

**CASE NOTE:
CONSENT AND 'RELATIONSHIP EXPECTATIONS' – *CHRISTIAN v R* [2017]
NZSC 145**

ANDREA EWING*

I. INTRODUCTION

In *Christian v R*¹ the Supreme Court was asked to decide the significance of a complainant's silence and inactivity during (allegedly non-consensual) sex.

In the Supreme Court's view, the answer to this question turns in part on whether there is a prior sexual relationship between the parties. Even where the complainant's conduct does not convey that she wants intercourse, a reasonable defendant can conclude from the *circumstances* of the sexual encounter – notably 'relationship expectations' developed over time – that she is consenting.

For those who hoped the judgment might usher in a "communicative" model of consent, the decision is disappointing. The judgment in *Christian* represents one step forward – silence is not a reasonable basis to assume consent – then two steps back: "relationship expectations" can justify proceeding to penetration, even if the complainant has done and said nothing on this occasion to suggest this is what she wants.

II. EVIDENCE ABOUT CONSENT: A FORENSIC PERSPECTIVE

Before turning to the judgment, it is helpful to briefly consider the two elements of sexual violation at issue: consent and reasonable belief in consent. They are often bundled together, and both engage the same definition of what "consent" is.² But the evidence that is logically probative of these two concepts differs, because each turns on a different participant's state of mind.

Consent is a state of mind internal to the complainant: a decision she³ makes to engage in sexual conduct with another person.⁴ Nothing *obliges* her to communicate

*Crown Counsel, Crown Law Office. The views expressed in this paper are in my personal, not professional capacity.

¹ *Cyrus Christian (aka William John Tassell) v R* [2017] NZSC 145 (*Christian* (SC)).

² *Christian* (SC) at [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."

³ Male and female pronouns are used for defendant and complainant respectively, following the facts in *Christian*. This convention is adopted for clarity, and should not be read as implying that this is always the case where sexual violation is concerned. Obviously either gender can perpetrate, or suffer, sexual violation.

⁴ "What will ... always be essential for there to be a valid consent is that a complainant has understood her situation and was capable of making up her mind when she agreed to sexual acts": *R v Isherwood* CA182/04, 14 March 2005, at [35].

that decision to her sexual partner; consent is not like conspiracy, requiring a 'meeting of the minds'.⁵ In most cases,⁶ a finding about consent turns on whether the jury accepts the complainant's direct evidence about the choice she made. What she did and said may have secondary significance: a defendant can point to her outward behaviour (say, his account of her enthusiastic participation) as adversely impacting the credibility of her evidence that she did not consent.⁷ But it is her decision, not her conduct, that is central.

In contradistinction, reasonable belief in consent is a state of mind internal to the defendant: the jury must assess what *he* thought the complainant's decision was, and why. Inevitably, this element will turn wholly on the complainant's outward behaviour – on the manifestation of her decision, rather than the decision itself.

What, then, is the significance of the fact a complainant does and says nothing during intercourse – that is, expresses neither consent nor dissent?

On the question of consent, the fact a complainant says and does nothing during sexual activity is properly viewed as neutral.⁸ It tells us nothing about what decision the complainant has reached internally: it is a failure to communicate her decision about the sexual activity. Put another way, consent *can* co-exist with silence, but this does not mean that silence is probative of consent. That position would reinstate the requirement for a 'hue and cry'. Thus juries are prohibited from inferring that a complainant consented to sexual activity "just because" she did not resist or protest: section 128A(1) of the Crimes Act 1961.

The same logic might be thought to apply to reasonable belief in consent. If a complainant does and says nothing to indicate either consent or dissent, what could be the basis to think she is consenting? This logic underpins what is sometimes called a "communicative" model of consent.⁹ Simply put, it can only be reasonable for a defendant to think that a complainant has consented to sexual activity if she has done or said something to communicate that decision. This was the position the Court of Appeal adopted in *Christian*, and which the Supreme Court overturned.

