IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA SC48/2024

BETWEEN	TRISTAN LEE TAMATI
	Appellant
AND	THE KING
	Respondent

Submissions for the appellant

30 October 2024

Counsel certifies that, to the best of his knowledge, these submissions do not contain suppressed information and are suitable for publication.

Counsel (assigned by Legal Aid)
James Carruthers
Mills Lane Chambers
PO Box 537, Shortland Street
Auckland 1140
james.carruthers@millslane.co.nz

Introduction

1. Mr Tamati was tried for two episodes of sexual offending against a teenage girl, alleged to have occurred several hours apart at a drug and alcohol-fuelled party.[1] The complainant said Mr Tamati raped her in the boot of a car at night and then on a sofa in a bedroom the following morning ("the bedroom incident"). Somewhat unusually, there were two eyewitnesses to the bedroom incident – the host and one of the complainant's friends – who the complainant said were literally within touching distance when it occurred. Indeed, the complainant said her friend looked her in the eye and held her hand as Mr Tamati raped her.[2]

2. The Crown called both as witnesses. They recalled seeing Mr Tamati and the complainant looking "cosy" on the sofa,[3] which was broadly consistent with what Mr Tamati had told the police when interviewed 15 months after the events.[4] But when pressed on whether anything else had occurred, the host said he did not see Mr Tamati and the complainant having intercourse,[5] while the complainant's friend said – initially – "that isn't when it occurred".[6] She then altered her account under cross-examination, largely adopting what the complainant had said.[7]

3. Despite the defence being fabrication and the central issue at trial being the complainant's credibility, Mr Tamati's counsel did not mention – let alone try to exploit – any of the above evidence when closing. In fact, he did not address the bedroom incident or the charge stemming from it at all. The jury found Mr Tamati guilty of all charges and, in keeping with a warning he had received some 20 years earlier, he was transferred to the High Court for sentencing. Simon France J then imposed preventive detention.[8]

4. Mr Tamati appealed his convictions on two grounds. The first was trial counsel's failure to exploit the above weakness in the Crown's case when

---

1 Charge List, CA Casebook p 42.

2 Complainant's EVI, CA Casebook pp 140-141; NoE p 26.

3 NoE pp 45, 61.

4 Mr Tamati's police interview, CA Casebook p 67.

5 NoE p 64.

6 NoE pp 44-45. She said later in cross-examination that she did not see a rape: NoE p 52.

7 NoE pp 46-48.

8 *R v Tamati* [2021] NZHC 2885, CA Casebook p 358.

closing. The second was the lack of a reliability warning, which, it was argued, was warranted on account of the discrepancies in the evidence given by the Crown's witnesses, the severely detrimental effect that alcohol and drugs had had on their perception and recollection of events, and the changing nature of the evidence given by the complainant's friend.

5. The Court of Appeal did not accept these arguments.[9] While it acknowledged that trial counsel's closing address could have been better, it thought the weakness in the Crown's case less significant than suggested and noted other aspects of the defence case had adequately been put.[10] As for the reliability warning, the Court held that the standard directions about credibility and reliability sufficed in the circumstances.[11] The short duration of the trial and the clear exposition of issues in evidence played a part in the Court's assessment of both grounds, too.[12]

6. Mr Tamati sought leave to appeal to this Court on essentially the same grounds, albeit he sought to fold into the first several troubling admissions trial counsel made under cross-examination at the appeal hearing. Broadly speaking, trial counsel said he had not given much thought to Mr Tamati's lengthy and exculpatory police interview, which was played at trial, nor had he considered how consistencies between the account Mr Tamati gave in that interview and the rest of the evidence could be used to advance the defence.[13]

7. This Court granted leave on both grounds.[14]

Summary of argument

8. First, in advocating for Mr Tamati – who faced preventive detention if convicted – trial counsel failed to address the rape charge stemming from the bedroom incident or the evidence on which the Crown relied to prove it. He also made no mention of a significant weakness in the Crown's case on that charge which went directly to the key issue at trial, nor did he

---

9 *Tamati v R* [2024] NZCA 113 ("CA judgment"), SC Casebook p 8.

10 CA judgment at [31]-[41], SC Casebook pp 23-26.

11 CA judgment at [47]-[50], SC Casebook p 28.

12 CA judgment at [35], [41], [44]-[46], SC Casebook pp 24, 26-27.

13 SC Casebook pp 56-57.

14 *Tamati v R* [2024] NZSC 91, SC Casebook p 7.

attempt to demonstrate how the exculpatory account Mr Tamati had given the police drew support from the rest of the evidence. Indeed, he skipped over that account almost entirely – seemingly because, by his own admission, he had not given it much thought. Whether viewed through a fair trial lens or a real risk lens, these errors occasioned a miscarriage of justice.

9. Second, the evidence given by the complainant and her friend had a number of concerning features. They were heavily intoxicated on a cocktail of cannabis, methamphetamine, and vodka, their memories suffered significantly as a result, and their evidence was inconsistent in material respects with each other's and with the host's. The complainant's friend also changed her evidence under oath. This combination of features gave rise to reliability issues which needed to be brought to the jury's attention. The Judge's omission in this respect compounded trial counsel's failure to address these same features when closing.

General background

10. The primary charges arose out of two incidents that occurred during a weekend that Mr Tamati and his friend, D, spent with the complainant and two of her friends, H and C, late in December 2017.[15] They knew one of the complainant's friends[16] and, unbeknown to him at the time, Mr Tamati also knew the complainant through her parents.[17] They picked up the complainant and her friends in D's car and took them out to his flat. There they consumed cannabis, methamphetamine, and alcohol, and Mr Tamati gave some tattoos.[18]

11. The complainant said that, after tattooing her, Mr Tamati pulled her close and tried to kiss her.[19] She pulled away, making it clear she was not interested.[20] Her next memory was of being with Mr Tamati in the boot of a

---

15 The complainant and D said H left during the party: Complainant's EVI, CA Casebook p 133; NoE p 63.

16 Mr Tamati's police interview, CA Casebook pp 54, 56; Complainant's EVI, CA Casebook p 103; NoE p 39.

17 Mr Tamati's police interview, CA Casebook pp 58, 71, 84-85.

18 Complainant's EVI, CA Casebook pp 104-105, 110-112; Mr Tamati's police interview, CA Casebook pp 54, 59-63; NoE pp 13-16, 40-41, 45-46, 60.

19 Complainant's EVI, CA Casebook pp 105, 112, 116, 120.

20 Complainant's EVI, CA Casebook pp 105, 120.

car, which she said was parked out the back of the property.[21] She had no idea how she had ended up there,[22] but purported to describe in detail how Mr Tamati sexually violated her in various ways.[23]

12. The complainant said that the following morning she woke up on a sofa in D's bedroom.[24] Mr Tamati was on the sofa with her, while D and C were on the bed right next to them. The complainant said Mr Tamati pulled her underwear to one side and had intercourse with her again.[25] She said she did not consent to that but, owing to what had occurred the night before, offered no resistance.[26] She said in her EVI that she and C locked eyes and held hands as that was happening,[27] and added in cross-examination at trial that D was having intercourse with C on the bed at the time.[28]

13. Around midday, Mr Tamati and D drove the complainant and C home, stopping to buy food and drinks on the way.[29] Mr Tamati and the complainant saw a bit of each other over the next few days, heading to the beach and to another person's house where Mr Tamati was to give a tattoo.[30] Methamphetamine circulated there and they left when one of the occupants presented a firearm.[31] The complainant said Mr Tamati tried at some point to make another advance on her while they were in a car together but stopped when she resisted.[32]

14. The offending came to light when the complainant's grandmother overheard her, in March 2018, calling Family Planning.[33] She asked the complainant what was going on, and specifically whether she had been

---

21 Complainant's EVI, CA Casebook p 133; NoE p 9.

22 Complainant's EVI, CA Casebook pp 105, 121.

23 Complainant's EVI, CA Casebook pp 122, 124-128.

24 Complainant's EVI, CA Casebook p 138.

25 Complainant's EVI, CA Casebook p 140.

26 Complainant's EVI, CA Casebook p 140.

27 Complainant's EVI, CA Casebook pp 140-141; NoE p 26.

28 NoE p 27.

29 Complainant's EVI, CA Casebook pp 139, 142-143.

30 Complainant's EVI, CA Casebook pp 151-153; Mr Tamati's police interview, CA Casebook pp 55, 66-68, 72. The others went with them to the beach.

31 Complainant's EVI, CA Casebook pp 153-156; Mr Tamati's police interview, CA Casebook pp 72-76.

32 Complainant's EVI, CA Casebook p 162.

33 Complainant's EVI, CA Casebook pp 145-147; NoE pp 20-21.

sexually assaulted.[34] The complainant was reluctant to speak up, and her grandmother evidently took her silence as confirmation.[35] The following day, the grandmother emailed the police and told them the complainant had been sexually assaulted by the man who had given her the tattoo.[36] It seems the complainant originally told her grandmother that D had given her the tattoo, as her grandmother wrote in that email "not the guy [D] that she had previously said had done the tattoos."[37]

15. A few days later, the complainant's and were arrested.[38] About a week after that, the complainant told the police that Mr Tamati had raped her.[39] She then completed an EVI in which she detailed much of the above.[40] The police spoke to Mr Tamati some 11 months later, or 15 months after the party.[41] He admitted spending that weekend with the complainant and tattooing her and her friends but denied engaging in any sexual activity with her.

16. Mr Tamati's defence at trial was that he did not have any sexual contact with the complainant. Trial counsel argued that, once her on the mistaken understanding that he had raped her, the complainant found herself locked into a lie.[42] If anyone had sexual contact with the complainant that weekend, it was D, which is why they were both diagnosed with chlamydia some months later.[43] That also explained the email the complainant's grandmother had sent the police.[44]

---

34 Complainant's EVI, CA Casebook p 146; NoE p 21.

35 Complainant's EVI, CA Casebook p 146; NoE p 30.

36 NoE p 23.

37 NoE pp 23, 81.

38 NoE pp 18-19, 82.

39 NoE pp 33-34, 81.

40 CA Casebook p 98.

41 CA Casebook p 51.

42 NoE pp 31-32; Defence closing, CA Casebook p 234.

43 NoE pp 25-26; Defence closing, CA Casebook pp 231-232.

44 NoE pp 23-25; Defence closing, CA Casebook pp 232-233. The argument appeared to be that the complainant had initially – and correctly – told her grandmother that D had sexually assaulted her, but that her grandmother had mistakenly come to understand it was Mr Tamati.

Trial counsel error

Background

Trial evidence

17. In respect of the bedroom incident, the complainant said Mr Tamati raped her in the presence of C and D. Indeed, she said C looked her in the eyes and held her hand while it was happening, and later added that C was having intercourse with D on the bed at the time. This account diverged from those given by D and C.

18. Like the complainant, D said he was on the bed with C while the complainant and Mr Tamati were on the sofa.[45] When asked by the prosecutor whether he saw anything happen on the sofa, he said "no" and added that he "was too busy fooling around with [C]".[46] He then confirmed under cross-examination that he did not see Mr Tamati having intercourse with the complainant.[47] The most he said was that they seemed "cosy".[48] Given their proximity – the complainant and C were literally within touching distance – it is difficult to imagine D simply not noticing Mr Tamati have intercourse with the complainant.

19. As for C, she said nothing in her evidence in chief about Mr Tamati having intercourse with the complainant in D's bedroom. Like D, the most she said was that Mr Tamati was kissing and hugging the complainant,[49] and when pressed by the prosecutor she said, "well, that isn't when it occurred. It occurred when she left with him."[50] At the end of her examination in chief, therefore, there was no suggestion from C that she had seen Mr Tamati and the complainant having intercourse. Indeed, she was emphatic that nothing of note happened then.

20. Under cross-examination, though, and in something of an about-turn, C said the complainant and Mr Tamati did have intercourse in D's bedroom that morning.[51] She said she was not there when it started, claiming to have

---

45 NoE p 61.

46 NoE p 61.

47 NoE p 64.

48 NoE p 61.

49 NoE p 45. According to C, everyone was on the bed.

50 NoE pp 44-45.

51 NoE p 46.

walked in on them.[52] When trial counsel pointed out the differences between her evidence and the complainant's, C admitted that she had been having intercourse with D at the time, but seemed to deny that she had held the complainant's hand and looked her in the eye.[53] She accepted that she did not tell the police any of that, and said by way of an explanation that "it was a long time ago."[54]

21. The effect of all this was that the complainant's evidence about the bedroom incident drew little support from either D's evidence or the evidence initially given by C. In fact, D's evidence and that initially given by C aligned more with what Mr Tamati told the police when interviewed some 15 months after the party. After acknowledging that he had spent the previous day partying with D, the complainant, and her friends,[55] he told the police that the following morning he was:[56]

> ... just crashing on the couch. I remember laying there, there was I think me, H and [the complainant], while they were in bed going hard out. [D] and [C] I think. ... Because it was like, we're laying on the couch and they're having sex right there.

