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

SC 48/2024
[2025] NZSC Trans 1

TRISTAN LEE TAMATI
Appellant

v

THE KING
Respondent

Hearing:	25 February 2025
Court:	Winkelmann CJ Glazebrook J Williams J Kós J Miller J
Counsel:	J E L Carruthers and S J Bird for the Appellant A J Ewing and M J Lillico for the Respondent

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CRIMINAL APPEAL

MR CARRUTHERS:

E ngā Kaiwhakawā, tēnā koutou. Carruthers and Bird for the appellant Mr Tamati.

WINKELMANN CJ:

Tēnā korua.

MS EWING:

E ngā Kaiwhakawā, tēnā koutou. Ko Ms Ewing ahau. Kei kōnei māua ko Mr Lillico mō te Karauna. Ms Ewing and Mr Lillico for the Crown.

WINKELMANN CJ:

Tēnā korua. So we can indicate, counsel, we have read the materials. We have a reasonably high level of familiarity with them so we thought we should be able to accomplish hearing this appeal by lunch. Does that accord with your expectations?

MR CARRUTHERS:

I will do my very best to accommodate with that.

WILLIAMS J:

This came as a surprise Mr Carruthers.

MR CARRUTHERS:

No, no, no, I appreciate the direction your Honour, thank you.

WINKELMANN CJ:

Yes, I think you should be able to adequately present your submissions by morning tea, and that will give Crown adequate time to reply, I think. Ms Ewing?

MS EWING:

Happy to do my best.

WINKELMANN CJ:

Thank you.

MR CARRUTHERS:

Given the Court's familiarity you'll know this is an appeal against conviction for serious sexual offending brought on two grounds. The first concerning inadequacies in trial counsel's closing address, and that ground consisting of two subparts. The first is trial counsel's failure in a he said/she said trial essentially, in which the main issue was credibility, to make any use, any meaningful use, of Mr Tamati's lengthy detailed exculpatory and, in everyone's assessment, broadly credible and reliable police interview.

WINKELMANN CJ:

I might struggle with that "everyone's assessment ... credible and reliable."

MR CARRUTHERS:

Sorry, that is simply a reference to the Crown submission made at both trial and in this Court that the complainant's evidence was in large part reliable because it married with what Mr Tamati told the police and if that's true then so is the corollary.

WINKELMANN CJ:

But not "credible", I think they didn't add in the word "credible", Mr Carruthers.

MR CARRUTHERS:

Yes, well. Sorry, the –

WINKELMANN CJ:

So any meaningful reference to Mr Tamati's statement.

MR CARRUTHERS:

The second subpart to that is counsel's failure to address one of the two incidents for which Mr Tamati was being tried and to attempt in any way to exploit what, in my submission, were deficiencies in the Crown's evidence on that incident which went to the heart of the key issue at trial, namely credibility.

The second ground concerns what, in my submission, was the failure of the Judge to direct the jury on the relevance of the complainant's and C's rather extreme intoxication during the events in question, to the reliability of their evidence, in circumstances where reliability on account of intoxication was a live issue on the evidence, one that the jury en route to guilty verdicts would inevitably have to grapple with, but when neither counsel had explored that issue in either cross-examination or closing.

Now, ground 1, subpart 1, if I can put it that way, the submission here is not only was there a failure on Mr Taffs' part to exploit in any meaningful way Mr Tamati's police interview when closing, to advocate in any way for his credibility and reliability, but there seems to have been a more fundamental failure, in my submission, to even really come to grips with the content of that interview in preparing for trial and to put himself in a position to exploit it, in even the most elementary way one might expect of defence counsel.

I just want to begin here by addressing a Crown submission made at, I think, paragraph 41 of their written submissions that: "It is unsafe" to draw such an inference from the record the Court has before it and I would just like to demonstrate, if I could, by reference to seven points in that record, why such an inference safely can and should be drawn.

Firstly, we know that Mr Tamati, when approached some 15 months or so after the offending, gave a lengthy and detailed and exculpatory police interview. We know that that was going to be played at trial. It was always going to be. The Crown opened on it, they referred to it in their opening address.

We know at trial when Mr Taffs was cross-examining the complainant about the circumstances of the second incident, that rape charge in the morning, Mr Taffs put to her a proposition which, in my submission, is in direct conflict with what Mr Tamati told the police during his interview.

So Mr Tamati, just to jog the Court's memory, told the police that while he was lying on the sofa with the complainant, D and C were having intercourse on the bed right in front of him. Now, he was the only person, if I could just add, Mr Tamati was the only person who was upfront about that, that fact, in the lead-up to trial.

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When the complainant admitted as much under cross-examination, Mr Taffs put to her, I think this is notes of evidence page 29, that she had just made that up. An unusual proposition, you might think, given the content of Mr Tamati's police interview.

Next we know that after listening to the prosecutor close his final address to the jury with a forceful and reasonably lengthy –

KÓS J:

Which one of your seven points is this?

MR CARRUTHERS:

This would be…

KÓS J:

Four?

MR CARRUTHERS

Three Sir.

KÓS J:

Oh.

WINKELMANN CJ:

Can you give us the number, please?

MR CARRUTHERS:

Yes, I apologise, Ma'am. The first, Sir, the fact of Mr Tamati's interview and that it would be played.

KÓS J:

Well, I don't think that's very helpful. I mean what I'm looking for are key points that lead to inference that Mr Taffs was not on top of the EVI. The fact there was one doesn't tell us anything.

WILLIAMS J:

I think your point is that Taffs must have known it was going to get played?

MR CARRUTHERS:

He must have known it was –

WILLIAMS J:

So he needed to be across it, that's your point.

MR CARRUTHERS:

Essentially, your Honour.

GLAZEBROOK J:

My issue is probably a bit more fundamental in that whether or not he was on top of it, what you have to show that is that not being top of it caused a miscarriage, so the real issue is whether there were things in that interview that he should've used in a different way and that he wasn't able to run the general

defence that was run. So it's a step back really because if there was nothing in that interview that could've been used, then there's no miscarriage and it wouldn't really matter whether he did or he didn't have any idea what was in it.

MR CARRUTHERS:

Well, if I could –

GLAZEBROOK J:

But I think you'll probably come to that, but I'm just indicating that –

MR CARRUTHERS:

I am definitely coming to that your Honour. I appreciate the – sorry, the third point was that after listening to the prosecutor launch towards the end of his closing address, a forceful attack on Mr Tamati's police interview, all Mr Taffs could muster in response case on appeal page 234: "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."

WINKELMANN CJ:

So what's wrong with that?

MR CARRUTHERS:

Well, given the length and detail included in Mr Tamati's police interview, and the extent to which it married with the wider evidence, that was, in my submission, a pretty meek attempt to advocate for Mr Tamati's credibility and reliability in the circumstances.

WINKELMANN CJ:

Yes, I think the difficulty of you having that regard though is the point that Justice Glazebrook has put to you and I think you have come to that because you could say that in fact Mr Tamati's statement tended to corroborate the

complainant's account as it came out at trial and as the other evidence came out in trial and so it could be a legitimate defence tactic just to zoom out and say: "Well, look, the essence of what he says is this didn't happen." But you'll come to that after your seven points.

MR CARRUTHERS:

No, no, I am happy to attempt to head straight to that, your Honour.

WILLIAMS J:

I think it's just as likely that a crusty old experienced defence lawyer saw that the jury wasn't enamoured of his client and played that. It's just a judgement call in the trial. He was there. He saw the 12. He could tell the body language.

MR CARRUTHERS:

Well just –

WILLIAMS J:

You will probably run into that problem yourself.

MR CARRUTHERS:

Well, when it comes to seeing the body language.

WINKELMANN CJ:

Not that you're crusty and old. I'm not suggesting you're crusty and old.

MR CARRUTHERS:

Well, no.

WILLIAMS J:

Well, yes, you're fresh and new but nonetheless.

MR CARRUTHERS

I would just step back though, brief response to your Honour's point, it does seem a reasonably elementary aspect of trial preparation for reasonable defence counsel to –

GLAZEBROOK J:

I'm not saying that. What I'm saying is that you have to show is that that lack of preparation led to a miscarriage of justice, which is why you would have to explain to us what the failures were, and the effect of those failures, in not actually referring to the statement. Apart from at that generic level.

KÓS J:

Nor am I prepared to accept at the moment your premise that there is a lack of preparation. I think you're making an awful lot out of a passage in the cross-examination Mr Taffs at page 57, but is there more to it than that? That's the one where he says: "I really didn't think much about what Mr Tamati had said quite frankly." Where have where got Mr Taffs saying that he had not read or prepared any analysis on the basis of the EVI? It may simply have been that he preferred not to rely on the EVI. He had a better defence theory.

MR CARRUTHERS:

My submission, Sir, was just going to be based on the opportunities Mr Taffs had to comment on his lack of utilisation or reference, but to Mr Tamati's police interview, that was squarely raised in the affidavit evidence prior to the Court of Appeal hearing. There was that express invitation for him to respond to that. He said absolutely nothing about it. I don't know what passed between him and the Crown in terms of whether that was responded to. He was offered another chance at the Court of Appeal hearing.

MILLER J:

Perhaps you should just run through your seven points, because I appreciate that some of them are really context for a further point you want to make.

WINKELMANN CJ:

Yes, so you are up to point 3. Statement that you put, statement that you can put the defence statement to one side. I'm not saying you should. He gave a credible account that it didn't happen but the Crown bears the onus of proof. That's his point.

MR CARRUTHERS:

Yes your Honour. The fourth point was the one I've just made to his Honour Justice Kós about that not sitting well with Mr Tamati who queried in his affidavit before the Court of Appeal why Mr Taffs hadn't pointed out any consistencies between his police interview and the other evidence. The paragraphs are there in his affidavit.

GLAZEBROOK J:

Is that a bit of a two-edged sword though, because that's your – I mean I'm never very keen on those arguments actually because I don't think they – they're usually made for the Crown. It's sort of, well look, it's all absolutely consistent and the only thing he denies is the last bit and that shows that actually it happened. Well it doesn't, to me, but equally to me the fact he's consistent right through, and the only thing that's inconsistent is that he doesn't actually say much for the other side either. So I mean I can understand why a defence counsel doesn't necessarily want to engage with that. In any detail, because it seems to me to be able equally to have, well, it's absolutely consistent and the only thing he denies is the actual, and so therefore it's useful for the Crown. Which is, as I say, usually in my experience the way the argument's put.

MR CARRUTHERS:

The corollary has to be true though.

GLAZEBROOK J:

Well that's true, but I'm not sure that it really helps particularly, does it? One can understand…

MR CARRUTHERS:

Well if it's a point worth making about the complainant's evidence, it's arguably also worth making about the defendant –

GLAZEBROOK J:

Well I'm just saying to you I don't think it's worth making about either side. I don't think it shows anything much.

WINKELMANN CJ:

So what is your point that's, can you just take me back to your point, because I think I've lost it. You're saying Mr Tamati said he wasn't happy that Mr Taffs, what did he –

WILLIAMS J:

Hadn't pointed out the inconsistencies.

GLAZEBROOK J:

Hadn't pointed out the consistencies between the two.

WINKELMANN CJ:

Yes, because his –

WILLIAMS J:

No, the inconsistencies.

GLAZEBROOK J:

No, this is the consistencies.

WILLIAMS J:

Oh, sorry.

GLAZEBROOK J:

Sorry, I might have misunderstood?

WINKELMANN CJ:

It is the consistency I think is the point, that was what –

WILLIAMS J:

Well caught.

MR CARRUTHERS:

Yes, he hadn't tried to point out any consistencies between what Mr Tamati had told the police in a lengthy interview –

WINKELMANN CJ:

Well look, I mean honestly –

WILLIAMS J:

I think the Crown did that for him.

WINKELMANN CJ:

I must say that must've been, that's a Crown point.

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WILLIAMS J:

The Crown did do that, didn't it.

MR CARRUTHERS:

In advocating for the complainant's credibility and reliability, but –

WILLIAMS J:

My reference to the consistencies with detail in Mr Tamati's EVI.

