NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA283/2019
[2021] NZCA 177

BETWEEN	SAYMORE MUTSAMWIRA Appellant
AND	THE QUEEN Respondent

Hearing:	17 March 2021
Court:	French, Ellis and Muir JJ
Counsel:	A M S Williams and K J Basire for Appellant B F Fenton for Respondent
Judgment:	13 May 2021 at 9 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Mutsamwira was convicted of sexual violation by rape following a District Court jury trial.

[2] The presiding judge, Judge Garland, sentenced him to a term of imprisonment of six years and one month.[1]

[3] Mr Mutsamwira now appeals his conviction on grounds of trial counsel error and the Judge's direction on intoxication.

The Crown case at trial

[4] The rape was alleged to have occurred in the morning of 28 December 2015 following a family gathering held the evening before at the house of the complainant's sister. The complainant was staying with her sister for Christmas. Also at the family gathering was the complainant's brother and his wife who were over from Australia.

[5] Mr Mutsamwira had been going out with the sister for a few weeks and she invited him to come for drinks to meet her siblings.

[6] He arrived at the house at approximately 9 pm on 27 December, having driven there. The group initially socialised in the kitchen and the mood was jovial.

[7] Everyone was drinking alcohol to a greater or lesser extent, with witnesses generally agreeing that Mr Mutsamwira probably drank the most. He consumed significant quantities of rum, and cognac as well as wine. At one point when some of the group were in a spa pool outside, he had to be helped out of the pool and vomited. He was guided inside by the complainant's sister to clean up. According to her evidence, they had sex in the shower.

[8] After being away for about 30 to 45 minutes, Mr Mutsamwira returned to the spa and, somewhat to the surprise of the others, resumed drinking alcohol. The complainant and her sister-in-law were in the spa with him and testified that he

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1 *R v Mutsamwira* [2019] NZDC 9977 [Sentencing notes] at [23].

was touchy-feely to them both. The two women decided on a code name "banana" to use with each other if it got too much so they could move away from Mr Mutsamwira.

[9] There was some inconsistency between the family witnesses and the complainant as to exactly what happened next and exactly when everyone retired for the night.

[10] The sister-in-law said that after she and the complainant got out of the spa, they went into the kitchen and chatted. The complainant who had been pacing herself during the evening was still drinking alcohol (wine). After a while, Mr Mutsamwira joined them in the kitchen.

[11] According to the sister-in-law, Mr Mutsamwira kept following the complainant around the kitchen and she had to keep pushing him off. Both women were annoyed by his behaviour. Eventually he left the kitchen after the complainant's sister came in to see what was going on. She had heard repeated use of the word "banana" in the kitchen. The sister recalled that the complainant accompanied Mr Mutsamwira from the kitchen to the sister's bedroom and said to him that he better be good to her sister. After he had left the kitchen, the sister-in-law said the complainant became noticeably more relaxed.

[12] The complainant and her sister-in-law subsequently went into the bedroom where the complainant's brother was sleeping. The sister-in-law said they were being silly. They woke her husband to ask for his car keys. He refused. In cross-examination at trial he agreed the complainant was drunk. The complainant left the room and the sister-in-law got into the bed with her husband and fell asleep. The brother and sister-in-law said the next thing they knew they were woken by the sound of the complainant swearing and shouting at Mr Mutsamwira to leave.

[13] The sister said that after Mr Mutsamwira left the kitchen he came to bed in her room and they had sexual intercourse. She could still hear the complainant and her sister-in-law talking. She fell asleep but woke up again to hear Mr Mutsamwira on the phone talking to someone in a foreign language. He also asked her for a charger. She went into the kitchen to get a charger and saw the complainant fast asleep in the

lounge. She gave Mr Mutsamwira the charger and he plugged it in. The sister then fell asleep again.

[14] The next thing the sister recalled was hearing the complainant saying loudly "stop, don't — get off me." The sister got up to see Mr Mutsamwira standing dressed in the kitchen doing something with his hands which she thought was odd but returned to bed. He followed her and they had a cuddle. Within a few minutes however, the complainant came into their room shouting and swearing at Mr Mutsamwira and telling him to leave.

[15] For her part, the complainant did not recall the post-spa kitchen interactions with Mr Mutsamwira nor did she recall going into her brother's room. She said that after getting out of the spa, she retired for the evening to sleep on the couch in the lounge after playing some music. She said she went to sleep feeling tipsy but not drunk. At some stage in the early hours of the morning, she heard a creak and saw Mr Mutsamwira in the kitchen. She went back to sleep and then woke to someone "humping" her. It was Mr Mutsamwira. Her bra had been pushed up over her breasts and her underpants down past her knees. She felt his penis briefly inside her. He did not say anything. She also said she felt his finger or fingers around or in her vagina.

[16] After the initial shock, the complainant pushed Mr Mutsamwira off her and told him to go away. A few minutes later she followed him into her sister's bedroom and shouted and yelled and swore at him to leave the house. According to the other family members, the complainant was distraught.

[17] Mr Mutsamwira did not say anything, but slowly got up, dressed and left the house. He drove off in his car. Later at around 9.20 am he sent three texts to the sister's cell phone saying he was home and that he missed her.

[18] Meantime, the complainant had called the police. The 111 call was made at 8.37 am. While waiting for the police, the sister-in-law noticed two condoms in the kitchen waste bin.

