above n 1, at [110].

18 *R v Matenga*, above n 17, at [31], as cited in *Christian* (SC), above n 1, at [110].

19 At [111].

20 Crimes Act 1961, s 128A(1).

21 The section was replaced in 2005 by the Crimes Amendment Act 2005, s 7. Both the Court of Appeal and Supreme Court considered that the provision remains materially the same.

purposes of s 128 of this Act.

Subsection (2) of the former s 128A provided that certain situations do not constitute consent, namely the actual, or threatened application of force to that person or another (or fear of such application); a mistake as to identity; or a mistake as to the nature and quality of the act.

The current section retains these provisions with slightly different wording. Subsection (1) now reads "A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". The current version adds that a person "does not consent" if the person is:

i) asleep or unconscious;[22]

ii) so affected by alcohol or drugs that the person cannot consent or refuse to consent;[23] or

iii) is under an intellectual, mental or physical condition or impairment of such nature and degree that the person cannot consent or refuse to consent.[24]

Both the current and former sections provide that the section does not limit the circumstances in which a person does not consent.[25]

The first issue that both the Court of Appeal and Supreme Court were required to consider was whether s 128A(1) also applies to reasonable belief in consent — that is, whether or not a defendant can form a reasonable belief in consent based solely on a failure to protest or resist.

In the 1996 case of *R v Tawera*, the Court of Appeal found that a failure to protest is highly relevant to consent, but "does not really bear on the critical issue of belief in consent".[26] On the facts of that case, the Court said there was nothing in the evidence "which objectively indicated the complainant was not consenting", and found that the appellant had a reasonable belief in consent.[27] In my view, this is a questionable reading of the evidence, given that the 16 year-old complainant tried to turn her face away from the 48 year-old appellant when

22 Section 128A(3).

23 Section 128A(4).

24 Section 128A(5).

25 Crimes Act 1961, s 128A(8). See also s 128A(3) in the pre-2005 Crimes Act.

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

27 At 293.

he tried to kiss her, and pushed her thighs together while he was holding them.

The view that s 128A does not apply to reasonable belief in consent was questioned by the Supreme Court in *Ah-Chong v R*.[28] In that case, the Court suggested (in obiter) that given that passivity and a failure to protest cannot amount to consent, the same circumstances could not give rise to a reasonable belief in consent.[29] The Court also suggested that *Tawera* might be at odds with the underlying principle of s 128A.[30]

The Court of Appeal in *Christian* said the suggestion in *Ah-Chong* was "unsurprising" and that "if lack of protest cannot, by law, constitute consent, it is illogical and inconsistent to hold nonetheless that silence or physical passivity can still provide a sufficient platform for a reasonable belief in the same consent".[31] It found that:[32]

> … the complainant's silence by itself must not be taken as consent and nor can her failure to resist in some physical way. It follows that consent, however it might be expressed, must be actively expressed. Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be *the suggestion of "yes" in the complainant's words or conduct* …

In *Christian,* the Supreme Court majority agreed with the Court of Appeal that *Tawera* "is not consistent with the statutory language", and noted, too, that the case is difficult to reconcile with the underling purpose of s 128A, as well as a number of subsequent Court of Appeal decisions.[33] The Supreme Court majority said:

> [32] The word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.

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

29 At [54].

30 At [55].

31 *Christian* (CA), above n 3, at [50].

32 At [49] (emphasis added).

33 *Christian* (SC), above n 1, at [30].

The majority went on to say that:[34]

> in most cases the issue of a reasonable belief in consent will involve consideration of evidence of a belief based on something more than just a lack of protest and lack of resistance by the complainant. The question for the jury will involve an evaluation of all aspects of the evidence of [a] defendant's belief and of its reasonableness.

