

**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

I TE KŌTI PĪRA O AOTEAROA

**CA135/2017
[2018] NZCA 598**

BETWEEN	TETIRIA RITEBONO Appellant
AND	THE QUEEN Respondent

Hearing:	8 November 2018
Court:	Clifford, Dobson and Mander JJ
Counsel:	D J Allan for Appellant K S Grau and H G Max for Respondent
Judgment:	18 December 2018 at 11.45 am

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is granted.**
 - B The appeal against conviction is dismissed.**
 - C The appeal against sentence is dismissed.**
-

REASONS OF THE COURT

(Given by Mander J)

[1] Following a jury trial in July and August 2012, Tetiria Ritebono was found guilty of a charge of rape and a further charge of sexual violation by unlawful sexual

connection. He was sentenced to 10 years' imprisonment.¹ Mr Ritebono seeks leave to appeal both his convictions and sentence out of time.

Background

[2] Mr Ritebono and the complainant (TK) were born in Kiribati. When TK moved to New Zealand, she met Mr Ritebono through members of her family. After some years, she moved to Te Puke to obtain employment. She stayed with Mr Ritebono and his wife and children, and looked up to him as a father figure. TK's brother worked at the same kiwifruit orchard as Mr Ritebono, and for a period in December 2010 TK replaced her brother when he was unable to work.

[3] One morning, Mr Ritebono told her that they had to get to the orchard early. They travelled by car. When they arrived no one else was there. When TK enquired where everyone was, Mr Ritebono replied that they were at the back of the orchard and they would go and find them.

[4] No one else was present when they got to the back of the orchard. TK's evidence was that Mr Ritebono forced himself on her in the car. Despite her protests and her attempts to protect herself, Mr Ritebono pulled her jeans down and digitally penetrated her whilst covering her mouth with his hand. He then raped her. TK also described Mr Ritebono forcing her to perform oral sex on him.²

[5] After Mr Ritebono stopped, TK dressed and immediately left the car. Mr Ritebono directed her to get back into the car. She said she complied because she was scared of him and no one else was around. Mr Ritebono attempted to start the car to leave but the battery was flat. TK accompanied Mr Ritebono to find assistance to start the vehicle. After walking to another area of the orchard and obtaining help to start the vehicle they drove to a store to purchase a battery. TK's evidence was that Mr Ritebono told her not to tell anyone what had happened and that she was scared whilst she remained alone with him.

¹ *R v Ritebono* DC Tauranga CRI-2011-070-2822, 12 October 2012 (sentencing notes) at [27].

² Mr Ritebono was acquitted of a charge of unlawful sexual connection relating to this act.

[6] After they returned to the orchard they began working. Once in the company of other people, TK felt safer. Her evidence was that she was angry at Mr Ritebono and she confronted him about what he had done. She shouted at him and tried to hit him with a stick. After work, an associate drove TK to Mr Ritebono's house. She gathered her belongings and left to stay with friends. Some weeks later, TK called her mother who came and picked her up. Once in Auckland, she disclosed the offending.

[7] Mr Ritebono accepted that sexual intercourse had taken place. He gave evidence that it was consensual and that TK had agreed to have sex with him before they drove to the back of the orchard. He claimed that TK had attacked him with the stick because she saw him drinking and had become angry when he told her that he loved his wife and children.

Application for leave to appeal out of time

[8] Mr Ritebono filed his notice of appeal some four years and four months out of time. Evidence was filed to explain this delay. The Crown opposed leave being granted. We grant the extension of time in order to focus on the merits of the appeal.

Appeal against conviction

[9] Mr Ritebono brings his appeal on the basis that a miscarriage of justice occurred as a result of him not receiving a fair trial.³ In particular, it is firstly alleged that the Judge erred in allowing the trial to proceed without making provision for a separate Kiribati interpreter for the Crown's witnesses, and that he failed to ensure that the whole proceeding was translated. Secondly, that the Crown prosecutor made an improper submission regarding language difficulties which had the effect of impeaching her own witness.

[10] The Crown's response is that no specific prejudice has been identified by Mr Ritebono arising from the translation arrangements made during the trial, and that

³ Criminal Procedure Act 2011, s 232(2) and (4)(b).

the prosecutor's submission did not amount to misconduct or cause the trial to miscarry.

[11] Two issues originally raised by Mr Ritebono were abandoned in the course of the oral hearing of the appeal. The quality of the interpretation provided by the trial interpreter was initially questioned. However, exhaustive analysis of the audio record of the translated evidence confirmed it to be substantively correct. There is no basis to allege that the standard of the translation provided by the Court-appointed interpreter hindered Mr Ritebono's understanding of the case against him, nor detracted from his defence as presented at trial.

[12] A complaint was also initially made regarding the trial interpreter's relationship with TK. Further inquiries revealed that, at most, there was a remote connection by marriage. Mr Ritebono himself also has a similar distant connection to the interpreter. In the absence of any material inaccuracy in the translation provided at trial, and given the very remote connection between the interpreter and the trial participants, this ground was, understandably, not pursued.

The dual role of the interpreter

[13] The remaining complaint regarding the translation services provided at trial distilled to the trial Judge permitting the interpreter assigned to Mr Ritebono to assist the complainant and two other Kiribati speaking witnesses to give their evidence. A further issue was taken about the closing addresses and the Judge's summing up not being translated.

[14] Neither Mr Ritebono nor the complainant were fluent in English. Both the Crown and Mr Ritebono's counsel requested Kiribati interpreters for the trial. However, by the time the trial commenced arrangements had only been made for a Kiribati interpreter for Mr Ritebono.

[15] Section 24(g) of the New Zealand Bill of Rights Act 1990 provides that a person charged with an offence has a right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court. Breach of that

right will result in an unfair trial.⁴ However, whether deficiencies in the interpretation provided may result in a breach will depend upon the circumstances of the individual case.⁵

[16] In *Abdula v R*, the Supreme Court observed that the standard of interpretation provided to a person at trial:⁶

... must reflect the accused person's entitlement to full contemporaneous knowledge of what is happening at the trial. Interpretation will not be compliant if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence.

[17] In *Fungavaka v R*, this Court held that in order for a miscarriage to arise it must be shown that the defendant's understanding of the proceeding or the conduct of his or her defence was affected by the interpretation issue.⁷

[18] As already observed, no complaint is now made that the interpreter's translation was materially inaccurate or resulted in prejudice to Mr Ritebono's defence. We consider that concession is properly made in the absence of Mr Ritebono being able to identify any errors or omissions in the translation capable of leading to a real risk that the outcome of the trial was affected, or which prevented him from fully participating and expressing his defence in his own words when giving evidence.

[19] Insofar as Mr Ritebono complains that his trial was unfair because the trial Judge permitted the interpreter to periodically assist the complainant and two other Kiribati witnesses in giving their evidence, we find that complaint unsustainable.

[20] TK had a basic command of English. She was generally able to answer questions put to her in her evidence in chief and under cross-examination in English. However, there were occasions when questions needed to be rephrased, and her answers were not always given in perfect English. At times TK broke into her native

⁴ *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at [44].

⁵ At [42].

⁶ At [43].

⁷ *Fungavaka v R* [2017] NZCA 195 at [23] and [29].

language. On those occasions, the interpreter assigned to assist Mr Ritebono translated portions of TK's narrative into English for the jury.

[21] Mr Allan submitted that the trial Judge should not have permitted the interpreter to assist the complainant, or the two other Crown witnesses who at times also struggled to communicate their answers in English. His submission was that, in the absence of a dedicated interpreter assigned to assist the Crown witnesses, the Judge should have aborted the trial. However, it is not clear to us how any prejudice resulted to Mr Ritebono from these arrangements.

[22] We do not consider the course adopted by the trial Judge led to any unfairness. The majority of TK's evidence was given in English, and the complainant only spoke in Kiribati when limitations in her English prevented her from expressing herself in the manner she wished. We do not consider the ad hoc arrangement to allow the interpreter to assist in those instances breached Mr Ritebono's fair trial rights. It neither represented a departure from the required standard of interpretation, nor did it leave him with an inadequate understanding of the evidence.

[23] We accept the Crown's submission that it is difficult to envisage how the interpreter translating for the complainant or the other two Kiribati witnesses on the occasions they needed assistance impacted on Mr Ritebono's ability to understand or participate in his trial. When the interpreter translated parts of the Crown witnesses' evidence, it was only to ensure the jury understood what had been said. Mr Ritebono did not have that difficulty. When the complainant or any other witness reverted to their native Kiribati, Mr Ritebono would have understood what the witness was saying. He has deposed to that being the position as regards TK in an affidavit filed in support of his appeal. We infer the same applied to other witnesses who spoke Kiribati.

[24] It is not suggested that the assistance provided by the interpreter to the witnesses hindered Mr Ritebono's understanding of the case. Nor is it suggested that when TK or any other Crown witness continued their evidence in English the interpreter did not discharge her duty by immediately translating that evidence for Mr Ritebono.

