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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 148/2023
[2024] NZSC 24**

BETWEEN	SAI KUMAR SACHU Applicant
AND	THE KING Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	D B Stevens for Applicant H G Clark for Respondent
Judgment:	25 March 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr Sachu, was convicted after trial on one charge of indecent assault in relation to a female acquaintance. He appealed unsuccessfully to the Court of Appeal against conviction.¹ He has filed an application for leave to appeal to this Court on the basis of trial counsel incompetence, in particular, there was a failure to cross-examine Crown witnesses on several material inconsistencies relating to what

¹ *Sachu v R* [2023] NZCA 610 (Mallon, Fitzgerald and Churchman JJ) [CA judgment].

he says were central matters in dispute. Accordingly, it is submitted a miscarriage of justice may occur if the appeal is not heard.²

Background

[2] The incident giving rise to the offending took place on 27 August 2021. The complainant and Mr Sachu were drinking and socialising at a small gathering with their respective partners. The gathering commenced earlier in the day and proceeded throughout the evening. The Crown case was that both Mr Sachu and his partner were behaving inappropriately towards the complainant.³ The trial Judge summarised the events in this way:⁴

[4] The indecent assault occurred in the evening when the jury have found that Mr Sachu firmly touched the victim's vagina over her clothing while she was sitting on the couch with her friend. It was clear as the Crown have submitted through the course of the trial, that this formed a part of a pattern of disrespect that had been shown towards the victim throughout the evening. The Crown accept and I accept that the assault was not sexually motivated per se but was with the aim of ridiculing and belittling [the complainant].

[3] The defence at trial was that the complainant and her partner had made up the alleged offending. This was either as a retaliation for an incident occurring involving the applicant and the complainant's partner, or an attempt by the complainant to assist her partner in a Tenancy Tribunal dispute between him and the applicant. At trial, the applicant denied both the allegation of indecent touching and that there was any other inappropriate behaviour. He gave evidence at trial.

The proposed appeal

[4] The applicant emphasises the jury's assessment of credibility was central to their determination and that, as the Judge indicated in summing up, consistency of evidence was important in assessing credibility. The applicant says that in this context, trial counsel's failure to cross-examine the Crown witnesses on several inconsistencies meant the jury could not properly assess the credibility of those witnesses in the way the Judge had directed.

² Senior Courts Act 2016, s 74(2)(b).

³ The applicant's partner was acquitted of a charge of indecent assault.

⁴ *R v Sachu* [2023] NZDC 9850 (Judge K Lummis).

[5] The inconsistencies relied on are said to relate to a number of topics. Some of the inconsistencies concern the complainant's formal statement in comparison to her evidence at trial. Others relate to inconsistencies he says arise as between witnesses. As advanced by the applicant, the main inconsistencies relate to the following topics:

- (a) How the complainant's body was positioned at the time of the assault (this related to whether her legs were "spread a bit" and her right leg was over her partner, or whether her left leg was over her partner so that she was "straddled" over him);
- (b) Whether the applicant jumped on the complainant before the assault (at trial she said she had been touched by the applicant after moving inside to the couch, whereas in her formal statement she had described being jumped on while she was cuddling her partner on the couch);
- (c) When the complainant left the house after the incident and when she returned to her home in another city;
- (d) Inconsistency in the complainant's and other witnesses' statements about whether another person altogether was present on the night of the incident;
- (e) When it was that the complainant said a call from the applicant apologising to her was made; and
- (f) As to aspects of what happened in the lounge.

[6] The applicant wishes to argue that competent trial counsel would have pursued these matters; that the Court of Appeal was wrong to find that the failure to cross-examine was not an error; and there was therefore a real risk that the outcome was affected.

Our assessment

[7] The proposed appeal would reprise the arguments made in the Court of Appeal. In addressing these matters, the Court of Appeal said that it would have been a “legitimate approach” to have cross-examined the complainant on the differences between her account as recorded in her formal statement and in her evidence at trial, and those between her account and that of her partner.⁵ The Court accepted that these inconsistencies were matters the jury could legitimately have taken into account in assessing credibility.

[8] However, the Court was of the view that the inconsistencies relied on were “not as stark as suggested”.⁶ The Court did not accept that lack of cross-examination was an error. Rather, it “likely reflected trial counsel’s tactical decisions” as to the matters necessary to focus on “particularly when the defence case was that none of the offending occurred” as against the risks of further cross-examination.⁷

[9] For example, the Court considered the position of the complainant’s leg at the time of the alleged indecent assault did not affect matters, in that the applicant would have been able to touch the complainant’s genital area in the manner claimed on either version of events. The Court also said that other areas of inconsistency relied on were “peripheral matters.”⁸ The complainant was extensively cross-examined on the defence theory that she was making things up either in retaliation or as an attempt to assist her partner in his dispute. She was also cross-examined about the date of her departure.

[10] There is no challenge to the principles applied by the Court of Appeal. The Court referred to this Court’s decision on the approach to be taken in this context in *R v Sungsuwan*⁹ and also to *R v Scurrah*.¹⁰ The proposed appeal would thus turn on the application of those principles to the specific facts. Accordingly, no question of general or public importance arises.¹¹ Nor does anything raised by the applicant give

⁵ CA judgment, above n 1, at [34].

⁶ At [35].

⁷ At [35].

⁸ At [36].

⁹ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730, at [110].

¹⁰ *R v Scurrah* CA159/06, 12 September 2006, at [17]-[18].

¹¹ Senior Courts Act, s 74(2)(a).

rise to any question about the correctness of the Court of Appeal’s assessment of the approach adopted by trial counsel and, in particular, on the impact of the absence of cross-examination on the matters relied on. There is no appearance of a miscarriage of justice.¹²

Result

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

Solicitors:

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

¹² Senior Courts Act, s 74(2)(b).