IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 95/2020
[2021] NZSC 48

BETWEEN	PIHI HEI Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: M E Goodwin and C M Chester-Cronin for Applicant
M J Lillico and A D H Colley for Respondent

Judgment: 24 May 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was convicted after trial of sexual offending in relation to two complainants and of one charge of stupefying the complainant, Ms F.[1] He was

[1] He was acquitted of one of the charges.

sentenced to a term of 16 years' imprisonment with a minimum period of nine years' imprisonment.[2] He appealed unsuccessfully to the Court of Appeal against conviction and now seeks leave to appeal to this Court against conviction.[3]

Background

[2] At the time of the incidents giving rise to the charges, the applicant operated an accommodation business (the Retreat) in a fairly remote coastal area. The complainants, foreign nationals in their 20s at the time, were each employed by the applicant, who was in his late 50s at the time of the offending against Ms H, to work at the business.

[3] The complainant Ms H arrived at the Retreat in the latter half of 2013. She said that after she had been at work for a couple of weeks or so, she was indecently assaulted and raped over the course of an evening. She said that she was raped again the next day. She left the Retreat that same day.

[4] Ms F arrived in New Zealand to take up her employment in late August 2017. She was met on her arrival by the applicant. On their journey to the Retreat, they stayed the night at a motel the applicant had booked for them. Ms F said that after indecently assaulting her in the room, he forced her to have oral sex, and then raped her. They continued their journey to the Retreat the next day. Ms F said she was sexually assaulted regularly (including by rape) over the next ten days or so. She also described an incident when the applicant forced her to drink a large quantity of wine (approximately 10 glasses), after which she lost consciousness. This gave rise to the charge of stupefaction. When she awoke, she contacted her insurance company who advised her to go to a hospital. She left the Retreat soon after to get medical care.

[5] The charges were heard together.[4] There was evidence from Mr Cornes of his encounter with the applicant in Vietnam in "about 2015 or maybe 2014" (that is, in the

---

2 *R v Hei* [2019] NZDC 14139 (Judge Ingram).

3 *Hei v R* [2020] NZCA 464 (Gilbert, Thomas and Dunningham JJ) [CA judgment]. The Court of Appeal allowed the applicant's appeal against sentence in part.

4 A defence application for severance was declined on the basis the evidence of the two complainants, who did not know each other, was cross-admissible on a propensity basis: *R v Hei* [2019] NZDC 7260 (Judge Harding) [Pre-trial ruling] at [28].

period between the incidents described by Ms H and those described by Ms F). Mr Cornes, who had not previously met the applicant, described him handing over a piece of paper with the word "Rohypnol" written on it. When Mr Cornes inquired why the applicant wanted this, suggesting it was a date rape drug, he said the applicant responded: "Some of the girls need a little bit to calm down". Mr Cornes later stayed at the Retreat on a visit to New Zealand. The defence at trial challenged the credibility of this evidence on the basis that Mr Cornes was confusing the applicant's visit to Vietnam with an encounter with someone else and had been happy enough to take his wife and son and stay at the Retreat.

[6] The applicant gave and called evidence at trial. His defence in relation to Ms H was that the sex was consensual or at least he had a reasonable belief that they were in a consensual relationship. In terms of Ms F, he said there were only two instances of sexual contact (oral sex) and that the sexual activity that occurred was consensual.

The proposed grounds of appeal

[7] The applicant raises two proposed grounds of appeal.[5] On the first ground, the applicant wishes to argue the Crown created illegitimate prejudice by the reference made to Rohypnol in closing, given the absence of any evidential foundation the drug was administered to the complainant.[6] While the evidence from Mr Cornes may have some limited relevance, such evidence needed a strong direction from the Judge about its relevance. There was a risk that without such directions, the applicant's alleged propensity pervaded the jury's consideration of the other charges. The jury should have been told to disregard the Crown submission that Rohypnol could have been administered and the Judge's failure to provide the necessary directions has given rise to a substantial miscarriage of justice.

[8] On the second ground, the applicant submits that the trial Judge was wrong to indicate that Mr Cornes' evidence related to character. That terminology was not used

---

5 Counsel initially acting for the applicant on this application was granted leave to withdraw. After present counsel was instructed, the grounds of appeal were amended from those set out in the Notice of Application. Counsel for the applicant was permitted to substitute new submissions in place of those filed.

