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: COURT OF APPEAL ORDER IN [2018] NZCA 153 PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE PROPENSITY OFFENDING VICTIM PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 118/2023
[2024] NZSC 54

BETWEEN	JESSIE ARTHUR HEKE-GRAY Applicant
AND	THE KING Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: N P Chisnall KC and L A Elborough for Applicant
Z R Johnston and W P So for Respondent

Judgment: 9 May 2024

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of several sexual offences against the complainant.[1] While the Court of Appeal allowed the applicant's appeal against

[1] The applicant was charged with other violent offences that are not the subject of this appeal.

sentence, it dismissed his appeal against conviction.[2] The applicant now applies for leave to appeal against his convictions to this Court.

Background

[2] In September/October 2016, the complainant arranged on social media to come to Whangārei to live with the applicant. This was on the explicit basis she would have sex with him in exchange for protection against her former partner. In sexualised Facebook communications, she agreed to anal sex (if he used lubricant) and "ruff vicious forced sex" (provided the applicant did not hurt her).[3]

[3] After collecting the complainant from the bus stop, the applicant told the complainant to drive him to a beach. His actions there led to three charges of sexual violation by unlawful sexual connection and one charge of assault with intent to injure (the beach incident).[4] At trial, the applicant disputed the level of violence involved and argued that the complainant consented and/or he believed she had done so.

[4] The other sexual offences arose from two incidents within a two-week period. On the same evening as the beach incident, further alleged acts by the applicant while they were staying at a hotel resulted in two charges of sexual violation by unlawful sexual connection (the hotel incident).[5] Almost two weeks later, alleged actions by the applicant at a farm resulted in a charge of sexual violation by rape (the farm incident).[6] At trial, the applicant's defence was that the hotel and farm incidents had not occurred.

[5] The jury convicted the applicant on all charges. The applicant appealed to the Court of Appeal against his convictions and sentence.

[6] In the Court of Appeal, the applicant applied to adduce further evidence. The proposed report from Dr Brandon Birath addressed how the applicant's Foetal Alcohol

---

2 *Heke-Gray v R* [2023] NZCA 474 (Gilbert, Thomas and Woolford JJ) [CA judgment].
3 At [10].
4 At [11].
5 At [12].
6 At [15].

Spectrum Disorder (FASD) may have impacted his belief in consent.[7] Dr Birath noted the applicant may have become "stuck" on the original transactional nature of the agreement and struggled to understand the complainant had changed her mind without explicit and straightforward communication.[8]

Court of Appeal decision

[7] The Court of Appeal found that while the evidence was credible, it was not fresh.[9] It then concluded that the evidence was not cogent in that it could not have affected the jury's outcome.[10] The hotel and farm incidents did not involve issues of belief in consent, as the applicant's argument was that these incidents did not happen. Further, what happened at the beach had gone so far beyond what the complainant and applicant had previously discussed that there was no room to suggest that the applicant's subjective belief in consent could be made reasonable due to "the rigidity in his thinking and inability 'to read the social nuance of the situation'".[11] As the evidence was not cogent, there was no risk that justice miscarried.

[8] While the appeal against conviction failed, that against sentence succeeded. The original sentence of preventive detention was replaced with a determinate sentence of 15 years and one month's imprisonment.

Grounds of proposed appeal

[9] The applicant argues that the proposed appeal raises an issue of general or public importance and that there is a risk of a substantial miscarriage of justice.[12]

[10] First, the applicant submits that the Court of Appeal required the further evidence to have potentially impacted the verdicts on *all the charges*. That would be an error, as the Court's role was to assess whether there was a real possibility that *a*

---

7 At [37]–[39].
8 At [39].
9 At [41].
10 At [62]. However, the evidence was found to be cogent with regards to the appeal against sentence: at [106]–[108].
11 At [61].
12 Senior Courts Act 2016, s 74(2)(a)–(b).

more favourable verdict on *a* charge would have been reached if the further evidence had been before the jury.

[11] Secondly, the applicant contends that the Court of Appeal merged the tests for admission of evidence on appeal and whether a miscarriage of justice had arisen.

[12] Finally, the applicant argues the Court of Appeal erred in concluding that there was not a reasonable possibility that more favourable verdicts could have been reached (particularly on the beach incident charges) if the further evidence had been before the jury. The argument is that the applicant's FASD may mean his subjective belief that the complainant was consenting was reasonable. As to this, we note that it is possible, albeit rare, that a defendant's personal characteristics could be relevant to the reasonableness of an asserted erroneous belief in consent.[13] There would need to be a credible narrative or expert opinion that the particular characteristic was relevant to the asserted belief in consent.[14]

Leave to appeal out of time

[13] The application for leave to appeal is out of time. The delay was only of a few days and was due to difficulties in locating the applicant. An extension of time to apply for leave to appeal is granted.[15]

Our assessment

[14] As to ground one, we do not accept that the Court of Appeal required the evidence to have impacted the verdicts on all the charges. The Court of Appeal clearly dealt with the incidents separately and considered the relevance of the evidence for each charge. Although the Court had found the evidence could not have assisted the jury in relation to the hotel and farm incidents, it went on to assess whether the evidence could have assisted the jury with respect to the charges arising from the beach incident.[16]

---

13 *Nixon v R* [2016] NZCA 589, (2016) 28 CRNZ 698 at [30]; and see also *R v Can* [2007] NZCA 291 at [49(b)].
14 *Nixon v R*, above n 13, at [30].
15 Supreme Court Rules 2004, r 11(4).
16 CA judgment, above n 2, at [44] and [51].

[15] Next, as to the second ground, once the Court concluded the evidence could not have affected the jury's outcome, no risk of a miscarriage of justice could arise from it not being before the jury.

[16] Finally, as to the third ground of the proposed appeal, the extent to which a defendant's subjective mental state is relevant to the mens rea element of sexual violation offences may raise an issue of general or public importance.[17] However, the applicant's proposed appeal is not an appropriate case to explore this issue. It is a case that turns very much on its own facts and has insufficient prospects of success. The evidence cannot assist on the hotel or farm incidents. While the Crown had to prove both the physical acts in issue and lack of consent, the applicant's defence at trial was that neither incident occurred. The jury found they did, and the Crown had disproved consent. The further evidence is not relevant to whether the physical acts occurred, is not fresh and would involve the applicant seeking to change the basis of the defence run at trial. No apparent risk of miscarriage arises in relation to the three incidents.[18] As the Court of Appeal found, the applicant's conduct at the beach greatly exceeded what had been agreed between the applicant and complainant. The evidence taken in total does not establish a case in any of the three incidents where the complainant changed her mind and the applicant was unable to perceive the changing dynamics of the relationship.

Result

[17] The application for an extension of time to apply for leave to appeal is granted.

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

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

---

17 Senior Courts Act, s 74(2)(a). See *Nixon v R* [2017] NZSC 56 at [4].
18 Senior Courts Act, s 74(2)(b).