The Chief Justice disagreed, finding that s 128A is only directly concerned with consent, and not reasonable belief. She considered that reasonable belief "remains a question of fact on the evidence as a whole", and accordingly "[a]lthough the policy behind s 128A may itself be relevant to reasonableness of belief, it is not determinative as a matter of law."[35]

Turning to the question of what does amount to consent, the Supreme Court disagreed with the Court of Appeal's view that consent must be positively expressed. The Supreme Court majority considered that the Court of Appeal "went too far in stating that consent must be expressed in a positive way, as if that was a requirement regardless of the circumstances",[36] and that it "took more out of the statement in *Ah-Chong* than was warranted".[37]

The primary reason for this was that the statute itself does not "say that there can be no consent in the absence of evidence of positive consent".[38] The former s 128A(1) provides that a failure to protest or resist does not "by itself" constitute consent, and the current section provides that a person does not consent "just because" of a failure to protest or offer physical resistance. By contrast, the other subsections use the words "do not constitute consent" (in the former provision) and "does not consent" (in the current provisions). Accordingly, the Supreme Court majority said that:

> [45] … consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent.

The only elaboration the Supreme Court gave on the meaning of what

34 *Christian* (SC), above n 1, at [33].

35 At [105].

36 At [43].

37 At [43].

38 At [43].

"something more" or "circumstances" might mean in this context was to say that:

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

As noted above, the Supreme Court majority considered that the Court of Appeal went too far in requiring a positive expression of consent.[39]

The standard set out by the Court of Appeal was the "suggestion of a 'yes' in the complainant's words or conduct".[40] If that sets the bar too high, then how is consent to be understood? It is well established that consent must be "genuine, informed, and freely and voluntarily given".[41] This is reflected by the standard jury direction that consent means "a true consent, freely given by a person who is in a position to make a rational decision".[42] What mere circumstances (as distinct from words or conduct) would ever be sufficient to amount to consent that is genuine, informed, free and voluntary?

Perhaps the Supreme Court considered that the Court of Appeal's decision restricted the consideration of consent to words or conduct at the time of the sexual activity, with no scope for consideration of the broader background. If that is what the Court of Appeal was suggesting, then the Supreme Court was correct to say that background circumstances may sometimes be relevant. In my view, the Supreme Court's "circumstances" could be a reference to a pattern of words or conduct over time, which may be relevant (but not determinative). That is consistent with the standard jury direction that:[43]

> The material time when consent, and belief in consent, is to be considered is at the time the act actually took place. The complainant's behaviour and attitude before or after the act itself may be relevant to that issue, but it is not

39 At [43].

40 *Christian* (CA), above n 3, at [49].

41 *R v Brewer* CA516/93, 26 May 1994; and *R v S* (1992) 9 CRNZ 490, as cited in *R v Annas* [2008] NZCA 534 at [25].

42 *Christian* (SC), above n 1, at [19].

43 Institute of Judicial Studies *Criminal Jury Trials Bench Book*, as cited in *R v Adams* CA70/05, 5 September 2005 at [48].

> decisive. The real point is whether there was true consent, or a reasonably based belief in consent, at the time the act took place.

In my view, the Supreme Court must not be suggesting that 'relationship expectations' could arise from the *fact* of a relationship rather than the words or conduct of the parties within the relationship. To treat 'relationship expectations' as something separate from words or conduct and as a potential basis from which to infer consent or reasonable belief would come dangerously close to reintroducing an exception for spousal rape in cases where the complainant is silent and passive, a result which the Supreme Court surely did not intend.

IV APPLICATION TO THE FACTS OF THIS CASE

The lack of clarity in the Supreme Court majority's judgment is illustrated and compounded by its application of the law to the facts of *Christian*.

The specific evidence about consent in relation to each charge is set out below. By way of further general background, shortly after the complainant turned 16, her mother became suspicious and beat her until she confessed to having regular sex with Mr Christian. Her mother took her to the Police station, and the complainant then made a statement to the Police that "it" was consensual. When she gave evidence in Court, she said that the statement was made at Mr Christian's direction. A few months after making the statement, she swore an affidavit in support of a protection order against her mother, deposing that rumours of a sexual relationship with Mr Christian were "not true". Her evidence was that this was what Mr Christian told her to say.