No translation of closing addresses and summing up

[25] Mr Allan submitted that the trial Judge made an error in directing that the closing addresses of counsel and his summing up need not be translated for Mr Ritebono. We accept that Mr Ritebono was entitled to a contemporaneous translation of counsels' addresses and the summing up. However, the issue of whether the closings and summing up were to be interpreted was a matter specifically raised by the trial Judge with the parties. Counsel agreed that this was unnecessary and, by consent, these parts of the trial were not interpreted. That agreement was formally minuted.⁸

[26] An initial ground of appeal sought to be pursued by the appellant was an incompetence of counsel argument. That ground was abandoned by Mr Ritebono. Mr Allan communicated that decision to the Court by way of a formal memorandum. He advised that he had obtained trial counsel's file, reviewed it at length, and had diligently investigated the competence question. In reviewing the reasons why that ground was no longer being pursued, Mr Allan referred to the closing addresses and summing up having not been translated. He advised that Mr Ritebono was "happy" with the quality of his legal representation apart from the way the complainant was challenged about a pair of jeans with a ripped zip that had been produced at trial in support of TK's rape allegation. However, having reviewed the defence closing with Mr Ritebono, it was accepted that no complaint could lie about the approach taken by trial counsel.

[27] Mr Ritebono in his affidavit refers only to what is self-evident from the closings and summing up not being translated, that he did not understand what was being said at the time. There is no criticism of the presentation of Mr Ritebono's defence. As was fairly acknowledged by Mr Allan, a good evidential foundation for Mr Ritebono's case was laid through a combination of cross-examination of Crown witnesses and defence evidence for a strong closing that challenged TK's veracity.

[28] Importantly, there is no suggestion that the waiver by Mr Ritebono of his right to the closings and summing up being translated was other than informed and

⁸ *R v Ritebono* DC Tauranaga CRI-2011-070-2822, 2 August 2012 (Minute No 1).

authorised by him. Mr Ritebono does not identify any specific prejudice arising as a result of the closings and summing up not being interpreted contemporaneously. It is not suggested it gave rise to any issue of competence on the part of his trial counsel, nor that this step was taken without his instructions.

[29] In the absence of the identification of any critical error made in the closing addresses or the Judge's summing up that would otherwise have been corrected had Mr Ritebono not waived his right to a translation, we do not consider this aspect of the trial gives rise to a miscarriage of justice.

The Crown submission regarding language difficulties

[30] When TK made her initial complaint to the police in December 2010, she provided an account which was translated by her relative, Ms K. The narrative TK provided was recorded in a job sheet by a detective constable. It does not take the form of a first person statement but is the officer's record of what TK told her as translated by Ms K.

[31] The job sheet records TK informing the officer that after the rape, when she got out of the car, Mr Ritebono followed her in his vehicle asking her to get back in. In her evidence, TK described Mr Ritebono coming after her on foot. It was an undisputed fact at trial that the car battery was dead at this stage. The inconsistency between what TK was recorded as having told the officer at the time of her initial complaint and her evidence at trial was considered to be significant in terms of challenging the veracity of TK in a case where the jury was faced with starkly contrasting accounts.

[32] Ms K gave evidence for the Crown. Under cross-examination she was asked whether TK had said to the police that after the sexual assault she had been followed by Mr Ritebono in the vehicle. Ms K replied that she remembered that.

[33] In its closing, the Crown suggested that TK's reference to Mr Ritebono following her in the vehicle could have been because of a translation error. The Crown prosecutor submitted:

... There has been obviously significant language and interpretation difficulties in this matter. Both [defence counsel] and myself have on occasions asked questions of witnesses and what was meant by asking the question has clearly, was just clearly misinterpreted by the witness, things appear to have been lost in translation.

But one example of something that may well have been lost in translation is this evidence you have heard about what was recorded in the job sheet by the detective in Auckland regarding the accused following her in the car. That can't possibly be what [TK] meant to say that day because there is no dispute that the battery was flat in the car. Perhaps what she said was, "He followed me" and the word "car" has simply been added in by [Ms K] or even the detective, given they had just heard the offending took place in a car.

Obviously you can't speculate about that sort of thing but this loss of meaning through translation just needs to be factored in. I suggest in any event where does this issue about what was on the job sheet regarding the travelling in the car take you.

[34] Mr Allan submitted that this submission by the Crown amounted to the impermissible impeachment of its own witness, Ms K, by suggesting that language difficulties may have been at the root of the inconsistency between TK's initial account to the officer, as translated by Ms K, and the evidence she gave at trial.

