

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,  
OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS "MS A".**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA252/2014  
[2015] NZCA 112**

BETWEEN	MOHAMMED MUNIF SAHIB Appellant
AND	THE QUEEN Respondent

Hearing: 10 March 2015

Court: Stevens, Asher and Williams JJ

Counsel: D P H Jones QC and A C Krzanich for Appellant  
P D Marshall for Respondent

Judgment: 17 April 2015 at 11.30 am

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**JUDGMENT OF THE COURT**

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- A The appeals against conviction and sentence are dismissed.**
- B Order prohibiting publication of name, address, occupation or identifying particulars of witness “Ms A”.**
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**REASONS OF THE COURT**

(Given by Asher J)

[1] The appellant, Mohammed Munif Sahib, was convicted following a trial on charges of rape, sexual violation by unlawful sexual connection and indecent assault. He was sentenced on 17 April 2014 by Judge Marshall in the Hamilton District

Court to a total term of imprisonment of seven years and eight months.<sup>1</sup> He now appeals against his convictions and sentence.

[2] His conviction appeal is advanced on the following grounds:

- (a) the defence should have been permitted to cross-examine the complainant concerning her previous sexual experience as a sex worker, pursuant to s 44 of the Evidence Act 2006;
- (b) this Court's previous decision dismissing Mr Sahib's pre-trial appeal against the scope of the propensity evidence that was admitted was too broad and not made out; and
- (c) the use made of the propensity evidence at trial was illegitimate, and made worse by inadequate jury directions.

[3] Mr Jones QC for Mr Sahib submits that each of these alleged errors gave rise to a miscarriage of justice.

[4] As to the appeal against sentence, he submits the Judge incorrectly characterised his offending as falling within band two of *R v AM*, resulting in a manifestly excessive starting point.<sup>2</sup>

## **Background**

[5] In the early hours of 21 July 2011, the complainant had been dropped off by a taxi on a street close to Lake Crescent, Hamilton. She did not have sufficient money to pay for her entire journey home. Mr Sahib pulled up next to her in a white utility vehicle and offered her a ride home. She accepted and got into the car.

[6] She gave evidence that shortly after getting into the car, Mr Sahib reached over, put his hand down her top, and grabbed her breast. She told him to stop and he removed his hand. She then realised that he had passed the turn-off to her home and

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<sup>1</sup> *R v Sahib* DC Hamilton CRI-2011-019-5616, 17 April 2014 [sentencing decision].

<sup>2</sup> *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

was driving away from it. She asked him repeatedly to stop the car. He ignored her requests and drove her to a rural area west of Hamilton, pulling up in a driveway. He forced the complainant to perform oral sex on him. He then removed the complainant's clothing, reclined the passenger seat and raped her. Afterwards, he drove her back in to central Hamilton leaving her at a supermarket.

[7] The complainant immediately called the police. She was observed by some young men in a distressed state and they stayed with her until the police arrived.

[8] The complainant deposed that she had given her telephone number to Mr Sahib because she feared he would not let her out of the car if she refused to do so or gave him false details. With the involvement of the police she arranged to meet with Mr Sahib. He fled after a plain clothes detective approached the vehicle and identified himself as a police officer. Mr Sahib was subsequently arrested.

### **The Crown case**

[9] At the trial, the Crown led propensity evidence from "Ms A", who gave evidence of an encounter she had with Mr Sahib three weeks prior to the alleged rape when she was 17 years old. Ms A described walking from her partner's house in the early hours of the morning in an area near to that where the complainant was picked up by Mr Sahib. At the time, Ms A was upset and crying. Mr Sahib pulled up next to her and offered her a ride home. She initially declined but he was persistent and she eventually accepted his offer and got into the car.

[10] Mr Sahib asked Ms A if she wanted a drink or cigarette on a number of occasions. After she had declined, he offered her money and asked whether she wanted to have a "good time". She declined. She gave evidence that Mr Sahib then asked her if he could "suck on [her] titty", and offered to pay her for sex. Ms A asked to be let out of the car on at least three occasions but her requests were ignored. Mr Sahib said that they could drive around the block. At that point Ms A, feeling scared, grabbed the gear stick and put the car into park, bringing it to a halt. She jumped out of the car and ran away. Mr Sahib yelled after her and attempted to grab her. He then followed her in his car, and when she changed course and ran in

the opposite direction, did a U-turn and continued to follow her. However, while he was turning, Ms A hid behind a parked van and Mr Sahib drove away.