[19] The condoms were removed by the police and analysed. One of the condoms was found to have significant quantities of the complainant's DNA on the outside and the DNA of Mr Mutsamwira on the inside. A vaginal swab taken from the complainant showed traces of a lubricant commonly used in condoms.

[20] When interviewed by police on 30 December 2015, Mr Mutsamwira said he had been very drunk and remembered little of the evening. He blamed his level of intoxication on drinking spirits which he said hit him real hard. He said he didn't usually drink spirits because he knows the effect they have on him.

[21] Although he had condoms with him in his jacket, he was unsure if he had used any and did not recall any sexual activity with the complainant. He did not recall when and how he got out of the spa and when he went to bed. He did recall hearing the word "banana" being mentioned but did not recall its context. He also recalled waking up in the sister's bed and needing a cigarette and going outside to smoke before returning inside. The next thing he remembered was waking up on the couch and realising the woman next to him had "a different body structure" to his girlfriend. They were lying sideways. He did not hear the complainant say to get off her. He returned to the correct bedroom because the sister came through and was standing there. He conceded it was possible he may have touched the complainant on the couch but could not recall the exact specifics.

[22] His explanation for not protesting or saying he had made a mistake when ordered out of the house was because he felt bad being in the wrong place.

[23] He also stated that once he left the house, he drove to a side street and parked there to sleep.

[24] A few hours after the interview, Mr Mutsamwira was arrested and charged. The following day, 31 December 2015, police searched his house and found a box of condoms of the same variety as those found in the kitchen rubbish bin.

[25] At trial, which did not take place until November 2018, Mr Mutsamwira was represented by Mr Hall QC. He faced two charges, namely sexual violation by rape[2] and sexual violation by unlawful sexual connection occasioned by penetrating the complainant's genitalia with his finger(s).[3] He pleaded not guilty to both.

[26] The defence was that if there was any sexual contact with the complainant, it was not possible on the evidence for the jury to be sure it was intentional and/or non-consensual or without a reasonable belief in consent. Mr Mutsamwira did not himself give evidence nor did he call evidence.

[27] The jury acquitted him of the unlawful sexual connection charge but found him guilty of sexual violation by rape.

[28] We turn now to address the grounds of appeal.[4]

The affidavit evidence

[29] As mentioned, the grounds of appeal include trial counsel error. Both Mr Mutsamwira and Mr Hall provided affidavit evidence and were cross-examined.

[30] In so far as there are conflicts in their evidence, we prefer the evidence of Mr Hall which was generally more consistent with contemporaneous documentation. Some aspects of Mr Mutsamwira's evidence showed a tendency to embellish and lacked credibility. For example, he gave different explanations for what was a demonstrably false statement he made to a nurse and added completely new details about crucial conversations with Mr Hall that were not in either of his two affidavits.

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2 Crimes Act 1961, ss 128(1)(a) and 128B.

3 Sections 128(1)(b) and 128B.

4 We note that two previously notified grounds of appeal — namely the failure to call expert evidence on memory and the length of the trial as a result of industrial action — were not pursued. A third ground of appeal that Mr Hall should have sought exclusion of the police interview was reframed not as an admissibility of evidence issue but as an erroneous assumption on the part of trial counsel that the police interview would be sufficient.

Trial counsel error

Advancing unauthorised and inconsistent defences

[31] In his affidavit, Mr Mutsamwira states he instructed Mr Hall his defence was that he was so intoxicated he was unable to form an intent to commit sexual violation. He also wanted the complainant's version of events tested in relation to her memory of events which appeared to get better over time. He also says he instructed Mr Hall to challenge whether the forensic evidence did support her allegation of penetration.

[32] The trial record shows that Mr Hall undertook all of those matters and did so competently.

[33] What is complained about is that Mr Hall also advanced other additional defences which had not been authorised. In particular, Mr Mutsamwira complains that in his closing Mr Hall developed a theme of the complainant consenting to sexual activity and either not remembering this or regretting such consent.

[34] That was done, it is alleged, without instructions and resulted in the jury being presented with a scatter gun defence, lack of intent being presented simply as a back-up argument. The effect was to undermine the statements made by Mr Mutsamwira in his police interview and create the risk the jury would consider Mr Mutsamwira was grasping at straws.

[35] We do not accept these contentions.

[36] The theme of the closing address was that on the evidence there had to be huge doubts about all the elements of the offence including penetration, capacity to form the requisite intent and consent which Mr Hall traversed. He did so with considerable skill, impressing the Judge who expressly noted at sentencing that Mr Mutsamwira's case was advanced "most cleverly and skilfully by senior counsel upon a variety of bases".[5]

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5 Sentencing notes, above n 1, at [8].

[37] As Mr Hall put it to the jury, the case was "bedevil[ed] by the fact that the two central witnesses… are quite unable to remember what actually occurred". In the case of the complainant, Mr Hall was able to justify that comment by reference to her "troubling" inability to recall significant portions of what happened after the spa as well as her inability to be sure of any of the detail in the immediate aftermath of the alleged attack. Mr Hall further submitted that given their respective states of intoxication it was not possible for the jury to exclude the reasonable possibility that the complainant had consented to sexual activity which she had now forgotten or was choosing not to remember. Mr Hall reminded the jury of evidence that one of the first things the complainant said to her siblings after Mr Mutsamwira had left was to express concern about what her partner would say.