A Count 2

In relation to the specific charge (count 2), the complainant's evidence was that this incident occurred when she was 13 or 14 years old, three or four weeks after she moved into Mr Christian's villa. He came into the room where the complainant was sitting on the couch. He removed her pants, pushed her legs open, and raped her. She remained silent throughout. The complainant said she was too scared to say anything but did not offer any encouragement, nor did she consent. She said, "I didn't even know what that word [consent] meant".[44]

44 *Christian* (CA), above n 3, at [5].

On appeal, the Court of Appeal noted the complainant's young age and Mr Christian's position of trust and power. Accordingly, the Court said, there was "no credible narrative of consent or reasonable belief in consent".[45]

The Supreme Court majority agreed. It found that there was no evidence contradicting the complainant's version of events leading to the first charge and no challenge to the evidence she gave as to consent; there was nothing before the jury to provide scope for doubt as to the absence of consent. It said, "there is an inherent lack of plausibility in the suggestion that she consented".[46]

Counsel for Mr Christian argued that although the jury accepted the complainant's evidence that the sexual relationship existed, it did not necessarily follow that the jury would have accepted her evidence as to the absence of consent.[47] This was because, unlike the existence of the sexual relationship, there was no corroborating evidence as to the lack of consent. Further, the complainant's credibility was said to be undermined by: the fact Mr Christian was found not guilty on count 1, said to occur just before the first rape, indicating the jury did not accept all of the complainant's evidence; her statement to the Police that "it" was consensual; and her affidavit denying that there was a sexual relationship.

Commenting only on the second of these factors, the Supreme Court majority rejected the argument that the untrue statement made at the Police station could have undermined the complainant's credibility, justifying a finding by the jury that her evidence as to consent was also untrue. The majority said:

> [56] That argument is problematic. As the jury must have found the sexual encounters between the appellant and the complainant happened, they must have rejected the defence proposition that the statement was untruthful because there was no "it" that could be consensual. That means that, in order to conclude that the statement to the Police was untruthful (and to call into question the credibility of the complainant as a consequence), the jury would have to have determined that the truth was that "it" was not consensual.

45 At [64].

46 *Christian* (SC), above n 1, at [53].

47 At [55].

The majority continued:

> [56] … In any event, given the context (that is, where the issue had arisen because of the mother finding out that the appellant and the complainant were having sex regularly) we do not consider "it" could possibly be interpreted as referring to the offence in count 2.

Further, the majority recorded that this was the first sexual encounter and so:

> [58] … there was no background relationship in respect of which some expectations of the kind described above could have arisen nor was there any dialogue between them before the sexual encounter occurred.

Finally, the majority found that there was no "air of reality" to the argument "that the jury may have found that the complainant's description of the sexual encounter was true in all respects other than her evidence as to her lack of any positive indication of consent, or her actual consent to the sexual activity".[48] As there was no evidence that the complainant consented, as opposed to failing to protest or resist, a conclusion by the jury that there was reasonable doubt in this respect could only be based on speculation.[49] The same considerations, the majority said, lead to the same conclusion as to reasonable belief in consent.[50] Any belief in consent that Mr Christian held could only have been based on a failure to protest or resist.[51]

The Chief Justice disagreed. Even though, on her approach, it was not necessary to consider the evidence because the failure to direct was in itself a miscarriage of justice, her Honour commented that "[q]uestions of credibility were live in the case and would have been directly relevant had the jury been directed to consider consent and reasonable belief in consent".[52] Accordingly, Elias CJ found it was not clear that the jury would have accepted the complainant's evidence as to consent and reasonable belief in consent.[53]

48 At [59].
49 At [59].
50 At [60].
51 At [60].
52 At [109].
53 At [109].

B Counts 4 and 5

Counts 4 and 5 were representative charges spanning the three-year period between September 1996 and September 1999. Count 4 related to the time during which the complainant lived with Mr Christian in the villa. She said that after the first time, she was subsequently raped "heaps of times";[54] that Mr Christian told her not to tell anyone; that he said he knew "heaps of people" (which she understood to refer to gang connections);[55] and that he said that if she told her mother she would get a hiding.[56] She said that "he just jumps on me and has sex with me and then gets off".[57] When asked if she had consented to this on any of the occasions, she answered "no", and when asked if she wanted it to happen she answered "no".[58]

Count 5 related to the period in which Mr Christian and complainant lived together in a house bus on the complainant's mother's property. The complainant said "he used to just come and have sex with me".[59] When asked if she wanted it to happen, she said:[60]

> I never wanted it to happen, but I know by the time we were in the bus out there that I felt like I couldn't say anything about it, or do anything about it, so I just said nothing and let him do it. But I never once said to him 'yes I want to have sex'.