[11] No charges arose out of the incident involving Ms A. The District Court ruled that her evidence was admissible as propensity evidence in Mr Sahib's case,<sup>3</sup> and that ruling was upheld by this Court in a pre-trial appeal.<sup>4</sup>

### **The defence**

[12] Mr Sahib gave evidence at trial. He accepted that he had had sex with the complainant on the night in question, and also accepted that he had picked up Ms A a few weeks earlier. However, his accounts of these events were different from those of both the complainant and Ms A. In relation to the complainant, he stated that he picked her up when she waved him down and asked for a ride to Dinsdale. She asked whether he had any cash. When he said that he did, she began touching his chest and penis. He pushed her hand away. However, following her directions, he drove into a rural area where the complainant said to him "give me some money for sex". He gave evidence that he gave her \$100 and had sex with her in the front seat of the car. He denied indecently assaulting her by touching her breast and denied that any oral sex occurred. It was put to the complainant in cross-examination that she falsely alleged that Mr Sahib had raped her because she "immediately regretted [her] decision to have consensual sexual intercourse" with him.

[13] In relation to the incident with Ms A, Mr Sahib admitted picking her up and offering her alcohol and asking to "suck her titty". He also admitted mentioning money and asking to have sex with her. He flatly denied refusing to let her out of the car. He stated that when she told him to stop he slowed down to look for a car park. At that stage, she pushed the gear stick into park and got out of the car and walked away. He denied trying to grab her or follow her.

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<sup>3</sup> *R v Sahib* DC Hamilton CRI-2011-019-5616, 18 December 2012.

<sup>4</sup> *Sahib v R* [2013] NZCA 231.

#### **Cross-examination under s 44**

[14] On two occasions, the District Court considered Mr Sahib's request to cross-examine the complainant about her previous employment as a sex worker.

[15] The first application was advanced prior to trial when the defence case was that the complainant had told Mr Sahib she was a prostitute and that just prior to meeting him she had engaged in an act of prostitution with a different man. Judge Connell held that it was irrelevant whether the complainant had worked as a prostitute either before or after the evening of the alleged rape and would not permit questioning on that subject.<sup>5</sup> However, with the Crown's acquiescence, he permitted questioning on whether on the day in question, 21 July 2011, the complainant was working as a prostitute; whether on that date the complainant told Mr Sahib that she was a prostitute; and whether in that capacity Mr Sahib paid the complainant for consensual intercourse.

[16] When the matter came to trial, defence counsel had changed. The defence to be run was somewhat different. It was no longer to be Mr Sahib's defence that the complainant had told him that she had worked as a prostitute earlier that night, but rather that "the accused accepted the [complainant's] invitation and paid the complainant for sex".<sup>6</sup> Given the change in the defence position, Judge Marshall revisited the earlier pre-trial ruling.<sup>7</sup> His view was that, since the complainant was not previously known to Mr Sahib, the fact that the complainant had been a prostitute in the past was not relevant to his belief in consent.<sup>8</sup> The Judge concluded that the evidence was reputation evidence and therefore its admission was prohibited by s 44(2) of the Evidence Act.<sup>9</sup>

[17] The Judge also considered the position under ss 44(1) and (3) in case he was wrong and the evidence was characterised as sexual experience evidence. He held that the evidence did not satisfy the relevance test required by s 44(3). He did not consider that prohibiting questioning on the complainant's past work as a prostitute

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<sup>5</sup> *R v Sahib* DC Hamilton CRI-2011-019-5616, 6 September 2013 at [32]–[34].

<sup>6</sup> *R v Sahib* DC Hamilton CRI-2011-019-5616, 11 February 2014 at [13].

<sup>7</sup> At [12].

<sup>8</sup> At [22].

<sup>9</sup> At [30].

would compromise Mr Sahib's right to a fair trial and to present an effective defence.<sup>10</sup> The trial therefore proceeded on the basis that Mr Sahib could not cross-examine the complainant on her past as a prostitute.