[38] Advanced in that way, the defences were not inconsistent. As Mr Hall explained in evidence before us, he was always conscious that the intoxication defence is problematic and that alternatives should be proffered for the jury. Further, given that Mr Mutsamwira told police he had no memory of the incident, we do not accept that Mr Hall's closing could logically have undermined his police interview.

[39] As to whether the defences were advanced without instructions, on that point there was a conflict of evidence as between Mr Hall and Mr Mutsamwira.

[40] Mr Mutsamwira suggested in evidence to us that he was taken by surprise by Mr Hall's closing address on 12 December 2018 and that it touched on issues such as forgotten or regretted consent that were not in a draft of the closing that he had read. He also said he complained to Mr Hall about the closing because there were matters that he thought were "mis[h]mashing" his defence.

[41] We reject those claims as lacking credibility. Mr Mutsamwira could not have been taken by surprise by the closing because as the trial record shows Mr Hall had made similar submissions about regretted consent in his opening address some two weeks earlier. It is also clear that throughout the period of Mr Hall's retainer, Mr Mutsamwira was actively involved in the preparation for the trial and in regular communication with Mr Hall both before and during the trial. He critiqued the Crown's expert evidence, passed notes to Mr Hall throughout the trial and each day as

the trial progressed was given a copy of the notes of evidence. Further, the trial could not have been the first time that defences other than intent to commit the sexual act were identified. Mr Mutsamwira had for example seen a brief of evidence provided to Mr Hall by an expert in which the latter outlined that his brief was inter alia to consider issues relating to honest belief in consent.

[42] This ground of appeal is without merit.

Failure to call the evidence of Dr Schep and errors relating to Mr Mutsamwira's election not to give evidence

[43] These two complaints are inter-related and in order to understand both it is necessary first to provide more detail about the lead up to the trial and the course of the trial itself.

Background

[44] Mr Mutsamwira retained Mr Hall as trial counsel in January 2016.

[45] His instructions to Mr Hall were that he had no memory of the events in issue. He also instructed that on his way to the drinks party on 27 December 2015 he had taken double the prescribed dose of two drugs he had been prescribed for bipolar depression.

[46] The two drugs in question were quetiapine and citalopram.

[47] Mr Mutsamwira said his prescription for quetiapine at the time of the alleged rape was 2 x 100 mg tablets to be taken at night and for citalopram 1 x 20 mg tablet per day. Mr Mutsamwira further instructed Mr Hall that in November 2015 he was attempting to wean himself off the medication by reducing his dosage of quetiapine to half normal and then stopping completely in December. However, he reacted badly to not taking the medications. Hence, after about two or three weeks in December, he started taking them again but back to the original dosage of 200 mg. Occasionally he would take double the dosages. That is to say, he would take 400 mg quetiapine (4 x 100 mg tablets) and 40 mg citalopram (2 x 20 mg tablets). And that, he instructed, is what he did on the evening of 27 December 2015.

[48] The potential significance of this instruction was that if drugs were involved in combination with alcohol, it might bolster the defence regarding lack of specific intent.

[49] In order to support this claim, Mr Mutsamwira phoned and emailed the medical centre where he had been a patient prior to 27 December 2015. He asked his doctor to send a letter documenting his medication history to Mr Hall. Mr Mutsamwira specifically asked the doctor to include in the letter that in December 2015 he had reverted to the original dosage because of reacting badly to not taking the medications.

[50] However, the doctor's letter that was sent in April 2016 did not fully support Mr Mutsamwira's instructions to Mr Hall. It confirmed the original dosage of 200 mg quetiapine. It also confirmed a proposal to reduce the dosage but significantly did not confirm there had been difficulties, nor that Mr Mutsamwira had reverted back to the original dosage in December 2015.

[51] What the letter said was that following a discussion in July 2015, as at October 2015, the daily dose had been reduced to 50 mg quetiapine consisting of two 25 mg tablets. It made no mention of a return to the original dosage of 200 mg or any further prescriptions in 2015 after October.

[52] The letter further stated that on 12 January 2016 Mr Mutsamwira had phoned to request more prescriptions and had not mentioned any deterioration. To the contrary, the doctor's note of the phone conversation expressly recorded that he was compliant with the regime of 50 mg (2 x 25 mg tablets, at night for sleep) and that she had gave him a prescription for that same low dosage.

[53] Also recorded in the note of the phone conversation was advice that he needed to get a new GP in the city to where he had re-located. The following day, the doctor wrote a letter dated 13 January 2016 for him to take to a new attending doctor. Under the heading "regular medications", the doctor advised that quetiapine was 50 mg nightly for sleep.

[54] We pause here to interpolate that later during the trial, Mr Mutsamwira attempted to get the doctor to change her April 2016 letter but she refused saying her letter was correct.

[55] Returning to the narrative, in August 2016 Mr Hall sought an opinion from a toxicologist, Dr Schep, about the effects of quetiapine and citalopram.

