

**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>**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 37/2025
[2025] NZSC 82**

BETWEEN BRENDAN KENT DAY
Applicant

AND THE KING
Respondent

Court: Ellen France, Williams and Miller JJ

Counsel: N P Chisnall KC for Applicant
D Lye for Respondent

Judgment: 15 July 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Day seeks leave to appeal his conviction for rape.

[2] He contends that a miscarriage of justice occurred because the jury were not given a reliability warning under s 122(1) of the Evidence Act 2006 with respect to the complainant's intoxication.

[3] He also contends that the Court of Appeal erred in finding that it was not in the interests of justice to admit on appeal the expert evidence of Associate Professor

David Menkes relating to the effects of intoxication on memory.¹ This latter ground of appeal we take to be a contention that a miscarriage may have resulted at trial because evidence of that kind was admissible there and might have made a difference, but was not called.

[4] With respect to the reliability direction, the Court of Appeal followed its previous decisions which have held that a s 122 warning “is not necessary where the issue of reliability is squarely before the jury” as in this case.² The Court considered the jury would not have been materially assisted in its assessment of the evidence by such a warning when reliability was clearly at issue. The trial Judge had taken the jury “carefully through the issues”.³ The Court also considered a s 122 warning in this case risked being interpreted by the jury as an indication as to how they ought to decide the case.⁴

[5] With respect to Associate Professor Menkes’ evidence, the proposition appears to be that it was possible the complainant was aware and capable of consent but unable by reason of gross intoxication to recall having done so, and expert evidence might have assisted the jury to understand the phenomenon of memory blackouts. The Court of Appeal rejected this contention, following *Chetty v R*, which stands for the proposition that the effects of alcohol intoxication on memory are generally within a juror’s experience.⁵ It concluded that the evidence was not admissible because it would not assist the jury, and it added that the evidence was not consistent with the defence case at trial.⁶

[6] At trial the complainant said that she passed out and awoke to find Mr Day having intercourse with her; she tried to push him off but he continued for several minutes. On her account, then, he persisted after she was awake and telling him to stop. The Crown contended that she was incapable of consent and he must have, or ought to have, known that. Mr Day’s primary case was that her evidence was untruthful; other evidence showed she was not so intoxicated as to be incapable of

¹ *Day v R* [2025] NZCA 76 (Katz, Grice and Powell JJ) [CA judgment].

² At [14]–[15].

³ At [15].

⁴ At [16].

⁵ At [40]–[41]. See *Chetty v R* [2017] NZCA 586 at [40].

⁶ CA judgment, above n 1, at [40]–[44]. See also at [45].

consent, and she was in fact a conscious and active participant throughout. But counsel also argued that she was unreliable by reason of her intoxication and admitted lack of memory. The trial Judge treated that as a question of fact for the jury.

[7] The proposed grounds of appeal raise no question of general or public importance, nor is there any reason to think that a substantial miscarriage of justice may result if leave is declined.⁷ The proposition that the jury needed direction or expert evidence on the effects of alcohol intoxication does not have sufficient prospects of success to warrant leave on these facts.⁸

[8] For these reasons, the application for leave to appeal is dismissed.

Solicitors:

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

⁷ Senior Courts Act 2016, s 74(2)(a)–(b).

⁸ See s 74(1).