REDACTED VERSION FOLLOWING VARIATION OF SUPPRESSION ORDER MADE BY THE COURT OF APPEAL ON 27 JULY 2021

NOTE: PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS (EXCLUDING OCCUPATION) 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

NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT'S FATHER PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: SUPPRESSION ORDER IN RELATION TO ASPECTS OF THE COURT OF APPEAL JUDGMENT PURSUANT TO S 205 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAME OF THE APPLICANT'S UNIT REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 40/2021
[2021] NZSC 90

BETWEEN	JAMIE ANTHONY FOSTER Applicant
AND	THE QUEEN Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	P L Borich QC for Applicant S E Trounson for Respondent
Judgment:	19 July 2021
Reissued:	12 August 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of sexual violation by unlawful sexual connection and indecent assault after a District Court jury trial. He was sentenced to a term of imprisonment of six years.[1] He appealed against his convictions to the Court of Appeal, but the appeal was dismissed.[2] He now seeks leave to appeal to this Court against his convictions.

Background

[2] The applicant and the complainant were both police officers based in the greater Auckland area who had been assigned to duties at the Waitangi Day celebrations.[3] They were staying in a motel in Kerikeri. There was a party atmosphere on the night in question with alcohol being consumed.

[3] The alcohol was stored in the motel unit assigned to the applicant and another male colleague. Around 12.30 am, the complainant went into that room to get a drink. Her evidence was that as she was doing this, the applicant indecently assaulted her by putting his hand down her shorts and rubbing her genital area over her underwear. She says she resisted this and the applicant desisted. She did not tell anyone as she did not wish to make a fuss. We will call this the first incident.

[4] At about 2.30 am, after the complainant had gone to bed in a unit she was sharing with a female colleague, the applicant entered the unit. On the complainant's evidence, she awoke to a painful forced feeling in her vagina. She protested and the

1 *R v Foster* [2020] NZDC 7250 (Judge Thomas).
2 *Foster v R* [2021] NZCA 90 (Courtney, Woolford and Mander JJ) [CA judgment].
3 On 27 July 2021, the Court of Appeal made an order under s 203(3) of the Criminal Procedure Act 2011 varying automatic suppression under that section of the complainant's identifying particulars to allow publication of her occupation. Automatic suppression of the complainant's name, address and other identifying particulars remains in force.

applicant stopped. A conversation of some 20 minutes then ensued, some of which the complainant recorded on her mobile phone. The applicant accepted that some sexual activity occurred, though he initially denied it. We will call this the second incident.

[5] The defence case was, in essence, that the complainant's reaction to the first incident was to indicate "not yet" and to invite the applicant to come to her room later. This provided background to the defence position that the complainant initially consented to the sexual activity in the second incident (or the applicant believed she did) but then changed her mind.

Issues

[6] The application for leave raises two broad issues. The first concerns s 21 of the Evidence Act 2006. The second concerns s 232 of the Criminal Procedure Act 2011. The applicant submits both issues are matters of general or public importance and that a substantial miscarriage of justice may occur if the appeal is not heard.[4]

Section 21 of the Evidence Act

[7] Section 21(1) of the Evidence Act provides:

> If a defendant in a criminal proceeding does not give evidence, the defendant may not offer his or her own hearsay statement in evidence in the proceeding.

[8] In the present case, the applicant exercised his right not to make a formal statement to the police and did not give evidence at his trial.

[9] There was evidence from two Crown witnesses (Constable C and Constable D) that the applicant told them that, during the first incident, the complainant had invited the applicant to come to her unit later. In both cases, the witnesses said the applicant told them about this *after* the second incident. A third police officer who was a Crown witness (whom we will call Sergeant Z) told the prosecution shortly before he was to give evidence in the trial that the applicant had told him *before* the second incident

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4 Senior Courts Act 2016, s 74(2)(a) and (b).

that the complainant had invited the applicant to come to her room later. Sergeant Z was a Crown witness. His account of the applicant telling him of being invited to the complainant's unit was that it had occurred in an exchange that took place apart from the other police officers at the motel. The applicant's counsel wished to ask Sergeant Z in cross-examination about this exchange. As s 21 was engaged, he sought leave to do so from the trial Judge.[5]

[10] The trial Judge refused the applicant's application to question Sergeant Z about the exchange with the applicant in an oral ruling.[6] The essence of the argument put to the Judge was that, despite its clear wording, the prohibition in s 21 should not be applied where this would lead to unfairness. The case cited in support of that proposition was a decision of the Court of Appeal, *R v King*.[7] In that case, the Court of Appeal said that s 21 means what it says.[8] The Court went on to note that s 368 of the Crimes Act 1961 could be invoked to require the Crown to lead the evidence if not leading it would cause an unfair trial under s 25 of the New Zealand Bill of Rights Act 1990.

[11] In the present case, the Court of Appeal noted that the proposed evidence was of a discrete conversation, separate from the other aspects of Sergeant Z's evidence, which related to exchanges that happened at other times. So, the evidence was of an entirely exculpatory statement that clearly came within s 21, not a mixed inculpatory/exculpatory conversation between a defendant and a witness. The Court upheld the trial Judge's decision to refuse permission to cross-examine Sergeant Z on the exchange under s 21.