She said Mr Christian told her they were "married in the eyes of the Lord" and threatened that if she left, he would kill her mother and sister.[61] She also said "she had been brainwashed into relying on him, being dependent on him" when asked why she returned to live with him following the police interview. [62]

In considering the application of the law to counts 4 and 5 in *Christian,* the Court of Appeal distinguished *R v Annas*.[63] That case had very similar

54 *Christian* (CA), above n 3, at [6].

55 *Christian* (SC), above n 1, at [62].

56 At [62].

57 At [62].

58 At [62].

59 At [63].

60 At [63].

61 At [63].

62 At [63].

63 *Christian* (CA), above n 3, at [65]. See also *R v Annas,* above n 41.

facts, except that the complainant said "yes" on the first occasion when the appellant asked if she would like him to teach her to "be a good lover".[64] In that case, the jury acquitted the appellant on the first specific rape charge, and convicted him on a representative charge. The Court of Appeal allowed the appeal against conviction on the representative charge. It split on the issue of consent, but refused to discount reasonable belief in consent and found the verdict unsupportable accordingly.[65]

In *Christian*, the Court of Appeal said that the starting point was the "opposite", as the first sexual encounter plainly lacked the complainant's consent or the appellant's reasonable belief in consent.[66] The Court of Appeal also listed "other relevant contextual factors" that demonstrated a lack of consent or reasonable belief in consent:[67]

i) the wide difference in age;

ii) the complainant's immature knowledge of sexual matters;

iii) the complainant's particular vulnerability because of isolation from and a poor relationship with her mother or any other support person;

iv) the appellant's status as a church leader and de facto guardian;

v) the evidence of the appellant's implicit threat to the complainant that she was not to tell anyone about the offending as he knew "heaps of people", which the complainant took to refer to his gang connections. The complainant also said in evidence that if she tried to leave the appellant would tell her that he would kill her mother and sister; and

vi) the appellant gave the complainant money and drugs such as cannabis.

The Court of Appeal rejected the suggestion that the fact that the complainant said to the Police in 1999 that "it" was consensual, and subsequently signed an affidavit saying that rumours of a sexual relationship were "not true", and that Mr Christian's letters from prison suggested a consensual relationship, provided a credible narrative for consent or reasonable belief in consent.[68]

64 *Annas*, above n 41, at [17].

65 At [30]–[40].

66 *Christian* (CA), above n 3, at [65].

67 At [66].

68 At [68]–[69].

The Supreme Court majority recounted the factors set out by the Court of Appeal and agreed that those factors pointed against any reasonable possibility of reasonable belief in consent.[69]

However, the Supreme Court found that, in relation to consent, there was a possibility that the jury, had it been properly directed, could not have ruled out consent, "albeit as a consequence of his grooming of her".[70] The majority accepted that "this was not the most likely outcome but it was a decision that needed to be left to the jury to decide."[71] Two aspects of the evidence underpinned this decision. The majority considered that the jury had to consider whether the statement to police that "it was consensual" may have been true "at least in the later stages".[72] The majority also noted the complainant's evidence that she was "brainwashed" into depending on Mr Christian.[73] Given that the outcomes to counts 4 and 5 were different when compared to count 2, scrutiny of the evidence relied on (to the extent it is set out in the judgments) is warranted.

C Comment on the Supreme Court's conclusions

The Supreme Court's finding that the jury was required to consider whether the statement "it was consensual" may have been true stands starkly against its reasoning on this issue in relation to count 2. In the Supreme Court's reasoning on that charge, as noted above, the majority rejected the relevance of the statement to the Police, on the assumption that in order to undermine the complainant's credibility the statement would have to be false. It also found that, due to the timing of the statement, it could not have related to count 2.

