NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 98/2018
[2019] NZSC 12

BETWEEN	MARK ARONA Applicant
AND	THE QUEEN Respondent

SC 118/2018

BETWEEN	PETER JOHN CHAMBERS Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: N M Dutch for Applicant Arona
C G Tuck for Applicant Chambers
S K Barr for Respondent

Judgment: 22 February 2019

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

Background

[1] On 19 October 2017, after a jury trial, Mr Chambers was convicted of rape and Mr Arona was convicted of sexual violation by unlawful sexual connection (penetration of the complainant's mouth). Each was also convicted as a party to the offence of the other. The alleged offending took place in a hotel room after the complainant attended a concert at Mr Arona's invitation on 21 May 2016. The sexual activity was accepted as having occurred. The issue at trial was whether the victim was so intoxicated (on alcohol and cannabis) as to be incapable of consent.

[2] Mr Chambers' appeal against conviction and Mr Arona's appeal against conviction and sentence were dismissed by the Court of Appeal on 12 October 2018.[1]

[3] Mr Chambers and Mr Arona now seek leave to appeal to this Court. They say that they should have been allowed to adduce evidence at trial that the complainant had engaged in sexual activity with two men in 2015 after a concert and that she may have exaggerated the extent of her intoxication on that occasion. In a pre-trial ruling, Judge Mabey QC had dismissed the application to lead that evidence.[2]

[4] Mr Chambers also says that there was a miscarriage of justice because the Court of Appeal did not deal with his argument that evidence of the 2015 incident should have been admissible to counter a suggestion that no one would consent to sexual intercourse in the circumstances alleged.

Court of Appeal decision

[5] On their appeal after their conviction, Mr Chambers and Mr Arona argued that evidence of the 2015 activity should have been admitted, particularly in the allegedly changed circumstances at trial.

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1 *Arona and Chambers v R* [2018] NZCA 427 (Miller, Mallon and Gendall JJ) [CA decision] at [25]–[27].

2 *R v Arona and Chambers* [2017] NZDC 21789 (Judge Mabey QC).

[6] The Court of Appeal accepted there might have been some relevance in the evidence of the 2015 incident but did not consider it would be substantially helpful under s 37 of the Evidence Act 2006. This was because there had been no complaint about sexual violation in 2015. The Court also did not consider the 2015 evidence as sufficiently probative of the proposition that the complainant lied about being intoxicated on that occasion.[3]

[7] Further, even if wrong on those points, the Court considered the evidence did not meet the heightened standard of s 44(1) of the Evidence Act.[4] It would have been illegitimate to use the 2015 incident to assert (as the defence seems to have wanted to do) a propensity to engage in group sex.[5] It was not possible to cross-examine on the intoxication issue divorced from the 2015 incident. The Court said, however, that s 44 did not stop the complainant being cross-examined on previous cannabis use.[6]

[8] It was argued on appeal that the circumstances had changed at trial from those considered by Judge Mabey. This was because evidence was led that the complainant had told Mr Arona before the 2016 incident that she had grounded herself for a year after the last time she went to Mr Arona's house (alleged to be at the time of the 2015 incident). The Court did not consider these statements required further elaboration. The obvious inference was she had drunk too much.[7]

[9] It was also submitted that the Crown wrongly led sexual reputation evidence and the defence had not been allowed to lead rebuttal evidence in the form of the 2015 incident. The impugned evidence was that, in a call to Mr Chambers, the complainant had said she was "not a one-night stand kind of girl".[8] This was in response to Mr Chambers asking whether she positively gave consent when she had sex with other men.

[10] The Court of Appeal considered that the trial Judge was correct to refuse counsel permission to introduce the 2015 incident in response to this evidence. The

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3 CA decision, above n 1, at [25].
4 At [28].
5 At [28].
6 At [34].
7 At [18].
8 At [18].

complainant had responded to an evidently unintentional implication from Mr Chambers that she was promiscuous. The evidence was not led by the Crown to show that a one-night stand was out of character and it was not mentioned again in the course of the trial.[9]

[11] The Court of Appeal did accept that the complainant's comment was inadmissible and ought to have been excised from the audio recording of the call that was played to the jury, along with the question from Mr Chambers that elicited her response. That having been overlooked, however, the proper course was not to allow the defence to explore the 2015 incident. The proper course was to instruct the jury to ignore the evidence (because it was inadmissible). This was not done.

[12] The Court noted that counsel did not, however, ask for a direction to this effect and the Judge evidently did not think it necessary. The Court commented that the fact that the evidence was not mentioned again during the trial indicates that it did not assume the significance at trial that it is now said to have.[10]

Our assessment

[13] The issue of admissibility of the evidence of the 2015 incident depends on the particular facts of this case. No point of general public importance arises. Further, nothing raised by the applicants suggests the Court of Appeal was wrong in its analysis of the issues.

[14] We do not accept Mr Chambers' argument that a miscarriage of justice arose because the Court of Appeal did not deal with one of his arguments on admissibility. The mere fact an argument was not addressed does not automatically mean there is a miscarriage of justice. If an argument was hopeless, as this was, then there can be no miscarriage.

[15] As we understand it, the Crown case was that this complainant did not consent. It was not that no one would consent to such activity. Even if it had been, then evidence of the 2015 incident would not have met the test in s 44(1).

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9 At [37].
10 At [38].

Result

[16] The applications for leave to appeal are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent