

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA746/2015
[2017] NZCA 89**

BETWEEN

DENNIS RANGIAHO HOHUA
Appellant

AND

THE QUEEN
Respondent

Hearing: 7 March 2017

Court: Kós P, Courtney and Williams JJ

Counsel: J K W Blathwayt for Appellant
P D Marshall for Respondent

Judgment: 28 March 2017 at 3.00 pm

JUDGMENT OF THE COURT

The conviction and sentence appeals are dismissed.

REASONS OF THE COURT

(Given by Williams J)

[1] Mr Hohua stood trial on two charges in relation to complainant A. Those charges were sexual violation by digital penetration and rape. He was found guilty of the digital penetration charge but acquitted on the rape charge. He was sentenced to three years and five months' imprisonment.¹ He appeals both conviction and sentence.

¹ *R v Hohua* [2015] NZDC 24012.

[2] The grounds for appeal against conviction are:

- (a) evidence of a previous sexual encounter of the complainant, which led to an allegedly false allegation of rape, should have been admitted as veracity evidence;
- (b) the verdicts were inconsistent and could not stand; and
- (c) the jury may have been misled when the Judge gave a direction on the meaning of penetration during the course of the jury's deliberations.

[3] In the appeal against sentence it is argued the sentence was manifestly excessive due because the Judge sentenced on the wrong factual basis.

Facts

[4] The incident giving rise to the charges occurred at a party in August 2014. The complainant lived at the address. Mr Hohua was a visitor known to the household. The complainant was then 20. Mr Hohua was 45. The complainant went to bed alone sometime around 4 am. At some point after that, Mr Hohua came into her bedroom uninvited. He offered the complainant some cannabis. According to the complainant, she declined and told him to leave. He eventually did and she went to sleep. She awoke a few hours later to find Mr Hohua vigorously inserting his fingers into her vagina and kissing her neck and breasts. She said she told him in forceful terms to stop and to leave. She could not say whether Mr Hohua had also raped her because she had no recollection of that.

[5] Mr Hohua said this account was false. He said after going in the first time he and the complainant had agreed he would return with cannabis. On his second visit he said he sat on the bed and, after a period of talking, began to kiss A's neck and breasts and then to feel her genital area. He asked her, he said, if it was okay to "hop in" and she said "yes". Mr Hohua said they then had consensual sexual intercourse and the complainant later regretted it.

[6] In the light of Mr Hohua's acceptance that he had sex with the complainant, but her inability to corroborate that, there was considerable contention over the precise basis upon which the jury acquitted on the rape charge but convicted on the digital penetration charge. We will return to that matter below.

Conviction appeal: ground (a) — "false" rape complaint

The application

[7] Prior to trial, Mr Hohua applied to lead propensity evidence of a sexual encounter between the complainant and another man, X. The incident had occurred three years earlier when the complainant was 17. X was much older than the complainant and suffered from Tourette's syndrome. She said X had harassed her at a party at a rural venue and then had forcibly dragged her into a tent he had pitched on the property, and raped her. She complained to the police.

[8] The police investigated and took statements from the complainant, X and other witnesses. The complainant accepted that she was drunk when the incident occurred. X denied any wrongdoing. He said he and the complainant had consensual sexual intercourse after she had made strong advances to him on the dance floor. Eyewitnesses around the dance floor on the night largely corroborated X's account of that part of the incident though no one, other than X and the complainant, could give any probative evidence of what happened inside the tent where the rape allegedly took place. The police decided not to bring charges. It was considered that the evidence suggested the encounter had likely involved consensual sex with subsequent regret.

[9] In the District Court, Mr Hohua argued that this evidence of false complaint was admissible under s 44 of the Evidence Act 2006 because it demonstrated the complainant had a propensity to have sex with older men and then, out of embarrassment, to make false allegations of rape.

[10] Judge Tuohy declined the application in reliance on the decisions of this Court in *Best v R* and *R v C*.² The Judge considered the facts did not disclose a “clean case” of false allegation, as then required by *Best*, and so would require a full trial within a trial.³ This could not be permitted.