22. It is worth observing at this point that other aspects of what Mr Tamati told the police married with the wider evidence the Crown adduced. He was open, for example, about spending time with the complainant and her friends in the days after the party, noting they headed to the beach for a swim.[57] He also said the complainant accompanied him to another address where he was scheduled to give a tattoo,[58] and that they left when one of the occupants presented a firearm.[59]

Closing addresses and summing up

23. When closing, the prosecutor made a muted attempt to reconcile the evidence given by the Crown's witnesses about the bedroom incident. Rather than confront the inconsistencies head-on, he traversed the

---

52 NoE p 46.

53 NoE pp 46-48.

54 NoE p 48.

55 Mr Tamati's police interview, CA Casebook pp 54, 59-63.

56 Mr Tamati's police interview, CA Casebook p 67.

57 Mr Tamati's police interview, CA Casebook pp 55, 66-68.

58 Mr Tamati's police interview, CA Casebook pp 72-76.

59 Mr Tamati's police interview, CA Casebook pp 72-76.

complainant's account in depth[60] and suggested the account C eventually gave under cross-examination – arguably her third – should be accepted.[61] He then said, by way of submission, that if D and C were having intercourse at the time, it would make sense that Mr Tamati and the complainant were, too.[62] He said nothing, however, about D's evidence on that point. As for Mr Tamati's police interview, he attacked aspects as self-serving and incredible, and said others supported the complainant's evidence.[63]

24. Rather surprisingly, trial counsel did not address, let alone attempt to counter, any of these points. He made no mention of the rape charge stemming from the bedroom incident or the evidence on which it was founded, and of Mr Tamati's police interview all he said was:[64]

> In approaching your task you must remember the burden of proof's on the Crown, we know that. You can disregard Mr Tamati's statement, you've still got to find him guilty on the Crown's evidence. I'm not saying you should disregard. When you look at that statement that was a pretty forthright – it was distressing for him but it was a forthright: "No way, this is lies she made up," but the burden of proof's on the Crown. ...

25. Instead, after speaking at length about the history of jury trials and the privileged position he was in,[65] and advising the jury he had little respect for people like Mr Tamati[66] and had been in the game too long to care whether he was found guilty or not guilty,[67] trial counsel focused on such issues as how the complainant's allegations had come about,[68] the coincidence that

---

60 Crown closing, CA Casebook pp 214-217.

61 Crown closing, CA Casebook p 217.

62 Crown closing, CA Casebook p 221.

63 Crown closing, CA Casebook pp 220-222.

64 Defence closing, CA Casebook p 234.

65 Defence closing, CA Casebook pp 224-226, 235.

66 Defence closing, CA Casebook p 229. Trial counsel said: "It's a society where first adult men and young ladies, young girls to be blunt, continuously are awash in alcohol and not just a beer but all these vodka things and mixed up things. It's hard core stuff and this is continuous, isn't it? You might think the only pause is when they're engaged in sexual activity or going to sleep. It's a world where these sane grown men, and I don't have any respect for Mr Tamati on this score, these same men willingly pass around drugs and share drugs. Cannabis is simply a social device. Meth, if you can get it. And that seems to be going on for as long as people could do it, doesn't it? It was drugs, sex and probably rock and roll." This was rather awkward because it lumped Mr Tamati in with men who have engage in sexual activity with young girls, whereas his defence was that he did not engage in any such activity.

67 Defence closing, CA Casebook p 225.

68 Defence closing, CA Casebook pp 227, 231-234.

both she and D had contracted chlamydia,[69] and where D's car was parked on the night in question.[70]

26. As a result, the prosecutor's rather muted attempt to reconcile the Crown's evidence about the bedroom incident went unopposed. It was left to the Judge to remind the jury when summing up of the discrepancies in that evidence and to encourage them to take those into account when deliberating:[71]

> [37] Now the defence say you should reject the complainant's account of events as unreliable and made up. The defence say there are major dents in her credibility and reliability. Firstly the implausibility that she would not know how she came to be in the car and how she came to be back in the house later. Secondly, the implausibility that she would have sexual intercourse with him on the couch while her friend [C] and [D] were alongside in the bed. Thirdly the fact that [D] did not see any such incident and that [C's] account was confusing and contradictory. And fourthly, the implausibility that she would continue to associate with him afterwards, as she did, if he had raped her.

27. Like trial counsel, though, the Judge said nothing of the consistencies between what Mr Tamati told the police about the bedroom incident and the evidence given by D and that initially given by C, nor did he comment on the broader consistencies between what Mr Tamati told the police about the days in question and the evidence adduced by the Crown. He did, however, remind the jury of the points the prosecutor had made about Mr Tamati's police interview.[72]

The evidence in the Court of Appeal

28. Mr Tamati swore an affidavit for the purposes of his appeal. He deposed that trial counsel took responsibility for the closing address and that he played no part in drafting it.[73] He observed that, on reflection, there were several points trial counsel could have made but did not:[74]

---

69 Defence closing, CA Casebook pp 231-232.

70 Defence closing, CA Casebook pp 226, 231.

71 CA Casebook p 246.

72 Summing up at [34], [41], and [77], CA Casebook pp 246-247 and 254. See also: Summing up at [42], CA Casebook p 247.

73 Affidavit of Mr Tamati para 2, SC Casebook p 48.

74 SC Casebook p 48.

4. My lawyer has pointed out to me that Doug made a number of good points in cross-examination that he didn't mention in closing. These include:

    a. [The complainant's and C's] patchy memories of what happened;

    b. The different versions C gave about whether she saw me and [the complainant] having sex in the bedroom; and

    c. The fact that [D] didn't see me and [the complainant] having sex in the bedroom even though we were supposed to be right there next to him and C.

5. There's also the fact that what [D] said about what happened in the bedroom, and what C initially said about that, matched what I told the police, not what [the complainant] said in evidence. Other aspects of what I told the police were consistent with the evidence too.

29. In response, after acknowleding that the key issue at trial was the complainant's credibility,[75] trial counsel explained his approach as follows:[76]

    7. [Following cross-examination] it was now open for the defense to put to the jury the proposition that the victim only named Tamati as her abuser to the Police to confirm the moral motivation for the attack on Tamati by and especially that her support of was a powerful motivation for her to lie to the Police and to the court. This accusation was squarely put to the victim at trial.

    8. My closing to the jury and indeed the conduct of the trial was based upon establishing and convincing the jury of the narrative which would banish the Crown elephant in the room, which is "why would the girl make up such a serious accusation?"

    9. As to matters of detail surrounding the "party" not being stressed at closing I took the veiw that the evidence was still fresh in the juror's minds and that a repetition of the minutiae of matters not central to the defense narrative would distract the jury from the only sensible defence available...

30. Trial counsel maintained that line under cross-examination at the appeal hearing. While he acknowledged that the discrepancy between the complainant's account of the second episode and the accounts given by D and C was a feather in the cap for the defence, he did not consider it central to the key issue at trial – namely the complainant's credibility – or to furthering the narrative he was trying to advance.[77]

---

75 Affidavit of Mr Taffs paras 3 and 5, SC Casebook p 50.

76 SC Casebook pp 50-51.

77 SC Casebook pp 54-56.

31. As to Mr Tamati's police interview, when asked whether it had occurred to him that the evidence given by D and C about the bedroom incident arguably aligned with what Mr Tamati had told the police, trial counsel said he "didn't really think much about what Mr Tamati had said quite frankly."[78] The exchange continued as follows:[79]

> Q. It didn't occur to you perhaps to try and point out consistencies between what [he'd] said and what other Crown witnesses had said?
>
> A. Not particularly, no.
>
> Q. Wouldn't that have been a good way [of] perhaps suggesting he might have been telling the truth, whereas the complainant might not have been?
>
> A. Possibly. I'm not here to say I'm infallible at all.

32. There are other indicators which suggest trial counsel paid that interview scant attention. For example, Mr Tamati told the police that, while he, the complainant, and another were sitting on the sofa in D's bedroom, D and C had intercourse on the bed right in front of them. The complainant made no mention in her EVI or examination-in-chief of D and C having intercourse then. When she finally mentioned it under cross-examination, trial counsel – seemingly unaware of what Mr Tamati had told the police – accused her of making it up on the spot.[80]

Legal principles

33. Although it is generally accepted that trial counsel have a degree of discretion when it comes to the style and content of their closing addresses, the Court of Appeal has on several occasions set out some basic minimum requirements. As the Court held in *E v R*,[81] for example (citing a previous decision in *Jeakings v R*[82]):

> [27] As outlined by this court in *Jeakings v R*, there are a number of factors that trial counsel must cover to provide an adequate closing address. In *Jeakings*, the Court noted that counsel must always tailor their address to the jury to the circumstances of the case and the evidential issues which arise in it. Therefore, trial counsel in closing is required to highlight the weaknesses

---

78 SC Casebook pp 56-57.

79 SC Casebook p 57.

80 NoE p 29.

81 *E(CA113/09) v R (No 2)* [2010] NZCA 280.

82 *Jeakings v R* CA231/98, 30 November 1998.

> and inadequacies of the Crown case and/or to indicate the factors in the defence case which should have precluded the jury from being satisfied of essential ingredients to the requisite standard.

34. The Court of Appeal elaborated on these expectations several years later in *Kaka v R*.[83] After acknowledging the degree of discretion afforded to trial counsel,[84] but observing that an inadequate closing address can, depending on the degree of inadequacy, render a trial unfair,[85] the Court offered the following guidance:

> [33] The closing address is the last opportunity defence counsel has to advocate to the jury on behalf of his or her client. All stages of the trial, from opening statements through to cross-examination and presentation of evidence, if any, culminate in the closing address. This point is emphasised by the authors of *Mauet's Fundamentals of Trial Techniques* in the following way:
>
> > Closing arguments are the chronological and psychological culmination of a jury trial. They are [the lawyer's] last opportunity to communicate directly with the jury. For that reason, it is imperative that the arguments logically and forcefully present [the defendant's] position on the contested issues and the reasons [the lawyer's client is] entitled to prevail.
>
> [34] Competent closing addresses will typically contain several components. These are carefully traversed in trial advocacy textbooks such as *Introduction to Advocacy*. The topics traversed in trial advocacy textbooks need not of course be contained in every closing address. Closing addresses need to be tailored to meet the unique requirements of each case.
>
> [35] In the present case, because of the nature of the defence Mr Kaka was running at trial, the closing address presented on behalf of Mr Kaka should have included, as a bare minimum, the following components:
>
> (a) an introduction;
>
> (b) an explanation of Mr Kaka's case;
>
> (c) a response to the Crown's case;
>
> (d) a clear explanation of why Mr Kaka was not guilty of either charge; and
>
> (e) a conclusion.

35. Some recent and relevant examples of where the Court of Appeal has found a closing address to have been inadequate include: *Sales v R*,[86] where trial counsel failed to address one of the two charges of sexual violation; *Karaka*

---

83 *Kaka v R* [2015] NZCA 532.

84 *Kaka* at [32].

85 *Kaka* at [25]-[32].

86 *Sales v R* [2022] NZCA 373.

v R,[87] where, among other errors, trial counsel failed to mention the defendant's exculpatory police interview and made only passing reference to one of the two charges; and *Waters v R*,[88] where trial counsel failed to mention a key weakness in the Crown's case which he had carefully exposed during trial. Of the failure in *Waters* and trial counsel's explanation that he thought the evidence spoke for itself, the Court of Appeal observed:

> [11] … This is not a sound reason for not highlighting what should have been perhaps the central plank of his closing.
>
> [12] The proposition could and should have been forcefully put that the evidence showed not just that D was mistaken on this count but that he was lying. This would then have been reinforced by a focus (also lacking in the closing) on the picture incident, and the possibility that again D was lying in relation to that. We cannot of course say what the jury would have made of this, but there is no doubt it was counsel's duty to make these fundamental challenges to D's credibility.
>
> [13] The case is far from a mere failure to put a general credibility challenge as well as it could have been. Rather, it is a situation where there is an opportunity to advance the case that there was literally no opportunity for the particular incident to have happened. If the jury accepted that, in the circumstances of this case the inevitable corollary would be that the complainant had made up the allegation. It is a fundamental breach of counsel's obligations not to have pursued this.

36. Returning to *Kaka*, and in particular the Court of Appeal's observation that the closing address is the culmination of each stage of the trial, arguably it is the culmination of each stage of the trial *plus* careful preparation going into it. It goes without saying that trial counsel have an obligation to prepare adequately for trial. As a basic component of that, trial counsel should familiarise themselves with the disclosure, identify any key documents, work out how they might be used to strengthen or weaken the respective cases, and ensure they are in a position to utilise them at trial if the opportunity arises.

37. Failure to take such fundamental preparatory steps may occasion a miscarriage of justice. As this Court wrote in *Sungsuwan v R*:[89]

---

87 *Karaka v R* [2023] NZCA 283.

88 *Waters v R* [2020] NZCA 93.

89 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730. See also *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [3]: "A key aspect to a fair trial is the right to be represented by competent counsel who should meet the relevant standards and comply with the various statutory, regulatory and common law obligations imposed on trial counsel."

> [64] ... Miscarriages of justice may arise from many causes. The conduct of defence counsel in handling the trial is but one possible cause. Conduct giving rise to criticism can occur in many different contexts. There may be acts or omissions in the course of preparation, there may be failure to follow direct instructions from the client, there may be incompetence through inexperience, there may be inadequate or wrong advice to the accused. Often the consequence may be that evidence was or was not ... put before the jury. There may be reasons for that, there may be good reasons, there may not be. They may accord with instructions. They may be baseed on confidential information in the possession of counsel.
>
> [65] Where error or irregularity is alleged and attributed to counsel, but that would not have affected the outcome – was not material – there will be no need to analyse and judge the conduct of counsel. On the other hand, where the complaint is that counsel's conduct was such as effectively to deny the accused representation to fairly present the defence, prejudice to the outcome will be readily found – and in extreme cases may need no inquiry.

38. To give an extreme example of inadequate preparation, in *Boodram v The State (Trinidad and Tobago)*,[90] trial counsel was unaware until late in the trial that he was appearing at a re-trial. When he became aware, he made no effort to secure the transcript from the first trial, let alone use it to further the defence. The Privy Council allowed the appeal and quashed the convictions. In doing so, it held:

> 40. In the present case Mr Sawh's multiple failures, and in particular his extraordinary failure when he became aware ... that he was engaged on a retrial to enquire into what happened at the first trial, reveal either gross incompetence or a cynical dereliction of the most elementary professional duties. Their Lordships do not overlook that the appellant has twice been found guilty by the unanimous verdicts of juries after they had enjoyed the advantage of seeing and hearing her give evidence. Nevertheless it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process. Even without embarking on any investigation of the impact of the breaches, the conclusion must be that in this exceptional case the defendant did not have a fair trial. For this reason also the conviction must be quashed.