[56] The subsequent report advised that when either drug was taken in overdose, alcohol can exacerbate the underlying clinical effects leading to symptoms of drowsiness. There was however insufficient evidence to suggest alcohol may exacerbate the effects of therapeutic doses of citalopram. The quantity Mr Mutsamwira claimed to have taken on the evening of 27 December 2015 was a therapeutic dose.[6]

[57] As regards quetiapine, Dr Schep's report stated there was limited information available regarding the cumulative effects of alcohol taken with therapeutic doses of quetiapine. The report noted that the manufacturers of quetiapine caution against concurrent ingestion of alcohol as it may potentiate the sedative effect of the drug. It also noted a recent case where an unknown dose of quetiapine was spiked in the alcoholic drink of a female victim leaving her sufficiently incapacitated for a sexual assault to take place. It concluded there was limited information to suggest quetiapine and alcohol could possibly cause additive central nervous system depression although doses necessary to achieve this were uncertain and evidence to substantiate it limited.

[58] In 2018 Mr Hall obtained a brief of evidence from Dr Schep which he served on the Crown on 6 November 2018.

[59] The brief set out the questions which Dr Schep had been asked to consider:

> Would the amount of alcohol, in combination with [Mr Mutsamwira's] medication, cause extreme intoxication to such a degree that he would have difficulty knowing whether, or not, the complainant consented to intercourse or he believed on reasonable grounds that she was consenting?

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6 In his subsequent brief of evidence, Dr Schep stated that overdose signs and symptoms typically occur at doses of citalopram exceeding 600 mg.

> Would the level of impairment have been increased by the double dose of medication that he ingested?

[60] For the reasons detailed in Dr Schep's 2017 report, the brief concluded that it was unlikely the double dose of citalopram on its own or in combination with alcohol would have increased Mr Mutsamwira's impaired judgment.

[61] In assessing the effects of quetiapine, the brief stated that in overdose, signs and symptoms may include drowsiness and confusion, reduced blood pressure and increased heart rate. It concluded however that it was unlikely the dose of 400 mg taken by Mr Mutsamwira would have contributed to his impaired judgment. As for the cumulative effects of alcohol taken with therapeutic doses of quetiapine, the brief again cited the same limited information mentioned in Dr Schep's initial report. The brief concluded it was possible that the combination of excess alcohol with quetiapine may have contributed to impairing Mr Mutsamwira's judgment to form an intent to have sexual intercourse.

[62] Dr Schep subsequently provided an addendum to his brief of evidence which Mr Hall served on the Crown on 21 November 2018. The addendum referred to "[m]edical notes from 2015 to 2018, recently provided by Mr Mutsamwira" which were said to show evidence of liver damage. In light of that evidence, Dr Schep stated that the effects of quetiapine interacting with alcohol could have been further enhanced due to Mr Mutsamwira's liver impairment, thereby "further enhancing the sedative effects of quetiapine and possibly contributing to the impairment of his judgment to form an intent to have sexual intercourse".

[63] Dr Schep's opinion was based on the assumption that Mr Mutsamwira had in fact consumed 4 x 100 mg tablets of quetiapine on the night as he claimed. It was not a claim Mr Mutsamwira had made to the police during his interview and therefore unless he testified — which he had made very clear from the outset he did not want to do — there was no evidential basis for Dr Schep's opinion.

[64] Mr Hall was aware that in the absence of a factual foundation for Mr Mutsamwira's claimed consumption, Dr Schep's evidence was technically inadmissible. However, in his experience (and indeed Dr Schep's experience as an

expert witness), there is often no objection and the opinion evidence is admitted by consent.

[65] The trial started on 28 November 2018. Dr Schep was scheduled to give his evidence on 7 December 2018. However, on 3 and 4 December 2018 the Judge raised concerns about Dr Schep's brief of evidence, including the need for an evidential foundation.[7]

[66] Mr Hall and Mr Mutsamwira then urgently obtained further medical records including some dispensing records. These were provided to the Crown.

[67] On 6 December 2018, the prosecutor advised during an in chambers discussion that she was in the process of reviewing the medical notes and would not be in a position to cross-examine Dr Schep the following day as planned.

[68] She also advised of the existence of a document that showed when first taken into custody on 30 December 2015, the police watch-house asked Mr Mutsamwira whether he was on any prescription drugs and the answer was no. However, because he was showing signs of depression and because of the seriousness of the charge, the police arranged for him to be seen by a nurse who undertook an evaluation.

[69] The nurse's report recorded Mr Mutsamwira as saying he had nil recollection of the alleged offending as he had consumed a large amount of whiskey and had blacked out. He did not mention taking quetiapine. The nurse's report also recorded him as advising that he had never suffered from depression and had never received any treatment for depression.

[70] In all the circumstances, and to give the parties time to consider their respective positions, the Judge on 6 December 2018 adjourned the trial until 11 December 2018.

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[7] The other concerns related to the scope of his expertise and the fact that his brief purported to answer the ultimate issue which in this case the Judge considered should properly be the sole preserve of the jury.

[71] Also on 6 December 2018, Mr Mutsamwira signed a written instruction to Mr Hall saying he had been advised of his right to give evidence but did not want to and wanted to call Dr Schep.

[72] On 10 December 2018, the day before the trial was to resume, Mr Hall emailed the prosecutor further medical information concerning Mr Mutsamwira's prescription details. The prosecutor did not however consider that these supported the defence case because there were no records of any prescriptions between October 2015 and 12 January 2016. In those circumstances and given Mr Mutsamwira's failure to raise the issue at the police interview, she advised that unless Mr Mutsamwira provided an evidential foundation for his prescription and medication use, the prosecution would object to Dr Schep's evidence being admitted.