⁵ A sexual partner who proceeds with sexual activity in such circumstances might be taking an ill-advised risk, but if it transpires the complainant had internally agreed to it, there would be no liability. See *R v Malone* [1998] All ER (D) 176 (absence of consent does not have to be demonstrated); *cf* Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence and Legal Theory" (2012) 23(2) *Columbia Journal of Gender and the Law* 395, 402 (suggesting that consent should be defined as *communicated* agreement).

⁶ Excluding cases where it is unclear from the complainant's own evidence whether her submission reflected true consent, and cases where her consent may have been vitiated by fraud, etc.

⁷ *R v Ewanchuk* [1999] 1 SCR 330, (1999) 131 CCC (3d) 481 (SCC) at [26]–[27]: whether the complainant consented is a "purely subjective" question to be determined by reference to the complainant's state of mind; external factors which may have caused acquiescence and the conduct of the complainant are of merely evidential significance.

⁸ Particularly in light of s 128A(1), which recognises that victims of sexual violence are no longer expected to raise a 'hue and cry' in order to prove that they did not consent.

⁹ See further Sarah Croskery-Hewitt, "Rethinking sexual consent: Voluntary intoxication and affirmative consent to sex" (2015) 26 *NZULR* 614.

III. *CHRISTIAN V R*: THE FACTS

Mr Christian ran a church in a small town. Among his congregation was the complainant's mother. At some stage the teenage complainant moved onto Mr Christian's property, living in a separate house from him.

One day Mr Christian came into the house where the complainant lived, removed her trousers and had sexual intercourse with her. She was then around 13 or 14. She did not say anything to him, because she was too scared and did not know what to say. But she said unequivocally that she did not consent – she did not even know what the word "consent" meant. This incident founded the first rape charge.¹⁰

Over the three years that followed (1996-1999), Mr Christian continued to have sex with the complainant – first while she lived on his property (the basis of the second, representative rape charge);¹¹ and later once she moved into a house bus with him (which resulted in a third, representative rape charge, when she was aged around 14-16).¹²

When the complainant was 16 she reported the matter to Police: her mother had become suspicious about their relationship, and during a beating from her mother the complainant had confessed that she and Mr Christian had regularly had sex. On the complainant's account, Mr Christian instructed her to say "it" was consensual; the complainant signed a statement to this effect. She later swore an affidavit stating the allegations were entirely made up; again, she said this was at Mr Christian's behest.

At trial, it was not suggested Mr Christian had had a consensual relationship with the complainant. Rather, his defence was that the complainant had fabricated the sexual contact.

The Judge explained all three elements of sexual violation, but instructed the jury that consent and reasonable belief in consent were not live issues. If they were sure penetration had occurred, therefore, their verdicts would be guilty. The jury convicted Mr Christian of all three counts of rape.

IV. THE JUDGMENT

The issue before the Supreme Court was whether the Judge ought to have directed the jury on consent, and reasonable belief in consent. Nested within this question was a more conceptual one: is there an evidential basis for a defence of consent, or

¹⁰ Charge 2.

¹¹ Charge 4.

¹² Charge 5.

reasonable belief in consent, where a complainant simply does and says nothing while penetration occurs?¹³

The Court of Appeal had answered this question “no”. The complainant’s unchallenged evidence at trial was that she had not wanted intercourse, and had done and said nothing when it occurred. Relying on *obiter* comments by the Supreme Court in *Ah-Chong v R*,¹⁴ the Court concluded that “consent must be positively expressed”:¹⁵

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

The Supreme Court took a different view. Three aspects of the Supreme Court’s reasoning *en route* to this conclusion are explored below.

A. *Silence does not show consent*

First, the Supreme Court confirmed that a mere absence of protest by the complainant does not provide reasonable grounds to believe she is consenting:¹⁶

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.

The waters had been muddied on this point by an earlier decision, *R v Tawera*,¹⁷ in which the Court of Appeal considered a complainant’s failure to express *dissent* – even if insufficient to prove she had consented – could nonetheless be relevant to the reasonableness of a defendant’s belief in consent.¹⁸ Post-*Christian*, *Tawera* is no longer good law.

