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IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY
SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA78/2020
[2020] NZCA 659**

BETWEEN	NEVADA JOHN SMITH Appellant
AND	THE QUEEN Respondent

Hearing:	11 November 2020
Court:	Brown, Duffy and Nation JJ
Counsel:	G A Walsh for Appellant J E Mildenhall for Respondent
Judgment:	18 December 2020 at 12.30 pm

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Following a jury trial in the District Court Mr Smith was convicted of one charge of sexual violation by rape, one charge of sexual violation by unlawful sexual connection and one charge of attempted sexual violation in respect of A and of one

charge of sexual violation by unlawful sexual connection in respect of B. He was sentenced by Judge Menzies to ten years' imprisonment.¹

[2] He appeals against his conviction on the grounds of prosecutorial misconduct and trial counsel competence. He appeals against his sentence on the ground that it is manifestly excessive.

Factual background

[3] A was 16 years old when she went with a friend to Mr Smith's house in April 2018. She had not met Mr Smith previously. During the day she drank home brew spirits supplied by Mr Smith and became very intoxicated. Mr Smith asked her questions about whether she had had sexual intercourse with older people. She repeatedly told him she was 16.

[4] A became so intoxicated that she could no longer talk and had difficulty walking. The friend asked Mr Smith if she could be put to bed in his bedroom so she could sober up. He agreed and said he would make sure no one went into the room.

[5] However, Mr Smith himself repeatedly tried to enter the bedroom, eventually getting in later that evening and closing the door behind him. He removed A's clothing and his own. He vaginally raped A and also penetrated her anus with his penis. He also attempted, unsuccessfully, to put his penis into her mouth.

[6] A's friend managed to gain access to the room. She saw Mr Smith engaging in sexual activity with A, who appeared unconscious. She was unresponsive and faintly breathing. The others present were concerned enough to check her pulse. Once she regained consciousness, she was distressed and vomited. Her friend dressed her and they left the address.

[7] The offending against B occurred approximately one month later. B was staying at Mr Smith's address with her partner. They were sleeping on the couch.

¹ *R v Smith* [2020] NZDC 2597 [Sentencing notes].

On some nights, Mr Smith pushed two couches together and would sleep alongside them.

[8] One night they were sleeping in this configuration, with B in the middle between her partner and Mr Smith. Mr Smith reached over and inserted his finger into her vagina. This woke her up. She then heard Mr Smith say “thank you”. She immediately got up from the couch and went into the bathroom.

The sentencing decision

[9] The Judge considered that the offending against A fell within rape band two of *R v AM (CA27/2009)*,² which provides for a starting point between seven and 13 years,³ on account of the following culpability factors:⁴

- (a) Planning and premeditation: A was given alcohol and placed in a room that was intended to be a refuge for her. Although Mr Smith said that he would ensure no one entered he did so himself in order to sexually violate her.
- (b) Victim vulnerability: A was vulnerable because of her young age which was significantly exacerbated by her level of intoxication and resulting unconsciousness.
- (c) Harm to the victim: A’s impact statement showed that the offending had caused her to have significant trust issues with people generally and older males in particular.
- (d) Scale of the offending: Mr Smith sexually violated A in two different ways and attempted to do so in a third, all during a single episode of offending.

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

³ At [98].

⁴ Sentencing notes, above n 1, at [10].

The Judge was satisfied that the offending against A warranted a starting point of nine years' imprisonment.⁵

[10] The unlawful sexual connection offending against B fell within USC band one of *R v AM (CA27/2009)* requiring a starting point of between two and five years.⁶ Relevant culpability factors identified were:⁷

- (a) Victim vulnerability: B was asleep when the violation occurred.
- (b) Harm to the victim: B's impact statement describes her feeling uneasy around males.
- (c) Breach of trust: B's partner had been a friend of Mr Smith's who had offered his house as a place for them to stay. He abused that trusting relationship.