6 The applicant's submissions accept that the Crown in closing "acknowledged that the jury could not be sure that Rohypnol had been administered to the complainant".

by either Crown or defence counsel and only arose in the summing up. The reference to character was in error where Mr Cornes' evidence related to the applicant's alleged propensity. The distinction between propensity and character is fundamental and gives rise to a question of general and public importance. Further, the misdirections have given rise to a substantial miscarriage of justice.[7]

[9] In opposing the application for leave, the respondent argues the evidence of Mr Cornes was relevant as it showed that, in the intervening period between the offending against the complainants, the applicant had demonstrated an interest in methods of overcoming resistance to his sexual advances. It was also highly probative of his state of mind. The respondent also says any unfairly prejudicial effect was mitigated by the direction from the trial Judge that the only evidence available to support the stupefaction charge was the consumption of alcohol, not Rohypnol. The respondent says no question of principle arises under the second ground where the relevant principles have been settled. Further, it is submitted the reference to character was of little moment in context.

Our assessment

[10] The first proposed ground raises no question of principle. Rather, the issue is whether the treatment of the evidence of Mr Cornes has given rise to a miscarriage of justice.[8]

[11] In respect of this evidence, the focus in the Court of Appeal was on its admissibility and effect. The Court took the view that the evidence was relevant to the critical issue at trial, that is, whether there was consent or reasonable belief in consent.[9] The Court noted that the Crown in opening had referred to evidence to come from a toxicologist on Rohypnol which might assist the jury on the stupefaction charge.[10] The Court considered it would have been "preferable" to have omitted this

---

7 The applicant says the Judge should not have suggested the jury draw inferences on the basis of bad character, given this was not argued by the Crown and given the defence did not have the opportunity to address it.

8 Senior Courts Act 2016, s 74(2)(b).

9 The evidence had been ruled admissible in a pre-trial ruling on the basis it was relevant to the issue of consent and to the defendant's state of mind: Pre-trial ruling, above n 4, at [34].

10 The prosecutor said: "His evidence will, I hope, assist you in determining whether in fact the defendant stupefied Ms [F] the night he forced her to consume at least alcohol."

reference because there was no evidence Rohypnol had been administered.[11] But, in closing, the Crown made it clear it relied on the forced administration of alcohol to support the charge of stupefaction. The Court concluded:[12]

> As the evidence was directly relevant to the issue of consent and reasonable belief in consent and it was made clear it was not suggested Rohypnol was used to stupefy Ms F, we do not consider the evidence had an unfairly prejudicial effect and its admission did not lead to a miscarriage of justice.

[12] Nothing raised by the applicant gives rise to the appearance of a miscarriage of justice in relation to this assessment. The Judge told the jury that it was only the alcohol that was in issue and that there was no allegation about drugs being administered and no evidence that they were. The Judge also said that the only issue was: "Did he force her to drink the wine?"

[13] The question of the sufficiency of the propensity directions was addressed by the Court of Appeal. The Court considered that the Judge had inappropriately used the term "character" as a "shorthand" for the applicant's "alleged tendency to engage in forced sexual activity on young women despite a lack of consent". The Court took a view favourable to the applicant in determining that the more neutral term "propensity" should have been used.[13] The Court nonetheless accepted the Crown submission, repeated in this Court, that this part of the summing up was clearly advanced as a summary of the Crown case. The Court continued: "More importantly, the Judge then went on to give standard directions about the use of propensity evidence."[14] In the circumstances, the Court was satisfied the directions were sufficient.

[14] Again, we do not consider the criteria for leave to appeal are met in relation to the propensity issue. Nothing raised by the applicant calls into question the Court of Appeal's assessment that the directions addressed the well-settled elements identified by this Court in *Mahomed v R*.[15] Accordingly, there is also no question of general or public importance that arises.[16]

---

11 CA judgment, above n 3, at [38].
12 At [40].
13 At [45].
14 At [47].
15 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
16 Senior Courts Act, s 74(2)(a).

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent