

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE
ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA82/2014
[2014] NZCA 304**

BETWEEN TOESE TU'UAGA
Appellant

AND THE QUEEN
Respondent

Hearing: 19 June 2014

Court: White, Keane and MacKenzie JJ

Counsel: C B Wilkinson-Smith for Appellant
T A Simmonds for Respondent

Judgment: 3 July 2014 at 2.00 pm

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
B The appeal against sentence is dismissed.
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REASONS OF THE COURT

(Given by MacKenzie J)

[1] The appellant appeals against his conviction on one count of sexual violation by unlawful sexual connection and one count of sexual violation by rape following trial in the Auckland District Court at the end of October and start of November 2013 before Judge Dawson and a jury. The ground of appeal is that there was a miscarriage of justice because a material part of the defence case was not adequately communicated to the jury.

[2] The Crown case was that one night in January 2011 the complainant was drinking in a bar in Auckland city. There, she met the appellant, whom she had not previously met, and told him that she was intending to go to another bar in the city to meet up with a friend. The appellant told the complainant that he also knew that friend, and offered to take her to the other bar. The pair went to the appellant's car. Instead of driving to the other bar, the appellant drove to a secluded area in Auckland Domain. In the car, he ripped off the complainant's underwear and performed oral sex on her. He then raped her. The appellant covered her mouth with his hand and also threatened to stab her with a needle or syringe if she did not stop screaming. The appellant then drove away, leaving the complainant at the scene. She sought help and was taken to a Police station. She subsequently underwent a medical examination. Semen found on a vaginal swab was DNA-matched to the appellant a year later. The scientific evidence was that sexual intercourse had occurred within 48 hours before the medical examination.

[3] The appellant was interviewed over a year later, in February 2012. He said that he could not remember what he was doing on the night in question. He said that he had many casual encounters with women around that time. He denied going to Auckland Domain and he denied ever having sex in his car. He said that was bad luck in his culture. When it was put to him that his semen had been found in the complainant's vagina he reaffirmed that he met a lot of girls and had casual sex with them but that he had never been to the Auckland Domain and had never had sex in his car.

[4] Mr Wilkinson-Smith submits that the defence sought to raise a scenario which explained the DNA identification while accepting the complainant's evidence of abduction. The scenario was that the appellant met the complainant at a bar and had a brief sexual encounter with her, either on the premises or nearby. The intercourse left the DNA located in her vaginal swab. They separated shortly after the encounter and the complainant continued to drink and socialise. The complainant was then offered a lift by an unknown offender. The offender abducted her and took her to Auckland Domain, where he assaulted her and had brief sexual intercourse but did not ejaculate.

[5] Trial counsel for the defence, Ms Manning, has filed an affidavit. She says the defence was that either the complainant had fabricated the allegations, or that someone else had sexually attacked her. Ms Manning says that she put both aspects of the defence before the jury, both in cross-examination and in her closing address. She says it became apparent during the summing up that the Judge had not appreciated the second aspect of the defence. She asked the Judge to recall the jury and explain that part of the defence, but the Judge declined.

[6] The scenario described by Mr Wilkinson-Smith involves the proposition that there was consensual sexual intercourse between the appellant and the complainant shortly before the alleged incident at Auckland Domain, separate from that incident. That proposition was not explicitly part of the defence case as described by Ms Manning. The defence did not dispute that sexual intercourse had taken place, but did not expressly assert that this was separate from the Domain incident. The question trail for the jury (discussed by the Judge with counsel) recorded, as a fact not in dispute, “that sexual intercourse took place between [the appellant] and [the complainant]”. That did not make it clear that the defence was asserting the admitted sexual intercourse was a different incident to the intercourse described by the complainant in the Domain.

[7] The proposition that the appellant and the complainant had intercourse on a separate occasion was not squarely put to the complainant in cross-examination. The complainant was cross-examined about the incident in the Domain and was then asked about whether she had gone out with another girl on a night after the alleged rape. She was then asked: “the truth is ... that you had consensual sex with Mr Tu’uaga at some point in the 48 hours before you were medically examined, didn’t you?” She answered: “No. That’s not the truth”. The possibility that there had been a separate sexual encounter between the complainant and the appellant, not connected with the incident at Auckland Domain, within the 48 hours before she was medically examined, was not put to the complainant any more directly than that.