Accordingly, something more than the complainant’s passive silence will be required to found a reasonable belief that she is consenting. But what qualifies as “something more”?

¹³ Leave was sought on two grounds: first, was the Court of Appeal right that consent had to be positively expressed? Secondly, had the jury necessarily accepted the complainant’s evidence that she had not consented? The Court ultimately granted leave on a single question, which might be thought unhelpfully broad in its ambit – “whether the Court of Appeal was correct to dismiss the conviction appeal” – expressing the view that the first proposed question could only be examined in its factual context: *Christian v R* [2016] NZSC 170 (*leave*) at [4].

¹⁴ *Ah-Chong v R* [2015] NZSC 83; [2016] 1 NZLR 445 at [54]–[55] (approaching reasonable belief in consent by enquiring whether the complainant had communicated her *dissent* was “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.”)

¹⁵ *Christian v R* [2016] NZCA 450 (“*Christian* (CA)”) at [49]. See also at [60].

¹⁶ *Christian* (SC) at [32].

¹⁷ *R v Tawera* (1996) 14 CRNZ 290 (CA).

¹⁸ *Ibid* at 293.

B. "Something more" than silence

If a failure to say "no" is not enough (s 128A(1)), it might be thought that there must be some aspect of the complainant's behaviour at the time that says "yes". This was the position taken by the Court of Appeal:¹⁹

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

As noted above, the Supreme Court agreed that "something more" than a lack of protest is required before it will be reasonable to infer consent. But it thought the Court of Appeal had "overstated the position" by saying that consent must be positively expressed – that is, conveyed by the complainant's words or conduct at the time:²⁰

While a failure to protest or offer physical resistance does not, of itself, constitute consent and something more is required, that "something more" may be something other than a positive expression of consent.

In the Supreme Court's view, even if the complainant is not positively expressing consent, the "circumstances" of the encounter may nevertheless provide a basis to infer consent:

[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*.²¹

...

[T]here must be something more in the words used, *conduct or circumstances* (or a combination of these) for it to be legitimate to infer consent.²²

Defining exactly what "circumstances" fall in this category might seem fairly important. After all, this was the basis for the Supreme Court considering the Court of Appeal was wrong in its approach to the law about when consent arises as a defence. Unfortunately, the Supreme Court's elucidation of this point offers limited guidance – indeed, it occupies a single paragraph:

[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.

'Relationship expectations' are said to be an *example* of the "circumstances" that may transform a complainant's silence into a sign of consent. But the Supreme Court judgment offers no principled basis on which we could discern what other circumstances might also qualify.

¹⁹ *Christian* (CA) at [60] (emphasis added).

²⁰ *Christian* (SC) at [5](c).

²¹ At [43].

²² At [45].

C. Relationship expectations

On the Supreme Court's approach, it is reasonable to infer consent from someone's lack of protest on *this* occasion, coupled with the "circumstance" of their consent to similar sexual activity with the same partner on a previous occasion. This is where the judgment in *Christian* is at its most unfortunate.

First, in the context of a sexual violation trial it is problematic to assume, as the Supreme Court does at [46] above, that a *defendant's* 'relationship expectations' are necessarily mutually held.²³ If the Courts are involved, there will necessarily be evidence that matters went beyond what the complainant was expecting.

The second objection is that, even assuming expectations *were* mutual, the Supreme Court's reasoning places too much weight on the complainant's established 'propensity' to consent.²⁴ It is hopefully uncontentious that a person's decision whether to engage in sexual activity turns not merely on the identity of the partner and the type of act engaged in, but on their wishes at the *particular* time. Putting it bluntly, people in a relationship do not constantly want sex with their partner, nor should their partner assume (absent any encouragement) that they do. And if people do not always reach the same choice about sex with their partner, their past willingness to engage in sex cannot reliably inform whether they are consenting on the present occasion. Where there is no other behaviour indicating sex is wanted, a propensity to consent is not enough.

Relying on a past sexual relationship as indicating consent also undermines the principle that consent and reasonable belief in consent fall to be assessed at the time that penetration occurs.²⁵ By contrast, the Court of Appeal's position – that consent can only be inferred from words or conduct on *this* occasion – respects the notion that consent to penetration is 'bespoke', not given to a particular person for all time.

But, one might ask, does an absence of protest in the context of an ongoing sexual relationship has a significance that it might not have in cases of 'stranger rape', or the abuse of a position of power? Putting it another way, can silence communicate consent if there seems no reason the complainant would not protest?

A prior sexual relationship is certainly *relevant* to consent and reasonable belief in consent. The fact the complainant has previously chosen to engage in sex with the defendant tends to indicate some degree of sexual attraction, which makes it more likely (but certainly not inevitable) that she will decide to engage in sex with the same person. For the same reason, prior intimacy may form *part* of the basis for a

²³ At [46].

²⁴ In other areas, the law has rejected the wrongheaded submission that a complainant's propensity to consent to intercourse with person A somehow bears on her choice regarding person B: Evidence Act 2006, s 44A(1); *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53]; *Bull v R* [2000] HCA 24, (2000) 201 CLR 443 at [53] per McHugh, Gummow and Hayne JJ.

²⁵ "[T]he material time when consent ... is to be considered is the time the act actually took place": *R v Adams* CA70/05, 5 September 2005 at [48].

reasonable belief in consent, and may enable the defendant to better interpret the complainant's behaviour. But this is quite different from saying that past consensual sex is *of itself* a sufficient basis to assume consent, even absent contemporaneous behaviour that suggests sex is wanted on this particular occasion. As the facts of *Christian* demonstrate, the existence of a prior sexual relationship is no guarantee that it is a healthy one. A complainant may feel unable to voice dissent despite the fact sex (or, as the Supreme Court found in *Christian*, rape) has occurred before.

This leads into the third difficulty with this aspect of the judgment in *Christian*: the total lack of any discernible policy rationale for overriding s 128A(1) where sexual allegations arise in the context of a relationship. When the law is defining what constitutes a 'reasonable' basis to think someone is consenting, policy considerations should be to the forefront. And in policy terms, it is unclear why "relationship expectations" are sufficiently socially important to permit defendants to proceed to penetration absent any encouragement from their partner. By contrast, the Court of Appeal's position incentivises active enquiry about consent: if a defendant's sexual partner is not communicating her decision on *this* occasion, it is only too simple to ask her.²⁶ This hardly sets an exacting standard of 'reasonable' conduct in sexual matters; and there is little on the other side of the ledger that could warrant a lower threshold.

Neither logic nor policy supports treating "relationship expectations" as of themselves grounding a reasonable belief in consent. The Supreme Court's decision on the facts of *Christian* highlights the problematic outcomes that will flow from this approach.

V. CONSENT IN MR CHRISTIAN'S CASE

To recap, a far older man in a position of power had sex with a teenage girl who was effectively in his care. Her unchallenged evidence at trial was that, on the first occasion as on the others, she had done and said nothing to indicate she wanted to have sex with him.²⁷ She described the later acts of intercourse in the house thus: "he jumps on me and has sex with me and then gets off".²⁸ He threatened her not to tell anybody. She continued to comply once they moved to the house-bus:²⁹

[B]y 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'.

²⁶ One of the policy rationales for the objective *mens rea* requirement for sexual violation is the ease with which harm can be avoided by making enquiry: Jennifer Temkin, *Rape and the Legal Process* (2nd ed.) (Oxford University Press, London, 2002), p125; D Omerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed.) (Oxford University Press, Oxford, 2015) p853.

²⁷ The complainant said she did not want to have sex with him, nor did defence counsel suggest that she had – either in cross-examination or in closing: *Christian* (SC) at [50].

²⁸ At [62].

²⁹ At [63].