39. There are other, less extreme, examples where inadequate preparation by trial counsel has occasioned a miscarriage of justice. Some involved failures to properly evaluate the Crown's evidence,[91] others failures to investigate and brief potential defence witnesses.[92] There would, however, seem to be few cases where the failure was as fundamental as that which occurred here,

---

90 *Boodram v The State (Trinidad and Tobago)* [2002] 1 CR App R 103.

91 *Aitchison v* R [2016] NZCA 529.

namely a failure to closely review a defendant's exculpatory police interview in circumstances where it would be played at trial and the defendant would not give evidence.

Discussion

40. Having exposed weaknesses in the Crown's evidence about the bedroom incident in cross-examination,[93] trial counsel should have exploited them when closing. He could, for example, have highlighted how little support the complainant's evidence about that incident drew from the evidence given by D and that initially given by C, and contrasted that with the support Mr Tamati's account drew from that same evidence. He could also have pointed out that the prosecutor had conveniently skirted around the evidence given by D and asked the jury instead to rely on the evidence eventually given by C, a witness whose memory was severely impaired by alcohol and drugs and who had changed her account under oath.

41. Trial counsel made none of these points. Indeed, he did not even address the charge arising from the bedroom incident or the evidence on which it turned, nor did he make any attempt to identify consistencies between Mr Tamati's account and the evidence the Crown had adduced. These were serious errors. The discretion trial counsel enjoy when closing does not extend to failing to mention a serious charge altogether, failing to address the evidence on which the Crown relies to prove that charge, failing to exploit deficiencies in that evidence which go to the heart of the issues at trial, and failing to advocate for their client's credibility and reliability. This is especially so when the stakes are as high as they were for Mr Tamati.

42. A comparison can be drawn with *Waters*.[94] As in that case, trial counsel here did not simply pass up an opportunity to chip away at the complainant's credibility, or to traverse "the minutiae of matters not central to the defence" (as trial counsel here put it in his affidavit in the Court of Appeal). He passed up an opportunity to highlight a weakness in the Crown's case which went to the heart of one of the charges and to the defence more

---

92 *R v K(CA421/08)* [2009] NZCA 176.

93 NoE pp 26-27, 46-48, 64.

94 There are also similarities with *Sales* (failing to address a charge) and *Karaka* (failing to address a charge and the defendant's police interview).

generally, and to argue that Mr Tamati's account of the events giving rise to that charge actually drew more support from the evidence than did the complainant's. In other words, he passed up an opportunity to attack the Crown's case and to further Mr Tamati's.

43. Compounding these errors is the fact that trial counsel's failure to advocate for Mr Tamati's credibility and reliability appears to have stemmed from a failure to familiarise himself with Mr Tamati's lengthy, detailed, and exculpatory police interview. An interview of that sort will invariably feature among the key documents for trial, especially if the defendant is unlikely to give evidence. Indeed, in such circumstances, the interview will often represent the version of events which the defendant will be asking the jury to accept and which it is trial counsel's fundamental duty to advance.[95] It is inconceivable that trial counsel could run a trial for serious criminal offending without having "[thought] much about", let alone mastered, its contents.

44. That, however, is what happened here. Trial counsel conducted the trial, over which the spectre of preventive detention loomed, without having "[thought] much about" Mr Tamati's police interview, and without having considered how it could be used to further his defence. That might explain why he put to the complainant propositions that were inconsistent with what Mr Tamati had said in his interview, and why all he said of the interview when closing was:[96]

> ... You can disregard Mr Tamati's statement, you've still got to find him guilty on the Crown's evidence. I'm not saying you should disregard. When you look at that statement that was a pretty forthright – it was distressing for him but it was a forthright: "No way, this is lies she made up," but the burden of proof's on the Crown. ...

45. Despite it featuring in the evidence taken at the appeal hearing, the Court of Appeal did not address the import of trial counsel's admission regarding Mr Tamati's police interview. It did, however, address the other complaints made about his closing address. While the Court accepted that trial counsel

---

95 *Hall* at [65].

96 Defence closing, CA Casebook p 234.

could have done more, it considered his approach reasonable in the circumstances. As set out below, its reasoning was erroneous.

46. First, the Court held that "emphasising discrepancies in the evidence of other Crown witnesses would not have assisted materially on the critical issue of whether the complainant was lying."[97] The point, however, was not the discrepancies between the evidence given by D and C but the discrepancies between their evidence and the complainant's. Such discrepancies were directly relevant to "whether the complainant was lying." It is not often there are eyewitnesses to an alleged rape (let alone within touching distance), and it must be directly relevant to whether the rape occurred that they seemed not to notice it.[98]

47. Second, the Court downplayed the extent of the discrepancies, noting that, like the complainant, both D and C placed Mr Tamati on the sofa with her and said they were "cosy", "hugging", and "kissing".[99] But that is little more than what Mr Tamati admitted to when he spoke to the police. As the Court noted, he told the police that he and the complainant were lying on the sofa together.[100] More importantly, though, although D and C noticed Mr Tamati and the complainant being "cosy", "hugging", and "kissing" on the sofa, neither of them (putting aside C's eventual evidence) noticed Mr Tamati raping her there. That is the key discrepancy.

48. Third, the Court said that highlighting the discrepancies might inadvertently reinforce the Crown case[101] and – presumably – harm Mr Tamati's defence. But Mr Tamati's defence was that he had been lying on the sofa with the complainant while D and C had intercourse on the bed next to them. If anything, therefore, his defence drew support from the evidence given by D and that initially given by C. The only evidence which favoured the Crown was the version C eventually settled on after changing course under oath. It is difficult to see how highlighting all that would have benefited the Crown at Mr Tamati's expense.

---

97 CA judgment at [32], SC Casebook p 23.

98 At least on C's initial evidence, which was emphatic: "That isn't when it occurred".

99 CA judgment at [33], SC Casebook p 23.

100 CA judgment at [33], SC Casebook p 23. Mr Tamati also said he thought H might have been there, too.

101 CA judgment at [33], SC Casebook p 23.

49. The Court also referred to reminders the Judge gave the jury when summing up.[102] It is acknowledged that the Judge mentioned in passing the fact that the evidence given by the complainant, D, and C about the bedroom incident did not always align. But he did not do so as thoroughly or persuasively as trial counsel could – and should – have, nor did he try to draw any positive comparisons between Mr Tamati's police interview and the wider evidence. That is hardly surprising given he was not advocating for Mr Tamati. His remarks should not therefore be treated as compensating for trial counsel's omission.[103]

50. For the above reasons, whether viewed through the "real risk" lens or the "unfair trial" lens, a miscarriage of justice has occurred.

Reliability warning

Background

Trial evidence

51. The complainant accepted in evidence that her lifestyle at the relevant time involved "near continuous alcohol and drug abuse"[104] and that she was "wasted"[105] on the night of the offending. Indeed, C said she had "never seen [the complainant] like fucked up as she was that day."[106] The complainant came to be in that state because, like C and the others, she had consumed cannabis, methamphetamine, and alcohol over the course of the day.[107] The result, as detailed below, was significant gaps in her memory of what occurred during the party at D's house and indeed the following day.