Supreme Court judgment in Best v R

[11] Since that pre-trial ruling, the Supreme Court has issued its decision on appeal from the *Best* decision.⁴ The majority in that Court held s 40(4) in relation to propensity requires this kind of evidence to be considered within the framework of the veracity rules in s 37 rather than the propensity rules because it is evidence directed at challenging the complainant’s veracity.⁵

[12] The Court found that s 44 (evidence of sexual experience of complainants in sexual cases) will also be engaged where there is no dispute that sexual activity occurred in the earlier incident and the issue is consent or belief in consent. The Court held that when s 44 is engaged, “an evidential foundation suggesting possible falsehood” must be found before s 37 is applied.⁶ A police decision not to prosecute will not in itself be determinative of this question.⁷

[13] If there is an evidential foundation, then the complainant should be asked to confirm (either in court or by police interview) whether or not the prior complaint was false.⁸ It must then be established, under s 37, whether the evidence is “substantially helpful”. The Court continued:

[73] Factors to be considered in the assessment of substantial helpfulness may include remoteness in time, similarity (or lack thereof) between allegations, the number of allegedly false prior complaints, the reason a complaint did not proceed or was withdrawn, whether the complaint was taken to a person of authority and whether the prior complaint was fraudulent or malicious.

² *Best v R* [2015] NZCA 159; and *R v C* (CA391/07) [2007] NZCA 439.

³ *R v Hohua* [2015] NZDC 21842 at [8].

⁴ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

⁵ At [55]. Section 40(4) provides: “Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.”

⁶ At [64].

⁷ At [64].

⁸ At [65].

[74] In line with the policy behind s 37 (including that behind the old collateral evidence rule), the substantial helpfulness of a previous allegedly false complaint will also depend on how clear it is that the previous complaint is false, how much evidence would need to be canvassed to decide on whether the complaint is false and the likely outcome of the assessment of that evidence. The more evidence that would need to be called on the unrelated prior allegation and thus the extent of any ‘trial within a trial’ and the more uncertain the outcome of the deliberations on that evidence, the less likely the evidence is to be substantially helpful in terms of s 37.

[14] The bright line “clean case” test posed by this Court has thus been aside in favour of a more multi-elemental balancing exercise.

Submissions

[15] Before this Court, Mr Blathwayt submitted that the District Court fell into error in framing the issue as propensity rather than veracity. Mr Blathwayt submitted the evidence in support of the proposition that the rape allegation was false was clear and strong. Independent witnesses had described the pair fondling each other intimately both before and after intercourse had taken place in the tent, and, if this evidence was believed, rape could be safely excluded. The police concluded that it was likely the complainant had become heavily intoxicated and then had sex she later regretted. There was, they considered, insufficient evidence to pursue the matter. Mr Blathwayt submitted that a jury was very likely to come to the same view.

[16] Turning to the *Best* factors, Mr Blathwayt submitted:

- (a) The complaint was made in a context where the complainant was under a legal obligation to tell the truth to the police.
- (b) She had a motive to lie about consent. She was embarrassed because X was older and (in the complainant’s view at least) physically unattractive.
- (c) The complainant had made at least one other significant false allegation. She claimed to others that her mother was dead when she was not. The false allegation in respect of X therefore fitted a pattern.

- (d) The complaints against X and Mr Hohua had real similarities:
- (i) forced sexual penetration;
 - (ii) there was alcohol consumption;
 - (iii) there was a time delay before the allegation was made;
 - (iv) there was significant difference in age between the alleged rapist and the complainant; and
 - (v) there was consistent description of attempting to push the assailant off, and making it clear there was no consent.

[17] Mr Blathwayt accepted that evidence in relation to the prior incident involving X would effectively require a trial within a trial but, he submitted, it would take no more than an extra day. More importantly, he submitted the evidence of the previous allegation was likely to be substantially helpful to the jury's assessment of the complainant's credibility — indeed, he suggested it would be decisive on the point.

Analysis

[18] In accordance with the suggested procedure in *Best*,⁹ the police made further contact with the complainant and she confirmed her story. According to the job sheet, she noted that she had reread the transcript of her original police interview in relation to the X allegations from 2011 and concluded, "I stand by what I said and maintain that it is a correct account of what happened."