[11] The Judge considered that the offending against B would on a standalone basis call for a starting point of two to two and a half years. However taking totality into account the Judge applied an uplift of only one year.⁸ There being no applicable mitigating factors the end sentence was ten years' imprisonment.

The appeal

[12] The grounds of appeal in respect of conviction were particularised as follows:

- (a) Certain remarks of the prosecutor in her closing address were impermissible.
- (b) Trial counsel was not adequately prepared for the trial, taking carriage of the case two weeks prior to trial.
- (c) Mr Smith should have been called to give evidence at trial.

⁵ At [15].

⁶ *R v AM (CA27/2009)*, above n 2, at [114].

⁷ Sentencing notes, above n 1, at [12].

⁸ At [15].

[13] The appeal against sentence was confined to the contention that the starting point adopted by the Judge of nine years' imprisonment was too high.

[14] This Court must allow the conviction appeal only if satisfied that the jury's verdict was unreasonable or a miscarriage of justice occurred that created a real risk the trial outcome was affected.⁹ The sentence appeal must be allowed only if the Court is satisfied there was an error in the sentence and a different sentence should be imposed.¹⁰

[15] Notices to cross-examine were issued by both Mr Smith and the Crown. Mr Smith and his trial counsel, Mr Boot, both gave evidence and were cross-examined.

Prosecutorial misconduct

[16] The essence of this ground of appeal is that the prosecutor is said to have made a legally impermissible submission in the course of her closing address which undermined Mr Smith's right not to give evidence. The issue arises from the following passage of the closing address which immediately followed the summary of the Crown case:

So that is the Crown's position. How do you as the members of the jury go about making this determination as to whether or not you accept the evidence that has been presented to you in this case? Well I suggest you do that having regard to the assessments of credibility that you have been undertaking from the time this trial began, you might have been doing that unconsciously, listening to the evidence you're hearing, sifting through it, thinking about how consistent it is within itself from one particular witness, how it fits with other evidence you have heard and the impression the witness made on you as she or he spoke and I mention "he" in that context here because while you haven't heard from the defendant here as of course is entirely his right and that has been made plain to you and will be made plain to you again, you have heard from him in the form of his interview and that is part of the evidence for you [to] properly consider in the course of your deliberations.

[17] Mr Walsh commenced by drawing attention to the principles governing the conduct of prosecuting counsel summarised in *R v Stewart*¹¹ including:¹²

⁹ Criminal Procedure Act 2011, s 232.

¹⁰ Section 250(2).

¹¹ *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425.

¹² At [22], quoting *R v Mallory* 2007 ONCA 46 at [340] (citations omitted).

The closing address is the proper forum for argument and the Crown is certainly entitled to argue its case forcefully. The Crown should not, however, engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness.

[18] He argued that the prosecutor's reference to Mr Smith not giving viva voce evidence at trial undermined Mr Smith's right not to give evidence. He submitted that it may have suggested to the jury that Mr Smith's election not to give evidence was somehow indicative of his guilt or at least indicative of a suggestion that the victims were not actually being challenged as to their evidence because they did not hear directly from Mr Smith.

[19] It was contended that the impact of the prosecutor's statement was unlikely to be capable of remedy by any direction which might have been given to the jury about the significance of his not giving evidence. Certainly the very brief mention made by the trial Judge in summing-up, in simply stating that Mr Smith elected not to give evidence as was his right, did not suffice to remedy the prosecutor's statement.

[20] It is apparent in the quoted passage that the prosecutor was addressing the jury concerning its function of making credibility assessments and was making the point that a jury is entitled to use a defendant's statements in a police interview as part of their assessment. As Ms Mildenhall observed, the context of the prosecutor's statement was a submission to the jury about how to go about assessing credibility, not determining guilt. There was express reference to Mr Smith's right not to give evidence. We agree with Ms Mildenhall's submission that the passage could not possibly be taken as inviting the jury to find Mr Smith guilty because he had not given evidence at trial.

[21] We note that the Judge's summing-up to the jury was in essentially the same terms:

[15] The defendant himself elected not to give evidence and that is his right. He did however provide his account of what he says occurred in his interview with the police that was played to you. That interview therefore forms part of the evidence.

[22] We also agree with Ms Mildenhall's submission that it cannot be said that the prosecutor was implying or suggesting that the fact Mr Smith did not give evidence meant there was no challenge to the complainants' evidence. Immediately preceding the passage in question the prosecutor had pointed out that the defence position was that the complainants were lying and she summarised the defence challenges to the complainants' evidence.

[23] In *Hohua v R*¹³ this Court recently cautioned that allegations of prosecutorial misconduct are serious and that care should be taken before making them. In our view the closing address of the prosecutor in this case contained no departures from good practice and we conclude that there is no basis for the criticism levelled at the closing address.

Trial counsel conduct

The complaint that Mr Boot was not adequately prepared for trial

[24] Mr Boot was engaged as counsel for Mr Smith following the withdrawal of his previous counsel, Mr Bean, who had developed a conflict. On 19 November 2019 Mr Bean applied for leave to withdraw, advising the Court that Mr Smith had asked to be represented by Mr Boot and that Mr Bean had contacted Mr Boot on 15 November 2019.

[25] In his affidavit in support of the appeal Mr Smith described the nature of his communications with Mr Boot both prior to and during trial.

22 The Thursday the following week I met Mr Boot at his office. It was just the two of us. The meeting lasted one hour and 28 minutes. I had to leave to report to Probation.

23 During the interview, there was some confusion over names especially between [X] and [Y]. We never talked about me giving evidence. He did say to me that there were a few hurdles to get over but that should be okay. He did not articulate what the hurdles were. We did not talk through the witnesses. We did not talk about the DNA evidence. We did not talk about trial procedure. In terms of the DNA evidence, I did not recognise that Mr Boot had not read about the ESR until in the trial.

¹³ *Hohua v R* [2019] NZCA 533 at [28].

- 24 There was no discussion about jury selection but I do recall the process in Court. Mr Boot did not look at jurors as they made their way to their seats. He did use four challenges. The Crown used three.
- 25 In terms of interaction with Mr Boot, there was little before trial. On the morning of trial, we met. We did not meet in between Court sessions except for one time.
- 26 He did come to ask me in the Court cell about giving evidence after the Crown case had ended. I said no as I told him I was my own worst enemy. I also thought that because there was no DNA evidence linking me to the offences, I did not need to. There was also no preparation about giving evidence.
- 27 On one of the days at the end, there was a discussion about bail issues. I was given a curfew [that] ended at 9am. A guard spoke to the registrar for me about this as it did not make sense that I had to be at Court by 9am but on curfew until 9am. During the trial, I wanted to fire my lawyer and wanted to talk to the Judge but the Judge would not talk to me and told me to talk to my lawyer. There was no discussion of the evidence with me through the trial. I left Court and spoke with my mother. I felt stitched up.
- 28 I also thought that Mr Boot was going to ask for an adjournment of the trial given he had only just been assigned two weeks before. I was concerned about this. I did ask him to ask for an adjournment.

[26] In his affidavit in response Mr Boot explained that he was assigned to represent Mr Smith on 18 November 2019 and obtained the file from Mr Bean that same afternoon. He explained that his first meeting with Mr Smith was at his office on 20 November 2019. He met again with Mr Smith at his office on 28 November 2019 and prepared a brief of evidence which he provided to Mr Smith. They discussed the Crown witnesses.

[27] Refuting Mr Smith's suggestion that they did not discuss trial procedure, Mr Boot annexed to his affidavit a document headed "How a jury trial works". He explained that it is his practice to provide a copy of that document to every defendant for whom he acts prior to a jury trial in order to ensure that they understand the trial process.

[28] It was Mr Boot's belief that both he and Mr Smith were fully prepared for trial and that at no time was he instructed to seek an adjournment of the trial. He remained resolute in cross-examination explaining among other things:

- (a) The reason he was in a position to undertake Mr Smith's trial was because another jury trial in which he had been engaged had been adjourned.
- (b) In accordance with his standard practice he took a brief from Mr Smith and provided a copy to him.
- (c) He had prepared an opening address in the event that Mr Smith elected to give evidence.

[29] In particular we note the following exchanges in his cross-examination:

- Q. Did you have sufficient time to prepare him for the potential of giving evidence?
- A. I believe so. I would not have prepared an opening address if I thought he wasn't ready to give evidence. I just wouldn't have wasted my time.
- Q. In the lead-in to the trial was there any talk about the potential of seeking an adjournment?
- A. No.
- Q. In your view was such a step required?
- A. Not from my perspective. I was fully prepared and ready for trial. I would have had no basis to suggest to the Court that I was not prepared so I couldn't have asked for it.

[30] In his cross-examination Mr Smith accepted that he discussed his case at a meeting with Mr Boot on 20 November and again at the further meeting on 28 November. He agreed that at the latter meeting Mr Boot discussed with him the document "How a jury trial works" and he acknowledged that it included advice about jury selection and the issue of a defendant giving evidence. However in evidence in chief he strove to minimise its significance by describing the contents of the document as a generalisation of what happens in court and not particular to his case.

[31] The evidence, including in particular the documentary record, indicates that Mr Boot briefed Mr Smith on the trial process, prepared a full brief of his evidence and went so far as to prepare an opening address in the event that, contrary to previous

indications, Mr Smith elected to give evidence. We can see no basis for the contention that Mr Boot was not adequately prepared for the trial. In any event as Ms Mildenhall observed what matters on appeal is not an evaluation of the sufficiency of trial counsel's pre-trial preparation but an assessment of whether his conduct of the trial gave rise to a miscarriage of justice.¹⁴ We endorse the Crown submission that Mr Boot's conduct of Mr Smith's defence at trial was competent and thorough. This ground of appeal is rejected.

Mr Smith's complaint that he should have been called to give evidence

[32] Mr Smith's affidavit concluded by saying that he had evidence to give and that he should have been called to defend himself at trial. By contrast, earlier in his affidavit he stated that he had declined to give evidence because he considered he was his "own worst enemy" and, because there was no DNA linking him to the offences, he did not think he needed to give evidence.¹⁵

[33] On this issue Mr Boot's affidavit stated:

The Decision not to Give Evidence

25. The decision not to give evidence was made by Mr Smith.
26. We discussed this both prior to trial when we met at my office on the 28th November and also, during trial, on the 3rd of December 2019.
27. When we met at my office on 28th November, Mr Smith and I discussed the advantages and disadvantages of him giving evidence.
28. Mr Smith indicated to me that he did not wish to give evidence.
29. He outlined to me an occasion where he had given evidence in the Family Court. He had described how that had gone poorly for him.
30. Therefore, he did not think he should give evidence in his jury trial.
31. I note in his affidavit at paragraph 26 that he acknowledged that he told me that he is his own "worst enemy". That is the tenor of what he described to me both before trial and when we discussed it at the conclusion of the Crown case.
32. Therefore, it was Mr Smith's decision not to give evidence.
33. This was not a trial where he had to give evidence.

¹⁴ See for example *Misa v R* [2018] NZCA 293 at [45]–[46].

¹⁵ At [25] above.

34. In furtherance of the above, attached and marked “D” is [a] note whereby Mr Smith confirms that he had spoken to me both prior to trial and then on the 3rd December 2019 confirming that he did not wish to give evidence at his jury trial.
35. If Mr Smith had wished to give evidence, then I would have called him.
36. I had taken a full brief from him and discussed giving evidence with him.
37. Moreover, I had even prepared an opening address should Mr Smith change his mind during trial and decide to give evidence. Attached and marked “E” is a copy of that draft opening address which was on my trial file.
38. Therefore, there was no reason for me to prevent or hinder him giving evidence.

[34] The document which was annexed as Exhibit “D” was a handwritten document dated 3 December 2019 signed by Mr Smith which read:

I Nevada Smith confirm that I have spoken to my lawyer Russell Boot prior to jury trial about whether I wish to give evidence. I have again spoken to Mr Boot on the 3rd December 2018 and have advised and confirmed with him that I do not wish to give evidence.

[35] In the course of cross-examination Mr Smith agreed that as a consequence of his meeting with Mr Boot on 28 November he knew both that it was for him to decide whether he wished to give evidence and that the final decision would probably be made only once all the Crown evidence had been heard.

[36] The fact of consultation between Mr Smith and Mr Boot following the closing of the Crown case was explored in Mr Smith’s cross-examination as follows:

- Q. I would just like to ask you a few final questions about your decision not to give evidence Mr Smith. Now, when Mr Boot came to see you after the Crown case closed, you knew then that it was a decision that you needed to make about whether to give evidence didn’t you.
- A. At that point in time, yes I did.
- Q. And you then had another conversation about the pros and cons, the advantages and disadvantages of giving evidence?
- A. In short,
- Q. And, Mr Boot then had a document with him which was the document that is exhibit D to his affidavit.

- A. That's correct.
- Q. And it refers to the discussion that you had prior to the trial about whether you wished to give evidence.
- A. Yes, at this point I think to a degree, it was under duress. I was very stressed. Um and I, I was relying on my lawyer to do what, to do the right thing and and and really go to bat and I didn't feel he had gone to bat for me at that point in time and I, I actually had two court hearings on that particular day. One was in a Family Manukau court hearing and one was in the Hamilton court hearing for this trial. So, I was actually dealing with two issues on that particular day.
- Q. You knew this was your decision to make though didn't you?
- A. It was my decision to give defence, give evidence and said I have already given evidence in the form of a DNA sample and that should be enough. But as for testifying in the stand, there should be no reason for me to testify in the stand.
- Q. And Mr Boot didn't put any pressure on you to sign that document did he?
- A. No, well, to a point he did. He said, because it came across as though if I didn't sign something then he wasn't going to go back into the courtroom.
- Q. Did Mr Boot say that to you?
- A. No, it was implied.

[37] A little later Ms Mildenhall questioned Mr Smith concerning his appreciation of the risk of giving evidence:

- Q. Mr Smith you knew the risk, you knew there were risks of you giving evidence and being cross-examined on your evidence didn't you?
- A. There's always a risk, yes ma'am.
- Q. And you still had the feeling that you could be your own worst enemy in those situations didn't you?
- A. Because I could possibly have got emotionally entangled into a, into a debate and as I was, as I said to you before, I was dealing with two court cases, I just had a court case where my ex-partner had said some really bad things in my, about my daughter, um, that were playing on my mind at the time, stressful things, you know, getting yourself into trouble and just being a typical teenager I suppose is the only way to call it.
- Q. So you may have had other things on your mind as well but, nonetheless, you made an informed decision to sign that document saying you did not wish to give evidence, didn't you?

- A. It was implied that he wasn't going to go any further and that I should sign this document so that he could cover his arse in the eventuality that, you know, something like this would happen and I said to him that ...
- Q. Do you accept that you, that's what you think now, it wasn't what you thought then?
- A. At the time I said I don't need to give testimony because there's no DNA ...

At that point Mr Smith revisited the significance of the evidence concerning the absence of DNA. The issue of DNA had been addressed in a memorandum of agreed facts pursuant to s 9 of the Evidence Act 2006. That memorandum stated the results from the DNA samples "were of insufficient quality for further meaningful comparison".

[38] Contrary to Mr Smith's assertions, Mr Boot disclaimed any pressure on his part concerning Mr Smith giving evidence. We note the following exchange in Mr Boot's cross-examination:

- Q. Do you feel you had enough time to prepare him to give evidence?
- A. Yes.
- Q. When you got him to sign the waiver did you do it with any I suppose you'd say things hanging over him, that the fight was over if he didn't sign?
- A. No. As I said I was happy for him to give evidence. I would have gone in and made the opening address which I had on file. I was perfectly content for him to give evidence if he wished to give evidence.

