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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 6/2023
[2023] NZSC 34**

BETWEEN MADHUR SHARMA
Applicant

AND THE KING
Respondent

Court: Glazebrook and O'Regan JJ

Counsel: N P Chisnall KC and L A Elborough for Applicant
J E Mildenhall for Respondent

Judgment: 14 April 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Sharma applies for leave to appeal against a judgment of the Court of Appeal dismissing his appeal against conviction.¹

¹ *Sharma v R* [2022] NZCA 648 (Katz, Mander and Downs JJ) [CA judgment].

Background

[2] In the District Court, Mr Sharma was found guilty of one charge of sexual violation by unlawful sexual connection and acquitted on five other charges of sexual violation against a complainant (M).²

[3] The charges were based on the following acts, which allegedly occurred during the same sequence of events (while M was highly intoxicated and pretending to be asleep):³

- (a) Mr Sharma attempted to penetrate M's mouth with his genitalia (charge one);
- (b) after this, Mr Sharma removed M's clothing and then digitally penetrated her vagina (charge five, the charge on which Mr Sharma was found guilty) and then raped her (charge two); and
- (c) following this, he carried her to her bedroom and performed another act of oral sexual violation (charge three), rape (charge four) and a further act of digital penetration of her vagina (charge six).

[4] After the alleged offending, M underwent a medical examination which included vaginal swabs. Mr Sharma's DNA was later located on these swabs, though no trace of seminal fluids was found (the DNA evidence).

[5] Mr Sharma initially told police that there had been no sexual activity but in a second interview stated that there had been consensual sexual activity (he maintained this later account at trial).⁴ There was some variation in M's testimony regarding the order in which events occurred. She also did not state until trial that Mr Sharma had digitally penetrated her in the bedroom (charge six).⁵

² Mr Sharma was sentenced in the District Court: *R v Sharma* [2022] NZDC 5592 (Judge Earwaker)

³ CA judgment, above n 1, at [3]–[11].

⁴ At [11].

⁵ At [22].

Court of Appeal judgment

[6] On appeal, Mr Sharma argued that his conviction on charge five was unreasonable as it could not be reconciled with the not guilty findings on the other charges.⁶

[7] The Court of Appeal held that the jury's verdict was not unreasonable. The Court stated that:⁷

...apart from charge five, in respect of which there was corroborative DNA evidence, the jury likely considered there were frailties in Ms M's evidence which prevented them from being satisfied beyond reasonable doubt on the other charges.

[8] This "corroborative" evidence was lacking for the other charges, including the rape charges.⁸ Further, the Court found that the jury might have distinguished charge five from charge six (the other act of unlawful digital penetration) because charge six was a "late addition to Ms M's narrative raised for the first time at trial, and the forensic evidence could not assist as to whether that type of act had occurred more than once".⁹

Applicant's submissions

[9] The applicant argues that the Court of Appeal erred in dismissing the appeal against conviction and that there is a real risk of a miscarriage of justice. According to the applicant, the Court of Appeal failed to recognise that this was an "all or nothing" case, akin to the English case of *R v Dhillon* where it was held that if the jury was unsure of guilt on one charge then it could not be sure of guilt on others.¹⁰

[10] The applicant argues that the DNA evidence was not determinative because the expert could not distinguish between digital and penile penetration as explanations for how the DNA was deposited. The applicant argues that (given his admission that he committed the actus reus for charges one, three and five), consent or a reasonable

⁶ Criminal Procedure Act 2011, s 232(2)(a).

⁷ CA judgment, above n 1, at [24].

⁸ Though the Court of Appeal does not explicitly state this link, we note that the DNA evidence showed no evidence of seminal fluid.

⁹ At [24].

¹⁰ *R v Dhillon* [2010] EWCA Crim 1577, [2011] 2 Cr App R 10.

belief in consent were the only bases for distinguishing between the charges. As the DNA evidence was only relevant to the actus reus, it could not be rationally relevant to any distinction the jury drew between charge five and the other charges.

[11] In addition, the applicant argues that the proposed appeal raises a question of general or public importance, because it has general significance in relation to the “separate trials” direction given by the trial Judge.¹¹ Specifically, the applicant argues that the proposed appeal provides an opportunity to reconcile a tension which he argues exists between the need for a logical basis of differentiation between verdicts and the need to consider distinct charges separately.

Respondent’s submissions

[12] The respondent argues that the leave criteria are not met. The respondent submits that this is a factually specific decision which does not have general importance. Nor is there a risk of miscarriage of justice. In the respondent’s submission, the jury did not place too much emphasis on the DNA evidence. It cannot be assumed (just because Mr Sharma admitted to performing the actus reus of certain offences) that consent had to be the determinative issue in the jury’s reasoning. The respondent also argues that it was reasonable for the Court of Appeal to take the “separate trials” direction into consideration, and that it is settled that such directions are a relevant consideration (particularly in “she said, he said” cases). The respondent submits that that the differing verdicts can logically be reconciled on the basis that the jury rejected Mr Sharma’s evidence but were unsure the prosecution case was proved on all but charge five.

Our assessment

[13] The leave criteria are not met.¹² The issue is particular to the facts of this case. There is thus no matter of general and public importance. Nor is there a risk of a miscarriage of justice.

¹¹ As stated in the CA judgment, above n 1, at [21], the separate trials direction is the “orthodox” direction “on the need to consider each charge separately and to reach separate decisions in relation to each”.

¹² Senior Courts Act 2016, s 74(2).

[14] The applicant has not shown the verdicts to be logically irreconcilable. His reliance on his admissions ignores the fact that the jury did not have to accept his evidence, especially as his account had varied between his two police interviews. Nothing raised by the applicant throws doubt on the Court of Appeal’s analysis that the jury may have felt there was general factual ambiguity, such that only charge five (in the light of the DNA evidence) could be said to have occurred beyond a reasonable doubt.¹³ In this case, the DNA evidence provided a rational basis for the jury’s decision. *Dhillon* (in which no such evidence existed) can be distinguished. We do not see this as a suitable case to examine the “separate trials” direction (if indeed it needs reconsideration). This direction was mentioned by the Court of Appeal but was not the main reason for the decision.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

¹³ See [5] of this judgment.