### **The application of s 44**

[18] Section 44 of the Evidence Act provides:

#### **44 Evidence of sexual experience of complainants in sexual cases**

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

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[19] The distinction between sexual experience as set out in s 44(1) and sexual reputation as set out in s 44(2) was considered by the Supreme Court in *B v R*.<sup>11</sup> The majority in that case stated:

[61] We do not agree with the Court of Appeal that the proposed evidence was evidence of sexual reputation, falling within the absolute prohibition in s 44(2). Although the proposed witness said he felt uncomfortable in the circumstances, his evidence did not concern the beliefs or opinions that other people held about the complainant (reputation); rather, it concerned the complainant's interactions (allegedly sexual) with a person other than the appellant on a previous occasion (experience). It is difficult to see how an incident with one person could amount to evidence of sexual reputation (unless, of course, it became the foundation for a more widespread belief about the complainant).

[20] The distinction to be drawn is therefore between the previous sexual actions of a complainant, which is evidence of experience, and the beliefs or opinions of

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<sup>10</sup> At [32].

<sup>11</sup> *B v R* [2013] NZSC 151, [2014] 1 NZLR 261 (citations omitted).

other persons about a complainant's previous sexual acts and experience, which is evidence of reputation. The former relates to previous events. The latter relates to what people think and believe.

[21] In this case, Mr Sahib wished to establish the fact that the complainant was a prostitute by cross-examining on this topic. He was not intending to question the complainant as to the opinions and beliefs of others about her or the basis for those opinions and beliefs. Rather, it would be about her past sexual experience as a prostitute. This is not sexual reputation but rather sexual experience evidence.

[22] We therefore agree with Mr Jones' submission for Mr Sahib that the Judge was wrong to characterise the proposed cross-examination as relating to the complainant's sexual reputation and thereby invoke the statutory prohibition in s 44(2). As the evidence went to the complainant's actual sexual experience, it had to be considered under ss 44(1) and (3).

#### **Was the s 44(3) test met?**

[23] Mr Jones submits that, in terms of s 44(3), evidence about the complainant's prior sexual experience as a prostitute was of direct relevance to facts in issue in the proceeding to the extent that it would be contrary to the interests of justice to exclude it. He points out that the crucial issue in Mr Sahib's trial was whether the jury believed his version or the complainant's version of events in relation to their sexual activity. Mr Sahib faced the difficulty that the jury might find it hard to accept that a young woman would consent to having sex with a stranger in the circumstances that unfolded unless they had further information or context about past prostitution. The complainant, if cross-examined, would not have been able to say that an act of prostitution, as contended by Mr Sahib, was something she would never engage in. Mr Jones submits that the defence was "emasculated on the issue". He submitted the jury would have proceeded on the understandable premise that young women do not normally engage in paid consensual intercourse with strangers.

[24] We accept that evidence the complainant had in the past been a prostitute could potentially be seen as relevant to the issue of whether Mr Sahib could be correct when he said that they had consensual sex for money, in that there could be

seen to be a greater likelihood that a person who has had sex for money on a previous occasion might do so again, thereby corroborating part of Mr Sahib's story. However, s 44(3) requires more than relevance as described in s 7(3) of the Evidence Act before the evidence or questions are permitted. The sexual experience must be of "such direct relevance to facts in issue" that "it would be contrary to the interests of justice to exclude it". This test is sometimes described as the heightened relevance test, and requires an examination of the degree of importance of the evidence to deciding key issues. Underlying the heightened relevance test is the concern that the too ready admission of evidence of prior sexual experience could lead to unfair prejudice against complainants. A further reason for the section and its predecessors was to protect complainants from unnecessarily intrusive questioning about previous sexual history.<sup>12</sup>

[25] To discern whether this heightened relevance test is met it is necessary to consider the specific way in which the evidence would be relevant. In order to do this, the exact circumstances of the complainant's previous actions, in this case as a prostitute, must be considered.

[26] The evidence of the complainant's sexual experience history is summarised by the Crown as follows:

- (a) She began working regularly as a prostitute in 2009, stopping in the winter of 2010, about a year prior to the night of the alleged offending.
- (b) She only ever worked in an agency environment, that is, a brothel. She worked within the brothel's premises. She abided by its rules. Her work was organised and was subject to the structure and protection that an environment of that nature provides.
- (c) There was no evidence to show she had ever directly approached men and offered sex for money.