MR CARRUTHERS:

Yes, but –

GLAZEBROOK J:

It's the point that he should've countered that and said it's equally likely to show that it didn't happen, is that the point?

MR CARRUTHERS:

Well, yes. The Crown is asking the jury to put Mr Tamati's explanation to one side.

WINKELMANN CJ:

Well did they, because wasn't it part of the Crown case that he basically admitted everything except – the whole set-up he admitted to was pretty much what was alleged against him apart from the offending.

MILLER J:

Your point simply is that he's, because he's an honest witness, or he's given an honest account in interview. That's a point that, yes, okay.

MR CARRUTHERS:

Essentially your Honour, and you can show that on his behalf by pointing out the marriage between what he said approached by the police 15 months after the event and the evidence given by the other witnesses.

MILLER J:

So he needed to do that given the use that the Crown was making of it?

MR CARRUTHERS:

Yes, and given it's a credibility contest where you have competing narratives at trial, one of the ways to make a dent, or try to prevent the Crown from proving a case beyond reasonable doubt, is to advocate for your client's credibility and reliability.

WINKELMANN CJ:

Yes.

MR CARRUTHERS:

And you can do that by pointing out that when approached, he has told the truth and here are a number of positive examples. No matter how poorly it might have reflected on him, he gave an honest warts and all account of that weekend and when you get down to the nitty gritty, for example, the second incident in the bedroom, you have the Crown calling two eyewitnesses whose evidence there is an argument to be made aligned more with what Mr Tamati told the police than it did with what the complainant said in her EVI and at trial and so you can start broadly. He didn't shy away from speaking. He didn't stay mum.

He gave a warts and all account which we know was largely correct even though it reflected poorly on him. He admitted he spent the weekend partying with young girls, that they were drunk, intoxicated, on alcohol, various substances, he tattooed them.

KÓS J:

But in particular, he said he did not touch, "get into", his words, the complainant. That was what he said in his EVI. That's not what the other Crown witnesses said, which seems to explain why Mr Taffs steered very clear of their evidence.

MR CARRUTHERS:

Well there are, there's a spectrum there. The complainant said he raped her on the sofa. Mr Tamati admitted that he was lying on the sofa with the complainant. He said he didn't make any moves or touch her. You then had the other two eyewitnesses both called by the Crown, eyewitnesses in support of their case. DH, he put them on the sofa. He said, I can't remember the exact words, they were hugging or looked cosy.

KÓS J:

He said: "They look cosy."

MR CARRUTHERS:

Yes, but he expressly said –

KÓS J:

But he said he didn't really pay any, he said he didn't really pay any attention to them because he was busy himself.

MR CARRUTHERS:

But, okay, first of all, he expressly said under cross that he didn't see them having intercourse. I mean he obviously knew they were there and had paid enough attention to say they were looking cosy.

MILLER J:

The difficulty you face on this seems to really come for the core of the case is that Mr Tamati was committed from the outset to a proposition that he displayed no sexual interest in the complainant at all. So returning to Justice Kós' point, the account of what happened in the bedroom that was given by the other witnesses tends to give the lie to that, doesn't it?

MR CARRUTHERS:

It gives the lie to a point.

MILLER J:

Sure. But enough for counsel, experienced counsel, to say: "Look, mmm, I'm going to steer away from that," because he had to run this case that she made everything up.

MR CARRUTHERS:

When it comes to – everyone accepts they were in the room.

MILLER J:

Yes.

MR CARRUTHERS:

No one disputes that. Mr Tamati has himself on the sofa. No intimate activity that he saw. The complainant has Mr Tamati raping her while the other two are on the bed. Two very starkly contrasting cases and this is –

WILLIAMS J:

He puts himself on the couch with the complainant?

MR CARRUTHERS:

He does.

WILLIAMS J:

You can see there's – it's not hard to see why 12 members of the community might go "mmm" when you've got a drug and alcohol-fuelled weekend with teenage girls?

MR CARRUTHERS:

But it's the evidence of what the eyewitnesses said happened.

WILLIAMS J:

I agree, but you can see why that might not help, given the hard line that was being taken, in the view of a jury that was not going to be well disposed in the first place, obviously. Don't you think it was just quite a good judgement call?

MR CARRUTHERS:

Well, when the Crown effectively avoided the evidence of those eyewitnesses, didn't really mention – didn't mention at all, I don't think, what D had said.

WILLIAMS J:

I mean, you're right, there is an obvious inconsistency and that's potentially problematic, but there is such a bigger elephant in the room that the jury probably just decided to disregard it, which they're entitled to do in context. It does seem to me that defence counsel read the room and ran that case, if for no other reason than not to antagonise them.

MILLER J:

What's the fifth point, if I may ask?

MR CARRUTHERS:

Sorry.

MILLER J:

Sorry, I didn't…

MR CARRUTHERS:

No, no, I'm happy to carry on the discussion, I think, departing from the points by quite –

WINKELMANN CJ:

Fair call, Mr Carruthers, fair call.

MR CARRUTHERS:

No, no, I've made the points, essentially.

WINKELMANN CJ:

Yes.

MR CARRUTHERS:

It was Mr Taffs had every opportunity to respond. All he came up with, which in my submission we really have to take at face value, is that he didn't think much about that interview, quite frankly, and it never even occurred to him, it seems, to try to draw consistencies between what Mr Tamati said and what the eyewitnesses said. He accepted under cross-examination that that may have been a useful way of showing that Mr Tamati was, in fact, telling the truth which in a credibility trial, when you have a contest over exactly what happened in a room, it might be quite an important point to make, and sometimes, your Honour, I mean, this was the Crown's evidence of the actual offending and the complainant's evidence was arguably undercut by the two eyewitnesses in a room. I mean, it may be –

WILLIAMS J:

Yes, but the broader context is this is the second of two alleged events and in some ways the less egregious one, for the reasons that the complainant gives in her evidence, and to silo the second event from the first event is probably unrealistic as well. You've already got some problems, if they believe the complainant in respect of the first one, then he's already got serious problems running into the second one. A technical argument about the second one probably isn't going to save him.

MR CARRUTHERS:

Well, if you can use the eyewitness evidence to undercut the complainant's evidence on the second one, and create that element of doubt about whether she's telling the truth, there's every chance that in a broader assessment that bleeds into the jury's assessment of the first one.

WILLIAMS J:

Yes, I agree, and that's often done and often done well, except the context here is so significant and that's what had to be dealt with.

MR CARRUTHERS:

Well, in a way I agree. Every one of the witnesses, including Mr Tamati, agreed that they were in the room and so that had to be confronted. Where did the balance of the evidence fall? Whose account did it support? And there was an argument to be made that it, in fact, supported Mr Tamati's account more so than it did the complainant's and it wasn't, in my submission, a risky argument. I mean, the facts were there. Everyone was in the room. You had to confront it. The Crown steered well clear of what those eyewitnesses said. Arguably, that speaks volumes about how their evidence came across. I mean, the Crown would usually dream about having eyewitnesses in the room to an alleged rape. Here, it didn't go near them.

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So any suggestion that it somehow may have backfired, well, by that stage defence counsel effectively had a free hit and then the Judge, when the Judge came to sum up, when he came to those two witnesses talking about the complainant's reliability, he didn't cite their evidence as somehow supportive of the complainant. He cited, albeit in passing, problems with their evidence as supportive of the defence argument as to the complainant's unreliability.

KÓS J:

The problem is they each had a problem. The Crown had a problem because the witnesses didn't support seeing the rape occur in the room next to them, and Mr Tamati had a problem because it was inconsistent with his statement he wasn't "into" the complainant.

MR CARRUTHERS:

But was it as inconsistent as it was with the complainants? They were right there. They didn't see Mr Tamati raping her, literally within touching distance

and C, according to the complainant, was holding her hand and looking her in the eye.

KÓS J:

Well C was all over the place.

MR CARRUTHERS:

She was.

KÓS J:

I mean at one point, at one point she said she came in to see it happening while at the same time apparently she was in the midst of having sex with D.

MR CARRUTHERS:

That's right and the prosecutor, in his closing, he effectively drew on that final version that C settled on and said: "Well, doesn't that make sense?" In my submission it's arguably remiss not to point out to the jury well, hold on, the prosecutor is asking you to place weight on at least the second, arguably the third version that an eyewitness has given. How about we go back a step and think about the first version that eyewitness gave when the Crown lobbed her some nice easy questions in evidence-in-chief? She had them sitting on the sofa, but not more and when the prosecutor pressed her, she said very emphatically: "That isn't when it occurred." Now, whose evidence does that marry up with that? Well, it marries up with what Mr Tamati told the police, nothing happened with them while they were on the sofa. It also marries up with what D told, with what D said in evidence: "Yes, they were on the sofa." "Did you see them being right there in the room having intercourse?" "No, I didn't."

It's a factual circumstance. It's the Crown's evidence of the actual offending and I hope I have somehow demonstrated that there was very much something for defence counsel to say about that in support of Mr Tamati's defence and in an attack on the complainant's credibility and, as I say, the Crown didn't go near it. Left the floor open for defence counsel to make any number of these points

and this wasn't some downstream circumstantial factor that you can fold into your defence. This was the Crown's evidence on the facts the jury had to accept to find Mr Tamati guilty.

GLAZEBROOK J:

I think I'm up to four.

WINKELMANN CJ:

No, he's abandoned them. He's abandoned them.

MILLER J:

No, we've covered them.

GLAZEBROOK J:

Oh, you've abandoned them.

MR CARRUTHERS:

I think I've covered probably subpart 1.

WINKELMANN CJ:

It's never a good idea when you've got more than about four points anyway, Mr Carruthers.

MR CARRUTHERS:

No, no, well to be frank –

WILLIAMS J:

Unless they're really good.

GLAZEBROOK J:

Well, your real point, isn't it, which was the point I was saying, I was asking you about is that more needed to be done to counter the Crown argument based on the statement.

MR CARRUTHERS:

Yes, your Honour, and I have probably actually covered ground 1 subparts 1 and 2 in terms of portraying Mr Tamati's –

WINKELMANN CJ:
Yes.

MR CARRUTHERS:
– account as, you know, not shying away from anything regardless of how poorly it may have reflected on him giving a lengthy frank account of that weekend and the ensuing days. Any number of points could have been made, small points, large points, pointing out the consistencies, how upfront he had been and then as I hope I have just demonstrated, there was more to make of the discrepancy in the evidence given by the Crown witnesses and the argument that what they said actually aligned more with what Mr Tamati told the police than what the complainant had said in evidence.

KÓS J:
What do we make of the point that that's just blindingly obvious, say, this gets to Justice Glazebrook's point about whether an omission leads to miscarriage. I mean, a jury were perfectly aware, let's take C's evidence, that C was all over the place, she gave four, probably four different accounts of what had occurred and D, well, D just didn't really see anything, which as you say is consistent with your man's theory. Now, a jury, that wouldn't be lost on a jury, they didn't need to have it rammed home by defence counsel and, of course, the Judge does refer to it.

MR CARRUTHERS:
Well, the Judge, the Judge refers to it in passing, but not in the same sort of forceful way the defence counsel could and should have teased out in closing, in my submission, I mean.

KÓS J:
It's not a killer point though.

MR CARRUTHERS:

Sorry, Sir?

KÓS J:

It's not a killer point, it's an obvious point. It's perhaps at first sight strange that he didn't make more of it, but one can see a theory of the case which would lead him not to go there. But the jury wouldn't have been – it wouldn't be lost on a jury.

MR CARRUTHERS:

Well, sometimes, your Honour, you can perhaps never take that for granted and when the stakes are this high and you have an inconsistency arguably of this magnitude, in relation to the very ingredients the Crown has to prove, it just strikes me as astonishing that it's not happened, especially when the Crown has utterly avoided it in its own closing. I mean, if there was anything to make of those witnesses, from the Crown's perspective, Mr La Hood would have made it at length, as he did with the complainant's statement.

WILLIAMS J:

Well, obviously it's not helpful to the Crown. You can see why the Crown would downplay it.

MR CARRUTHERS:

Yes, but the corollary, Sir, is that I...

WILLIAMS J:

I mean, the problem the defence had was a 42-year-old man, a drug and alcohol-fuelled weekend with three teenage girls, and "I didn't touch them". That was always a hard case to run.

MR CARRUTHERS:

Yes but in support of his defence, the jury may think, oh, well, that's unbelievable, but hold on, we actually have two eyewitnesses in the room whose evidence you can marshal in support of that defence.

WINKELMANN CJ:

Well, not quite, actually. That's not quite what they say, is it? In fact, it's not what they say at all and he says, he says he didn't touch them, but then the evidence is that they're cosy on the couch and, et cetera, et cetera, so it's not –

MR CARRUTHERS:

Yes, no, sorry, Ma'am, right –

WINKELMANN CJ:

And I mean, add in that he's a middle-aged man on a couch with a very young girl in a room with two other people having sex, I mean, there are –

WILLIAMS J:

Who he's just – two of whom he's just tattooed with their trousers off.

WINKELMANN CJ:

Yes, who he's just, yes, you could see why both sides would have an interest in staying away from their accounts and you might say that the Crown left the floor open for Mr Taffs to also sidestep it and just go with the flat denial and the "made it all up", had to come up with a –

GLAZEBROOK J:

And with some reasonably good high-level indications of that in terms of the grandmother's initial complaint to the police and the coincidence of the chlamydia.

MR CARRUTHERS:

Yes, I mean, my response – sorry, just to go back to your Honour's, I accept what your Honour said and I, really, the point is that I was trying to make, there was an argument to be made that the complainant – sorry, the eyewitness evidence was more consistent with Mr Tamati's defence than with the complaints.

GLAZEBROOK J:

That doesn't – "more consistent" perhaps isn't that helpful though, because there's not, there's not much and it's only in relation to that second incident, as well I understand the point about undermining credibility, but...
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MR CARRUTHERS:
Well, when all you have to create is a reasonable doubt, and I –

MILLER J:
What you've got to show us here is that it was a choice a competent counsel would not have made, which is, and your best point in support of that is really is that Mr Taffs didn't even really think about it. Didn't really kind of defend it on the basis that we're now putting to you that it was really best to stay away from any evidence that suggested a sexual interest in this girl.

MR CARRUTHERS:
No, he didn't think about it. Didn't put himself in any position, it seems, to make any use of it.

WILLIAMS J:
Well he didn't seem to remember much at all in the Court of Appeal under cross-examination. Of the detail of the way in which the facts ran.

MR CARRUTHERS:
No but he was reasonably frank about –

WILLIAMS J:
He was quite frank.

MR CARRUTHERS:
Not thinking much about the police interview and it not occurring to him to try drawing positive comparisons.

KÓS J:

But we simply cannot make this a, if you don't have the evidence to say this was a badly prepared defence counsel, not thinking about it is not the same as not having read it, prepared for it, and dispensed with it because I had a better point.

MILLER J:

Put it this way, his closing doesn't, to me, convey the impression that he didn't think about his case. He seemed to have a number of well structured points, and in evidence in the Court of Appeal it's true, he appears not to have prepared for the evidence that he was asked to give there. I'm not sure how much we can take from his admission there that he didn't think about it.

MR CARRUTHERS:

My submission is simply that in a case where you essentially have competing narratives given by the complainant and the defendant, lengthy detailed exculpatory, to simply make no attempt to advocate for your client's credibility and reliability and to prop up that narrative is just so remiss of defence counsel.

WINKELMANN CJ:

Are those your submissions Mr Carruthers?

MR CARRUTHERS:

Your Honour those, I mean…

WINKELMANN CJ:

What about the reliability.

MR CARRUTHERS:

Yes, I'll come to that Ma'am.

WINKELMANN CJ:

I wasn't quite sure if we'd got through that, but I don't think we have, because you wanted to engage with cases.

MR CARRUTHERS:

I just round off. I set out at length in the written submissions points that, in my submission, Mr Taffs could have and should have made in closing. If on a review of those the Court sees any force in them, I would just note that the Judge did not cure the omission, if I can put it that way. While there was passing reference to D and C's evidence, there was no teasing out of the discrepancies, or the arguments that could have been made. There was no argument for positive parallels between what Mr Tamati had said and what C and D had said, and frankly when he summarised the defence case there was no reference at all to Mr Tamati's police interview. So effectively by the end of the trial, despite Mr Tamati having given that interview, which could be portrayed as I said a frank warts and all account of the weekend, no one had made any attempt to prop it and thereby his narrative up as credible and reliable, which in a credibility trial is, in my submission, quite an omission.

KÓS J:

Do you say anything particularly turns on the fact that, as Mr Taffs will have known, he was going to give evidence? That's to say Mr Tamati wasn't going to give evidence. Does that alter the burden on him?

MR CARRUTHERS:

I mean whether it's an exculpatory police interview or your client's evidence, if you're trying to defend your client to the hilt I would've thought you try to lean heavily on each and prop them up and here it is (a) nothing was done and (b) arguably that is because Mr Taffs never put himself in a position to do anything.

MILLER J:

It isn't really the case that he didn't seek to bolster Mr Tamati's credibility though, is it? He did, for instance say he wouldn't have got in the car with these people had he thought –

MR CARRUTHERS:

By other means.

MILLER J:

Yes, by other means, yes.

MR CARRUTHERS:

I accept that.

MILLER J:

Yes.

MR CARRUTHERS:

I mean the other points he made finally, I know he was angling at the complainant's credibility in his application. There was nothing inconsistent with those arguments and more fine grain arguments he could've made attacking the complainant's credibility by pointing out the discrepancies between her evidence and the evidence of the eyewitnesses and, sorry, police interview of Mr Tamati. It all gelled.

MILLER J:

He had some good points to make, didn't he? The fact that her nana got the wrong man initially, or named the other, made a mistake in identifying Mr Tamati and then she's committed to lie for her [relatives after they attacked him] and Mr Taffs went to quite a lot of trouble to make clear that the chronology worked for that, didn't he?

MR CARRUTHERS:

He did and I have no criticism of that, but further evidence he could have drawn on –

MILLER J:

Those were always going to be his best points, weren't they?

MR CARRUTHERS:

I would've thought that attacking the complainant's account on the actual facts the jury has to accept by reference to what the eyewitnesses in the room did

and didn't see and had to say would've been at least as good, if not a better point. It's in furtherance of the same end.

MILLER J:

Yes.

MR CARRUTHERS:

We say the complainant is lying, here's the big picture and by the way, when you zoom in, there's further evidence which the Crown has conveniently skirted around.

MILLER J:

You also had the STD point and Mr Taffs again made that quite forcefully, didn't he?

MR CARRUTHERS:

He did.

MILLER J:

The jury didn't accept any of that.

WINKELMANN CJ:

Mr Taffs had quite a powerful and coherent narrative for the defence, but, and I think you accept that he had a coherent narrative for the defence. Your criticism is that he failed to make what he should have from Mr Tamati's account from the unreliability, the lack of any kind of corroboration for the complainant's account and the other two witnesses, on your submission, and points that actually squared with Mr Tamati's account and those other two witnesses.

MR CARRUTHERS:

Yes, your Honour. Just moving on to the second ground.

WINKELMANN CJ:

Yes.

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MR CARRUTHERS:

In terms of a reliability warning, the submission is that the relevance of complainant and C's rather heavy intoxication to the reliability of their recollections was a further factor which needed to be brought to the jury's attention but it wasn't. It seems to be reasonably well established that excess alcohol and drug consumption can wreak havoc on memories in various ways, just drawing on the case law: impaired perception, lengthy blackouts, mistaking intense dreams for reality, just causing gaps that lead to the temptation or possibility of inaccurate reconstruction and, as I say, nothing I've mentioned there is anything Courts haven't recognised in this and other contexts.

A few years ago this Court in *R v R* [2023] NZSC 132, [2023] 1 NZLR 507, talking about in the context of delays, they referred to the distortion of memory over the course of time.

A Court of Appeal case cited in the bundle, *Taula v R* [2016] NZCA 194, sorry, that's T-A-U-L-A, apologies for the pronunciation. The point made there, the jury doesn't need expert evidence to know young cannabis users can mistake intense sexualised dreams for reality.

Another example, *Ang v R* [2023] NZCA 445 in the bundle, that's A-N-G, essentially the jury doesn't need expert evidence to understand that people who have alcohol blackouts may unconsciously use confabulation to fill gaps.

So, for those and other reasons, judges often specifically remind juries of the relevance of alcohol and drug consumption to reliability assessments, either in the form of a warning or a caution, a direction under section 122, or just a specific mention or focus among more general directions they give at the outset of summing up and this was a live issue in this case. The complainant and C were teenage girls who, over the weekend in question, seemed to have taken a cocktail of substances: vodka, cannabis, methamphetamine. Their memories were heavily impaired. I think both were quite frank about the fact that they

struggled to remember aspects of the weekend. The complainant had lengthy blackouts at times, after being tattooed up, until the first offending, and then after the first offending for some time until, essentially, the second. She also struggled to remember what had happened the following day and it seems the day afterwards.

There were inconsistencies in the evidence. One that Mr Taffs seized on, the complainant's account as to where the car was parked as opposed to D's account, D being a resident at the address, as to where he always parked his car or where it was parked, and there were also inconsistencies which I have covered in the previous ground as to what happened in the bedroom. The complainant, on one reading, was out on a limb saying that Mr Tamati was having intercourse with her, as that was happening she was looking C in the eye and holding her hand. The jury heard nothing of the sort from C or D.

Finally, a point, just in terms of the issue being live in this case, the lengthy blackouts the complainant had either side of the first offending were punctuated by a period of very detailed recall about what happened, then back to lengthy blackout.

MILLER J:

Why isn't the direction the Judge gave at paragraphs 44 and 45 enough in this case? It's at page 248 of the case, Court of Appeal case. So this is where he's saying you can rely on her evidence alone but as a matter of prudence or caution you may think you want to look at other evidence to see if it supports or refutes her, and then in paragraph 45 he points to details such as "not knowing how she came to be in the car, not knowing how she came to be back in the house". That's a reference to her intoxication, isn't it?

MR CARRUTHERS:

Yes. The point the Judge is making there is the implausibility of her not knowing. Now the point from the defence perspective wasn't that it was implausible she didn't know, it's that she was so intoxicated she didn't know,

and that that level of intoxication – if the jury thought she was a credible witness, they had to also be satisfied she was a reliable witness.

WINKELMANN CJ:

It's quite a pro defence direction at paragraph 44, isn't it? "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."

MR CARRUTHERS:

It is.

WINKELMANN CJ:

Mmm.

MR CARRUTHERS:

But there's one aspect of it which went largely unmentioned, and that is the relevance of the alcohol and drug consumption to reliability, and it went unmentioned because everyone's focus…

KÓS J:

Do you think the jury overlooked that?

MR CARRUTHERS:

Well there is a risk of the jury overlooking it, your Honour, when everyone's focus is on credibility. Whether the complainant is lying. Once they get past that, they then have to be sure that she's accurate in her recall, and there hasn't really been much focus either in the evidence, or in closing addresses, on the impact that that alcohol and drug consumption might have on the accuracy of recall. But it was still a hurdle that the jury en route to a guilty verdict would have to overcome, and if no one has brought it to their attention, but it's live on the evidence, then there's a greater risk of it just passing them by.

MILLER J:

Is it really that live on the evidence? Mr La Hood in his closing address really began by pointing out that the defence case is this is all a fabrication. He says: "… this is a case about truth, not about recollection or memory… 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 comes from gaps in your memory." Isn't that the essential issue here? A reliability direction doesn't solve this issue for the defence.

MR CARRUTHERS:

But I'm not suggesting it does. It addresses a subsequent issue the jury will need to grapple with if it gets there, and that may have been the focus of the trial, just as in *R v R* in the context of delay. The defence –

MILLER J:

It really suggests a reliability – what I'm putting to you is a reliability direction is not really called for in this case. It isn't a case about, say, consent for instance, or about, it's about whether things happened at all. Whether she's lying about that. Mr Tamati has really nailed his colours to this mast right from his police interview, hasn't he?