52. The complainant could not, for example, recall what occurred between Mr Tamati pulling her close on the sofa and violating her in the back of the car. She had no idea how she ended up in the car,[108] nor did she have any idea how or when she made her way back inside and into a bed with C.[109] Although she recalled waking up on the sofa with Mr Tamati and being

---

102 CA judgment at [39], SC Casebook p 24.

103 As they sometimes can be: *Kaka* at [30].

104 NoE pp 22-23.

105 NoE p 23.

106 NoE p 42.

107 Complainant's EVI, CA Casebook pp 104, 111-113; NoE pp 13-14, 34, 41.

108 Complainant's EVI, CA Casebook pp 105, 121.

109 Complainant's EVI, CA Casebook pp 132-133.

raped by him there, she recalled little else of that day, other than drinking more alcohol and vomiting in the car on the way home.[110] Her memory of the ensuing days was rather clouded, too.[111]

53. As well as suffering from the effects of her intoxication, and perhaps because of it, the complainant's evidence was starkly inconsistent in some respects with the evidence given by D and C. Some of those inconsistencies have been addressed above. A further one which trial counsel attempted to exploit at trial was the complainant's claim that the car in which Mr Tamati had raped her was parked at the back of the property. When D gave evidence, though, he said in response to a question from the Judge that his car was – as it always is – parked on the street.[112] The only cars he had out back were hollowed out frames and chassis.[113]

54. The complainant's evidence was also rather incomplete, at least initially. As noted above, she said nothing in her EVI or evidence in chief about D and C having intercourse on the bed while she and Mr Tamati were on the sofa. That was something Mr Tamati had been frank about in his police interview and D had adverted to in his examination in chief. The complainant, by contrast, made no mention of it until cross-examination.

55. The same is true of C. It was not until cross-examination that she admitted to having intercourse with D while the complainant and Mr Tamati were nearby. Moreover, that was the third account of the bedroom incident that she had offered in a matter of minutes. Her evidence quickly went from having seen nothing occur between Mr Tamati and the complainant,[114] to having walked in on them having intercourse, to having seen them having intercourse while she was having intercourse with D on the bed next to them.

56. C's sudden (apparent) clarity as to what had occurred no doubt came as a surprise to trial counsel. Not only had she not mentioned intercourse

---

110 Complainant's EVI, CA Casebook pp 139, 141-142.

111 Complainant's EVI, CA Casebook pp 149-150.

112 NoE p 65.

113 NoE pp 66-67.

114 Aside from cuddling and kissing: NoE p 44.

between anyone in her formal statement, she had – as trial counsel reminded her – told the police when making that statement that:[115]

> It's all a bit of a blur. I just remember bits and pieces. I can't really tell you much more than I already have.

Closing addresses and summing up

57. When closing, the prosecutor presented the case as one about credibility rather than reliability, arguing that the gaps in the complainant's memory, and by extension her profound intoxication, were largely irrelevant. As he put it, for example:[116]

> Now of course … the defence case is completely at odds with that summary of the Crown case that I've just given to you. His case is that she's made this all up. That it's a fabrication. That it's a figment of her imagination. There's no possibility in this case that they're both telling you the truth, I suggest to you. Their accounts are so different that it can only be one of them that's told you the truth. The stark contrast between those two accounts is really important in this case. I suggest to you because of that this is a case about truth, not about recollection or memory. Is it a fabrication or not? You might think that no matter what faults you might have in your memory from the consumption of drugs or alcohol, these sorts of sexual acts that you describe are not the sort of thing that come from gaps in your memory.
>
> …
>
> So … I've already said the real issue is can you be sure [the complainant] told you the truth on essential ingredients of those charges? … Does [her evidence] sound like someone doing their best to recollect the real event, warts and all, or does it sound like someone making up a lie, telling you a fabrication, a figment of their imagination? … [D]oes it have the sort of detail you might expect from a true account where someone's doing their best to recollect despite being intoxicated at the time?

58. As for the discrepancies in the evidence the Crown's witnesses had given about the bedroom incident, the prosecutor largely bypassed them. He instead emphasised the complainant's credibility and argued that the evidence C ultimately settled on under cross-examination was reliable.[117] Contrary to the approach he took to the inconvenient evidence D had given about where his car was parked,[118] the prosecutor expressed no concerns

---

115 NoE p 52.

116 CA Casebook pp 207, 210.

117 Crown closing, CA Casebook p 217.

118 Crown closing, CA Casebook p 213. The prosecutor downplayed that evidence on account of D's drinking and drug-taking and the fact he said it for the first time at trial.

about the fact that C had been heavily affected by drugs and alcohol and had given this evidence for the first time several years after the event.

59. Trial counsel said almost nothing about the issues canvassed above, mentioning only the differing evidence about where D's car was parked.[119] He did not address the complainant's and C's intoxication and substantial memory loss, the discrepancies between the complainant's evidence about the bedroom incident and that given by D and C, or the fact that C had changed her evidence about that incident under oath.

60. It seems the Judge tried to compensate for this to some degree when summing up. When summarising the defence case, for example, he said:[120]

> [37] Now the defence say you should reject the complainant's account of events as unreliable and made up. The defence say there are major dents in her credibility and reliability. Firstly the implausibility that she would not know how she came to be in the car and how she came to be back in the house later. Secondly, the implausibility that she would have sexual intercourse with him on the couch while her friend [C] and [D] were alongside in the bed. Thirdly the fact that [D] did not see any such incident and that [C's] account was confusing and contradictory. And fourthly, the implausibility that she would continue to associate with him afterwards, as she did, if he had raped her.

61. The Judge then addressed what he considered to be the competing arguments about the complainant's evidence, and offered some guidance as to how to resolve them:[121]

> [43] Now I want to deal with a number of aspects of the evidence of the complainant... You will all appreciate that your assessment of her credibility and reliability is vital in this case. For you to convict the defendant on any of the charges he faces you must be satisfied beyond reasonable doubt of the essential ingredients of the particular charge through her evidence. in other words you have to be satisfied of the essential truthfulness of her account beyond reasonable doubt.
>
> [44] As a jury you are perfectly entitled to rely on her evidence alone but you may think as a matter of prudence and caution that you should look at all of the other evidence in the case and see if there is evidence that tends to support or refute her account of events. So although you may rely purely on her evidence, prudence and caution would suggest that you look for supporting evidence. As I have to you in the written material the Crown says in essence there is supporting evidence, the opportunity he had to commit the offences, his concession when interviewed that he had tattooed

---

119 Defence closing, CA Casebook p 231.

120 CA Casebook p 246.

121 CA Casebook pp 247-248.

> her, that methamphetamine was used, that he slept in the car and on the couch and thirdly what the complainant said to her friends...
>
> [45] The defendant on the other hand says that there is refuting evidence. The implausibility of aspects of her account including not knowing how she came to be in the car, not knowing how she came to be back in the house and the implausibility of the sexual incident on the couch in the way she described. Her reason to implicate the defendant as the rapist to back up
> The evidence in particular from [D] about the car usually being parked out the front of the house and not in the driveway as described by the complainant.

62. As for C's evidence, the Judge referred to its "confusing and contradictory" nature when first summarising the defence case but otherwise said nothing about its potential flaws. He also said little about the complainant's and C's intoxication insofar as it was relevant to the clarity of their perception and reliability of their memory. He covered it from the Crown's perspective, though, citing it as a reason the complainant could not have consented to any sexual activity[122] and as a reason to forgive any inconsistencies in her evidence.[123]

Legal principles

Reliabilty warnings and intoxication

63. The Court of Appeal has, on numerous occasions, considered whether reliability warnings were required in circumstances where the complainant was deeply intoxicated.

64. A convenient starting point is *Bruce v R*,[124] where the alleged offending was sexual and the defence one of consent. The complainant, the appellant, and an eyewitness were all intoxicated, having consumed alcohol and cannabis. Their accounts married to an extent, but also diverged in important respects, with the complainant's at times being the odd one out.[125] By her estimate, she was a 9/10 on an intoxication scale and thought she could remember about 60 per cent of the relevant period.[126] The prosecutor closed on the basis that her pockets of memory were reliable.[127] When summing up the Judge reminded the jury of the complainant's "patchy

---

122 Summing up at [23], CA Casebook p 243.

123 Summing up at [36], CA Casebook p 246.

124 *Bruce v* R [2015] NZCA 332, (2015) 28 CRNZ 150.

125 *Bruce* at [11]-[12].

126 *Bruce* at [10] and [13].

memory" and advised it to "carefully assess whether to accept her evidence".[128] In allowing the appeal on the basis that the warning given was inadequate, the Court of Appeal observed (in part):

> [24] First, it was common ground that a reliability warning was required in this case. Ms T's own evidence was of "about 60 per cent" memory after smoking marijuana. And intoxication at a level of 9 out of 10. There were, unsurprisingly, inconsistencies within her own evidence, and as between it and the evidence of Messrs Bruce and C... There was also the agreed fact ... directed to perception rather than recollection. Plainly what is not perceived or which is imperfectly perceived cannot correctly be recalled. The important thing here was that both memory inputs and outputs were affected by intoxication of this kind. In our view the ... direction failed to draw adequate attention to the agreed perception (or input) issue. This was important because the prosecutor had put great emphasis on the supposed "clear patches" in Ms T's recollection.
>
> ...
>
> [26] Thirdly, in this case the direction needed to be fuller. In our view it needed to address ... the potential adverse effects of marijuana on perception of memory input reflected in the agreed facts. It needed to draw attention to at least the key inconsistencies concerning certainty as to undressing and penetration. It needed to counsel care in adopting the prosecutor's assertion, not founded on evidence, that Ms T's "clear patches" of memory were in all the circumstances lucid and reliable ...
>
> [27] Fourthly, we distinguish the decision of this Court in *Pakau v* R... As the Court noted [there], [the complainant] had little recollection of the evening at all. All she could remember was being grabbed from behind, blacking out and waking up in the grounds of a church. There was no suggestion in that case that reliable "clear patches" were available to implicate the appellant.

65. Since *Bruce*, the Court of Appeal has generally been unreceptive to appeals brought on the basis that a reliability warning was required due to the complainant's significant intoxication.[129] Reasons it has given for disagreeing include that: counsel squarely addressed the point in cross-examination and closing;[130] the Judge reminded the jury in general terms of the relevance of alcohol and drug consumption to memory and reliability;[131] the complainant's evidence was generally consistent with that given by other

---

127 *Bruce* at [17].

128 *Bruce* at [19]-[20].

129 See: CA judgment; *Toa v* R [2024] NZCA 295; *A v* R [2023] NZCA 533; *Taylor v* R [2022] NZCA 345; *Waitokia v* R [2018] NZCA 198; *B v* R [2018] NZCA 137; *Daradkeh v* R [2016] NZCA 172.

130 CA judgment at [44]-[46], SC Casebook p 27 (albeit trial counsel said nothing in closing); *Waitokia* at [15]; *B* at [31] and [35]; *Taylor* at [30]; *Toa* at [36].

131 *Waitokia* at [15]; *B* at [31] and [35]; *Daradkeh* at [42]; *Taylor* at [30] and [32]; *A* at [35]; *Toa* at [25] and [36].

witnesses;[132] any inconsistencies were peripheral;[133] the primary issue was fabrication rather than recollection;[134] and giving a warning might have unfairly undermined the complainant's evidence.[135]

66. Some of these reasons are difficult to reconcile with the "basic propositions" a majority of this Court reiterated recently in *R(SC78/2018) v R*.[136] Although the context in *R(SC78/2018)* was historic alleged offending, those basic propositions would appear to be of more general application. Indeed, they arguably represent a suitable framework for considering whether a warning needs to be given in a case such as the present. The effects of time and gross intoxication on memory are not altogether dissimilar: gaps and inconsistencies are likely to abound, and with them comes the prospect of inaccurate reconstruction. As the majority observed in *R(SC78/2018)*:[137]

> The first [category of delay-related risk] is the risk that (usually, but not always) complainant memory may have become degraded or distorted. Indicators include for example, in or out of court statements containing material inconsistencies, statements inconsistent in some material way with known wider factual context, and/or inability to recall material detail…

67. Unlike time, though, intoxication can, by clouding perception, also impact memory at its inception. As the Court of Appeal remarked in *Bruce*, "plainly what is not perceived or which is imperfectly perceived cannot correctly be recalled."[138]

The credibility / reliability distinction

68. One of the propositions which this Court reiterated in *R(SC78/2018)*, namely that a reliability warning may still be required if the defence is one of fabrication, deserves specific mention. That the defence is one of fabrication, or the focus at trial was the complainant's credibility, is still

---

132 *Daradkeh* at [41]; *A* at [29] and [34].

133 *Taylor* at [34]; *Toa* at [41].

134 CA judgment at [47], SC Casebook p 28; *A* at [34]; *Toa* at [41].

135 *Daradkeh* at [43]; *Toa* at [42] and [43].

136 *R(SC78/2018) v R* [2023] NZSC 132, [2023] 1 NZLR 507 at [49]. See also the points made at [54] and [67].

137 *R(SC78/2018)* at [49](e).

138 *Bruce* at [24].

often seized on as a reason in itself not to give a reliability warning.[139] This is inappropriate for at least the following two reasons.

69. First, as the majority in *CT v R*[140] observed, s 122 is not concerned solely with reliability in its narrow or technical sense.[141] Rather (and in counsel's submission), it is concerned with evidence on which it might, for whatever reason, be unsafe to rely.[142] That reason might be grounded in a witness's dishonesty, a witness's inaccuracy, or a combination of the two.[143] Whatever the case, if the reason is sufficiently compelling, s 122 will be engaged. That this is what is meant by "unreliable" in the context of s 122 is plain from the language of the section itself. Two of the circumstances, listed in subs (2), in which Judges must consider whether to give a warning relate to concerns about credibility – evidence given by witnesses who might have a motive to lie, and evidence given by prison informants.[144]

70. Legislative history supports this analysis, too. Section 122 was, it seems, intended to carry over and expand on s 12C of the Evidence Act 1908,[145] which concerned evidence given by witnesses who may have had a motive to lie[146] – a classic credibility issue. The original draft version of s 122 – cl 108 of the Evidence Code – expanded on s 12C to include, as further circumstances in which a judge must consider whether to give a warning, "hearsay evidence" and "evidence of a confession that is the only evidence of an offence". In its commentary on that original draft version, the Law Commission observed:[147]

> The three categories mentioned in s 108(2) are to be treated as potentially unreliable evidence requiring the judge to consider in every case whether to give a warning …

---

139 For recent, post-*R(SC78/2018)*, examples in the historic offending context, see: *F(CA437/2024) v* R [2024] NZCA 478; and *Moran v* R [2024] NZCA 44.

140 *CT v* R [2014] NZSC 155, [2015] 1 NZLR 456.

141 *CT* at [45]: "The scheme of s 122(2), which identifies types of evidence for particular attention, makes it clear that "unreliability" is not a narrow or technical term."

142 Put another way, the section treats credibility as a subset of, or necessary precursor to, reliability. It might be unsafe to rely on a witness's evidence because the witness is dishonest or because the witness is honest but mistaken.

143 Indeed, in practice it will often be impossible to know whether a difference between evidence given by witnesses to the same event is an honest mistake or a less than honest one.

144 Evidence Act 2006, s 122(2)(c) and (d).

145 NZLC R55 – Volume 2, p 243, C385.

146 Evidence Act 1908, s 12C – Witnesses having some purpose of their own to serve.

147 NZLC R55 – Volume 2, p 243, C385.

71. Second, issues with reliability in its narrow sense (as entirely distinct from credibility) can still arise when the defence at trial is fabrication and the primary focus the complainant's credibility. As the minority in *R(SC78/2018)* explained, "in order to find a defendant guilty, the jury has to be satisfied beyond reasonable doubt that a complainant or other relevant Crown witness is not only credible (telling the truth) but also that they are reliable (not mistaken)."[148] If the evidence discloses reasons to approach the accuracy of the complainant's recall with particular caution, a warning should be given.

Discussion

72. A warning should have been given in respect of the evidence given by the complainant and C, which presented with a combination of concerning features. Whether rooted in their credibility, reliability (narrowly conceived), or both, those features were highly relevant to whether their evidence could safely be relied on.

73. Beginning with the complainant, the jury first had to be sure she was, as the prosecutor put it, "doing [her] best to recollect despite being intoxicated at the time".[149] If it reached that point, it then had to be sure her recollection was accurate. There were features of the evidence which could properly have led the jury to proceed with caution at each step. These included the sheer extent of the complainant's intoxication and memory loss, the selective nature of her purported recall,[150] the inconsistencies between her evidence and that given by D and C, and the fact that the evidence given by D and C said aligned to a degree with what Mr Tamati had told the police.

74. These and other points should have been conveyed to the jury in the form a warning which centred around the complainant's severe intoxication on a cocktail of alcohol and drugs. But they were not. Although the Judge encouraged the jury, as a matter of prudence and caution, to look for

---

148 *R(SC78/2018)* at [174]. The point is implicit in the way the prosecutor framed the issue for the jury, saying the complainant did not come across as dishonest but as someone "doing her best to recollect despite being intoxicated" at the time: Crown closing, CA Casebook p 210.

149 Crown closing, CA Casebook p 210.

150 Like C, the complainant failed to mention until cross-examination that C was having intercourse with D.

evidence supporting the complainant's account,[151] he did not explain why such caution was necessary, nor did he marshal the evidence to underscore the point. Moreover, the list of reasons he then gave for why, from Mr Tamati's perspective, the complainant's evidence should not be accepted was rather inaccurate and incomplete. To recap, he said:[152]

> [45] The defendant on the other hand says that there is refuting evidence. The implausibility of aspects of her account including not knowing how she came to be in the car, not knowing how she came to be back in the house and the implausibility of the sexual incident on the couch in the way she described. Her reason to implicate the defendant as the rapist to back up
>
> The evidence in particular from [D] about the car usually being parked out the front of the house and not in the driveway as described by the complainant.

75. Taking in turn the two points made in the first half of this paragraph, the real point from Mr Tamati's perspective was not that it was implausible that the complainant would suffer severe memory loss, but the combination of intoxicants she consumed, the sheer extent of her memory loss,[153] and the consequent impact on the reliability of her recall. Similarly, when it came to the bedroom incident, the real point was not necessarily that it was implausible that Mr Tamati and the complainant would have intercourse on the sofa while D and C were having intercourse on the bed nearby, but that the complainant's claim that they did drew no support from the evidence given by D or that initially given by C.

76. A further issue is that what the Judge did say about the complainant's intoxication tended to favour the Crown. As set out above, he cited it as a reason the complainant could not have consented to any sexual activity in the back of the car and a possible innocent explanation for any inconsistencies in her evidence. But that was only half the picture. It was also a reason to approach her purported recollection of events with caution and to subject to particular scrutiny any inconsistencies within her evidence or between her evidence and that given by D and C. That point, which favoured Mr Tamati, was not made.

---

151 Summing up at [44], CA Casebook p 248.

152 CA Casebook p 248.

153 Trial counsel cross-examined the complainant on the basis that she was "wasted" and "couldn't remember many, many things": NoE p 23.

77. Similar concerns arise in respect of C's evidence, which should also have been the subject of a warning. Like the complainant, she was heavily intoxicated at the relevant time and her memory suffered accordingly. In addition, she gave various accounts – under oath – of the bedroom incident, the final one forming an important part of the Crown's case.[154] Given this, the Judge should have told the jury to approach her evidence with caution and, with reference to relevant portions of it, explained why. Instead, he made only passing reference to its "confusing and contradictory" nature.

78. Pulling the above together, the complainant and C were the primary Crown witnesses, and C's evidence was where the jury would naturally search for support for the complainant's account, as the Judge encouraged it to. That being so, it was important the jury was told of the numerous and valid reasons why their evidence needed to be treated with caution. But it was not – by either trial counsel or the Judge.

79. For these reasons, justice miscarried and the Court of Appeal erred in holding otherwise. Indeed, on the approach that Court has generally taken to this issue,[155] the circumstances were ripe for a reliability warning and a conclusion that justice miscarried.[156]

30 October 2024

J E L Carruthers / S J Bird
Counsel for Mr Tamati

---

154 As noted, the prosecutor asked the jury to accept it: Crown closing, CA Casebook p 217.

155 For a summary of this approach, see para 65 above.

156 For example: the complainant and C were significantly intoxicated at the relevant time and their memories suffered as a result; on a crucial issue their evidence was inconsistent with each other's (and with D's); C changed her evidence under oath; the prosecutor asked the jury to rely on supposed clear patches in the complainant's memory and C's third version of events; trial counsel did not address these issues when closing; and the Judge did not even remind the jury in general terms – let alone with specific reference to the evidence – of the impact of alcohol and drugs on memory.

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: Crown Law.