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<sup>12</sup> Law Commission *Evidence Law Character and Credibility* (NZLC PP27, 1997) at [324].



[27] In *R v B*, William Young J observed:<sup>13</sup>

Generally and most importantly, the complainant's supposed interest in having sex on [another] occasion cannot logically provide any support for the theory that she consented to have sex with the appellant on the night in question.

[28] We reject the leap of reasoning required to conclude that previous experience as a prostitute significantly helps to prove that a specific instance of sex with a stranger in different circumstances was consensual, even when the defence is that there was consensual sex for money. This Court has stated in the context of the admissibility of evidence under s 44(3) about previous work as a prostitute:<sup>14</sup>

[52] The fact that the complainant may have been a sex worker could not possibly advance Mr Cant's allegation. A generalised claim that sex workers may be more likely than non sex workers to use drugs or offer sex in exchange for drugs is of no probative value. It is nothing more than an assertion of an occupational reputation. There was no evidence that the complainant was a drug user.

[29] There is nothing to indicate that the complainant in this case had previously undertaken the sort of action that Mr Sahib is now claiming she took. While the victim accepted she had previously turned to prostitution due to financial difficulties, there was no evidence she had ever responded to a particular situation by spontaneously offering to sell sex to a stranger. She had not worked on the streets. She had not been collected by customers in motor vehicles. She had not had sex in motor vehicles. The fact that the complainant had, in entirely different circumstances, worked as a prostitute for a limited time in a brothel a year earlier is therefore only of marginal relevance. It is distant in time and different in circumstance. It provides no direct probative support for the defence theory that she propositioned a stranger in a car who had picked her up for sex for money.

[30] In our view therefore, the probative value of the evidence is low. It does not respond in a direct way to the improbability of a young woman having been collected by a stranger in a motor vehicle spontaneously proposing a commercial sexual transaction. While that improbability may be lessened slightly by the fact that a year earlier the complainant had worked for a period as a prostitute, given the very

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<sup>13</sup> *B v R*, above n 11, at [122](c).

<sup>14</sup> *Cant v R* [2013] NZCA 513.

different circumstances of the earlier events and distance in time, it clearly does not meet the heightened relevance test.<sup>15</sup>

### **Unfair use of the s 44 ruling?**

[31] Mr Jones argued that the Crown unfairly used the s 44 ruling to bolster the complainant's credibility by highlighting the apparent implausibility of Mr Sahib's version of events. The prosecutor had commented in closing that the defence case that the complainant was drunk and had acted in a brazen way, but was then in a very short period of time heard to make a complaint and go through the indignities of the complaint process was unlikely. Mr Jones submits that the complainant's regret at reverting to prostitution could have been a cogent argument explaining her behaviour.

[32] We do not accept this submission. There were no facts to support it. It is speculative. We agree with the Crown submission that it is difficult to see how the fact that the complainant had previously worked as a prostitute could render the regret theory more, rather than less, plausible. The fact that she had complained almost immediately after she was dropped off would have been a problem for the defence whatever the previous sexual experience of the complainant. Moreover, the defence could always have suggested that the complainant had suddenly regretted resorting to prostitution, regardless of whether there was evidence of her past.

[33] The ruling did not prevent Mr Sahib advancing his full defence. His version of events, that there was a commercial transaction initiated by the complainant, was before the jury in its entirety. That defence required no reference to her previous experience. There was no suggestion that Mr Sahib was aware of any previous experience on the complainant's part.

[34] Therefore, Judge Marshall was correct in his conclusion that the relevance of the evidence was too remote, and Mr Sahib's right to present an effective defence was not compromised.

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<sup>15</sup> The facts of this case are similar to those in the English Court of Appeal decision in *R v White* [2004] EWCA Crim 946 where the evidence was excluded, but we note that the statutory regime in England is different.

## **The propensity evidence**

[35] Mr Jones also submits that when the Court of Appeal admitted the propensity evidence pre-trial, it overstated its probative value and consequently the basis upon which it could be relied on by the Crown.<sup>16</sup>

[36] This Court referred to Ms A's evidence as possibly demonstrating that Mr Sahib had "a tendency to persist in engaging in sexual activity with female strangers notwithstanding the fact that they do not consent".<sup>17</sup> No sexual actions had in fact occurred between Ms A and Mr Sahib. The whole judgment proceeds on the basis that there was no physical contact between them and the use of the term "sexual activity" must be seen in that context. Ms A had described Mr Sahib as sexually propositioning her on a number of occasions and this is what was meant by "sexual activity". It was quite plain what the Court was referring to and there is no sign that the judgment was misinterpreted by either trial counsel or the Judge.

[37] Mr Jones was critical of the Crown's opening address where it was stated that Ms A's evidence would show that Ms A "refused [Mr Sahib's] sexual advances but she'll tell you he didn't stop". He submitted that this statement suggested that Mr Sahib kept engaging in sexual behaviour with Ms A despite her saying no. He was similarly critical of the prosecutor stating that Ms A was "the one that got away" and in closing that "he was not prepared to take no for an answer".

[38] None of these statements by the prosecutor involve an assertion that there was actual sexual activity between Ms A and Mr Sahib. The comments are clearly made in the context that Mr Sahib was seeking sexual contact and Ms A was rejecting it. This is, of course, exactly consistent with Ms A's evidence.

[39] Ms A's evidence, if accepted, showed that Mr Sahib had a tendency to act in a predatory and sexually inappropriate way towards women, and in particular that he would refuse to desist from sexual advances when rebuffed. The prejudice to Mr Sahib in this reasoning was justified by the probative value of the evidence. It was also mitigated by the Judge's directions. The Judge accurately explained to the

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<sup>16</sup> *Sahib v R*, above n 4.

<sup>17</sup> At [25].

jury how they could properly use the evidence of Ms A and gave the usual express warning that they should not jump to a conclusion that because Mr Sahib had acted inappropriately towards Ms A, he must also have acted inappropriately towards the complainant. Further, the Judge addressed the defence position on Ms A's evidence, stating that the defence had pointed out differences between Ms A's evidence and the complainant's evidence, and the fact that there was no actual sexual activity with Ms A. These directions cannot be faulted.

[40] There is therefore no basis for Mr Jones' criticisms of the propensity evidence of Ms A.

### **The sentence appeal**

[41] Mr Sahib was sentenced on three charges, those being indecent assault, unlawful sexual connection and sexual violation by rape. The Judge considered that band two of *R v AM* applied.<sup>18</sup> He considered the offending was moderately serious, being premeditated, predatory and involving the removal of the victim to an area where she could not seek assistance. It comprised a range of sexual activity while she was vulnerable. The Judge noted that the premeditation was at a high level, that there was an element of deliberate detention, and that serious harm was caused to the victim who was terrified throughout the incident and believed she might well be killed. He considered the appropriate starting point to be nine years' imprisonment.

[42] Mr Jones submits that the offending fell within the upper limit of band one of *R v AM* and that a starting point of seven to eight years' imprisonment was appropriate. He submits that the offending was not prolonged and did not involve unusual violence or degrading acts, did not involve abduction from the roadside and did not involve physical restraint. He also submits that it was relevant that the location was not remote as Judge Marshall described it to be, that the complainant was not especially vulnerable due to intoxication, that the offending was largely opportunistic, and that Mr Sahib did not act in consort with others.

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<sup>18</sup> Sentencing decision, above n 1, at [11]; *R v AM*, above n 2.

[43] In our view, the Judge was right in fixing this offending as falling within band two of *R v AM*. There were three factors increasing culpability, being the premeditation, the element of detention and the variety and extent of the sexual acts. The victim has suffered severely.

[44] These factors made it inevitable that a sentence within band two would be imposed. We do not consider the end sentence to have been manifestly excessive and we note that a generous discount of 16 months, or about 15 per cent, was given by the Judge to give Mr Sahib credit for his contributions to the community, particularly his religious community. The end sentence of seven years and eight months' imprisonment was therefore well within range.

## **Result**

[45] The appeals against conviction and sentence are dismissed.

[46] An order is made prohibiting publication of the name or identifying particulars of witness Ms A to protect the witness's privacy.

Solicitors:  
Crown Law Office, Wellington for Respondent.