MR CARRUTHERS:

He has. But that doesn't relieve the jury of assessing accuracy once they've assessed honesty. It's the same in any case. I mean the jury has to be sure the witness is telling the truth. Okay, she's trying to tell us the truth here. Is she accurate about that. Is this an actual memory and, if so, how accurate and how sure can we be given her advanced state of intoxication that she's got this right.

1100

MILLER J:

What I'm really coming to is the trial judge has to think do I need a reliability direction here? That's the duty that's cast upon him, right, and in this case you answer that firstly by saying what is the issue in this case and then you ask yourself is it blindingly obvious to the jury that there's a reliability issue here?

Doesn't intoxication fall into that category? It usually is blindingly obvious both that it it's a factor and that the jury will understand what are the effects of intoxication.

MR CARRUTHERS:

No more so than delay, your Honour. What are the effects of 25 years?

MILLER J:

Well, isn't there some basis in the authorities which the Crown has cited for saying that delay is in a different category? That's extreme delay.

MR CARRUTHERS

I mean in *R v R* this Court said sometimes you're not really telling the jury anything more than they don't already know intuitively.

MILLER J:

Right.

MR CARRUTHERS:

But it's your obligation to bring it to their attention and in that case the defence was credibility. But the appeal was essentially allowed, if my memory serves me correctly, on the basis that a reliability warning wasn't given. The prospect that the complainant's change in allegations from relatively minor indecencies to serious violations was the result of distorted memory over time. That wasn't how the case was run.

WINKELMANN CJ:

Your point is that in a case where the defence is something other than reliability, that might just be the very case where the judge gives a direction because it can be overlooked.

MR CARRUTHERS:

Exactly, because it's more likely in those circumstances because it hasn't been the focus necessarily of cross-examination or closing addresses. If it's still live

on the evidence, the judge really should bring it to the jury's attention because if no one does there must be a risk of it just slipping by and just, sorry, going back to your Honour's point about reliability being an issue in this case, yes, the prosecutor, in his closing address, said this is all about credibility. But it's implicit in the way he then pitched his argument to the jury that actually, reliability is a factor in there as well and a couple of examples, I'm not sure whether they're best, but page 214: "The Crown says it was a warts and all account from a person trying their very best to recollect." An honest warts and all: "Account of a young woman trying her best to recollect a traumatic event."

MILLER J:

Your point is this is an obligation on the judge then, to go back to what the Chief Justice just said, and defence perhaps doesn't even need to emphasise it because you can rely on the judge to do it.

MR CARRUTHERS:

Well, that's right.

MILLER J:

Sometimes counsel do approach trials on that basis, don't they?

MR CARRUTHERS:

That's right and in some of the cases said there was no need for a warning because the reliability aspect had been a focus of cross-examination, had been a focus of closing addresses and so it had been brought specifically to the jury's attention. Here it hasn't been and it's in a case where it hasn't there's the risk that it slips through the cracks.

WILLIAMS J:

The difference between this case and *R v R* though is that here the witness has said: "Look, I don't remember it. I was out of it, or I was drunk. There are big gaps in my memory." Right, it's in the record. In *R v R* there was no suggestion of that. The story changed because the complainant changed her attitude toward the defendant, that was the reason. So the cause –

MR CARRUTHERS:

Which?

WILLIAMS J:

The cause in this case for potential unreliability was front and centre in the evidence. The cause for potential unreliability went unremarked on in *R v R* and needed to be remarked on because there it was said, there the complainant said: "I didn't raise these things because I didn't want him to go and I thought I loved him, but now I'm a grown up and I've seen through my childlike fantasies for what they are", and in that context the effluxion of time was an unremarked upon phenomenon. In this context, intoxication was a highly remarked upon phenomenon and one very familiar to the jury.

MR CARRUTHERS:

Yes, but it was the fact of intoxication was remarked upon.

WILLIAMS J:

By the witnesses themselves.

MR CARRUTHERS:

Yes, but no one at any stage linked that to the accuracy of what they purported to recall.

KÓS J:

Well, it seems to me, that's exactly what Mr La Hood is doing at 213 and 214, particularly 14, if you read the whole of the page.

GLAZEBROOK J:

Sorry, I didn't quite catch what you were referring to?

KÓS J:

Page 214.

WINKELMANN CJ:

Where it says she – by issues in relation to memory caused by drug and alcohol intake, but not on the essential issues.

WILLIAMS J:

I guess your point is, someone should have said, well, yes, actually, on the essential issues, too. You can't silo off clarity and disclarity as if clarity is unaffected.

MR CARRUTHERS:

Precisely your Honour, and the – it's mentioned, it's raised as an innocent reason, an innocent explanation for any inconsistencies in the evidence. The Judge repeats that in his summing up. It's never raised from the defence perspective, if the jury gets to the second state of its enquiry. But it's also a reason to approach the purported recollection with a degree of caution because of the habit, we know the cocktail of drugs and alcohol can wreak on someone's perception or ability to recollect.

WINKELMANN CJ:

And that would have to have been given in respect of all the witnesses and the defendant?

MR CARRUTHERS:

Yes. I mean, I don't – if it's relevant to all of the witnesses, it needs to be brought to the jury's attention and so, I mean –

MILLER J:

One of the difficulties with this, it seems to me, is it stems from a proposition that intoxication is a common thing and its effects are generally well understood by juries. We could end up adopting a practice in which reliability directions are routinely given for complainants and perhaps also for defendants in sexual cases, is that really what –

MR CARRUTHERS:

If it's appropriate, Sir, it shouldn't be shied away from, and a direction, I mean, it would only be needed if the point hasn't been brought home to the jury.

MILLER J:

Yes, you're singling out the witnesses, for what, and saying something that really is quite obvious. Isn't there a risk that the jury will take it as a signal from the judge about the reliability of, and perhaps they shouldn't accept the reliability of the complainant's account or the defendant's, they're both problematic?

MR CARRUTHERS:

Well, it doesn't seem to have had that impact in cases referred to in the record where the judge has given a thorough though slightly more generic reminder of the relevance of intoxication or drug taking to an assessment of a witness' reliability, be a complainant, an eyewitness, the defendant. Those cases have all gone to appeal.

MILLER J:

Right.

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MR CARRUTHERS:

Which they only can if the jury has taken that warning onboard or that direction onboard and, nonetheless, found the defendant guilty. But it's a point made in *R v R*, a direction of the relevance and potential importance of intoxication to an assessment of accuracy should be able to be given in a way that runs no risk of swaying the jury one way or the other.

WILLIAMS J:

Well, must be able to be given that way, otherwise it shouldn't be given.

WINKELMANN CJ:

Right.

MR CARRUTHERS:

11.11, your Honour.

WINKELMANN CJ:

Do you think you're finished?

MR CARRUTHERS:

Well.

WINKELMANN CJ:

Admirable. You can just take a moment if you want to and check your notes.

MR CARRUTHERS:

I did have some points to counter those that the Crown have made, but I have made those points already in the course of submissions. The response to well, it was all so obvious, but the main issue was credibility. The argument that, well, the complainant's account is convincing in my submission puts the cart before the horse. It's only convincing if it's reliable and to conclude that it's reliable you have to grapple with the factors impacting reliability and the jury just wasn't asked to do that by anyone and I think I've set out towards the end of the written submissions that this case was lacking a number of features in my submission which the Court of Appeal often draws on to bat away the submission that a reliability warning was needed in the circumstances. Here, reliability wasn't explored in evidence. There was little to no mention of the impact of intoxication on reliability in closing and there was not even a generic direction from the judge, all of which heightens the risk of it slipping through the cracks.

WINKELMANN CJ:

Thank you, Mr Carruthers.

MR CARRUTHERS:

Thank you, your Honour.

WINKELMANN CJ:

Ms Ewing.

MS EWING:

The test for miscarriage arising from a closing address is not whether there was another submission available that could've been made. The question is simply whether the defence was adequately put before the jury and if that test is met, then the fact that something further or better could have been said or different evidence pointed to is not grounds for a retrial.

In Mr Tamati's case, trial counsel's closing put the core of his defence of fabrication squarely before the jury. At the core of his defence was the evidence explaining why the complainant might have lied, the timeline of her complaints to various people relative to the timing of her [relatives' attack on Mr Tamati]. That was the core of Mr Tamati's defence and plainly that part of his defence was explained in detail in closing.

Trial counsel also leveraged the trial evidence in detail to suggest that it proved the complainant was lying. The coincidence of her catching chlamydia at the exact same time as D, the person the defence said she had been having sex with that night. The inconsistency between her evidence and D's evidence about where the car in which she had been repeatedly violated had been parked, and the awkward position, as a young person, that was put in when her nana busted her on the phone to Family Planning, and the defence submission there was the complainant, this young woman in this awkward situation just goes with the flow. She takes the path of least resistance. That was the core of Mr Tamati's defence and it was before the jury.

Mr Tamati's focus in this Court is on the fact that something else could have been said. That there was a submission that could have been made about C's and D's evidence about the couch incident, and the Crown response is twofold. First, that's not the test for miscarriage. Second, that part of the evidence was reasonably avoided by trial counsel. At the outset of the trial the point that C and D had been in the room when the alleged room occurred, but did not, at least did not consistently or reliably describe seeing it, was always part of the

defence case. It was elicited in cross-examination of all of the Crown witnesses, and it may have seemed at the outset of the trial that this was going to be, as Justice Kós put it earlier, a killer point.

But things changed during the trial. The first thing that changed was that it became clear that C and D had not just been passively lying on a nearby bed when sex occurred. They had been having sex with each other at the time. They were distracted. They were not necessarily in a position to notice what the other couple in the room was doing.

The second thing that changed was the quality of C's evidence on the point. Because the submission that her evidence dented the complainant's account, only worked if C's evidence itself was reliable and persuasive. But by the end of the trial C had flip-flopped on that critical point, I think we've estimated between three and four times. At the end of the trial the best that could be said the trial judge thought for Mr Tamati was that she was confusing and contradictory, and there is a tension, in my submission, between my learned friend's arguments on the two grounds here. On one hand he is saying that C's evidence should have been at the centre of the defence closing, and on the other hand he is saying that her evidence was so unreliable that the jury should have been cautioned not to accept it. So by the end of the trial C's and D's failure to notice the rape, or to recall it reliably, didn't take Mr Tamati that far, and that meant it wasn't worth the risk of reminding the jury about what C and D had seen.

That, in a nutshell, is the Crown submission on the closing – the first ground about closing address, and I do want to take your Honours in more detail to Mr Tamati's interview and the evidence of C and D. It's apparent from the discussion we've had already that you're all very much across the case, so I will allow your Honours to move me along if I'm telling you what you already know.

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But first I wanted to just briefly cover what trial counsel did say during the closing address, the arguments that he did make and the backdrop to all of this, as the Crown's written submissions make clear, is that there won't be a miscarriage if the defence has been adequately explained. It has never been the case that trial counsel needs to close exhaustively, cover every point. What matters is whether the core of the defence was put and, as I have said –

GLAZEBROOK J:
I'm not sure I totally accept that because I think what you would have to show is that what was admitted didn't cause a miscarriage.

MS EWING:
That's a fair point, your Honour.

GLAZEBROOK J:
So you can put the core of the defence it didn't happen, but if there was a whole pile of evidence that really should've been either brought or cross-examined on properly, or in the closing address, then I think you could still have a miscarriage.

MS EWING:
Yes. So it's perhaps helpful to look at some examples that have met this threshold because generally speaking, where a closing address means the defence hasn't been put it's often the case that it actively undermines the defence case or undermines the defence interests. So I won't take your Honour in detail to the facts of these cases, but examples in that category are *R v Boyd* [2007] NZCA 507, *E (CA113/2009) v R (No 2)* [2010] NZCA 280 and *Kaka v R* [2015] NZCA 532 and also *Mason v R* [2019] NZCA 459 and just to give your Honours a flavour, those were closing addresses that really were confused, jumbled, incoherent.

All made points that favoured the Crown that the Crown hadn't picked up on. So in *Mason*, for example, the closing was described as being: "So deficient in content and delivery that the practical effect was worse than if no closing

address was given at all." But, if the core of the defence has been explained, it's never been the case that every last inconsistency needs to be leveraged, for example, in support of an assertion that the complainant is lying.

WILLIAMS J:

That takes you to back to the standard of a risk of miscarriage because that is a reference to the core of the case, is it not? If the core of the case is not put, the risk of miscarriage is present. If what is not put does not go to the core of the case, then there's obviously no risk of miscarriage, that's the point.

MS EWING:

So perhaps we all agree that if the core of the case was missing, then the test for miscarriage may be met and so the question here really is was C's and D's evidence in that category? Is it helpful then if I move on to that question?

WINKELMANN CJ:

Yes.

MS EWING:

I suppose the point I'm making before I move on, your Honours, is simply that it is important to have regard to what was put, or what was developed in terms of the defence case and the Crown's written submissions explain the points that defence counsel made. In brief, the timeline. The complainant has contracted chlamydia from C, she's put in an invidious position when she's caught out on the phone, it's Nana and not the complainant who infers a sexual assault, the complainant silently allows that assumption to remain, her family finds out, Mr Tamati [is attacked], the complainant is locked into the story. So that was the core and the trial evidence was leveraged in detail to support it. For example, the spontaneous truths that emerged during the trial that showed the complainant was lying. These are the written Crown submissions paragraph 28.

In cross-examination it emerged that the complainant hadn't told her nana that she was going to Family Planning. Her nana had walked in on the phone and

found out and trial counsel made the point this is how this whole thing began. If Nana hadn't found out about that phone call, we wouldn't be here, and he references the complainant's evidence in cross-examination, that she didn't want her nana to know about going to Family Planning. Obviously, as a young person, that was an awkward position for her to be in, and the centrepiece of this argument was D's evidence about where he had parked the car, because on the defence theory, if she doesn't know where that car was parked it's because she never went there with Mr Tamati and she was never raped in it.

And as his defence counsel put it, that was an important part of the Crown case. The way that it emerged at trial appears to have had real impact with the prosecutor scrambling to repair the damage and making not much headway and, in closing, the Crown had doubled-down on that point. Had said: "It's not an essential detail, but you can prefer the evidence of the complainant for the following reasons."

So, everyone in the room agreed that this was a problem for the Crown. The Crown focused on trying to repair it and that is the inconsistency that trial counsel selected to focus on as evidence of fabrication. So, he explained this is a huge difference in evidence. This directly contradicts the complainant's account and D had no –

WINKELMANN CJ:

You're saying, your point is, that that's the dynamic of the trial that he's picking up on, so he's picking that out?

MS EWING:

That's right. So, putting it simply, everybody at – both parties at that trial focused on D and where the car was parked and steered away from the couch incident and, as I said, it does appear, even on the record, that D's revelation about where the car was parked had a real impact on the jury. So trial counsel reinforced that D had no motive, no possible motive to lie about that, why would he lie about where his car was parked that night? He gave spontaneous detailed evidence. Your Honour's will recall from the notes of evidence, he was

able to name the shells of cars, the makes and models of cars, that he had parked out the back. He ex –

WILLIAMS J:
The half car.

MS EWING:
The half cars, indeed, with seats missing, or – so, you know, stripped of their seats and at one point in the attempt at recovering this evidence the prosecutor appears to be trying to suggest that maybe there had been some cars out the back that could have been used for this purpose, but it's immediately apparent from D's evidence that –

WILLIAMS J:
There's nothing in them?

MS EWING:
There's nothing in them, they're shells.

KÓS J:
We can see them on the photographs.

MS EWING:
Yes, and so this inconsistency in the evidence was the one that trial counsel chose, the one that had had the most impact on the jury, the one the Crown was concerned about, the one that related to the most serious charges and where D's evidence, critically, was clear, spontaneous, detailed and apparently reliable. That decision was reasonable and there was no need for trial counsel also to focus on the evidence about the couch incident.

WILLIAMS J:
Why was there no need?

MS EWING:

Well, I'm coming on to why it was equivocal or risky, so perhaps – so, the core of defence here was the complainant has a motive to lie and she has lied and the motive to lie was clearly exposed in the defence closing and the evidence – aspects of the trial evidence were then leveraged to support the submission that she was, indeed, lying, but it's never been the case that a miscarriage will result if defence counsel doesn't cover every last piece of evidence or every last available point and, of course, there are tactical decisions to be made.

WILLIAMS J:

Unless it's a core point.

MS EWING:

Unless it's a core point, yes, but there are always –

WILLIAMS J:

Yes and that's what you have to face.

MS EWING:

Yes.

WILLIAMS J:

The argument that this is a core point.

1130

MS EWING:

Yes. So, other aspects of – just before we move on from the defence closing, the defence closing also reinforced in the introduction and the conclusion that the jury faced a very serious task. It was described as a very heavy burden. One that had to be discharged diligently and fairly, looking at reason and evidence, that's case on appeal pages 224 to 225, and the conclusion of the defence closing reminded the jury the burden is on the Crown, it's a very high burden, and don't rush to a decision. There's no room in cases of this case for a she'll be right approach, that's case on appeal pages 234 to 235, and as I

think it was Justice Miller, pointed out, trial counsel also turned parts of the unsavoury backdrop to Mr Tamati's advantage, suggesting that Mr Tamati moved in circles where people presented guns at each other for no reason, then why on earth would have gotten into the car with the complainant's [relatives] if he knew that he had raped her.

He went on to say that this world in which the, Mr Tamati and the other Crown witnesses were moving, was a place where the truth was a very flexible commodity. So as your Honours have pointed out there was this awkward or unsavoury aspect of the backdrop of the party and the behaviour that was going on, but trial counsel turned that backdrop, or attempted at least to turn that backdrop to Mr Tamati's advantage, and the Crown, of course, have done the same with the complainant, explaining that she was no angel in its closing, and addressing the fact that she had been drinking and engaging in conduct that her parents and grandparents and other members of the jury might not approve of.

So why was C's and D's evidence about the couch incident not a fundamental part of Mr Tamati's defence? Why was it not at the core of –

WILLIAMS J:

Well not *the* core. That's narrowing it, because you can have more than one core, can't you. Otherwise –

MS EWING:

Well –

WINKELMANN CJ:

Why was it not called in aid of the reliability and truth of what Mr Tamati had said in his, I think is what the point was.

MS EWING:

So, your Honours have really –

WILLIAMS J:

Which is – the point is that core can distract. Why was it known so – why was it not so important that there's a risk of miscarriage, is the test.

MS EWING:

I'm sorry, I didn't understand the first part of your Honour's question. The core…

WILLIAMS J:

I used the word "core" because we're using that as a shorthand, but it can be a bit of a distraction because in your case it allows you to argue there's only one thing, there's only one thing, when in fact what we have to ask is, was this so important, failure to raise it created a risk of miscarriage.

MS EWING:

Yes, but it's important to understand that the defence here was the complainant is lying.

WILLIAMS J:

Yes, yes, I understand.

MS EWING:

And that that core was clearly before the jury. So your Honour's point is there can be more than one core. What I'm saying is that there was one core here. It was fabrication, and specifically motive to lie, and of course, naturally, different pieces of evidence could be leveraged to support that core. But to say that one piece was chosen over another, so where one piece was reasonably chosen over another, against the backdrop that you don't have to cover them all, the core has been covered. That's my position.

GLAZEBROOK J:

But isn't the point if there was real doubt about the second incident, that would clearly be something, if it's the argument as I apprehend, that would clearly be something that it should have been put before the jury very clearly, because

doubt about the second incident would colour that. So it's not, that is part of the core that wasn't put, was the argument as I understand it.

MS EWING:

Yes. So –

GLAZEBROOK J:

So I think you probably have to say why it was dangerous or a reasonable decision now to concentrate on that second incident. As well as the other points that were made.

MS EWING:

Yes. So the defence here relied to a significant extent on events external to the party, if I can put it that way. It was, we know that the complainant is lying because she was put in a position –

WINKELMANN CJ:

It's morning tea time actually.

MS EWING:

Yes. Do you want me to finish answering that question?

WINKELMANN CJ:

Yes, finish answering the question.

WILLIAMS J:

At least the sentence.

WINKELMANN CJ:

Finish answering the question, Ms Ewing. It's just I have a responsibility to adjourn at times and sometimes my colleagues get cross at me for failing to discharge that responsibility.

MS EWING:

We're all grateful for someone monitoring the time for morning tea.

WINKELMANN CJ:

In this occasion, Justice Kós.

KÓS J:

Needs his caffeine. But I can hear your sentence.

MS EWING:

Yes. Well, look I'm very happy to break and come back.

KÓS J:

No, no, let's hear your answer.

WINKELMANN CJ:

No, answer, yes.

MS EWING:

My learned friend's point, if I can rephrase it as that, if there were, well perhaps it's just better if I tell your Honours what my point in response is. So I've explained the core is motive to lie. Evidence, different pieces of evidence can be leveraged in support of that motive to lie and my learned friend is really focusing on how close to the events the evidence was, but I say that is an insufficient way of assessing, or that's too atomistic because it doesn't take into account the other features of the evidence like how good was the evidence that contradicted the complainant's account. D's evidence about the car was great. C's evidence about the couch incident not so. In fact, for the reasons your Honours have articulated, problematic for Mr Tamati.

The other aspects that trial counsel may have had in mind include the fact there was always going to be a question about reasonable belief and consent for the incident on the couch. So, because the complainant had said: "I just lay there, I did nothing, I didn't say or do anything," there was always going to be a, the judge was always going to sum up on that issue in that part of the case.

The offending, by contrast, what had happened in the car was self-evidently the most serious allegations that Mr Tamati faced. Three separate violations against resistance despite distress and with no real narrative available about – well, those were the most serious allegations that Mr Tamati faced and that may well have been a factor when you are considering which parts of the evidence to emphasise. D's evidence about the car naturally related to those most serious allegations where Mr Tamati was in trouble if the complainant's evidence was accepted. So I say that proximity to the central allegations, sorry, proximity to the elements of the offence is not a sufficient way of assessing the forensic advantage of what evidence to focus on in closing.

WINKELMANN CJ:

So your point is that when you look at it in that way, the evidence about the location of the car was far more potent?

MS EWING:

Yes.

WINKELMANN CJ:

Right. Okay, we will take the morning adjournment.

COURT ADJOURNS: 11.39 AM

COURT RESUMES: 11.58 AM

MS EWING:

Your Honours, I really don't have much more to add on the first ground. I'm going to very quickly take you through a high level summary of the Crown position simply because it appears your Honours have already grasped all of the points that I was planning on making.

WILLIAMS J:

You said you were going to say something about Mr Tamati's EVI.

MS EWING:

Yes, indeed, so I've got three things to say at this point, complying with the Chief Justice's rule of not more than four. The first is –

WINKELMANN CJ:

Actually I think I'd amend that to five, I think five is credible, but once you get past five…

MS EWING:

Okay, first, why C and D's evidence wasn't part of the essence of Mr Tamati's defence, or a key component as the Court described it in *Waters v R* [2020] NZCA 93. Second, why his interview also didn't need to be a central focus, and third, I just want to briefly say something about the allegation of failure to prepare. So I'll be brief, but as I said, your Honours appear to already have really grasped all of these points.

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So the couch incident evidence, if I can put it that way, was not part of the essence of Mr Tamati's defence because by the end of trial what C and D had seen damaged his denial of sexual interest in or attempt to have intercourse with the complainant and what they hadn't seen was explicable.

