



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

TRISTAN LEE TAMATI v THE KING

(SC 48/2024) [2025] NZSC 70

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsfnz.govt.nz.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

What this judgment is about

This judgment concerns whether alleged deficiencies in trial counsel’s closing address gave rise to a miscarriage of justice. This ordinarily requires an appellant to show that their counsel acted unreasonably, assessed in the overall context of the trial, and that it is reasonably possible this deprived them of a more favourable verdict. The judgment also addresses whether, in the particular circumstances of this case, the Judge ought to have given a reliability warning—that is, a judicial direction to the jury regarding evidence that may be unreliable—in relation to the evidence of two intoxicated witnesses.

Background

The appellant, Mr Tamati, was found guilty of five charges of sexual offending against the 15-year-old complainant: two charges of sexual violation by rape, two charges of sexual

violation by unlawful sexual connection and one charge of doing an indecent act on a young person. He was also convicted of one representative charge of supplying methamphetamine to her.

The complainant and two of her friends, of about the same age, were picked up by Mr Tamati and a Mr H. The complainant and Mr Tamati knew each other through her family. The party travelled to Mr H's house, where they consumed cannabis, alcohol and methamphetamine. Mr Tamati, a tattoo artist, tattooed the complainant. The sexual violation charges arose from two incidents said to have occurred during the night—the first in the back of a car (the car incident), and the second on a couch in a bedroom (the bedroom incident). Mr H and Ms F were in the room at the time of the bedroom incident, engaged in sexual activity.

Several months later, the complainant was overheard on the telephone by her grandmother arranging to go to a Family Planning clinic. When her grandmother asked whether she had been sexually assaulted, the complainant said it had been “the guy that did [her] tattoos”. A week later, two of the complainant's relatives were involved in a violent attack on Mr Tamati, apparently in an act of retribution.

Mr Tamati was interviewed by police a year later. He denied having sex, or trying to have sex, with the complainant. He described lying on the couch with the complainant and another girl, while Mr H and Ms F had sex on a nearby bed. But he said he and the complainant were “just hanging out”; he said he was not attracted to her because she was “too young”.

At trial, the Crown called Mr H and Ms F as witnesses. Mr H gave evidence that he had not seen Mr Tamati having sex with the complainant but that he had seen them “cuddling up” earlier in the night and looking “cosy” on the couch. Ms F gave a confused account, diverging in some respects from her statement to police. While she initially told police she had not been aware of what happened at the time and was only told by the complainant later, she said during cross-examination that she had in fact walked in on Mr Tamati and the complainant and had observed the rape taking place. When challenged, she reverted to her original account, saying she did not remember “that actual ... rape scenario happening”.

In his closing address, Mr Tamati's defence counsel did not mention this evidence or the bedroom incident more generally. Instead, counsel chose to advance a defence of fabrication—that is, that the complainant had falsely accused Mr Tamati—by reference to, among other things, the sequence of events following the party. This included the fact that both the complainant and Mr H had contracted chlamydia, a sexually transmitted infection. The defence case was that, first, any sexual contact that night had been with Mr H and, secondly, the complainant had only named Mr Tamati as her rapist in an attempt to justify her relatives' actions after they mistakenly inferred he was the culprit.

The jury returned verdicts of guilty on all six charges. The Court of Appeal subsequently dismissed Mr Tamati's appeals against conviction and sentence.

Issues

Mr Tamati was granted leave to appeal to this Court against conviction. The questions before the Court were:

- (a) whether errors by trial counsel may have occasioned a miscarriage of justice; and
- (b) whether in the circumstances a reliability warning was required.

Submissions

On the first issue, counsel for Mr Tamati submitted that trial counsel's closing address should have dealt with the bedroom incident and, in particular, the evidence given by Mr H and Ms F. Instead, trial counsel failed to exploit Mr H's non-observation of what was alleged, or the several different accounts given by Ms F. The discrepancies between this evidence and that of the complainant were directly relevant to the central issue of whether the complainant was lying. Moreover, trial counsel failed to advocate for Mr Tamati's credibility by pointing out consistencies between the account he gave in his police interview and the evidence of other witnesses.

