NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

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

IN THE SUPREME COURT OF NEW ZEALAND

SC 129/2016
[2017] NZSC 34

BETWEEN	F (SC 129/2016) Appellant
AND	THE QUEEN Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	P E Dacre QC for Applicant Z R Johnston for Respondent
Judgment:	17 March 2017

JUDGMENT OF THE COURT

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

REASONS

Introduction

[1] Mr F was found guilty on three charges involving sexual offending against his then wife.[1] He was either found not guilty by the jury or discharged by the trial Judge on a further eight charges.

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1 One of sexual violation by rape and two of indecent assault.

[2] The allegation in respect of all 11 charges faced by Mr F was that he had engaged in sexual activity with his wife which commenced while she was asleep or feigning sleep. His primary defence to most, although not all, of the charges was that he suffered from the sleep disorder "sexsomnia" and had been asleep at the time of the conduct in question.

[3] The pattern of verdicts suggests that the jury accepted that it was reasonably possible that the conduct in issue in respect of the some of the charges occurred while Mr F was asleep and was therefore not deliberate.

[4] Mr F's appeal against conviction was dismissed by the Court of Appeal.[2] He now seeks leave to appeal to this Court. The application for leave to appeal was filed on 3 November 2016, approximately five months out of time.[3]

Background

[5] The full background is set out in the Court of Appeal judgment. Suffice to say that from the first year of marriage in 2007 until the marriage ended in 2012 there were a number of occasions where the complainant awoke to find Mr F engaged in some kind of sexual activity with her.[4] The complainant initially accepted Mr F's sexsomnia explanation but later came to doubt it,[5] particularly after Mr F admitted he had been awake during the incident which was the subject of charge eight, discussed below. The complainant made it clear that she did not want Mr F engaging in sexual activity with her when she was asleep. There is some issue as to whether this occurred before or after the events which were the subject of charge eight. The Court of Appeal, however, noted that sex while the complainant was sleeping had been an issue from the first year of marriage.[6]

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2 *F (CA705/2015) v R* [2016] NZCA 180 [Court of Appeal decision].

3 The Court of Appeal decision was delivered on 6 May 2016, and re-issued (to incorporate name suppression) on 17 May 2016. The reissued judgment noted that 6 May remained the effective date of judgment. The Criminal Procedure Act 2011 requires that a notice of application for leave to appeal must be filed within 20 working days: ss 239 and 243. Twenty working days from 6 May 2016 was 3 June 2016.

4 Court of Appeal decision, above n 2, at [2]–[7].

5 At [8].

6 See at n 4.

[6] Mr F had not had a professional diagnosis of sexsomnia. However, at trial, the Crown called an expert on sexsomnia, Dr Fernando, who gave general evidence on the condition. He confirmed that sexsomnia exists as a variation of parasomnia, a recognised sleep disorder. He has personally treated 10 to 15 patients who complained of it and he is familiar with the specialist literature. Dr Fernando gave evidence that someone with this type of disorder could be asleep while performing sexual acts. His evidence was that it was common for a person indulging in sleep sex to be aggressive and selfish, in contrast to their normal sexual behaviour. Their partners therefore could usually differentiate between sleep sex and normal sex. Based on his patients' reports, there was generally no communication during sexsomnia.

[7] We note at this point that we do not consider that the evidence at trial was such that, in the absence of a formal diagnosis, it is possible to conclude, as the Court of Appeal suggested,[7] that there was a probability that Mr F suffered from sexsomnia (as against a possibility that he was so suffering).

The charges on which Mr F was convicted

[8] Mr F was found guilty on charges four, eight and 10. Charge four alleged sexual violation by rape and was said to have occurred between 7 March 2007 and 31 December 2008. The complainant said that she woke up, face down in the bed with Mr F on top of her, having sexual intercourse. She said "no" and resisted but could not get away. Mr F did not desist. Just before ejaculation, he said "I'm going to come", a remark he would make during consensual intercourse. The next day, according to the evidence of the complainant, Mr F admitted to remembering having made the remark but said that he "wasn't awake enough to stop". In his police statement, which was before the jury, Mr F said he had a brief memory of only one event where he was at "that point knowing I'm about to ejaculate but not knowing how I got there" and that, even if he had wanted to stop, he would not have been able to.