So starting with that first point, and your Honours made these points yourselves, he didn't just deny intercourse. He vigorously denied any sexual interest in the complainant: "Honestly, she's not sexy in my eyes," he said, "because she's too young. Never tried getting into her, never tried once. No time he held her or had a hand on her." So what C and D had seen happening on the couch between them undermined that denial. C described Mr Tamati being: "Touchy feely, kissing and hugging and stuff like that," and this wasn't mutual attention. She said quite clearly who was doing the hugging and kissing, "him" and D's evidence was perhaps less specific. He said: "They seem cosy." That's notes of evidence at 61. But just a page earlier in there he had used that same word to describe them: "Cuddling up on the back porch." So he said around nine or 10 at night he had seen them sitting on the back porch cuddling up and he said: "They looked cosy." So in context, when

moments later in his evidence he describes them looking cosy on the couch, what he said was consistent with what C described.

So there was a real danger for the defence here in emphasising that evidence and in that respect, what they said might be thought to be closer to the complainant's account than to Mr Tamati's vigorous denials. What they didn't see was explicable. Everyone was intoxicated by that point. C and D, as it emerged during trial, were clearly distracted. C's evidence flip-flopped back and forth on whether she had observed sex and when she did describe seeing sex, it wasn't in a particularly persuasive way. As Justice Kós pointed out, she simultaneously seemed to be walking into the room and having sex with someone on the bed at the same time, and given how everyone was positioned in the room, it would've been understandable if C and D had not seen Mr Tamati moving the complainant's underwear to one side and penetrating her from behind and I say that because the two, the bed and the couch were parallel to each other within the bedroom. The complainant was on the side of the couch closest to the bed. C was on the side of the bed closest to the couch. The complainant and Mr Tamati were on their sides, Mr Tamati behind her and D was on the other side of the bed.

So that's just in a nutshell why this wasn't at the core of Mr Tamati's or the essence, a key component of his defence and for similar, or for related reasons, it was also understandable that trial counsel didn't devote attention, or didn't dive into his police interview in detail. What he said in that interview had been contradicted by C and D during the trial and the real focus of the defence was on providing reasons why the complainant had fabricated. So there's two sides of the same coin really. If one of these two people is lying, the defence chose to focus on why the complainant was lying and that naturally would then mean Mr Tamati had to be telling the truth and as I explained earlier, the real focus of the fabrication defence was her external reasons to lie, the reason, the fact her [relatives had attacked] Mr Tamati, the fact all her complaints on the defence case at least had come after that moment in time, the way her complaint emerged to her nana and those were all matters outside Mr Tamati's knowledge. They weren't things, the [attack] aside obviously, they weren't

things that – he couldn't advance that defence just by denying sexual intercourse.

WINKELMANN CJ:

So, Mr Carruthers says that a proposition that counsel put to C, I think, was inconsistent with Mr Tamati's statement?

MS EWING:

Yes, so did your Honour have any questions about – that's a failure to prepare point, so that's my third point.

WINKELMANN CJ:

Oh, okay, sorry.

MS EWING:

No, that's fine. But I was kind of finished with the –

WINKELMANN CJ:

I don't think we have any questions about the point you just raised, we've traversed that quite thoroughly.

MS EWING:

Yes, so that brings us to failure to prepare and Justice Glazebrook really hit the nail on the head here. The Crown submission is that it doesn't matter. A failure to prepare can only cause a miscarriage if it impacts the trial in some way and my learned friend's argument seems to be: one, C's and D's evidence supported Mr Tamati's account; two, that should have been brought out in closing or his interview should have been traversed in closing; and three, the reason it wasn't is that trial counsel didn't know what it said.

So, I've given you the Crown answer to why the interview didn't have to be a central focus of the closing address and if that's right, in the Crown's submission, it can't be the case that a failure to prepare has really had any impact.

KÓS J:

Are you conceding –

WILLIAMS J:

Well, if it's right, then the third proposition can't be right, surely.

MS EWING:

Hang on, I'm lost.

WINKELMANN CJ:

Yes, I am too.

WILLIAMS J:

Well, if your points 1 and 2 are correct and –

MS EWING:

Those aren't my points, your Honour, they're Mr Tamati's points, but –

WILLIAMS J:

Yes, no, I don't mean Mr Tamati's points 1 and 2. I mean if you say there were strategic reasons for the way the defence unfolded, then it follows that the failure to prepare point can't be factually correct. Unless you're suggesting that it's – that the strategy was an accident?

MS EWING:

So my submission on points 1 and 2 is about objective reasons why some – this evidence could be omitted reasonably and point 3 is an allegation that the subjective reason why trial counsel didn't mention Mr Tamati's interview.

WINKELMANN CJ:

But wouldn't you say, anyway, that your points 1 and 2 are – tend to contradict a lack of preparation?

MS EWING:

Absolutely, as does the rest of the trial record, in the Crown's submission, because it's apparent that this defence of motive to lie was quite painstakingly constructed from disclosure documents. It wasn't part of the Crown evidence at all and I can take your Honours to –

WINKELMANN CJ:

He scores some wins, doesn't he, in the course of the case. He might have thought as defence counsel he was scoring some wins along the way.

MS EWING:

Yes.

WINKELMANN CJ:

With the evidence he was eliciting through cross-examination.

MS EWING:

Yes, but –

WILLIAMS J:

Well, he was certainly across the timeline better than Crown counsel were.

MS EWING:

Yes and able to make, therefore, spontaneous responses to the Crown closing about –

WILLIAMS J:

Correct.

MS EWING:

About what [the complainant's friend], for example, had said in her cross-examination. So, but so the failure to prepare, the allegation really is that trial counsel didn't know what the interview said and that's why it didn't get more focus at the trial and I will come on to address your Honour's point about the cross-examination of the complainant in a second, but the Crown response is twofold. First, a failure to prepare can only gain traction if it affects the trial in

some way and if authority for that proposition is needed I can provide it. But it seems –

GLAZEBROOK J:
That seems obvious to me.

MS EWING:
Obvious.

KÓS J:
Yes, yes.

GLAZEBROOK J:
Because you have to have a miscarriage.

MS EWING:
Yes.

GLAZEBROOK J:
And the failure to prepare doesn't give you a miscarriage unless it had an effect.

MS EWING:
Yes,

GLAZEBROOK J:
Of course, in many cases it will have had an effect.

MS EWING:
Exactly right and *Aitchison v R* [2016] NZCA 529 is the authority I was thinking of. That's an example where it did have an effect on the way the trial unfolded. But this, the Crown says, is not that case. So that's the first Crown answer and that therefore means the factual inference about failing to prepare perhaps doesn't need to be addressed, but for the sake of –

1210

MILLER J:

What is relevant in this sense, that often the point that's taken by defence counsel whose conduct in the trial is challenged is that I made a reasonable call about this, balanced all the risks, and some deference is given to the assessment of counsel in circumstances that Mr Taffs doesn't say that, then we do have to look at it a bit more closely, don't we? We're not in a position to say it was within the reasonable judgment of counsel because on the face of it he didn't even think about it.

MS EWING:

Well I don't agree that that inference is available, but I accept your Honour's point, that if we had, if there was overwhelming evidence that, you know, the facts in *Boodram v The State (Trinidad and Tobago)* [2001] UKPC 20, [2002] 1 Cr App R 12 where trial counsel was completely unaware of the fact that there had been a previous trial.

MILLER J:

Yes.

MS EWING:

That kind of level of lack of understanding will perhaps inform, will mean that error, prejudice, the outcome will be –

MILLER J:

I take your point that Mr Taffs clearly was across the case in the ways he thought important.

MS EWING:

And he reasonably didn't think that Mr Tamati's video interview was critical, essential to the defence.

KÓS J:

That's the other inference that you can draw from that passage that Mr Carruthers was relying on on page 57. No I really, I didn't really think much about what Mr Tamati had said quite frankly.

MS EWING:

Indeed.

KÓS J:

Me neither, I didn't think it was very relevant, or could mean I didn't actually think about it at all, who knows.

MS EWING:

I didn't think I needed to.

KÓS J:

Yes.

MS EWING:

Yes. So I'll just then respond to your Honour's question about the cross-examination of the complainant and why the Crown says that doesn't evidence a failure to prepare. So this point is addressed in footnote 101 of the Crown submissions, just in case that's helpful. What happened is that the complainant revealed for the first time, so trial counsel was putting to the complainant this point about C not having seen the rape despite having been right there, and he asked her: "Why do you think she didn't mention that in her police statement".

So he's in the middle of putting to her what he hopes will be a powerful defence submission about the fact that a potential eyewitness just hadn't seen the rape, and she immediately responds because she was having I think, working off the top of my head, sexual relations with D at the time.

At that point that was the first moment in the trial where it would've become apparent that the complainant alleged the rape had occurred at the precise

moment when C and D were having sex. So Mr – the complainant in her EVI had made no mention of C and D having sex at the time. Mr Tamati in his interview had said that the sex between C and D occurred when he, the complainant, and a young woman by the name of H, was on the couch, and the evidence, the complainant said, and the other Crown witnesses ultimately agreed, that H had left before the complainant alleged the rape had occurred. Does that make sense?

WINKELMANN CJ:
Can you just go back over it?

GLAZEBROOK J:
Another timeline issue.

MS EWING:
Another timeline sorry. So the complainant, let's start with the complainant's account. The complainant says: "I wake up once on the bed and H is on the couch." She goes back to sleep. The next time she wakes up she's on the couch with Mr Tamati, and H has gone, and C and D are in the bed. She doesn't mention them having sex at that point, so trial counsel wouldn't have been aware that she alleged that that's what was going on while she was raped. Mr Tamati –

GLAZEBROOK J:
Can I just, sorry, you say the complainant was in bed. She woke up and saw H on the couch, is that…

MS EWING:
Yes, so I can take you to, perhaps it's helpful to take you to the Crown –

GLAZEBROOK J:
That's all right, and then the next time H had gone?

WINKELMANN CJ:

There's two waking incidents.

MS EWING:

Mmm.

WINKELMANN CJ:

She wakes up once, H is there. Wakes up again, H is gone, and Mr T is there.

MS EWING:

Correct. Mr Tamati, so on her account it's clear that the rape has occurred after H leaves. In the EVI this is and Mr Tamati then says: "At one point I was on the couch with the complainant and H," and that is the point in time when C and D were having sex. So just working on the documents that trial counsel would've had available before trial, there would've been no way for him to know that the complainant was going to come out with this revelation that his two eyewitnesses, the people he hoped would've been in a position to observe the rape, were actually having sex with each other at the same time. That revelation damaged the defence submission that he hoped to make about the fact that C and D must have seen this. If it happened, they must have seen this and so his instinctive reaction under cross-examination is to say that's a lie. You didn't say it in your EVI, it's a massive addition, it hurts my defence, it's a lie. That is a perfectly understandable and reasonable decision in the circumstances bearing in mind that neither C nor D had said in their police statements that they had had sex with each other at any point.

MILLER J:

So your point is he's not contradicting Mr Tamati's account in his police interview at all?

MS EWING:

No and he's setting up a problem with the complainant's evidence if C and D come along and say something different because at that point their police statements made no mention at all of them having sex with each other. Certainly not at the same time. So anything could've happened. C could've

come along and said: "Yes, I was having sex with D, but it was when H was on the couch," for example and if that had of happened, trial counsel needed to have put the foundation to say this is a lie. So it's complicated, but when you put yourself in trial counsel's shoes with the information he had at the time, it is understandable and it certainly doesn't portray a complete lack of knowledge in his interview.

That is all I hoped to say on the first ground. Is there any points I haven't – sorry, there is one more point I wanted to make actually which is not in the written submissions. Both my learned friend's submissions and my submissions explain that in the summing up of the defence case, when the Judge was summing up the case, the trial judge explained that part of the defence case was that D hadn't seen the rape and C's evidence was confusing and contradictory and I just want to make the point because neither of us made it in our written submissions, that also made it into the question trail that the jury received and that's in the additional.

WINKELMANN CJ:

Can you just repeat that, I'm sorry, I lost the thread in it?

MS EWING:

Yes, so it's a small point that I'm adding. So both my learned friend and I, perhaps I can just remove everyone's submissions from the picture.