The first aspect of the majority's reasoning on this point in relation to count 2 was that the statement could either be false because "it" did not occur (the defence case, rejected by the jury in its verdicts), or because "it" did occur but was not consensual (the prosecution case) — both problematic positions for Mr Christian. However, the statement could also be true (and therefore undermine the complainant's evidence in Court that she did not consent). This possibility was not mentioned by the majority in its analysis in relation to count 2. In my

69 *Christian* (SC), above n 1, at [66]–[67].

70 At [67].

71 At [67].

72 At [67].

73 At [67].

view, the challenge to the complainant's credibility did not rely on the statement being false, but was a broader challenge based on the inconsistency between the statement, her affidavit only a few months later denying a sexual relationship, and her evidence in Court. With respect, the majority's reasoning on this point in relation to count 2 overlooks the fundamental point made by the Supreme Court in this case: that having rejected the defence case, the jury was still required to consider consent and reasonable belief on the basis of all the evidence.

The second aspect of the majority's reasoning was that the statement had no bearing on count 2 because it was made in the context of the complainant's mother finding out that the complainant and Mr Christian were having sex regularly. However, count 4 was a representative charge spanning the period immediately following count 2, and occurring while they were living together at the same address. In my view, there is no reason to consider that the complainant's statement might have been true in relation to every other time they had sex during that period, but could not possibly have related to the first incident. It is difficult to imagine any reason why the complainant would have made such a distinction.

The second piece of evidence highlighted by the majority in its conclusion on counts 4 and 5 was that the complainant said she was brainwashed into depending on Mr Christian. She said this in relation to count 5, specifically, the period in which she continued to live with him following the Police interview.[74] Accordingly, this evidence cannot possibly have related to count 4. The complainant also said she was "brain-washed into thinking it was alright", but it is not clear from the Court of Appeal judgment whether this related to count 4 or 5 or both,[75] and it was not mentioned by the Supreme Court. Further, although not highlighted in its conclusion, the Supreme Court majority may have placed some weight on the complainant's evidence that she "just said nothing and let him do it".[76] That comment was set out by the Supreme Court in its narration of the evidence only in relation to count 5 and not count 4.

Accordingly, to the extent the Supreme Court majority relied on the complainant's evidence as to her conduct at the time as a basis for inferring

74 *Christian* (SC), above n 1, at [63].

75 *Christian* (CA), above n 3, at [38].

76 *Christian* (SC), above n 1, at [63].

a reasonable possibility of consent, the evidence could only, in my view, have related to count 5.

More fundamentally, even if a jury may have interpreted those statements as giving rise to a reasonable possibility of consent it is unclear why, as a matter of principle, consent induced by grooming is capable in law of amounting to consent. Grooming, by its very nature, is the overbearing of the will of a younger complainant in order to falsely manufacture their compliance. This could have been an opportunity for the Supreme Court to consider whether consent that arises as a result of grooming could ever be "genuine, informed, and freely and voluntarily given".

This issue was considered by the Court of Appeal in *Annas*.[77] The complainant in *Annas* had initially said "yes", and the appellant had been acquitted on that charge but convicted on a subsequent representative charge. On appeal, two Judges found that actual consent could not be excluded beyond reasonable doubt, while one Judge disagreed.[78] All three Judges agreed that reasonable belief in consent had not been excluded and the appeal was allowed on that basis.[79] In the context of its analysis as to reasonable belief in consent, the Court noted that in the context of grooming, "a more thoughtful analysis might go behind the language used to why ostensible consent was given",[80] but concluded that to "assimilate grooming and seduction of a girl with absence of consent would change what has to date been the approach of the law".[81]

The difference in *Christian* is that there was no initial positive expression of consent, and the possibility of consent was premised only on the complainant's acquiescence. Whether groomed acquiescence can amount to true consent required deeper consideration than was given by the Supreme Court majority in *Christian*.