[19] We accept that an evidential foundation is established for the suggestion that the complainant's allegation in relation to X was false in terms of s 40(4). The Crown responsibly conceded this point. Various eyewitnesses recalled the complainant approaching and being amorous with X on the dance floor at the party

⁹ *Best v R*, above n 4, at [65].

and one witness recalled them leaving the dance floor arm-in-arm in circumstances that did not support the suggestion that the complainant was unwilling.

[20] But we do not agree that evidence about this incident would have been substantially helpful to the jury in assessing the veracity of the complainant in relation to her allegation against Mr Hohua.

[21] First, there are material differences between the two incidents:

- (a) The complainant admitted she was very drunk in the incident relating to X but in relation to Mr Hohua she said she was relatively sober. Intoxication was a significant factor for the police in assessing the likelihood of securing a conviction in relation to the X incident. It was not available as a factor for Mr Hohua's case.
- (b) According to eyewitnesses in relation to the incident, the complainant left the dance floor and willingly headed to X's tent. But in Mr Hohua's case he entered the complainant's bedroom uninvited having (according to the complainant) already been told once that he was not welcome.
- (c) Though she admitted to being very drunk during the earlier incident, it was common ground that the complainant was conscious while in the tent with X and she gave a detailed account of what happened. In the Hohua incident, the complainant said she was unconscious when he came in and began to sexually assault her. She said she was awakened by his vigorous digital penetration of her vagina. She said she remembered nothing of what had happened before that point.

[22] Secondly, the absence of an independent witness as to what happened inside the tent means that deciding whether a rape occurred would inevitably have reduced to a credibility contest between the complainant and X. To be sure, evidence of dance floor eyewitnesses supported the proposition that the complainant was not telling the truth about that part of the story, but that does not necessarily mean she

was inevitably lying about the sexual encounter itself. It would have been open to a jury to disbelieve the complainant's dance floor story but still accept her version of what happened inside the tent. In other words, a jury could have accepted that the essential story was true even if the complainant's self serving embellishments around it were not.

[23] Thirdly, all of this means the evidence required to assist the jury assess veracity in relation to the X incident would be extensive. The police interviewed five eyewitnesses and it is likely all would be required to give evidence, in addition to that of the complainant and X himself. Mr Blathwayt's estimate that the evidence in relation to the X incident could be completed in a day was overly optimistic. This would not just be a trial within a trial. It would effectively come to take over its host and dominate the trial. It could well have involved calling more witnesses than those giving evidence about the Hohua incident itself. Given the fact that it is not at all clear what the jury in this trial would have made of that collateral evidence, it cannot be concluded that it would have been substantially helpful in assessing the complainant's veracity in relation to Mr Hohua. Indeed we consider, on balance, that it would have been a substantially unhelpful distraction.

Conviction appeal: ground (b) — inconsistent verdicts

[24] On Mr Hohua's version of events, he entered the complainant's room for the second time, and sexual activity ensued during which he felt the complainant's genital area while she was very much awake. The complainant's version was that she was awoken by Mr Hohua thrusting his fingers into her vagina.

[25] During the course of the jury's deliberations they submitted a formal question as to whether the DNA evidence could distinguish between digital and penile penetration. After consulting with counsel, Judge Hastings advised that the evidence could not draw such a distinction. Ten minutes later, the jury returned with its verdicts of not guilty on the rape charge but guilty on the digital penetration charge.

[26] Mr Blathwayt submitted that given the way the Crown's case was argued, these verdicts were so inconsistent as to be incapable of reconciliation in terms of

R v Shipton.¹⁰ Mr Blathwayt submitted that the only basis upon which Mr Hohua could have been acquitted on the rape count was reasonable grounds for belief in consent. This, he said, was on the basis of Mr Hohua's own evidence that he kissed the complainant's neck and breasts, evidence accepted by the complainant. Therefore, Mr Blathwayt submitted, if the jury had found reasonable belief in consent in relation to the rape charge the same had to necessarily apply to the digital penetration charge.

[27] We do not think the reasoning process advocated by Mr Blathwayt was the only or even the most likely path to the verdicts reached. It is true that Mr Hohua admitted to having sexual intercourse with the complainant. But she had no recollection of this. Thus, the jury could simply have adopted the methodology described by the Judge in his tripartite direction: if they come to disbelieve Mr Hohua's story, they must set it to one side and then assess the remaining evidence to determine whether proof is made out beyond a reasonable doubt. Here, the jury set aside Mr Hohua's concession and looked at the proof contained in the complainant's evidence. He got the benefit of the doubt on the rape charge even though he conceded penile penetration. But he was convicted on the digital penetration charge because the jury believed the complainant.