[73] Mr Hall considered the prosecutor's position was tactical and designed to force Mr Mutsamwira into giving evidence and thus expose him to cross-examination on all issues. That, in Mr Hall's assessment, would have been extremely damaging to the defence case and it was not what Mr Mutsamwira wanted. Mr Hall considered Mr Mutsamwira would not be a convincing witness.

[74] It appears from the transcripts of the in chambers discussions that Mr Hall endeavoured to come up with alternative solutions including Mr Mutsamwira giving evidence solely on drug consumption at a voir dire and then that evidence being used at trial.

[75] The following day 11 December, the prosecutor forwarded Mr Hall a copy of a brief of evidence obtained from a forensic psychiatrist Dr Panckhurst about the effects of quetiapine when combined with substantial quantities of alcohol in a person with liver damage. Mr Hall immediately provided Dr Schep with a copy.

[76] The Panckhurst brief of evidence included the following key points:

(a) The leading studies in the use of quetiapine for bipolar depression suggest that optimal dosing is in the range of 300–600 mg per day, so that whatever Mr Mutsamwira's prescribed dose was at the time of the

alleged offending, there was no indication he had ever been over-prescribed.

(b) Clinical experience indicates that quetiapine is a well tolerated and relatively safe medication. The primary adverse side effects associated with quetiapine are weight gain, increased blood sugars and its sedating properties. In terms of the effects of quetiapine being exacerbated by alcohol there would invariably be a degree of additive sedation (drowsiness).

(c) Mr Mutsamwira's medical records indicated that any liver damage was transient-mild in nature and unlikely to have significantly affected his ability to metabolise quetiapine.

(d) It was important to bear in mind that Mr Mutsamwira had had six years experience of quetiapine.

(e) The plasma levels of the sedating agents would have been at their peak level 90 minutes after ingestion and therefore likely to have been significantly reduced by 7 am the next morning.

(f) Evidence of purposeful conduct such as being able to successfully apply a condom was significant.

[77] Following receipt of the Panckhurst brief of evidence, there were further discussions in chambers with the Judge at the beginning of the Court day on 11 December. The Crown maintained its position that an evidential foundation of consumption was required before Dr Schep's evidence was admissible and the Judge indicated provisional opposition to the voir dire option. Another suggestion mooted was that Dr Schep could give evidence derived from the medical records that Mr Mutsamwira had been prescribed quetiapine over a period of time and then comment on the effect of quetiapine when combined with alcohol on a hypothetical basis, along the lines "if Mr Mutsamwira had consumed 400 mg of quetiapine that night, then…". It appears the Crown were amenable to that suggestion.

[78] Mr Hall confirmed in response to a question from the Judge that he wanted to talk to Dr Schep and Mr Mutsamwira before deciding about having a voir dire and a legal argument. It was agreed that after completing the Crown evidence which was not expected to take long, the trial would be adjourned until 3 pm with counsel and the Judge reconvening at 12.30 pm. The Judge asked Mr Hall if he thought that would give him enough time to be in a position to indicate what if any issues needed to be resolved by legal argument and/or voir dire. Mr Hall said he hoped it would.

[79] The trial then briefly resumed at 10.42 am to complete the Crown's evidence. That was concluded at 11.15 am. The Judge then adjourned until 3 pm.

[80] Between 11.15 am and 12.43 am, Mr Hall conferred separately with both Dr Schep and Mr Mutsamwira. Having read Dr Panckhurst's evidence, Dr Schep conceded that he had over-stated Mr Mutsamwira's liver damage. He also did not dispute what Dr Panckhurst had to say about the plasma level post-ingestion and the prescription levels for quetiapine.

[81] In Mr Hall's assessment, those acknowledgments would have undermined Dr Schep's evidence. Mr Hall was also concerned about the significant risks of calling Mr Mutsamwira to give evidence. His account of his drug consumption was easily able to be impeached. He would be asked about the attempt to persuade the doctor to change her letter, the absence of any reference in the medical records to him resuming the original dose in December 2015, the contrary indication in the January 2016 phone consultation, the lies he told to the watch-house nurse and the failure to mention consuming the drugs to the police.

[82] In short, Mr Hall considered that the risks of calling both Dr Schep and Mr Mutsamwira far outweighed the benefit. He was of the view that if they both gave evidence, they could do irreparable damage to the defence. On the other hand without them, the issue of intoxication would still be before the jury and there was overwhelming evidence about that. Also, there was no need for Mr Mutsamwira to give the jury his account of the events of 27 and 28 December 2015 because that was also already before the jury via the transcript of the police interview.

[83] Mr Hall advised Mr Mutsamwira accordingly.

[84] Mr Mutsamwira signed a written instruction that he did not want to call Dr Schep. Although the written instruction did not refer to Mr Mutsamwira himself giving evidence, it is common ground that his decision on that issue remained as before.

[85] Mr Hall conveyed those instructions to the Judge. The jury were then released for the day. Closing addresses and the Judge's summing up then proceeded on 12 December 2018.

Arguments on appeal

[86] Mr Mutsamwira's appellate counsel Mr Williams contended that the above sequence of events involved a series of errors on the part of Mr Hall.

[87] In Mr Williams' submission, the main error was failing to appreciate the need for an evidential foundation for Dr Schep's evidence and taking appropriate action well before trial such as obtaining a full set of medical and prescription records and preparing Mr Mutsamwira to give evidence. That would have included preparing him how to respond to cross-examination.

