IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 44/2021
[2021] NZSC 99

BETWEEN		DARRYN MICHAEL HORTON Applicant
AND		THE QUEEN Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: W C Pyke for Applicant
M R L Davie for Respondent

Judgment: 12 August 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Following trial in the District Court at Rotorua, the applicant, Mr Horton, was found guilty of violent and sex-related offending against a single complainant.[1] He had earlier pleaded guilty to a single charge of supplying methamphetamine. Mr Horton now seeks leave to appeal a decision of the Court of Appeal dismissing his appeal against conviction.[2] As argued in the Court of Appeal, Mr Horton seeks to argue that the trial Judge caused a miscarriage of justice when he declined leave to

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1 One charge of abduction for sexual connection, five charges of sexual violation by unlawful sexual connection, two charges of sexual violation by rape, and one charge of assault with a weapon.

2 *Horton v R* [2021] NZCA 82 (Goddard, Lang and Hinton JJ) [CA judgment].

cross-examine the complainant about her previous conviction for dishonesty offending.

[2] The prosecution case at trial was that Mr Horton had abducted the complainant, injected her with methamphetamine and repeatedly raped and sexually violated her over the course of a weekend. She escaped by leaping from Mr Horton's car as she was being driven on Monday. Mr Horton did not stop.

[3] The defence case at trial was that sex between Mr Horton and the complainant had occurred but was consensual, and that the complainant had lied when she gave evidence otherwise. Mr Horton gave evidence. He accepted that sexual intercourse had occurred on one occasion only. He said it was consensual and it had stopped when the complainant expressed discomfort. He also accepted that he had assisted the complainant to inject herself with methamphetamine. The defence called other witnesses who had visited the pair at Mr Horton's house over that weekend. They said that there did not appear to be any problem between Mr Horton and the complainant.

The complainant's offending

[4] As the Court of Appeal records, the complainant (who was 56 years old at trial) had 24 previous convictions for dishonesty offending between 1980 and 2015. Twenty-one of those convictions were for shoplifting and theft involving items valued at less than $500. Another was for receiving stolen property in 2006, again valued at under $500.

[5] The two additional convictions related to one charge in 1985 of theft as a servant, and one in 2005 of theft by a person in a special relationship. The scale of the offending is reflected by the penalty. In the case of the 1985 conviction, reparations were ordered of $291.52 and the complainant was ordered to come up for sentence if called upon. In relation to the 2005 conviction, reparations of $150.00 were ordered together with a sentence of 80 hours of community work.

The Courts below

[6] In the District Court in Rotorua, Judge Snell considered that the "substantially helpful" threshold in s 37 of the Evidence Act 2006 was not met. Essentially, he found that the dishonesty and offences were all too minor to assist the jury in determining the complainant's propensity to tell the truth in respect of her allegations against Mr Horton.[3]

[7] The Court of Appeal agreed. The Court cited with approval two decisions in that Court, *Ieremia v R*[4] and *Key v R*,[5] in concluding that evidence of a witness's prior convictions for minor dishonesty offending such as shoplifting and petty theft is generally unlikely to be substantially helpful in assessing veracity.[6] The Court noted that context is nonetheless important and must be assessed case by case. Relevant factors will include the nature and seriousness of the convictions (particularly if any falsehood is disclosed), the age of the convictions, any overall pattern of offending, and the circumstances of the trial (that is, the particular way in which the issues of veracity arise).[7]

[8] Applying those contextual considerations to the facts in Mr Horton's case, the Court held that the evidence of the complainant's shoplifting, theft and receiving convictions was not substantially helpful, particularly because the previous convictions did not disclose "in and of themselves" the past telling of falsehoods.[8]

[9] As far as the convictions in 1985 and 2005 where concerned, the Court considered they were historic and minor. Further, the Court held that while there was inherently an element of "abuse of trust" in the nature of the offending, "the simple fact of such a conviction is as equivocal in terms of disclosing a propensity to tell lies as a conviction for shoplifting".[9]

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3 *R v Horton* [2019] NZDC 13928 at [11]–[12].
4 *Ieremia v R* [2020] NZCA 17.
5 *Key v R* [2010] NZCA 115.
6 CA judgment, above n 2, at [30].
7 At [30].
8 At [31].
9 At [32].

Applicant's submissions

[10] For Mr Horton, Mr Pyke argued that at trial, the prosecution placed great emphasis on the complainant's veracity. Mr Pyke argued that the trial Judge and the Court of Appeal had failed to grasp the significance of the *totality* of the complainant's conviction history. While each offence was individually minor, in totality they showed "a fundamental flaw in [the complainant's] character, that is to say that she is a dishonest person by habit". Mr Pyke argued that the Crown had effectively put the complainant's honesty in issue in the way it had framed the case and in the way Crown counsel closed to the jury.

Analysis

[11] The arguments advanced by the applicant relate to the application of settled principles to the particular facts of this case. As the authorities consistently emphasise, applying the test in s 37 to a witness's prior criminal record is very much a contextual exercise. In this case, the Court of Appeal carefully assessed the complainant's list of prior convictions and came to the view that, in context, they would not be substantially helpful to the jury in assessing the complainant's veracity.

[12] Even if it could be argued that the Court of Appeal did not properly grapple with the cumulative effect of the complainant's consistent but minor dishonesty offending, we are satisfied this did not occasion any risk of miscarriage. Had Mr Horton been permitted to put the complainant's criminal history in issue and chosen to give evidence himself (as he did at trial), he risked the prosecution in turn being permitted to put Mr Horton's own history of dishonesty offending to him.[10] This history includes multiple instances of receiving stolen property and breach of court orders (such as failure to answer bail and breach of release conditions), as well as one instance of unlawful taking of a vehicle and two of shoplifting. It is unlikely that adopting such course would have provided Mr Horton with any advantage.

[13] Finally, with respect to Mr Horton's reliance on the *Ieremia* decision, we do not agree that the 2012 conviction in that case for using a document for pecuniary

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[10] Evidence Act 2006, s 38(2).

advantage entered in respect of one of the complainants – a conviction that "troubled" the Court of Appeal in that case[11] – is of assistance in the present case.[12] That conviction involved the relevant complainant forging her sister's signature on four timesheets. The amount involved was in excess of $5,300. Whatever the breach of trust convictions involved in the present case, they were very small change by comparison.

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

Solicitors:
Crown Law Office, Wellington for Respondent

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11 *Ieremia*, above n 4, at [50].
12 This Court considered the 2012 conviction in *Ieremia v R* [2020] NZSC 143 at [83]–[84].