[28] The verdicts were not inconsistent. Rather, they were disciplined and, in effect, merciful.

Conviction appeal: ground (c) — Direction on the meaning of penetration

[29] When the jury asked the DNA question referred to above, the Judge consulted with counsel before calling the jury back into court to provide his answer. In the course of that consultation, and separately from it, the Crown asked the Judge to give the jury a direction on penetration because this had not been covered in the summing up and should have been. The defence was opposed to this course, suggesting it would be an unnecessary distraction at that late stage. But the Judge decided to accede to the Crown's request and gave the standard penetration direction in addition to answering the DNA question.

¹⁰ *R v Shipton* [2007] 2 NZLR 218 (CA).

[30] Mr Blathwayt submitted that this produced a miscarriage of justice because it invited the jury to treat Mr Hohua's acknowledgment that he felt the complainant's "pussy" as an admission of the "slightest penetration". He submitted that this must have provided the basis for the guilty verdict. It led the jury into error, he submitted, because there was no evidence of penetration of any kind in Mr Hohua's evidence.

[31] We do not agree.

[32] As we have said, the verdicts are consistent with the jury believing the complainant's version of the kind of penetration that occurred. We do not consider that the late penetration direction was a distraction at all. The jury gave no indication that it was wrestling with that issue.

Sentence appeal

[33] The Judge considered the offending fell within band one of *R v AM*,¹¹ and that a starting point of three and a half years' imprisonment was appropriate given the aggravating factors that were present:

- (a) some degree of premeditation;
- (b) invasion into her bedroom, after being asked to leave the first time;
and
- (c) the complainant was vulnerable as she had been drinking, smoking cannabis, and was asleep.

[34] The Judge said that the evidence of kissing her neck and breasts did not at all diminish Mr Hohua's culpability. He noted the considerable psychological and emotional harm to the complainant.

[35] As to personal factors:

- (a) his 93 previous convictions were unrelated, so no uplift was imposed;

¹¹ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

- (b) the offending was committed while on a sentence of supervision, warranting a four month uplift;
- (c) the alcohol and drug report indicates remorse and willingness to rehabilitate, warranting a four month discount; and
- (d) he had spent time on electronically monitored bail (EM Bail), warranting a one month discount.

[36] That brought the end sentence to three years and five months' imprisonment.

[37] Mr Blathwayt's arguments as to sentence are based on the submission that the jury's verdict was based on Mr Hohua's account (limited touching of the "pussy") rather than the complainant's (forceful thrusting). This puts the case at the lower end of band one. Further, he submits that:

- (a) the complainant did not regard herself as vulnerable, as she insisted she was not affected by alcohol and she was in control prior to and after the incident;
- (b) there was no element of invasion in the sense used in *R v AM*; and
- (c) there was only — and barely — a low level of premeditation.

[38] Finally, the four month uplift was excessive because there was nothing to suggest any issues with his supervision (aside from one minor breach), and there should have been a greater allowance than one month for the time spent on EM bail: six months, with no issues of non-performance.

[39] We consider the Judge's assessment cannot be faulted. It was open to the Judge to adopt the more serious form of penetration on the evidence as the basis for his sentencing (a conclusion with which we concur) just as, we suggest, the jury did. This meant his starting point was clearly in range. We agree that the complainant was not vulnerable due to intoxication, but she was asleep when assaulted. That has

its own vulnerability. In addition, entry into her private bedroom did indeed have an element of invasion.

[40] As to personal factors, the four month uplift for breach of supervision was available and was, in any event, neutralised by a relatively generous discount for remorse and willingness to rehabilitate. Finally, the one month reduction for EM bail might have been higher but, the cases are clear that there is no formula and discount will be a matter for broad judicial discretion. The Judge was in the best place to assess the appropriate discount.

Disposition

[41] The conviction and sentence appeals are dismissed.

Solicitors:
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Crown Law Office, Wellington for Respondent