[88] The direct result of failing to do those things was that crucial decisions had to be made at the last minute and were rushed.

[89] The third related error was that there was insufficient time for the implications of the Panckhurst brief to be considered in a meaningful way. That in turn along with the content of the incomplete records bore on Mr Hall's assessment of the value of Dr Schep's evidence and hence the quality of the advice that was given to Mr Mutsamwira about calling Dr Schep. A more careful consideration would have come to the conclusion that Dr Schep could still have advanced the defence case. There were also aspects of the Panckhurst brief of evidence that could have been challenged as inadmissible.

[90] All of that meant that while Mr Mutsamwira gave his instructions not to give or call evidence, it was a hurried decision based on poor advice. He was put under unfair pressure due to Mr Hall's fundamental error. Mr Hall did not have a plan B and he should have had.

Analysis

The quality of the advice given by Mr Hall

[91] We agree it would have been preferable for Mr Hall to have had a plan B. However we also consider that, regardless of whether Mr Hall should have had a plan B, he was justified in having the concerns he did about calling Dr Schep and Mr Mutsamwira. No amount of "preparation" for cross-examination could have overcome the significant difficulties Mr Mutsamwira would have faced in providing credible explanations for the following:

(a) His selective memory of events — he was able to remember events immediately prior to his going into the lounge and after waking up lying alongside the complainant but not what happened in-between times.

(b) The fact the complainant weighed 110 kgs and that for them to have both been lying on the couch sideways as he claimed — as opposed to him being on top of her as she claimed — would have been close to physically impossible.

(c) Failing to attempt to offer any explanation when asked to leave the house.

(d) The evidence that he had engaged in purposeful conduct at times proximate to the alleged rape as well as at times when his level of quetiapine and alcohol would have been higher than at 7 am:

    (i) having consensual sex with the complainant's sister;

(ii) conducting a phone conversation, seeking a charger and plugging it in;

(iii) finding his own way outside and smoking a cigarette;

(iv) successful application of a condom;

(v) placing the condoms in the kitchen bin;

(vi) undressing and dressing;

(vii) responding to the request to leave by leaving unaided;

(viii) driving a motor vehicle; and

(ix) texting.

(e) Inconsistencies between the medical records and his claims about reverting back to the 200 mg dosage of quetiapine or more in December 2015.

(f) The likelihood of a doctor failing to record on three separate occasions first in December 2015, secondly the phone consultation on 12 January 2016 and thirdly the advisory letter of 13 January 2016 what would have been a significant clinical matter, namely that Mr Mutsamwira had told her he had deteriorated and was reverting to his original dosage.

(g) His failure to mention his consumption of drugs to the police. In his police interview, he blamed his intoxicated condition entirely on drinking spirits and the effect they "always" have on him.

(h) The explanation Mr Mutsamwira seeks to give for this omission — and which he presumably would have given to the jury — is that the interviewing officer was very aggressive and had already made his mind up. Mr Mutsamwira panicked and was worried about being

criticised for mixing alcohol and drugs. However, while it is true the officer expressed disbelief at some of Mr Mutsamwira's statements, that was much later in the interview. At the stage where they were discussing what Mr Mutsamwira had consumed that night, the questioning was bland and open. There was every opportunity for Mr Mutsamwira to tell the officer about the quetiapine. We note too that Mr Mutsamwira told the officer he did not need a lawyer and wanted just to talk because he "[knew] what [he was] gonna say."

(i) His failure to mention the medication to the police watch-house in response to a specific question about prescription drugs and then the nurse. Again, he only mentioned that drinking spirits had caused him to black out and have no memory. As previously stated, we have been given different explanations for this omission. In his affidavit, Mr Mutsamwira says by the time he saw the nurse, he was "exhausted and mentally drained." In oral evidence however he said that he had reasons for not disclosing this, intimating it was a deliberate choice.

[92] It is in our view no answer for Mr Williams to submit that records that have now been obtained and which should have been obtained earlier would or should have made a difference to Mr Hall's assessment.

[93] In fact, the additional records obtained for the appeal hearing almost three years after the trial still do not show any prescription for quetiapine between 8 October 2015 and 16 January 2016. Further, the records show that the last prescription for 100 mg quetiapine tablets was for a month's supply back in July 2015. The 8 October 2015 prescription was for three month's supply but of 25 mg tablets. That would have involved Mr Mutsamwira in an unlikely scenario of swallowing 16 tablets of quetiapine as well as the two tablets of citalopram while on his way to the drinks party.

[94] The additional records obtained for the appeal do contain confirmation of two instances of drugs being dispensed in 2015 that were not in the records available at trial. The dispensing records of 100 mg tablets now show that between

13 January 2015 and 15 July 2015 Mr Mutsamwira had obtained in total nine months' supply of 100 mg tablets.

[95] At the rate of two tablets daily, that supply would have been nearing its end by late September 2015. That would be consistent with a new prescription being written in 8 October 2015 for the 25 mg tablets although there is still no dispensing record for that prescription.[8]

[96] However, in his affidavit evidence filed in this Court, Mr Mutsamwira says he was stockpiling the medication and so as at mid to late December 2015 when he reverted to the original dose and occasionally a double dose, he did still have 100 mg tablets available to him. He describes the supply he had in December as "plentiful." By plentiful, he told us he meant at the very least 50 x 100 mg tablets.