[39] The election whether to give evidence is one of the three fundamental decisions on which counsel's failure to follow specific instructions would generally give rise to a miscarriage.¹⁶ However as the Supreme Court observed in *R v Sungsuwan*¹⁷ an accused who has acquiesced in his counsel's advice not to go into the witness-box himself or herself will usually have great difficulty in showing a miscarriage of justice on that account.

¹⁶ *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65].

¹⁷ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [45], quoting *R v Pointon* [1985] 1 NZLR 109 (CA) at 114.

[40] There can be no question that Mr Boot advised Mr Smith that it was his decision whether to give evidence and that Mr Smith understood that. Mr Smith confirmed in writing that he had discussed with Mr Boot the issue of giving evidence both prior to trial and again on 3 December 2019. We note that Mr Smith had given an extensive police interview and we agree with Ms Mildenhall's submission that it seems highly unlikely that he could have improved his position by giving evidence. In our view there was no error on Mr Boot's part and Mr Smith's decision was a reasonable one in the circumstances.

Sentence appeal

[41] Although no issue was taken with the one year uplift for the offending against B, Mr Walsh contended that the starting point of nine years' imprisonment for the lead offending against A was too high, referring by way of comparison to three decisions of this Court: *Edmonds v R*,¹⁸ *Pule v R*¹⁹ and *Luisi v R*.²⁰ He contended that the offending against A was similar to *Edmonds* where an intoxicated complainant who had been put to bed awoke to find the defendant sexually violating her followed by rape. The incident was brief but the victim was vulnerable and in her own home. The starting point of seven years' imprisonment was held not to be outside the available range.

[42] In both *Pule* and *Luisi* a nine year starting point was adopted. In the former this Court recognised that the offence featured five of the culpability assessment factors identified in *R v AM (CA27/2009)* and, while viewing the sentence as stern, considered that in view of the aggravating features the nine year sentence was not manifestly excessive. *Luisi* concerned two charges of rape in relation to the same complainant following consensual sexual intercourse. On the first occasion the defendant squeezed the complainant's throat and on the second assaulted her by punching her on numerous occasions. Mr Walsh submitted that *Pule* and *Luisi* were both more serious than the instant case, contending for an end sentence of eight to nine years' imprisonment.

¹⁸ *Edmonds v R* [2019] NZCA 567.

¹⁹ *Pule v R* [2015] NZCA 154.

²⁰ *Luisi v R* [2020] NZCA 73.

[43] Ms Mildenhall submitted that in this case three of the *AM* factors increasing culpability were present to a moderate degree and a fourth factor (victim vulnerability) present to a high degree. She submitted that the offending against A demanded a starting point that was at the very least in the middle of *AM* rape band two.

[44] She submitted that, while having certain culpability factors in common, the factual circumstances in *Pule* and *Luisi* were quite different from the present case. More pertinent in her submission were the circumstances of *Smith v R* where the defendant had invited a 13 year old victim to his flat, plied her with alcohol and forced her to engage in both sexual intercourse and oral sex. The relevant culpability factors were the very vulnerable victim, degree of planning and premeditation and the emotional harm to the victim. On a challenge to the starting point of nine years this Court held that when the aggravating factors were taken into account, in particular the victim's age and vulnerability, the categorisation of the offending as being within rape band two of *AM* could not be criticised.²¹

[45] Sentencing involves the exercise of discretion and *R v AM (CA27/2009)* allows for a level of flexibility in the assessment of an appropriate sentence. In this case the Judge accurately identified the seriousness of the offending and conducted a thorough evaluation of the relevant factors. In our view that analysis amply justified the adoption of a nine year starting point in the circumstances of the case.

Result

[46] The appeal against conviction and sentence is dismissed

Solicitors:
Crown Law Office, Wellington for Respondent

²¹ *Smith v R* [2011] NZCA 447 at [15].