WINKELMANN CJ:

Yes, I think remove the submissions from the picture.

MS EWING:

Everyone agrees that the trial judge mentioned C's and D's evidence during summing up as part of the defence case. This is the comment about C's evidence being confusing and contradictory and I just want to make the point that that part of the summing up was recorded verbatim in the question trail, the written question trail which the jury received when it retired, which is in the additional material. So simply put, the submission my learned friend is saying

should have been made was in any event captured as part of the defence case, both in the summing up and in the written materials the jury received when they were deliberating and that's a feature that distinguishes this case from, for example, *Waters* where the trial judge didn't capture the part of the defence case that had been missed in closing and those are my submissions on ground 1.

1220

Moving to ground 2, I'm conscious that I have 40 minutes remaining. We may not need that long because the Crown submissions really capture everything the Crown has to say on this point, so I will just very briefly encapsulate the Crown position.

First, the need for a reliability warning will be most acute where the unreliability is of a sort that the jury may not readily detect or may not know how to analyse and section 122(2) captures many of those kinds of evidence that are seen as lurking risks, as one of the Australian cases puts it.

WINKELMANN CJ:

Beyond the common knowledge.

MS EWING:

Yes, beyond the common knowledge and, you know, hearsay, forensic disadvantage from delay, these are classic topics that judges may know more about than jurors and therefore, some help is required. But intoxication is not in that category and the corollary is that in many cases it will be sufficient for it to be traversed at trial where it will almost always be explicit. Intoxication is not the kind of point that defence lawyers miss or fail to cover in cross-examination and secondly, the risk of a miscarriage if a warning isn't given is likely to be much lower because of the fact the jury is capable of assessing reliability in the usual way.

In the written, Crown's written submissions I've explained some of the features that might determine when an intoxicated witness' evidence is so unreliable that

a warning might need to be at least considered and really, when you think about it, they're all the usual indicia of reliability that jurors will use to assess the reliability of witness' evidence. Were they intoxicated or not? Do they remember things clearly? Do they give a coherent account? Are they able to recall detail? If they have memory loss, do they nevertheless have a continuous recollection of events that follow as opposed to the kind of the cases where someone is really in and out consciousness and it's not clear that they have a consistent or a continuous recollection of events and internal consistency, again, an obvious indicator of unreliability, one that juries are capable of assessing.

So the kinds of features that the Crown says should feed into an assessment of whether someone's, an intoxicated person's evidence may be unreliable are all the same things that juries will be using to determine reliability in any event, and also of significance in the Crown's submission is the issue in the case. So in simple terms, what is it suggested the complainant has got wrong? Is it suggested that her memory of repeated violations in the boot of a car may be unreliable, a figment of her imagination? There's far less scope obviously for reliability concerns in a case of that kind than where the defence is identification or consent where there may be questions about whether the complainant's memory loss cover periods where events may have occurred relevant to consent or reasonable belief in consent.

WINKELMANN CJ:

So Mr Carruthers says, well, that where reliability is not the defence issue at trial, that's just the kind of case, I think as was the case in the *R v R* – and the Queen, I think at the time, or King actually – but anyway, just that kind of case where reliability is not the issue, but reliability – not the defence issue, but reliability is nevertheless in play is the kind of situation where a judge should direct.

MS EWING:

I don't think any rigid rule can be made about that, because everything is, in these cases, is so fact specific. But if we take this case as an example, the

defence didn't pursue reliability. Its sole focus was fabrication and the reason for that was because a reliability-based defence would not have gained much traction. The defence was a total denial. The complainant had lucid and clear recollections of being repeatedly violated, first in the boot of the car, then on the couch, and she did not budge one inch from that account in cross-examination. So, if the defence is fabrication because there's very limited scope for concern about reliability, then it doesn't follow that a warning is needed and that's so in this case. Because in one point in his submissions, my learned friend suggests that the judge excused inconsistencies in the complainant's evidence as a result of intoxication. The defence here wanted every deficit in the complainant's account to be evidence of fabrication. They did not want it to be excused as a faulty memory, because in reality the defence had no chance of establishing that the complainant had just dreamed these detailed violations up.

WINKELMANN CJ:

So if the defence, if – were a judge to give a reliability warning on the basis that, oh, look, there were drugs and alcohol used and you might want to consider the impact of that on the evidence, your point is that actually might rebound against the defence. If the judge was to go further and say "and therefore you should take care when you consider the complainant's account of the evidence" in a case such as this, where there is detailed account of prolonged offending, would you say that there would need to be some sort of evidential basis to give rise to an obligation to give a reliability warning? Because it certainly might not be something a judge might feel free to assume, that alcohol and drugs could, in fact, cause a false memory of that nature?

MS EWING:

I'm not sure whether your Honour's question is about whether there needs to be some evidential foundation for the general –

WINKELMANN CJ:

Yes.

MS EWING:

Is that right? The general?

WINKELMANN CJ:

Not the general.

MS EWING:

Or the – or for the specific?

WINKELMANN CJ:

For one in this case, in this case, because it is unusual, it's not – so, I think Mr Carruthers's point is that, really, there was a reliability issue about her whole account of offending and where that offending – that account of offending is of detailed, lengthy offending, on her account, over a period of time, would there need to be some sort of evidential basis to say well, look, a combination of drugs and alcohol in this situation could produce a false memory of that nature, because it's just not – it's beyond fogginess, misattribution, gaps?

MS EWING:

I mean, there's two answers to your Honour's question. The first part is that I think both my learned friend and I accept that, as in *R v R*, the focus should be on indicia of – objective indicia of unreliability about the core parts of the complainant's account. So, my answer in a sense is, no, I don't, I don't – I'm not suggesting that there needs to be, or that there should be expert evidence led about that sort of thing, because the courts have made it very clear that that sort of evidence just involves telling jurors, in scientific terms, what they know already.

1230

But the second limb or the second part of the answer is that it wouldn't usually be the that if you had expert evidence, that it would involve offering an opinion on the reliability of a particular complainant's evidence. It would usually be much more generic and that's why it doesn't usually take things anywhere, because it's just things we already know in more scientific terms.

WINKELMANN CJ:

But my point is, I certainly don't know that a combination of drugs and alcohol could cause a false memory of this protracted and detailed a nature.

MS EWING:

So your Honour's point is should a defence request –

WINKELMANN CJ:

Because what we're talking about –

MS EWING:

– for a reliability warning –

WINKELMANN CJ:

Yes, what we're talking about.

MS EWING:

Be supported by…

WINKELMANN CJ:

Yes, so there's –

GLAZEBROOK J:

I mean something more than –

WINKELMANN CJ:

– two kinds of reliability warning.

GLAZEBROOK J:

A normal intoxication warning would just say something like, well these people were really, really intoxicated, everyone seems to have been intoxicated, although I think the accused said he wasn't. But take that into account when you're assessing the evidence.

MS EWING:

Mmm.

WINKELMANN CJ:

So that doesn't need an evidential basis, but if you're going to go on and say in this case, and when you assess the complainant's account of what occurred to her, you should take into account that she was, you know…

WILLIAMS J:

Well would intoxication of that kind cause confabulation.

WINKELMANN CJ:

Yes.

WILLIAMS J:

As a matter of science.

MS EWING:

I mean, again, yes, confabulation and filling in gaps in memory is also a matter that judges have said are within the common knowledge of the jury. It's obvious that, when a defence lawyer makes the submission in cross-examination, well you don't actually know what happened, you're just filling in the blanks. You don't need expert evidence to understand that that can be so, but equally intoxicated people can have memories that are true, and so I don't know that it…

WINKELMANN CJ:

I suppose the question is probably one for Mr Carruthers. What kind of direction exactly does he think should have been given.

MS EWING:

Yes.

WINKELMANN CJ:

And did he tell us that in his submissions.

GLAZEBROOK J:

And I suppose in terms of your point that says it's just ordinary indicia of reliability, in fact the Judge did go through that in some detail, in terms of saying, well look for corroboration, look for…

MS EWING:

Mmm.

GLAZEBROOK J:

And as you say that would be whether the person was intoxicated or not intoxicated, there wouldn't be necessarily a difference.

MS EWING:

That's right, so if their objective indicia of unreliability are patent for everyone to see, does it need to be pointed out in any great detail, will justice miscarry if it's not.

WINKELMANN CJ:

It's at paragraphs 73 and 74 of Mr Carruthers submissions I think.

MS EWING:

I'm sorry, I'm not sure if I understood your Honour's question correctly. Did I answer it or…

GLAZEBROOK J:

No, I think you'd made the point that the jury should be directed to an exercise that looks at whether the evidence is reliable or not, and I was just putting to you that, in fact, that seems to have been done by the Judge. Not with a specific reference to "intoxication" but with a specific indication of whether it's reliable.

MS EWING:

Yes, and to be clear when I was talking earlier about the objective indicia of unreliability, I wasn't at all suggesting that in every case the Judge should give that direction. I was saying those are the kind of things that judges will take into

account when considering whether a complainant's evidence is so unreliable that it needs to be, the jury needs to be warned about it. But those same factors are the very factors that juries use day in and day out anyway. So my point was designed to reinforce that juries are well capable of assessing this kind of thing.

WINKELMANN CJ:

So Mr Carruthers said that the jury should have had conveyed to them in the form of a judicial warning centred around the complainant's severe intoxication on a combination of alcohol and drugs. Should have conveyed to them that there were features of the evidence which could properly have led the jury to proceed with caution. The complainant's intoxication, memory loss, the selective nature of her recall, the inconsistencies between her evidence and that given by H and C, and the fact the evidence given by H and C aligned to a degree with what Mr Tamati had told the police. One might amend that, but the point is you could focus on, should have proceeded, the jury should proceed with caution when considering the evidence of the complainant given the evidence to the extent of her intoxication and admitted memory loss. I suppose is what really is the core of what Mr Carruthers is suggesting.

MS EWING:

Yes. My submission is that in this case the complainant's evidence was nowhere near the threshold where such a warning might be appropriate. So turning to that point then, and I cover this in my written submissions starting at paragraph 80. So it seems uncontentious to say that a reliability warning will only need to be considered if there are signs that the evidence in question may be unreliable and in the complainant's case, all of the objective indicia that I have been talking about came down on the side of reliability rather than unreliability. So she was upfront about her memory loss. She hasn't confabulated it away, she's acknowledged it and yet between her memory losses, or her memory gaps, she has a full coherent and quite detailed recollection of events.

So, just to take an example relating to the first charge, she recalled what Mr Tamati talked to her about when he was doing her tattoos. He commented on her blue underwear which she'd gotten ink on from the tattoos and Mr Tamati, in his own interview, confirmed that the topics that she said they had talked about. So, they talked about her family, the fact that she knew him through his family and they both came along and said in their accounts of that event that that's what they'd talked about. So similar levels of detail about her violations in the car. She recalled being face down and trying to scream, her face being pressed into the boot of the car and the way that Mr Tamati held her neck when that was happening and she described the clothes she was wearing when all of this was happening and how she put them back on afterwards.

My learned friend obviously, in this context in the second ground, makes much of D's evidence about where the car was parked and the Crown response really is you can't take two intoxicated witnesses and assume that one of them is getting it right. So, yes, your evidence was inconsistent with D about where the car was parked, but inconsistencies between a group of intoxicated witnesses doesn't really take us anywhere in the reliability inquiry because it begs the question that's really for the jury about whose evidence is more reliable.

KÓS J:

But isn't that the very reason why you need to give the reliability warning? I mean you seem to be suggesting that someone is a valuable intoxicated witness who can fill in lots of detail should be relied on or is inherently more reliable. But that could simply a process of confabulation, imagination as opposed to someone who doesn't say very much at all?

MS EWING:

So on the spectrum of vague, foggy, blurry to highly detailed, most jurists would accept that getting towards the detailed end of the spectrum is more consistent with reliability and in this case, Mr Tamati confirmed what she said about the details, so her recollection is accurate, that's what I'm saying.

KÓS J:

Well, I think that corroboration is critical.

MS EWING:

Yes, indeed.