[97] There is reason to be sceptical about the stockpiling explanation. Stockpiling of the 100 mg tablets was never mentioned to Mr Hall including in a statement Mr Mutsamwira wrote during the trial about his drug consumption which he asked to be put in affidavit format and which he said he would come in and sign. Mr Mutsamwira intended the statement to be sworn evidence for the proposed voir dire. Mr Mutsamwira wrote that statement at a time when he knew the prosecution was relying on the records not showing any prescription between 8 October 2015 and 12 January 2016.

[98] Mr Mutsamwira did not need further records to say he had been stockpiling. If that were true, he would obviously have known that from the outset.

[99] We note too that stockpiling was never mentioned in Mr Mutsamwira's first affidavit filed for the appeal.

[100] The stockpiling explanation also sits uneasily with Mr Mutsamwira telling the doctor he needed a repeat prescription on 12 January 2016 which again would be

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[8] Mr Mutsamwira says he used different chemists for that prescription and he cannot now remember which ones.

consistent with him exhausting or coming near the end of the three-month prescription of the 25 mg tablets that was issued on 8 October 2015.

[101] In our assessment, even with the additional material now available, Mr Mutsamwira's account of drug consumption still lacks cogency and therefore does not significantly detract from the concerns expressed by Mr Hall during the trial. Those concerns and therefore his advice remain valid. To have advanced drug consumption at trial would in our view have almost certainly damaged Mr Mutsamwira's credibility in the eyes of the jury as well as exposing him to highly damaging cross-examination on all the other issues.

[102] We also consider that viewed objectively Dr Schep's evidence was of limited value and would not have significantly strengthened the defence case. His conclusions about quetiapine and alcohol were understandably and of necessity tentative. They were based solely on the manufacturer's instructions and one case involving a different situation which lacked relevant detail.

[103] In an affidavit provided for the appeal, Dr Schep suggests that his concessions after reading the Panckhurst brief of evidence were not as significant as Mr Hall appears to have thought and that essentially he made concessions only on the liver issue. However, at the time, the liver issue was considered significant or would have appeared to the jury to have been considered significant because Dr Schep went to the trouble of providing an addendum solely on that issue. In our view, inaccurate statements about Mr Mutsamwira's liver condition were likely to have damaged Dr Schep in the eyes of the jury. The correct position was very plain to see in the medical records. At best the jury might have thought Dr Schep's opinion was based on incomplete records or worse that he had been careless in his perusal of the records or selective in which part of the records he highlighted.

[104] We therefore reject the argument that Mr Hall's evaluation of Dr Schep's evidence was inadequate or erroneous. The advice not to call Dr Schep was soundly based. It would not have substantially strengthened the defence and calling it would have created more problems.

The decision not to give evidence

[105] That however is not the end of our inquiry.

[106] The right of a defendant to give evidence is a fundamental right. It is so fundamental that even although a decision not to give evidence is objectively a wise decision, the trial will still be by definition unfair if that decision was not made voluntarily or was not a fully informed decision or was made under unfair pressure.[9]

[107] Mr Mutsamwira says that his election not to give evidence was made under undue pressure. He claims to have had only 10 to 15 minutes to make up his mind. He also claims that it was during the 10 to 15 minutes that Mr Hall made him aware for the first time of:

(a) the Panckhurst brief of evidence, the only part which Mr Hall showed him being the conclusions;

(b) the fact the Panckhurst brief of evidence would cancel Dr Schep's evidence;

(c) that if he still wanted to call Dr Schep, he (Mr Mutsamwira) would have to give evidence in front of the jury not only about the quetiapine but about the whole night of the offence; and

(d) if Dr Schep gave evidence, then the Crown would call Dr Panckhurst.

[108] Mr Mutsamwira said he wanted more time to understand and ask more questions. He asked Mr Hall for more time but was told the Judge would not allow it. He then asked Mr Hall if it was possible for him to obtain a phone and ring a couple of support people. This too was denied by Mr Hall who stated that he had to make a decision right now.

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9 See generally New Zealand Bill of Rights 1990; and s 25; *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65].

[109] Mr Mutsamwira says his head was spinning. He was confused, upset, helpless and hopeless all at the same time. He could not think through the complicated issues clearly. His case was crashing down around him and Mr Hall seemed exasperated with him. The last thing he wanted was to fall out with his lawyer. He did not feel he was adequately prepared to give evidence. He felt he had no choice but to accept Mr Hall's advice. In what he describes as a "spur of the moment" decision, not to give evidence seemed the only logical way to cushion the damage.

[110] He also claims that Mr Hall never discussed the concessions Dr Schep had made after reading the Panckhurst brief of evidence and that Mr Hall never discussed with him that if he and Dr Schep gave evidence, it could harm his defence.

> [W]e never discussed anything at length. The main purpose, when he came to see me, during those ten minutes was to tell me we are not calling Dr Schep because Dr Panckhurst is going to be damaging, you have to testify and I am not calling you on the stand.

[111] As mentioned there was an hour and a half gap between the Court adjourning and Mr Hall advising the Judge of Mr Mutsamwira's instructions. During that hour and a half, Mr Hall spoke to both Dr Schep and Mr Mutsamwira. Exactly how long he spoke with each is unclear. Dr Schep estimates the discussion with him was for 20 to 30 minutes and that after approximately 10 minutes, Mr Hall returned to advise him of Mr Mutsamwira's decision that he was not needed. That supports Mr Mutsamwira's estimate of time except for the fact that Dr Schep does not know whether Mr Hall had already spoken to Mr Mutsamwira before talking to him. Mr Hall's recollection is that he went back and forth between the two.