On the second issue, counsel for Mr Tamati submitted that the evidence given by the complainant and Ms F had several concerning features, including their heavy intoxication, memory gaps and inconsistencies with other evidence. The Judge should have brought these issues to the jury's attention by giving a reliability warning.

Supreme Court decision

The Supreme Court has unanimously dismissed Mr Tamati's appeal.

Trial counsel error

The Court began by noting that the primary burden on an appellant alleging trial counsel error is to show that their counsel acted unreasonably, assessed in the overall context of the trial, and that it is reasonably possible this deprived them of a more favourable verdict, thereby producing a miscarriage of justice. The Court noted that, under *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730, an appeal will not generally be allowed if trial counsel has made a tactical decision that was reasonable in the context of the trial, even if the outcome of the trial may have been affected. Moreover, where deficiency in closing address is alleged, appeal courts will not usually intervene unless the closing address is so deficient that the essential defence is not adequately put to the jury (at [34]–[39]).

Turning to the present appeal, the Court considered it was a reasonably available defence strategy to concentrate on fabrication and, in particular, the attack on Mr Tamati by the complainant's relatives. The effect of Mr Tamati's evidential interview, in which he had denied any attraction to or sexual activity with the complainant, was to remove the ability of the defence to argue consent or reasonable belief in consent. Realistically this only left false complaint. The events involving the complainant's relatives provided essential reinforcement

for that defence, as did the fact that the complainant and Mr H contracted chlamydia at a similar time (at [40]–[41]).

The Court agreed with counsel for Mr Tamati that defence counsel’s failure to address the bedroom incident in closing was a misjudgement; the inconsistencies in the evidence of the bedroom incident offered a potentially valuable means to attack the complainant’s credibility and reinforce the fabrication defence (at [42]).

The Court could not, however, conclude that this misjudgement had the likely effect of causing a miscarriage of justice in the result, giving five reasons (at [43]–[48]).

First, the net effect of the evidence was hardly a convincing evidential basis for saying the complainant was lying: Mr H’s failure to see Mr Tamati violate the complainant was explicable, and Ms F’s variable evidence was patently unreliable. Secondly, emphasising Mr H’s evidence was a double-edged sword: his evidence was that, while he had not seen Mr Tamati having sex with the complainant, he had seen them cuddling and looking “cosy”. This was hard to square with Mr Tamati’s claims that he was not interested in the complainant.

Thirdly, defence counsel’s omission was substantially repaired by the trial Judge, who in his summing-up offered a broader perspective of the available defence than defence counsel had expressed in closing. Fourthly, it had not been suggested that the verdicts were otherwise perverse; it was clearly open to the jury in light of the other evidence to accept the essential evidence of the complainant as credible and reliable and to deliver guilty verdicts accordingly. Finally, while defence counsel was at times laboured in his delivery and digressed into irrelevant material, these matters did not ultimately detract from the strength of the defence offered.

Reliability warning

The Court did not consider an intoxication-related reliability warning was required, giving four reasons which largely turned on the particular facts and circumstances of the case (at [52]–[56]).

First, a jury may be assumed to understand how intoxication affects memory; this was not therefore a case where jurors might lack insight into the implications of the particular condition. Secondly, intoxication and its effects on memory were firmly before the jury; the complainant and Ms F had both accepted in evidence that they had consumed alcohol and drugs and could not remember aspects of the night in question. Thirdly, such a direction could have undermined the defence case that the events as charged did not occur, because Mr Tamati—who denied any form of sexual activity with the complainant in his interview played to the jury—was himself intoxicated. Finally, the Judge had given a form of reliability warning in relation to the critical evidence of the complainant.

Result

The appeal is dismissed.

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