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[7] At [28]. The Court of Appeal said that there was "sufficient evidence to raise the real possibility, even probability" of sexsomnia.

[9] Charge eight alleged indecent assault, said to have occurred between 1 November 2011 and 31 August 2012.[8] According to the complainant the incident in question followed similar incidents on two preceding nights. She awoke to hear Mr F asking, "[a]re you awake?" She was, by this stage, suspicious of his claimed sleep disorder and feigned sleep. He moved her hand slowly towards his penis. When she confronted Mr F about this, he initially maintained that it was another incident of sexsomnia but later acknowledged that it was not.

[10] Charge 10 was a representative charge of indecent assault. The complainant said that on a number of occasions she woke up to find that Mr F rubbing his erect penis on her bottom. On one of these occasions, she asked him what the time was.[9] He looked over at a clock near the bed and told her and, as she was falling asleep, he rolled over and resumed rubbing his penis against her bottom.

Court of Appeal judgment

[11] The Court of Appeal dismissed Mr F's appeal against conviction. In relation to the rape charge, the Court did not accept that the conviction was inconsistent with the jury's verdicts on other charges and instead was of the view that that fact that Mr F acted normally and just as he would during conscious sex was sufficient to negate the reasonable doubt that might otherwise have arisen as a result of the sexsomnia evidence.[10]

[12] The Court of Appeal held that it was open to the jury to find that the conduct which was the subject of charges eight and 10 was indecent.[11] Further, the conviction on charge 10 was not inconsistent with the other verdicts of acquittal as the jury was entitled to take the evidence of communication as negating reasonable doubt.[12]

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8 It appears this incident may have occurred in March 2012 from the evidence at trial.
9 The complainant had read that asking something could stop sexsomnia from occurring.
10 Court of Appeal decision, above n 2, at [30]–[31].
11 At [33] and [34].
12 At [35].

Application for an extension of time

[13] In his notice of application for leave to appeal, Mr F refers to the need to spend time reviewing disclosure,[13] the evidence and the Court of Appeal decision, as well as obtaining legal opinions and engaging senior counsel to assist; and the practical difficulty of being in custody as his reasons that this Court should consider his application despite it being out of time.

[14] The Crown submits the explanations given are unsatisfactory. It notes that Mr F has retained the same senior counsel who represented him at trial and in the Court of Appeal and that the issues raised are broadly the same as those advanced in the Court of Appeal. It submits therefore that this is not an appropriate case for an extension of time to be granted.

[15] We accept the Crown submission that an extension should not be granted in this case. No adequate explanation as to the delay in filing the application has been advanced and there is nothing compelling to suggest that leave should be granted despite the delay. Indeed, as we discuss below, there is nothing in the grounds raised to suggest that there is any risk of a miscarriage of justice if an extension is not granted.

Grounds for application for leave

[16] Mr F puts forward grounds with regard to all three charges which essentially raise the same issues as to the reasonableness of the verdicts as were raised in the Court of Appeal. Mr F also raises two issues with the directions given by the trial Judge. In Mr F's submission, where there is a reasonable possibility that a defendant suffers from sexsomnia, the prosecution should be required to prove that the defendant was awake during the whole or a major part of the incident. Mr F submits that it is not sufficient for the prosecution to prove that the defendant was conscious at the end of the episode (as with charge four) and then invite the jury to infer that the defendant was awake for the whole or a significant part of the incident.

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[13] The Crown says this is presumably a reference to disclosure received before trial, as the Crown is not aware of any disclosure that occurred after trial.

[17] In addition, Mr F submits the indecent assault charges raise matters of general public importance as to appropriate directions in cases of alleged sexual assault in the context of parties in an intimate relationship consensually sleeping together and where the complainant is awake at the time of the incident. It is asserted that inadequate directions were given by the trial Judge on these issues.