[112] We consider it unlikely that any of the estimates of time are precise given they were being recalled well over a year after the trial. But regardless of whose estimate is correct, it is beyond doubt that an hour and a half is not a long time.

[113] However, there are critical aspects of Mr Mutsamwira's account of his discussions with Mr Hall which we do not consider credible because they are implausible and/or belated allegations which bear all the hallmarks of embellishment.

[114] For example, Mr Mutsamwira claimed he was unaware of the difficulties he would face if he were cross-examined and that the only reason he decided not to give evidence was because he had not been prepared. The lack of preparation was also the only reason he thought he might jeopardise the defence by giving evidence.

[115] Mr Mutsamwira went even further and claimed that prior to trial he had specifically asked Mr Hall about cross-examination so he could try and figure out what might come out of cross-examination but that Mr Hall had refused to discuss cross-examination.

[116] This allegation was raised orally for the first time at the hearing. There was no mention of it in either Mr Mutsamwira's affidavits including an affidavit sworn in response to an affidavit from Mr Hall in which Mr Hall expressly asserted that Mr Mutsamwira was "well aware" of his shortcomings as a witness and the difficulties he would face if he was exposed to cross-examination. We would add it seems most unlikely that Mr Mutsamwira, who has a doctorate in chemistry, would have been unable to appreciate for himself the difficulties he would face. His major vulnerabilities as a witness were self-evident.

[117] There were also inconsistencies. Having denied ever being advised the difficulties he would face included his lies to the watch-house nurse, Mr Mutsamwira stated in re-examination that the first time the issue of what he had said to the watch-house nurse came up was Tuesday 11 December. Not only was that inconsistent but it was also demonstrably wrong. The transcript of the in chambers discussions of 6 December records a discussion about the report which Mr Mutsamwira must have known about because the same transcript also records that Mr Mutsamwira had given Mr Hall a limited consent authorising disclosure of the report to Mr Hall. Mr Hall must have discussed the contents of the report with Mr Mutsamwira because it has never been disputed that Mr Mutsamwira refused to agree to the report being disclosed to the prosecution.

[118] Also raised for the first time at the appeal hearing was the allegation that Mr Mutsamwira had asked Mr Hall for a phone so he could ring support persons but

that Mr Hall had refused saying "no you cannot do it, you have to make a decision right now."

[119] Not only is that allegation belated, it does not make sense. Mr Mutsamwira was aware that the trial had been adjourned until 3 pm. Further, the transcripts of the in chambers discussions support Mr Hall's contention that the Judge was well aware of the problems facing the defence and that had further time been required it would have been allowed. Even if Mr Mutsamwira was not present at all the in chambers discussions — as he claims — there would be no reason for Mr Hall to mis-represent the Judge's attitude.

[120] Another new allegation was that Mr Hall told Mr Mutsamwira that it was all his (Mr Mutsamwira's) fault and that he had only brought it on himself, rendering Mr Mutsamwira close to tears. Again there would be no reason for Mr Hall to say such a thing and it does not ring true.

[121] Another inconsistency was that Mr Mutsamwira painted a graphic picture of himself being taken by surprise, having no input into the decision making, being intimidated by Mr Hall's hostile manner and essentially being told by Mr Hall what to do. Yet, he also stated orally that Mr Hall had advised him the issue of intoxication would still be before the jury even if he and Dr Schep did not give evidence and that he (Mr Mutsamwira) had disagreed with that assessment. That was something not mentioned in either of his affidavits.

[122] For all those reasons, we have concluded that Mr Mutsamwira's account of the discussions with Mr Hall on 11 December is not a reliable account. It exaggerates his lack of appreciation and understanding of the decision he had to make and the issues bearing on that decision. It also overstates the pressure he was under and the time constraints. While the Panckhurst brief of evidence was late, the question of the evidential foundation for Dr Schep's evidence and how that might be resolved were issues that had been traversed for several days.

[123] In our assessment, the decision made by Mr Mutsamwira was an informed decision and it was based on sound advice.

[124] We therefore also reject this ground of appeal.

Misdirection on intoxication

[125] Mr Williams contends that the Judge's direction to the jury on intoxication was flawed because the Judge referred to capacity for intent rather than the fact of intent. This combined with references made by Mr Hall to "involuntary behaviour" in his closing, created a real risk the jury may have erroneously believed the appellant needed to be so intoxicated as to be incapable of forming intent. Whereas the correct legal position is that the jury were entitled to conclude the Crown had failed to prove the necessary intent even if Mr Mutsamwira's level of intoxication fell short of involuntary behaviour.

[126] However the direction needs to be read in its entirety. And in our view the direction in its entirety made it very clear that the question for the jury was whether as a matter of fact Mr Mutsamwira had acted with the requisite intent. This was further reinforced by the question trail. There was never any suggestion that intoxication could only be relevant if Mr Mutsamwira's mind was no longer functioning.

[127] We therefore do not accept there was any risk of the jury being misled and taken down illegitimate paths of reasoning.

[128] This ground of appeal also lacks merit.

Outcome

[129] The appeal against conviction is dismissed.

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