[12] The late disclosure of this evidence by Sergeant Z was a matter that the Court of Appeal said was controversial. It said: "the Crown had legitimate cause to dispute its claimed content".[9] There was CCTV footage of areas in the motel where the police team had gathered and Sergeant Z was unable to identify the point at which this exchange between him and the applicant (with no one else present) had taken

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5 To "offer evidence" is defined in s 4(1) of the Evidence Act 2006 as including eliciting evidence by cross-examining a witness called by another party. So, s 21 was engaged.
6 *R v Foster* [2020] NZDC 4212.
7 *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527.
8 At [15].
9 CA judgment, above n 2, at [77].

place. But, for the purpose of considering the present application, we put those concerns to one side.

[13] In his leave submissions, the applicant's counsel argues that, if this Court grants leave, it will be required to scrutinise *whether* s 21 applied to the statement. He wishes to argue, by reference to *King*, that the prohibition in s 21 must give way in cases where applying it would make the trial unfair; that the Court of Appeal did not take a fairness or rights-consistent approach to s 21; and that, on the facts of the present case, it was unfair not to allow cross-examination of Sergeant Z on the conversation, when the prosecution had not adduced evidence of it.[10]

[14] We do not see this argument as having sufficient prospects of success to justify a further appeal. As noted by the Court of Appeal in *King*, s 21 means what it says.[11] As the Court of Appeal pointed out in the present case, Sergeant Z's statement was different from those of Constable C and Constable D, which were reports of conversations that were of a mixed inculpatory and exculpatory character.[12] In those cases, fairness required the Crown to lead both the inculpatory and exculpatory aspects of their accounts.[13] That analysis did not apply to the wholly exculpatory statement to which Sergeant Z refers.

[15] The applicant also wishes to argue that the statement of Sergeant Z is different from cases like *King*, because the conversation he had with the applicant, during which, he says, the applicant's exculpatory statement was made, took place *before* the second incident and was essentially part of the event. It was relevant evidence in terms of s 7 of the Evidence Act and, by analogy with s 35(2)(b) of the Evidence Act (which says a previous statement of a witness that is consistent with the witness's evidence is admissible if it "forms an integral part of the events before the court"), it should be seen as admissible on the basis that s 21 is disengaged in this situation.

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10 Section 368 of the Crimes Act 1961 has now been replaced by s 113 of the Criminal Procedure Act. The applicant does not expressly suggest the Judge should have required the Crown to ask Sergeant Z about his conversation with the applicant, applying s 113(3), but rather that s 21 should have been interpreted to allow cross-examination of Sergeant Z on the conversation if evidence of the conversation was not led by the Crown.

11 *King*, above n 7, at [15].

12 CA judgment, above n 2, at [81].

13 At [81]. See also *R v Felise (No 3)* (2010) 24 CRNZ 533 (HC) at [23]–[25].

[16] We do not consider the argument that s 21 is disengaged in relation to statements made before the alleged offending has sufficient prospects of success to justify a further appeal. Section 21 does not include any exceptions of the kind that appear in s 35. As the Court of Appeal pointed out, the obvious solution for the applicant if he wanted to give evidence of the alleged exchange with Sergeant Z was to give evidence himself.

Section 232 of the Criminal Procedure Act

[17] The other ground of appeal relates to the Court of Appeal's treatment of four things which the Court found went wrong during the trial, but which it found did not affect the outcome and therefore did not cause a miscarriage in terms of s 232(4)(a) of the Criminal Procedure Act.

[18] The Court of Appeal found there were four errors at the trial. These were:

(a) Refusing the applicant leave to cross-examine the complainant about a conversation he said he had with her about her father [redacted] during the second incident. He says this caused the complainant to "melt down" and argues it was the reason why she changed her position from consenting to sexual activity to opposing it.

(b) The Judge's intervention to suggest answers to the expert witness about DNA results.[14]

(c) Not permitting the applicant to explore with Sergeant Z the contents of a job sheet prepared by another witness, Detective Inspector Y, relating to the pressure that Sergeant Z was said to have been under to give evidence favourable to the Crown.

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[14] The Court of Appeal found there was no error in relation to this point, so it is not entirely clear to us whether this really is an error, as the applicant suggests: CA judgment, above n 2, at [35] and [38].

(d) Refusing the applicant permission to elicit from Detective Inspector Y evidence that the complainant's father was [redacted] and to explore any associations between Detective Inspector Y and the father.

[19] The Court of Appeal said that none of these errors created a real risk that the outcome of the trial was affected, so no miscarriage arose in terms of s 232(4)(a) of the Criminal Procedure Act. That is consistent with the approach in this Court's recent decision in *Haunui v R*.[15] The applicant wishes to challenge that conclusion on appeal. The applicant also wishes to argue that he was deprived of his right to a fair trial under s 25(d) and (e) of the New Zealand Bill of Rights Act, and that therefore s 232(4)(b) of the Criminal Procedure Act applied: these were errors that "resulted in an unfair trial". So, the submission is that even if the errors did not affect the outcome in terms of s 232(4)(a), they did cause an unfair trial in terms of s 232(4)(b).

[20] The applicant argues that the Court of Appeal ought to have recognised that as this was a "she said, he said" case, it was for the jury to decide what to make of the evidence the Judge prevented it from hearing, and the approach adopted required speculation. He argues that the errors in combination deprived the applicant of his right to offer an effective defence.

[21] The applicant says this argument raises a matter of general or public importance justifying the grant of leave under s 74(2)(a) of the Senior Courts Act 2016. We do not consider that is the case. Rather, we see the Court of Appeal's analysis as fact-specific. We see no appearance of error in that analysis. The point the applicant raises is essentially seeking a reconsideration of the combined effect of the identified errors.

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

Solicitors:
Crown Law Office, Wellington for Respondent

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15 *Haunui v R* [2020] NZSC 153.