[35] We do not consider the Crown's submission amounted to an impeachment of its own witness. Mr Allan argued that the suggestion that the inconsistency had resulted from a "lost in translation scenario" amounted to a breach of s 37(4) of the Evidence Act 2006. However, that provision prohibits a party who calls a witness from offering evidence to challenge a witness's veracity. We do not consider a submission that a mistake may have occurred as a result of language difficulties involved a challenge to Ms K's disposition to refrain from lying.⁹

[36] A party may offer evidence as to the facts in issue contrary to the evidence of a witness who it has called.¹⁰ Arguably, by reference to the language and interpretation difficulties that had occurred during the course of the trial, there was some basis for

⁹ Evidence Act 2006, s 37(5).

¹⁰ Section 37(4)(b).

the submission. However, Mr Ritebono's complaint is that the submission was contrary to the evidence of the interpreter, Ms K, who in cross-examination had said that she recalled TK having made the statement to the police officer about being followed in the car by Mr Ritebono.

[37] We have some doubt as to the weight that could be attached to Ms K's evidence of remembering such a specific and relatively innocuous detail from TK's previous narrative provided some 18 months before the trial. We also note that prior to giving her evidence, Ms K was cross-examined in the course of a voir dire. The police officer's job sheet was specifically referred to Ms K before a passage that included the detail in question was read to her. She was asked, "Do you recall that?", to which she replied that she did. However, we accept that the Crown prosecutor chose not to ask the jury to consider the likelihood of Ms K recalling whether TK said she was followed in the vehicle by Mr Ritebono. Rather, the submission was made as to the possibility of an error having been made as a result of language difficulties.

[38] Ms Grau on behalf of the Crown addressed the issue as potentially one of prosecutorial misconduct. She acknowledged that the prosecutor's statement — in light of Ms K's apparent confirmation of her translation which, as we have already observed, is perhaps open to question — was an overstatement of the position and was better left unsaid. However, Ms Grau submitted that such an "overstepping of the mark" was not such "grave, persistent, prejudicial or irremediable" conduct as to make the trial unfair.¹¹

[39] We doubt the prosecutor's submission falls into the category of being legally impermissible or unfair. Having regard to the state of the evidence, we consider it is better characterised as a weak and speculative submission which got its "just desserts" when Mr Ritebono's trial counsel responded in his closing address. He submitted:

[TK] said she walked away to the main road but she didn't leave it there, she said that Mr Ritebono followed her in his car and was telling her to get in. She didn't leave it there, she said that she wouldn't get back in the car. Well the Crown suggests that this just may have been something that was lost in translation. That's, with respect to the Crown, not the way Mrs Kabwea (sic) who made the interpretation, who came along here and gave her evidence, it's

¹¹ *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425 at [32]; citing *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

not the way she recalls it. She said that yes, that's what was said and that's why she interpreted those words.

...

If she's lied about what happened after, how then can you accept that she's been truthful in terms of the allegations that she's made?

[40] Trial counsel in his address made an incorrect reference to Mrs Kabwea rather than Ms K. Ms Kabwea was the interpreter at trial. However, it would have been plain to the jury from the evidence they had heard that Ms K was the interpreter at the police station, and it would have been clear that she was the interpreter counsel was referring to.

[41] Mr Allan submitted that the Crown prosecutor's error was compounded when the trial Judge failed to direct the jury to put the submission to one side. We do not consider that any specific direction was required. The Judge in his summing up repeated defence counsel's response to the Crown's submission:

[T]he submission of Mr Bergseng is very much that you can't rely upon the complainant. He also submits that it is not simply a case of being lost in translation. This was to do with the original complaint she gave to the police and again what happened after getting out of the car.

There was no repetition or endorsement of the Crown's submission by the trial Judge.

[42] Proceeding on the basis that the Crown's submission was not legitimate we do not consider it represented such a blatant departure from good practice, or was so prejudicial to Mr Ritebono, as to render his trial unfair or his convictions unsafe.¹² The jury was directed to decide the case solely on the evidence, and the ordinary caution that counsels' submissions do not amount to evidence was provided by the trial Judge. We are not convinced that this irregularity was capable of tainting the jury's decision-making process or diverted it from a proper assessment of the witnesses and their evidence in accordance with the trial Judge's directions. In that regard, it is notable that the jury returned a verdict of not guilty on the charge relating to the allegation of oral sex.

¹² *R v Stewart*, above n 11, at [33].

[43] For the foregoing reasons, we do not consider the appeal against conviction has merit.

