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 33/2019
[2019] NZSC 94

BETWEEN	PAVLOS PAUL GIZELIS Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, Glazebrook and Ellen France JJ
Counsel:	M Kan for Applicant S K Barr for Respondent
Judgment:	30 August 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Gizelis was convicted after trial of sexual violation by rape and kidnapping. He appealed unsuccessfully against conviction to the Court of Appeal and now seeks leave to appeal to this Court.[1] The proposed appeal relates to the admissibility of DNA evidence called at trial.

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1 *Gizelis v R* [2019] NZCA 77 (French, Dobson and Brewer JJ) [CA judgment].

Background

[2] The complainant performed oral sex on Mr Gizelis in his car for money. At that point, the car was parked in central Auckland. She then fell asleep. Whilst she was asleep, Mr Gizelis had driven the car about 30 minutes north of Auckland. The complainant said that when she woke up, several hours later, Mr Gizelis was having unprotected sexual intercourse with her in the car. She said she protested but he continued. She recalled feeling semen running down her leg.

[3] Mr Gizelis voluntarily provided a DNA sample but declined to make a statement to the police.

[4] The prosecution led expert evidence at trial about the results of the DNA testing undertaken. This evidence is described by the Court of Appeal as follows:

> [7] … Scientists identified the presence of sperm in the complainant's vaginal swabs, but no DNA of any male was identifiable in that sample. Tests were also undertaken on the seat in Mr Gizelis's car on which it was alleged the intercourse had occurred. That only revealed a probable semen stain containing DNA that was likely from the complainant and DNA from an unidentified person. No DNA matching Mr Gizelis's was present in any of the samples. …
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> [8] Samples were also taken from the complainant's undergarments. These revealed no semen, but the probable presence of saliva staining. This contained DNA from at least three people, one being the complainant, but the remaining DNA was found unsuitable for comparison.

[5] A scientist from the Institute of Environmental Science and Research told the jury there could be a number of explanations for the DNA testing results obtained.[2]

[6] The defence at trial was that the complainant willingly went with Mr Gizelis in the car after oral sex and there had been no sexual intercourse. The defence did not object to the admission of the DNA evidence but rather, used it to support the defence. In particular, the complainant's evidence was that she had had unprotected sex with

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[2] The scientist explained that in samples containing a very high concentration of DNA (not uncommon for swabs of an intimate nature), a high concentration of DNA from the complainant would be expected. In those cases, where there is a lesser concentration of DNA from another person, that DNA may simply get "swamped out".

her partner days before the incident and the defence said that this provided a possible explanation for the sperm identified in the vaginal swabs.

[7] In summing up, the trial Judge, Judge Sharp, explained there was no obligation on Mr Gizelis to provide a DNA sample but he had done so voluntarily. The Judge told the jury that when Mr Gizelis provided the DNA sample, "he could not be said to have been attempting to engineer a defence, because he didn't know anything about the allegations that were made against him". The Judge also explained the effect of the DNA evidence and in this context, directed the jury in this way:

> [46] … What that boils down to in legal terms is you don't have elements that can prove anything in the case against Mr Gizelis. There is simply nothing that you could rely on to demonstrate that he had sex in the car with [the complainant]. You might find it from other evidence, but that evidence can't help you. The aspect to that that he provided the voluntary DNA sample means he put himself up for the testing to take place and you are entitled to take that into consideration.
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> [47] Now the other factor is the evidence from [the complainant], at least as she told it to the police, was that she was aware of the absence of a condom because she noticed stuff running down her legs. Now this evidence might be hard to rationalise against the scientific material. It's something that you will consider and it will be your view of it that's important.

The proposed appeal

[8] Mr Gizelis says the proposed appeal would raise a general question about the relevance of forensic evidence and that the admission of this evidence has given rise to a miscarriage of justice. In relation to the latter point, Mr Gizelis seeks to argue on appeal, first, that the DNA evidence was not relevant because it could not show the DNA could have come from Mr Gizelis.[3] Second, it would be argued on appeal that the expert evidence was inadmissible opinion evidence as it could not have provided substantial help to the jury.[4] Finally, Mr Gizelis wishes to argue that even if the DNA evidence was relevant, it should have been excluded because the risk of unfair prejudice outweighed the probative value of this evidence.[5]

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3 Evidence Act 2006, s 7.
4 Evidence Act, s 25.
5 Evidence Act, s 8.

[9] The admissibility of the evidence and the effect of its admission was considered by the Court of Appeal. In terms of relevance, the Court agreed with the submission for the respondent to the effect that DNA evidence, "is so much a stock part of investigations of allegations of rape that its omission would be likely to distract a jury".[6] In particular, the Court took the view that:

> [25] … The fact such testing had been undertaken, along with its outcome, was relevant to the issues in dispute, irrespective of the outcome. The Judge's observations mentioned above acknowledge the forensic evidence's potential relevance; this relevance being inconsistent with exclusion of the forensic evidence on the grounds argued on the appeal by [the applicant's counsel].

[10] Nor did the Court consider that the admission of the evidence gave rise to a risk of a miscarriage of justice.

[11] The Court's conclusion about the relevance of the evidence reflected an assessment of the particular facts. No question of general or public importance accordingly arises.[7]

[12] Nor do we consider any appearance of a miscarriage of justice arises from the Court of Appeal's consideration of these issues.[8] The Court made the point that, absent any challenge to the admissibility of this evidence, "and particularly where the defence was likely to place positive reliance on the DNA evidence (as it did), it would have been untenable for the trial Judge to take an initiative to rule it inadmissible".[9] In addition, any potential concerns about prejudicial effect were addressed by the directions of the Judge set out above which were favourable to the defence. The criteria for leave are not met.

[13] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 CA judgment, above n 1, at [25].
7 Senior Courts Act 2016, s 74(2)(a).
8 Senior Courts Act, s 74(2)(b).
9 CA judgment, above n 1, at [26]. Both the question of whether intercourse had occurred and the complainant's account focused attention on the attribution of the semen or probable semen she described feeling on her leg.