[8] In closing, trial counsel for the appellant described the essential issue as being whether the sexual intercourse was without consent or reasonable belief in consent. She referred to the difficulty the appellant had in being able to remember

who the complainant was more than a year later, because he had sex with many women. She reminded the jury of the appellant's statement in his interview that he did not sexually violate the complainant, and did not take her to Auckland Domain in his car.

[9] Counsel said:

... what it is easy for Mr Tu'uaga to remember, ladies and gentlemen, what it is easy for Mr Tu'uaga to be able to say with absolute clarity is that he did not sexually violate [the complainant], he did not take [the complainant] to the Domain in his car, he did not sexually violate her by putting his mouth on her vagina, he did not sexually violate [the complainant] by raping her.

He was sure he did not pick someone up and go to the Domain. He said, "No, I never went to a park or something like that," ...

[10] Counsel further said:

Mr Tu'uaga can't explain everything that happened to [the complainant] on the 23rd of January 20[11] or the 22 nd of January 20[11]. He can only say what he does know, and that is that he didn't rape [the complainant].

[11] Counsel referred to lack of detail in the complainant's evidence about the surrounding circumstances, and to the complainant's description of the sexual encounter and said:

So ladies and gentlemen, even if you are sure that [the complainant] was taken to the Domain by a man and attacked, you can't be sure that that man did in fact rape her, that is penetrate her labia with his penis or that he ejaculated.

[12] Counsel then went on to say:

Now, [the complainant] denies that she had consensual sex with Mr Tu'uaga at some point in the 48 hours before the medical examination that took place at 5.00 am, or between – it was an hour and three quarters that it took to take – to do that examination, so between 5.00 am and 6.45 am on the 23rd of January. But the defence suggests that that is what has happened in this case, ladies and gentlemen, and that [the complainant] is either not being truthful about the fact that she had some consensual sexual encounter with Mr Tu'uaga, or she just can't remember it.

[13] The Judge, in summing up referred to the note in the question trail that sexual intercourse was not disputed. He said:

[14] In count 2, in step 1, you will see the first question you need to ask yourself is, “Are you sure that on or about the 23rd of January, that Toese Tu’uaga caused his penis to penetrate [the complainant’s] vagina?” I suspect that question will not take you long, because it is conceded effectively already.

[14] The Judge described the defence case in these terms:

[22] The defence say that Mr Tu’uaga can only speak generally, but he can say with clarity that he did not go to the Domain and he did not sexually violate or rape anybody. The defence submit that [the complainant] cannot give an account of all her movements that evening and just accepts what others have told her. She also had a lot of alcohol to drink that night and the defence say she is an unreliable witness.

[23] The defence submit that what happened was consensual sex or [the complainant] just cannot remember it. The defence submit that the standard of proof beyond a reasonable doubt has not been met in this trial and therefore, Mr Tu’uaga should be found not guilty on both counts.

[15] Following the summing-up, trial counsel for the appellant raised with the Judge in Chambers that an essential aspect of the defence case had not been summed up to the jury, in these terms:

Yes sir I have a number of matters to raise. The first is in relation to the way that Your Honour has summed up the defence case. The defence case was that the evidence that the Crown has brought does not show more than that sexual intercourse took place between Mr Tu’uaga and [the complainant] within 48 hours. The defence case is that either [the complainant] is making this up and she was not raped, or that the jury cannot discount that there was someone else who attacked [the complainant] in the manner that she described, and that he did not ejaculate and that there was no semen. That is the defence case and that has not been summed up to the jury.

[16] Both counsel for the Crown and the Judge indicated that they had not understood that to be the defence case, and the Judge advised that he did not intend to call the jury back.

[17] The law as to putting the defence case is described by this Court in *R v Shipton*.¹ The underlying principle is that it is the absolute duty of a trial judge to identify and adequately remind the jury of the defence case.² A failure to refer in summing up to a central line of defence that has been placed before the jury will generally result in the conviction being set aside. That duty prevails even where the

¹ *R v Shipton* [2007] 2 NZLR 218 (CA).