MILLER J:

Also the issue about D, am I correct that he gave his evidence about where the car was for the first time at trial, so it's several years later, whereas she gave her account of where it was in her interview with the police a few months later? 1240

MS EWING:

Yes, but I'm not suggesting that judges should go through a detailed process of trying to work out who is right before the give a reliability warning. My point is that that's a question for the jury and the fact another –

MILLER J:

I was really asking the question whether it's a live issue in this case, as between her and D, as opposed to her and Tamati.

MS EWING:

I think the way I put it in the submissions is that D's evidence cannot be compared to CCTV contradicting her account and there's support for that idea in *R v R* where the Court, when it was talking about objective indicia of reliability, talked about known facts. So not alleged facts or someone else's recollection, but known facts, that's the kind of thing that can point to unreliability.

MILLER J:

Right.

MS EWING:

There really weren't any internal inconsistencies in the complainant's evidence at trial and even reading her evidential video interview, she gives a really quite spontaneous and very detailed account. She talks about what – which buildings

they were parked outside, after this incident, after the second incident, where she ended up in the car with Mr Tamati, and even within her own EVI where she's going over the same events again and again, her account is internally consistent.

The defence here was denial and as I've explained already, this is the kind of case where a defendant may well prefer signs of inconsistency like D's evidence about the car to be viewed as – through the lens of fabrication rather than as a sign of unreliability.

WINKELMANN CJ:

So a general, say if we were to think it's quite a good idea to give a general intoxication warning which is as to the impact on the various people you've heard of the fact they were drinking and had taken drugs, would it be your submission that wouldn't help – wouldn't have helped the defendant, yes, Mr Tamati, because actually that was the Crown's case that you can take that into account when you're looking at little bits and pieces around the edge? I mean, what difference would it have made? What about the absence of a general intoxication direction?

MS EWING:

Yes, yes. So the judges do give general intoxication directions of this kind, as your Honours will appreciate from the Court of Appeal cases that both sides have relied on, but generally on the spectrum of section 122 warnings that would have to be right at the bottom. It's nowhere near inviting caution about somebody's evidence, it's really telling the jury how to analyse it in the same way that judges say a witness, you know, witness evidence may be unreliable, if there are inconsistencies look at whether it's confirmed by external evidence, that kind of thing. It's the direction that section 122 is concerned with is really about inviting caution about particular evidence and there's nothing wrong, to answer your Honour's question, with judges making that kind of general comment, but because it's telling the jury what they already know, it would rarely be a risk, it would rarely result in a miscarriage if it's not included.

WILLIAMS J:

One of the points made in *R v R* is that it's essential to discuss the necessity for reliable – reliability warnings in circumstances where section 122 is engaged at the latest by prior to the judge's summing up, earlier if possible. Given the judge's references to reliability, do we know whether there were any discussions that took place?

MS EWING:

I have reviewed the trial prosecutor's notes and I didn't detect any. Obviously I haven't been able to speak with him in this case, but I haven't – I didn't detect any discussion about that point, but equally there's no suggestion that one was requested.

WILLIAMS J:

No, no, well, that's clear. Okay.

MS EWING:

The final – that really concludes –

WINKELMANN CJ:

But your point is that the section 122 judge, what is it, must consider the threshold is not engaged, the requirement that the judge turn their minds to it was not engaged?

MS EWING:

Yes. Sorry, I may not have been particularly clear in that part of my submissions. So the Crown's position really is that in many cases there won't be sufficient indicia of unreliability as a result of intoxication for any kind of person to be singled out for caution and in those cases, cases like this where everybody is drunk and on drugs there is no harm in a generic warning, but equally, it's simply telling the jury what they already know. I think I've forgotten your last question. Could you ask it again?

WILLIAMS J:

You covered it.

MS EWING:

Have I?

WINKELMANN CJ:

No, I think you covered it, yes.

MS EWING:

Okay, that's good, that's good. So that concludes what I wanted to say about C really, that the Crown answer is a warning wasn't required because there just wasn't any sign that intoxication had really undermined her account to the extent that it shouldn't be relied on or that the jury would have difficulty with it, which brings me to C and here again the argument is simply that the issues with C's evidence were obvious. It was obvious that she was drunk and had been taking drugs. She acknowledged it herself and as my learned friend said, everyone steered clear of what, of much of her evidence in closing precisely for the reason I think that it had just, even on the transcript, her evidence about the couch incident was so inconsistent.

WINKELMANN CJ:

I think that was my point rather than Mr Carruthers'. He was saying they shouldn't have steered clear of it.

MS EWING:

Yes. I understood my learned friend to say that the Crown dodged it.

WINKELMANN CJ:

Steered clear of it. Yes, that's right.

MS EWING:

It relied on aspects of her evidence but not that, the flip-flop part where she was quite inconsistent. So it would've been obvious to everyone in the room that C had offered a bunch of different versions about the same events and that that

meant none of them took anyone really very far and for that reason it can't be said that justice has miscarried as a result of the absence of a warning, and as I said earlier, there is this kind of tension where my learned friend is saying C's evidence was an important part of the Crown case and if to the extent that that's so, a caution from the judge that it shouldn't be accepted wouldn't necessarily have advanced his defence. I see I have 12 minutes before lunch and I possibly –

WINKELMANN CJ:
Well, there's also reply.

MS EWING:
Yes, exactly, so I will leave things there unless your Honours have any questions?

WINKELMANN CJ:
Thank you, Ms Ewing.

MR CARRUTHERS:
Just one point on the closing address issue, picking up this concept of the core, in a case where the defence says the complainant is lying about the offending, in my submission what would be more at the core of the case and problems with the Crown evidence of that offending which can then be marshalled in support of a submission that the complainant is lying about it, I mean, it's the evidence of the actual ingredients of the offence which can be marshalled in submission to the jury that they don't marry with what the complainant said. The complainant is lying. It folds in at a granular level attaching to the very questions the jury will have to ask itself in the question trail. It folds in at that level with the broader defence being run. I just can't think of anything more at the core of the defence.
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WINKELMANN CJ:

What do you say about that test of the core? Because you heard Justice Glazebrook challenge Ms Ewing about that.

MR CARRUTHERS:

Sorry your Honour, I – what was the...

WINKELMANN CJ:

Well, what do you want, put it?

MR CARRUTHERS:

Sorry, Ma'am.

GLAZEBROOK J:

Yes, I was going to say, I didn't quite understand that submission.

KÓS J:

I'm glad you said that, because I didn't either. Try it again.

GLAZEBROOK J:

Yes, so but then I thought maybe you'll explain it a bit more, but I didn't really understand – maybe if I put it this way. Was your point that all of the evidential difficulties that you have outlined, especially in relation to the couch incident, were actually core to saying, or to the case, that the complainant was lying, is that what the submission meant?

MR CARRUTHERS:

Yes, your Honour.

WINKELMANN CJ:

Or, but how you actually –

GLAZEBROOK J:

Right and so they should have been, they should actually have been addressed by defence counsel both in closing, and possibly more in cross-examination, is that…

WINKELMANN CJ:

Can I just say, I thought – think you may have put it a bit better than that, which is that a granular analysis of the evidence that suggested the complainant's account was false was at the core of the defence, so you needed to go through.

MR CARRUTHERS:

Yes, well, if the defence is the complainant is lying.

WINKELMANN CJ:

But so Ms Ewing had said, look it's not going to be a miscarriage unless counsel has failed to put, and I may misstate this, "failed to put the core of the defence", what do you say about that test? Because Justice Glazebrook challenged it and said well, no, that can't be right, because it may not – you might put the core of the defence but still there's some detail that's so powerful that is omitted that gives rise to a risk of miscarriage?

MR CARRUTHERS:

Well, in my submission, then you haven't put the core. Because if the detail is that powerful, then it really is the core, or it goes to the core of the defence case.

GLAZEBROOK J:

Yes, that's what, that's…

WINKELMANN CJ:

Perhaps "core" is not a very good way of putting it, it suggest it's –

GLAZEBROOK J:

No it's really, it's, I suppose some – you don't have to put every element that could possibly support your defence, I think that's fairly clear from the cases.

MR CARRUTHERS:

I accept that, your Honour, yes.

GLAZEBROOK J:

And one can understand that, because if you have 56 points you might have lost the jury at point 2, and if you have 56 points they might have forgotten or not taken into account the really important point. So, is the real issue it's not the core that you have to put, but the important issues and the important evidence that would go through this and, in this case, you say that there was a failure to do that, especially in relation to the couch incident?

MR CARRUTHERS:

Yes, your Honour, the –

GLAZEBROOK J:

Because those were very important issues, important inconsistency in evidence that actually showed the complainant is lying and it wasn't really reliability, it was lying?

WINKELMANN CJ:

Strong pillars, maybe. The strong pillars of your defence.

MR CARRUTHERS:

Yes, your Honour, and it went directly to the elements of the offence.

WINKELMANN CJ:

Yes. Okay, thank you. Next point, Mr Carruthers.

GLAZEBROOK J:

And is it, just in relation to the couch incident, is there any, are you saying there was anything else left out, I probably should just check?

MR CARRUTHERS:

No. It's in relation to the couch.

GLAZEBROOK J:

Okay, thank you.

MR CARRUTHERS:

The couch incident, your Honour, highlighting the, what I have tried to show are the discrepancies between the two eyewitnesses and the complainant's evidence and trying to align what those eyewitnesses said more with what Mr Tamati had told the police, trying to track through the complainant's credibility and add to Mr Tamati's, which was in keeping with the broader focus of the defence: the complainant's lying, Mr Tamati was telling the truth.

GLAZEBROOK J:

You did also say there should have been a counter to the – and I'd assume you still say this – there should have been a counter to the, "well, his evidence was really consistent with what she said, so she must be telling the truth", and there should have been a counter to that?

MR CARRUTHERS:

Well, yes, your Honour, because it means the corollary is true, that Mr Tamati is in large part, perhaps might be able to demonstrate going through –

GLAZEBROOK J:

And that's slightly different from just the couch incident though, isn't it?

MR CARRUTHERS:

Yes, it is.

GLAZEBROOK J:

Yes.

MR CARRUTHERS:

It – you can, one of the examples you can use in support of your submission that Mr Tamati is telling the truth, is by trying to draw on the couch incident, but you can draw beyond that and draw on other examples to argue that he told the truth, or tried to argue, told the truth, through start to finish.

KÓS J:

I suppose another way of putting the submission you've just made is if he spent so much time banging on about the location of the car in relation to the car rape, then why would you not do so in relation to discrepancies in the couch incident, when you're talking about the couch, the second rape charge?

MR CARRUTHERS:
It's one of the charges Mr Tamati faces.

KÓS J:
Well, I appreciate that.

MR CARRUTHERS:
Yes.

KÓS J:
But my point is one of consistency of theory. He exploited inconsistencies in the evidence in relation to the car, why would you not then do so in relation to the couch?

MR CARRUTHERS:
Well, precisely.

KÓS J:
That's really your argument, isn't it?

MR CARRUTHERS:
Well, yes. I mean, it just goes to the actual charge, the heart of the alleged offending, what the Crown has to prove.

WINKELMANN CJ:
I think we've got that point.

MR CARRUTHERS:
Yes, thank you, Ma'am.

WINKELMANN CJ:

What's your next point?

MR CARRUTHERS:

To be frank, I don't think I can really improve on my written submissions, your Honour.

WINKELMANN CJ:

Okay, you don't need to carry on, there is no obligation. One point is an excellent level of number of points.

MR CARRUTHERS:

Well I would, if you'll indulge me, he hasn't spoken today, just acknowledge Mr Bird's contribution to the appeal.

WINKELMANN CJ:

Thank you, Mr Carruthers.

WILLIAMS J:

That's a good point.

WINKELMANN CJ:

That is a very good point, and thank you for your submissions.

MR CARRUTHERS:

Thank you.

WINKELMANN CJ:

Well, we will reserve our judgment on this matter. I thank all counsel and we'll retire.

COURT ADJOURNS: 12.57 PM