NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 15/2017
[2017] NZSC 56

BETWEEN	MATEO MELINA NIXON Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	S J Gray for Applicant R K Thomson for Respondent
Judgment:	2 May 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant pleaded guilty to a number of charges of sexual offending in relation to six complainants. He was sentenced to a term of imprisonment of 14 years with a minimum period of imprisonment (MPI) of eight years.[1] He appealed unsuccessfully to the Court of Appeal against conviction but his sentence was reduced on appeal to a term of 13 years with an MPI of six years and six

1 *R v Nixon* [2015] NZDC 16756 (Judge Phillips).

months.[2] The applicant seeks leave to appeal to this Court against conviction and sentence.

[2] The applicant suffers from Autism Spectrum Disorder (ASD). He wishes to argue on his conviction appeal he had a tenable defence based on a reasonable belief in consent which his trial counsel failed to advance.

[3] The applicant also wishes to argue insufficient allowance has been given in sentence for the hardships he faces in prison as a result of his disability.

Assessment

[4] As the respondent accepts, the relevance of a defendant's subjective mental state to the mens rea element of sexual violation in issue could comprise a question of law of general or public importance.[3] The Court of Appeal concluded there was no evidence that the applicant's assessment of consent by the complainants was affected by his disability. On that basis, no more general question arises. There is nothing raised by the applicant to call in doubt the Court of Appeal's conclusion. Nor is there a risk of a substantial miscarriage of justice.[4] We make three points.

[5] First, the applicant provided no evidence that his assessment of the complainants' viewpoint was affected by his disability. To the contrary, as the Court of Appeal observed, in the course of his interview with police the applicant's approach was that the complainants "positively and actively consented".[5] For example, he rejected the accounts of a number of the complainants that they were asleep at the time. The applicant would seek on appeal to adduce an affidavit. But the affidavit simply asserts a belief the complainants were consenting and so takes the matter no further.

[6] Second, the summary of facts to which the applicant pleaded guilty records that four of the six complainants said they "positively indicated that they did not

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2 *Nixon v R* [2016] NZCA 589 (Randerson, Cooper and Asher JJ) [*Nixon* (CA)].

3 Supreme Court Act 2003, s 13(2)(a) which still applies to this application by virtue of the transitional provisions in the Senior Courts Act 2016. The criteria in s 13 are now set out in s 74 of the Senior Courts Act.

4 Supreme Court Act, s 13(2)(b).

5 *Nixon* (CA), above n 2, at [25] and [32].

want sex or communicated that his behaviour was unacceptable immediately after the incident".[6] Two of the complainants said they were asleep when the applicant initiated sexual conduct and four were either "drowsy or under the influence of alcohol and drugs".[7]

[7] The applicant did not challenge the summary on appeal. He now submits the complainants' accounts were significantly different to the summary of facts on a number of key events and says that there was insufficient discussion with his counsel on the summary despite the applicant's concerns. In relation to two of the complainants, the applicant's analysis of the complainants' interviews indicates variations which may have been potentially significant to the question of reasonable belief in consent. But the analysis before us does not suggest any link between that issue and the applicant's disability.

[8] The applicant also relies on an email sent to trial counsel by counsel instructed to act for the applicant when he entered his pleas. It is said this email supports the applicant's account he had insufficient understanding of the significance of the summary of facts and he had problems with the facts therein. There was no challenge to trial counsel's assessment that there were no concerns about the applicant's intelligence or his ability to communicate or as to his understanding. He did challenge one aspect of the summary at the time of entering his guilty pleas, which indicates he did engage with it.

[9] Finally, the Court of Appeal carefully analysed the expert evidence on the applicant's disability and concluded there was insufficient evidence to show ASD affected the applicant in his judgment on these matters. This comprised the following: a report from Dr Ruth Baker, a general practitioner specialising in ASD, prepared prior to sentencing; a report from a psychiatrist, Dr Mhairi Duff, filed in support of the appeal by the applicant; and an affidavit from another psychiatrist, Dr Justin Barry-Walsh, filed on behalf of the Crown. The Court's assessment was that Dr Baker did not point to any "actual examples" of how the applicant may have

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6 *Nixon* (CA), above n 2, at [6](d).
7 At [6](a) and (b).

misunderstood the complainants[8] and that Dr Duff's report did not show that the applicant's assertions that he thought the complainants were consenting arose from "any specific misread signals".[9] Finally, Dr Barry-Walsh considered "there was insufficient material on which to conclude that ASD explained Mr Nixon's actions".[10]

[10] The proposed sentence appeal raises no question of general or public importance. The discount for the applicant's remorse, rehabilitation and the effects of ASD on the applicant in prison was increased by the Court of Appeal from five per cent to 12.5 per cent (one year to two and a half years). That credit does not give rise to any substantial risk of a miscarriage of justice.

[11] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

8 At [24].
9 At [25].
10 At [26].