NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS 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: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 93/2023
[2024] NZSC 19

BETWEEN	T (SC 93/2023) Applicant
AND	THE KING Respondent

Court:	Glazebrook and Ellen France JJ
Counsel:	Applicant in person Z R Hamill for Respondent
Judgment:	27 February 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] In August 2021, the applicant (T) was tried and found guilty on one charge of doing an indecent act on a young relative (N) and one of breaching a protection order by doing that act. He also pleaded guilty to three charges of breaching a protection

order in relation to the child's mother (whom we call NF). He was sentenced to concurrent sentences of eight months' home detention on these charges.[1]

[2] T appealed against the convictions relating to N on the ground there was fresh evidence tending to show that he suffers from sexsomnia, and so had a viable defence of sane or insane automatism. The Court of Appeal dismissed his conviction appeal.[2] The Court concluded that the evidence advanced was fresh but not cogent because it was not probative of sexsomnia as an explanation for the index charge. T has filed an application for leave to appeal to this Court against the decision of the Court of Appeal.

Background

[3] The conduct giving rise to the charge in relation to N took place in June 2019 during an overnight stay with T (the 2019 offending). N said that she woke to find that T had come into her bed and was touching her vagina. The offending occurred shortly before the morning alarm went off. The defence to the charge relating to N run at trial was that the complainant was mistaken and that her allegation may have arisen out of conflict between T and NF.

[4] To put the proposed appeal in context, it is necessary to say a little about the consideration given to sexsomnia as a potential defence both before trial and subsequently. The trigger for the investigation of sexsomnia as an explanation for the offending prior to trial was that T reported NF had told him that, in 2009, on two occasions he engaged in sexual activities with her while asleep. As part of the investigation, two reports were obtained from Dr Fernando, a consultant psychiatrist and sleep specialist.

[5] In preparing the first report, Dr Fernando had taken some family history which indicated T had no childhood history of sleep disorders. Dr Fernando spoke briefly with NF by phone about the 2009 activities she had referred to. She reported that T had "done things" to her in his sleep but did not want to continue the phone call.

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1 *New Zealand Police v [T]* [2021] NZDC 24463 (Judge S Moala).

2 *T (CA36/2022) v R* [2023] NZCA 299 (Miller, Woolford and Cull JJ) [CA judgment]. T also appealed unsuccessfully against sentence on the protection order charges relating to NF.

On having made these inquiries, Dr Fernando could not offer a confident diagnosis of sexsomnia in his report dated 20 May 2021.

[6] A second report was prepared dated 9 July 2021 taking account of further inquiries made by Dr Fernando—namely an overnight sleep study and a more comprehensive discussion with NF. During that discussion she described a particular incident of sexual activity in 2009 (the 2009 incident). NF was unsure if he was asleep when this occurred and said that T was having a bipolar episode at the time. She further described that when T was manic, he wanted sex all the time. While the overnight sleep study could not exclude sexsomnia, neither did it support that diagnosis. Dr Fernando's second report said that the likelihood of sexsomnia as an explanation for the offending in relation to N was "low".

[7] After trial, in the context of subsequent Family Court litigation, T repeated in an affidavit that NF had told him of an instance of sexsomnia during their relationship. NF responded in her affidavit saying "[i]t is correct that [T] touched me while he was asleep."

[8] This exchange led to a third report being obtained from Dr Fernando. In his report dated 2 September 2022, he said NF's affidavit was "crucial" to a diagnosis of sexsomnia. On the basis of that affidavit and other supporting material such as family members with parasomnia, Dr Fernando said that the possibility of T having sexsomnia "should be strongly considered" as an explanation for the offences. A further affidavit was filed from NF in which she denied telling T that the 2009 incident was an episode of sexsomnia. She further described that while initially thinking T had been asleep on this occasion, she came to believe he had been awake because of the nature of his actions, and because he appeared able to control his behaviour.

[9] It was against this background that the fresh evidence application was made in the Court of Appeal.

The Court of Appeal decision

[10] The Court of Appeal heard evidence from Dr Fernando on behalf of T and from Dr Dean, a consultant forensic psychiatrist, on behalf of the respondent.[3] Dr Dean prepared a report in advance of the hearing of the appeal in which he reviewed Dr Fernando's reports and interviewed NF. Dr Dean did not interview T. NF reiterated her account of the 2009 incident. Dr Dean's conclusion was that the likelihood of sexsomnia as an explanation for the 2019 offending was "almost completely absent". Dr Dean emphasised various factors including the lack of history of parasomnias, that T was not initially sleeping in the same bed as N (movements of bed partners being common triggers for sexsomnia) and NF's claim that Ts had been suffering from a manic episode during the 2009 incident.

[11] In concluding that the evidence relied on by T was not probative of sexsomnia as an explanation for the 2019 offending, the Court of Appeal found five points supporting that conclusion. The respondent's submissions helpfully summarise those reasons in this way:

> Firstly, there was "very little collateral information to support a diagnosis of sexsomnia".[4] One of several factors informing this first point was that there was "some collateral information pointing to an alternative mental health explanation for the 2009 incident".[5] The four other reasons the Court gave were: the differences between the 2009 behaviour and the circumstances described by [N] (thereby unsupportive of any pattern of parasomnia behaviours); the fact [T] moved to the complainant's bed (meaning there was no apparent trigger for an episode of sexsomnia, such as the movement of a bed partner); the fact the incident happened just before the alarm went off in the morning (rather than the early phase of [T's] sleep, which is the usual time during which sexsomnia occurs); and finally, Dr Fernando's inability to diagnose sexsomnia (for these very reasons)—and his acceptance that such a diagnosis would not necessarily explain the index offending.[6]

The proposed appeal

[12] T's main argument in support of his proposed appeal is that Dr Dean fabricated evidence of the statement that bipolar mania was the reason for his inappropriate conduct in relation to the 2009 incident. He says that he was in fact depressed and

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3 The Court also had a further affidavit from NF.
4 CA judgment, above n 2, at [37].
5 At [37](c).
6 At [37]–[41].

appends various medical reports to support this. His argument is that the medical notes stand in contrast to Dr Dean's evidence. He also says that Dr Dean's report removed his evidence of sleep disturbances of parasomnia sexsomnia that occurred during the period surrounding the 2009 incident.

[13] T's proposed appeal does not raise any question of general or public importance, but rather would challenge the Court of Appeal's factual assessment.[7] Further, nothing raised by T gives rise to the appearance of a miscarriage of justice in the Court's assessment of the facts.[8]

[14] In terms of T's allegation that material was fabricated, Dr Fernando also took account of NF's description of the 2009 incident including her reference to manic behaviour. Nor do the medical reports appended to T's submissions raise questions about this part of the expert evidence. Accordingly, as the respondent submits, the evidence about the effects of the diagnosis of bipolar disorder appears to have been uncontroversial between the parties. More generally, the Court of Appeal was entitled to take into account Dr Dean's criticism that Dr Fernando had altered his view based on a single statement by NF that provided no detail and which, in Dr Dean's view, did not significantly change the evidence for a successful automatism defence.

Result

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

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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7 Senior Courts Act 2016, s 74(2)(a). This proposed appeal accordingly stands in contrast to that of *Cook v R* [2024] NZSC 12, where this Court recently granted leave to appeal on the question of whether the defence of sexsomnia in that case gave rise to sane or insane automatism.

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