A final point is that the majority was sure of Mr Christian's guilt in relation to count 2. This is surely relevant and powerful evidence of Mr Christian's propensity to engage in non-consensual sex with this particular complainant during this particular time period. It is surprising that the Supreme Court

77 *Annas*, above n 41.

78 At [29].

79 At [30]–[39].

80 At [34].

81 At [37].

did not grapple with what is surely the flipside of 'relationship expectations' — if the first sexual encounter was, inevitably, a rape, does that not seriously undermine the possibility that the complainant consented every time they had sex subsequently?

The answer to these questions may well be that while the complainant's consent was unlikely, that was a matter for the jury. That is perhaps correct. But as I have attempted to demonstrate, it is difficult to discern a principled basis for the majority's distinction between count 2 and counts 4 and 5. The Chief Justice commented that the majority's conclusion that the same error (failing to direct the jury) was material in relation to count 2 but not to counts 4 and 5, was "odd".[82] I agree with that assessment.

V CONCLUDING REMARKS

The vexed issue of what amounts to consent in the absence of a "yes" or a "no" remains largely unclarified by the Supreme Court's decision. The requirement for "the suggestion of a 'yes' in the complainant's words or conduct" was rejected,[83] in favour of the possibility that "circumstances" by themselves, including 'relationship expectations' may be a sufficient basis to infer consent. That outcome is in my view difficult to reconcile with the very concept of consent.

The Supreme Court's decision that the Judge must direct on all elements of the charge reflects a fundamental principle of criminal law: regardless of the defence theory, the Crown must prove all elements of the charge beyond reasonable doubt. Having rejected the defence evidence that no sex occurred, the jury was still required to consider all the evidence and find, beyond reasonable doubt, that the complainant did not consent and that Mr Christian did not reasonably believe she consented.

As I have outlined, the Supreme Court majority's rejection of Mr Christian's arguments about the complainant's credibility in relation to count 2 is very difficult to reconcile on any principled basis with its finding that the same evidence was relevant to credibility in relation to counts 4 and 5. In my view, the issue of whether the complainant's credibility was undermined by her inconsistencies, notwithstanding her explanations, would have been equally

82 *Christian* (SC), above n 1, at [89].

83 *Christian* (CA), above n 3, as cited in *Christian* (SC), above n 1, at [38].

relevant to the issues of consent and reasonable belief in consent on all charges, had the jury been directed to consider those issues.

That leaves 'relationship expectations' as a possible, or perhaps primary, basis for the Supreme Court majority's different conclusions in relation to counts 4 and 5 compared to count 2. Although not explicitly referred to in those terms in the majority's reasoning on counts 4 and 5, the absence of a "background relationship" in which expectations "could have arisen" was noted in its conclusion on count 2.[84] The fact that 'relationship expectations' is the only "circumstance" suggested by the Supreme Court majority in its analysis of the law further suggests that this distinction underpinned its reasoning.

As the majority accepted, the complainant's (possible) consent could only have arisen as a result of Mr Christian's grooming of her. The majority also accepted that any belief in the complainant's consent could not have been reasonable given the dynamics of the relationship. What then, was the "expectation" held by the complainant from which the jury might have inferred consent? How could any such expectation be sufficient to distinguish this case from a failure to protest or resist? Does this case establish that acquiescence induced by grooming, even following a rape, may in some circumstances amount to consent?

The Supreme Court majority, both in its exposition of the law and in finding that it was possible a jury could not have ruled out the reasonable possibility of consent in relation to counts 4 and 5, failed to grapple with several issues:

i) how 'relationship expectations' could arise independently of words or conduct (in this case or generally);

ii) on what conceptual basis 'expectations' could be relevant to actual consent as opposed to reasonable belief in consent;

iii) why as a matter of principle consent induced by grooming may amount to true consent; or

iv) how an initial rape might be relevant to any assessment of 'relationship expectations'.

84 *Christian* (SC), above n 1, at [58].

Those questions remain unanswered. Yes still means yes and no still means no, but the space between those points is yet to be clearly mapped, despite the Supreme Court's decision in this case.