The Supreme Court held, on the evidence relating to the first (specific) charge of rape, there was no narrative giving rise to a defence of consent.³⁰ Nor did reasonable belief in consent arise;³¹ Mr Christian had not yet formed “expectations” on which he could draw to justify ignoring his partner’s lack of enthusiasm:³²

This was the first sexual encounter between the appellant and the complainant, so there was no background relationship in respect of which some expectations of the kind described above could have arisen nor was there any dialogue between them before the sexual encounter occurred. Accordingly, there was nothing to provide the basis of a finding of anything more than failure to protest or resist on the part of the complainant.

However, as time wore on and the complainant continued to submit to sex without complaint, the Supreme Court considered there was a basis for the jury to find the complainant had consented:³³

Although the complainant said she never said she wanted to have sex, it is possible the jury may have, if properly directed, concluded that they could not rule out the reasonable possibility that the interactions between the complainant and the appellant involved her consenting, albeit as a consequence of his grooming of her. We accept this was not the most likely outcome but it was a decision that needed to be left to the jury to decide.

Mr Christian’s convictions for raping the complainant for the remainder of the three-year period were therefore overturned.

Note that Mr Christian’s convictions were overturned on the basis of *consent*, not reasonable belief in consent.³⁴ This outcome simply ignores the complainant’s unchallenged evidence at trial. She was unequivocal about the decision she had made: she said she did not want to have sex, nor did she offer any sign that she did.³⁵ Worse, to hold that she may have consented “as a consequence of [Mr Christian’s] grooming of her” overlooks the fact that submitting to sex in such circumstances often does not reflect true consent.³⁶

³⁰ At [53].

³¹ At [60].

³² At [58].

³³ At [67].

³⁴ In the Court of Appeal, the appellant’s argument centred on reasonable belief in consent; no one suggested consent arose as a defence.

³⁵ While the complainant’s Police statement said that “it” was consensual, her unchallenged evidence at trial was that that statement was a lie (Mr Christian’s assertion was that it was a lie but for a different reason, i.e. there was no “it”).

³⁶ See for example *R v C* [1995] 2 NZLR 330 (CA); *R v Allison* CA489/95, 21 February 1996; *Colquhoun v R* CA446/98, 13 September 1999; *R v Ali* [2015] 2 Cr App R 33; cf *R v Annas* [2008] NZCA 534.

VI. CONCLUSION

In summary, three points of significance arise from the Supreme Court judgment in *Christian*:

First, it is unreasonable for a defendant to believe that a complainant is consenting based *solely* on her silence and inactivity. This conclusion is hardly contentious, since it simply reflects s 128A(1); but the Supreme Court has now overturned *Tawera*, which had held to the contrary.

Second, the Court held, it can be reasonable to believe the complainant is consenting based on something other than her behaviour at the time – specifically, based on the “circumstances” of the encounter. This second finding is perplexing: the Court did not see fit to define precisely what kind of circumstances qualify (beyond the example of “relationship expectations”). Nor will it be easy for trial Judges to define this category, given the dearth of reasoning supporting the Supreme Court’s conclusion that the “circumstances” of a sexual encounter can bear on whether the complainant is consenting.

Third, and most problematic, is the Supreme Court’s view that “relationship expectations” based on past encounters can substitute for behaviour by the complainant on *this* occasion suggesting sex is wanted. As a matter of logic, it is hard to see why the complainant’s *repeated* failure to protest on past occasions should be treated as a basis for Mr Christian to infer consent if, on a single occasion, her mere silence would be insufficient. And in policy terms, it is anything but reasonable to proceed to penetration without even the most minimal conduct communicating consent. It is precisely because silence does *not* always indicate agreement that s 128A(1) was enacted. If there is a sound policy rationale for treating complainants in relationships differently in this regard, it appears nowhere in the Supreme Court’s judgment. On the contrary, the Supreme Court’s approach to the facts of *Christian* highlight the potential for “relationship expectations” to create unsatisfactory outcomes, most obviously where (as here) vulnerable complainants are groomed into submitting to sex without protest.

It may be time for legislative reform in this area. For now, the Supreme Court judgment in *Christian* undercuts the effect of s 128A(1) in ‘relationship’ cases, and in a way that encourages assumptions about consent rather than active enquiry.