² At [33].

grounds for the defence are “weak or improbable” and even if there is no real address to the jury from the defendant.³

[18] Also, in *R v Tavete*, this Court stated that the law requires an adequate direction by the judge to the jury of all matters, whether of fact or law, which, upon the evidence, are reasonably open to the jury to consider in reaching their verdict.⁴ That requirement is not dependent upon the defence having raised that matter.⁵

[19] The defence case, as it is now put by counsel for the appellant, was not raised in that way with the jury. The proposition that the complainant may have had, in addition to this sexual encounter with the attacker in Auckland Domain, a separate sexual encounter with the appellant was not put to her directly. The point was raised only obliquely in the question set out at [7] above. If it was to be relied upon by the defence, that proposition needed to be squarely put to the complainant, and it was not.

[20] Further, trial counsel did not put the defence case in that way in her closing address. The closest counsel came was in the passage which we have set out at [12]. It is not surprising that neither Crown counsel nor the trial Judge appreciated that counsel for the appellant was inviting the jury to find, as a reasonable possibility, that there might have been a separate sexual encounter, which might explain the presence of the appellant’s semen, so as to raise a reasonable doubt as to whether he was the attacker in Auckland Domain.

[21] We therefore consider that the Judge is not in breach of the duty to remind the jury of the defence case, and to refer to all lines of defence that have been placed before the jury by counsel.

[22] We do not consider that there was a sufficient evidential foundation for a reasonable possibility that there had been a separate sexual encounter, such that the Judge was required to direct on that as a defence which was reasonably open to the

³ At [34], citing *Maney v R* CA116/99, 21 October 1999 and *R v Doctor* CA202/03, 21 October 2003.

⁴ *R v Tavete* [1988] 1 NZLR 428 (CA) at 431.

⁵ At 431.

jury. The appellant in his interview had not said that there was sexual contact between him and the complainant. He said only that he had sexual contact with a number of women, and suggested that the complainant may have been one of those. To the extent that the proposition that there had been a separate sexual encounter was put to the complainant, in the question to which we have referred at [7], she denied it. There was no evidence on which to base a specific challenge to the credibility of that denial. There was therefore no evidential foundation for the proposition that there was a reasonable possibility that a separate sexual encounter had taken place. The Judge was not obliged to raise that possibility or to direct on it.

[23] For these reasons, we are satisfied that the Judge did not fail to put the defence case to the jury. We are satisfied that there is no risk of a miscarriage of justice in the way in which the defence case as presented by counsel was described to the jury. Nor is there such a risk because the Judge did not specifically direct the jury to consider whether it was reasonably possible that there may have been a separate sexual encounter, which might raise a reasonable doubt that the appellant was the attacker in Auckland Domain.

[24] The proposition that there was both a sexual attack in Auckland Domain by an unknown attacker, and a separate consensual encounter between the appellant and the complainant, faced the difficulty that semen from only one male was found in the complainant's vagina. To accept as reasonably possible that there had been two sexual encounters, the jury would have to find as a reasonable possibility that the attacker may not have left semen. Trial counsel submitted to the jury that they might have a reasonable doubt as to whether penetration had occurred or, if penetration had occurred, that ejaculation had also occurred. However, counsel did not invite the jury to use that doubt to explain the presence of the semen of only one male, when the jury was considering whether it was reasonably possible that there had been two separate sexual encounters. Rather, counsel raised that as inviting the jury to conclude that they could not be sure that the attacker in Auckland Domain did in fact commit rape.

[25] We are satisfied that, even if the defence that the appellant was not the attacker in Auckland Domain and that his semen had been deposited on a separate

sexual encounter had been raised so as to give rise to the duty on the trial Judge to direct on it, the proposed defence was so improbable and without an evidential foundation that the failure to direct on it could not, in this case, give rise to a miscarriage of justice.

[26] For these reasons, the appeal against conviction is dismissed.

[27] There is also an appeal against sentence. Mr Wilkinson-Smith advised that he anticipated receiving instructions to withdraw that appeal, and did not advance any submissions in support of it. The Judge found the offending to fall within band two of *R v AM (CA27/2009)* and imposed a sentence of nine years.⁶ We are satisfied that the sentence is not manifestly excessive. The appeal against sentence is also dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.