Appeal against sentence

[44] Mr Allan submitted that the sentence of 10 years' imprisonment was manifestly excessive. He argued that the Judge erred by placing the offending in the top end of the second band of rape offending identified in *R v AM (CA27/2009)*.¹³ He submitted it should have been placed in band 1.

[45] In sentencing Mr Ritebono, the trial Judge identified a number of aggravating features which he assessed as follows:

- (a) The presence of planning and premeditation.¹⁴ Mr Ritebono invented a false story about having to get to work early to get his victim alone. The Judge considered Mr Ritebono drove to the orchard knowing full well what he intended. Once at the orchard, steps were taken to get the victim alone at the back of the orchard.
- (b) The offending involved a breach of trust.¹⁵ The victim was much younger than Mr Ritebono and viewed him as a father or uncle-type figure. At the time she was staying with Mr Ritebono's family and she had no reason to suspect she would be unsafe with him.
- (c) The Judge considered that the victim was vulnerable.¹⁶ There is a degree of overlap with the breach of trust factor. However, TK had limited support and was dependant at the time on Mr Ritebono while living in Te Puke.
- (d) Mr Ritebono threatened the use of violence on TK.¹⁷ Mr Ritebono responded to TK's protests by stating that "the more you talk the more

¹³ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹⁴ Sentencing notes, above n 1, at [19].

¹⁵ At [20].

¹⁶ At [21].

¹⁷ At [23].

I hurt you”, and at one stage raised his hand in a fist, and put his hand over her mouth. The physical force used during the course of the rape went beyond the inherent violence of the sexual violation.

- (e) The offending resulted in particular harm to the victim.¹⁸ As a result of the offending, TK had to leave her employment. She described in her victim impact statement being scared and having been left afraid of other men. TK described the experience as being very hard on her and her family, and that being a rape victim is considered very shameful within the Kiribati community.

[46] Band 2 offending, which may attract a starting point of between seven to 13 years’ imprisonment, is appropriate for cases which have two or three aggravating features present to a moderate degree.¹⁹ When applying a guideline judgment such as *R v AM (CA27/2009)*, a sentencing Judge is required to exercise judgement in assessing not only the number of aggravating factors but also their gravity. The placing of any particular case within a band is very much an evaluative exercise.²⁰

[47] The trial Judge identified five aggravating features which he considered were present to at least a moderate degree. While that may be open to dispute, it is at least clear that there were a number of significant aggravating factors. As Ms Grau submitted, this was a planned rape of a young woman who was in Mr Ritebono’s care, during the course of which threats of violence were used to overcome her resistance.

[48] We do not consider it can be tenably suggested that a starting point in band 1 which attracts a starting point of six to eight years’ imprisonment was appropriate. That band applies to cases of sexual violation where either no aggravating features are present or only to a limited extent.²¹

[49] We consider the starting point of 11 years’ imprisonment, which falls in the upper-middle range of band 2, while stern, was available to the sentencing Judge in

¹⁸ At [22].

¹⁹ *R v AM (CA27/2009)*, above n 13, at [98].

²⁰ *Setu v R* [2018] NZCA 127 at [10].

²¹ *R v AM (CA27/2009)*, above n 13, at [93].

the exercise of his discretion. Any concern that it has resulted in a manifestly excessive sentence is alleviated by the generous deduction of one year made in recognition of the potential language difficulties Mr Ritebono may face in prison.

[50] As part of the evidence filed in support of the appeal, a statutory declaration from a Mr N was tendered. Mr N had been in a relationship with TK in Kiribati. His declaration is relied upon to challenge an observation made by the Judge at sentencing that TK had been rejected by her husband. Mr Allan submitted that the Judge had erred in his reference to TK being “rejected” and that the breakup with her husband had not related to the offending.

[51] We do not consider this information materially alters the assessment of harm caused to the victim. Regardless of any misapprehension as to the reason for the breakup of TK’s former relationship, there is no doubt TK suffered considerable harm from the offending. The information provided by Mr N does not dissipate the shame TK feels as a result of being a rape victim within the Kiribati community.

[52] We also place little weight on Mr N’s statement that he heard a rumour that TK had settled with someone else some two years after the rape. There has been no challenge to the cultural effect on TK, and the harmful impact of such sexual offending on a young woman is plain. We do not consider the Judge’s misapprehension regarding the reason the relationship with N ended, which we note was not something raised by TK in her victim impact statement, materially affects the seriousness of the harm suffered, nor bears on the length of the sentence.

Result

[53] The application for an extension of time to appeal is granted.

[54] The appeal against conviction is dismissed.

[55] The appeal against sentence is dismissed.