[18] Finally, there is a complaint as to the level of disclosure made by the foreperson as to his association with Mr F's mother.

Unreasonable verdicts and jury directions

Rape charge

[19] Nothing raised by Mr F suggests the Court of Appeal was in error to conclude that there was a sufficient evidential basis for the jury's verdict with regard to charge four.

[20] As to the directions given by the trial Judge, we do not accept the submission that, in a case of this kind, the prosecution should have to prove that a defendant was awake for the whole or a significant part of the incident. As the Crown points out, the definition of "sexual connection" includes the continuation of the connection.[14] This means that, if the actus reus and mens rea of rape co-exist, even for a short period, rape is established.

[21] Indeed, the directions given by Judge Gibson on the issue of whether the defendant's actions were deliberate could be seen as unduly favourable to Mr F. This is because the directions could have been taken to refer to the moment of initial penetration and therefore the need to be sure Mr F was awake at that point. If the jury did take this from the directions, then they would have acquitted if they had a reasonable doubt as to whether Mr F was awake at the moment of initial penetration, even if sure he had been awake at a later stage of the incident.

[22] For completeness, we note that the jury had been told to acquit if they considered there to be a reasonable possibility that Mr F's actions were not deliberate

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[14] Crimes Act 1961, s 2.

because of sexsomnia. If the jury had accepted as a reasonable possibility that Mr F's account may have been true and therefore that he was not awake enough to stop, then it is axiomatic that his actions were not deliberate. It is clear by their verdict that the jury had rejected his account.

Indecent assault charges

[23] Nothing raised by Mr F suggests that the Court of Appeal may have been in error to reject his contention that the verdicts were unreasonable on these charges. As to Mr F's complaints as to the trial Judge's directions, there were orthodox directions as to consent and belief in consent. Further, the Judge told the jury that in determining whether the actions of the applicant were indecent the context was of a "husband and wife in bed together". The Judge also directed that the jury that Mr F could only be found guilty if he recognised that his actions would be so regarded by right-minded people. This could have been interpreted requiring the Crown to prove that Mr F knew his actions were indecent, a matter that does not have to be proved by the Crown.[15] The directions given were therefore, if anything, unduly favourable to Mr F.

Disclosure by jury foreperson

[24] The issue as to the conduct of the jury foreperson arises in this way. At an early stage in the trial the foreperson advised the Judge that he knew Mr F's mother "by sight". Defence counsel was given the opportunity to consult with Mr F. There was no objection to the foreperson remaining on the jury.[16]

[25] For the purposes of the appeal, Mr F submitted affidavit evidence from his mother as to her involvement with the foreperson. An application for an order that the foreperson be interviewed was declined by French J.[17] It is accepted by Mr F

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15 *R v Aylwin* [2007] NZCA 458 at [34].

16 His mother was not at the trial at Mr F's request and did not see the foreperson at the time. She was not a witness in the proceedings.

17 By minute of 9 February 2016. An application for recall of the decision was declined on 31 March 2016. Her decision was based on the fact that there was no evidence that the foreperson knew Mr F personally or had even met him and there was no evidence of any direct social dealings between the mother, the foreperson or his family and the complainant. In addition, there was no reason to believe that the foreperson had understated his level of familiarity with Mr F's mother.

that French J applied the appropriate principles in dealing with the application before her but it is submitted that the Court of Appeal's rejection of this ground of appeal was based on limited information and without any input from the foreman as to his "true knowledge" of Mr F and his mother.

[26] We do not regard this aspect of the case as raising a matter of general or public importance or one giving rise to any appearance of the risk of a miscarriage of justice. We accept the Crown submission that the principles applicable to juror impartiality are clear, as are the procedures for investigating any concern regarding impartiality. Nor does the level of acquaintance described in the affidavit give rise, to a fair-minded and informed member of the public, to a reasonable apprehension or suspicion that the foreperson would not discharge his task impartially.[18]

Result

[27] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[18] *R v Tainui* [2008] NZCA 119 at [26]; *Cavanagh v R* [2010] NZCA 36 at [50]; and *Fraser v R* [2010] NZCA 313.