NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA14/2008
[2008] NZCA 515

THE QUEEN

v

NATAS SIMI

Hearing: 18 September 2008

Court: Ellen France, Wild and Cooper JJ

Counsel: G J King for Appellant
B J Horsley for Crown

Judgment: 1 December 2008 at 3.15 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The appellant was tried before Judge Behrens QC and a jury on an indictment alleging that he raped the complainant B. He was convicted, and sentenced to imprisonment for a term of seven years.

[2] The present appeal is against his conviction only. It is advanced on four grounds. They are first, that the District Court erred in allowing the complainant to give her evidence by way of video link from Germany. Second, it is claimed that the trial Judge erred in permitting the Crown prosecutor to re-examine the complainant from a prior consistent statement. Third, it is said that the Crown prosecutor wrongly introduced his personal opinion on the appellant's guilt and that in various other respects his closing address was unsatisfactory. Finally, the appellant argues that the Judge failed adequately to redress the issues arising from the prosecutor's closing address, in the summing up.

Background

[3] At the time of the alleged rape, both the complainant, B, and the appellant were staying at a backpacker hostel in Wellington. The complainant was a 19 year old German citizen who was spending time in New Zealand prior to going to university. She was due to leave the hostel the following day, as were two other backpackers, and farewell drinks were held on 21 February 2006. The complainant acknowledged that during the course of the evening she had drunk a substantial amount of alcohol.

[4] There were a number of interactions between the appellant and B during the course of the evening. In a conversation the appellant said that he was looking for a girlfriend and really liked B. She told him that she did not want a relationship, as she was leaving Wellington the next day. Later in the evening they kissed. She accepted in cross-examination that the kissing had gone on for about a minute and the points of their tongues had met. There was a further episode of kissing a little later.

[5] After those events, B had sexual intercourse with a friend and compatriot E, in a spare room in the hostel. There was evidence that during their intercourse B told E that it was starting to hurt her a little bit because the condom he was using was not sufficiently lubricated. The intercourse stopped at that point.

[6] B returned to her own room and went to bed. She remembered E coming in and waking her up so that she would be ready to leave in the morning. However, she fell back to sleep. The appellant arrived and asked her if he could get into her bed. It was at this point that, according to B, the rape took place. Without her agreement, the appellant got into the bed. He pulled the underpants she was wearing to the side and entered her with force against her will. She told him that she did not want sex and had said "no". At some point during these events, another person entered the room. Both B and the appellant saw this other person, but neither said anything to him.

[7] The appellant's account was very different. In his video interview, he claimed that he had engaged in a consensual and mutual course of sexual conduct, in which he had stimulated B's vagina with his fingers, kissed her breasts and engaged in extensive kissing and foreplay. This had culminated in the appellant pulling down his pants, pulling her underwear to one side and having consensual sexual intercourse, during which he ejaculated.

[8] In cross-examination B referred to the appellant as having said that he did not have a condom. She said that he quickly stopped, withdrew his penis, buttoned up his trousers and left.

[9] B filled out an "Incident Form" at the hostel reception. She wrote it in English. Included on the form were the words:

> Then he stopped and said that he don't has [sic] a condom - I said that we can't have sex then. Then he put his trousers on and leave [sic] the room.

[10] The police were called. B underwent a medical examination which revealed some minor injuries consistent with blunt force trauma. The appellant agreed to a video interview, and during the course of that interview he described the incident as

having involved consensual sex, as we have already mentioned. At various times during the course of that interview he said that he thought that on the basis of the evening's events he had been in a relationship with B.

Evidence by video link

[11] The complainant gave evidence at the trial by video link from Germany. That course was approved by Judge Singh in a ruling that he gave prior to the trial pursuant to s 103 of the Evidence Act 2006: DC WN CRI-2006-085-001162 15 October 2007. The appellant contends that the Crown's application to call B's evidence in this way should have been declined.

[12] The Crown's application was based on the evidence of Detective Johnstone. In an affidavit that he swore on 27 September 2007, Detective Johnstone deposed that after giving her statement to the police on 22 February 2006, B had returned to her home in Germany. He recorded that since February 2006, three trial dates had been organised. The first was for a trial commencing on 31 May 2007, the second for a trial commencing on 22 August and the third for a trial commencing on 15 October. Arrangements were made for B to return to New Zealand for the purposes of the October 2007 trial. However, on 25 September 2007 B sent Detective Johnstone an e-mail in which she advised that her plans had changed and she was no longer able to come to New Zealand for the trial. The reasons that she gave were that she had been declined entry to the university she would have preferred to attend (where she had been due to start her study on 19 October), and was now going to study at a different university in a different city where she had to be on 15 October. If she did not appear on the due date, she would miss a full year of university study.

[13] Detective Johnstone attached B's e-mail to his affidavit. It was in the following form:

> Dear Mr Johnstone,
>
> Suddenly my planes [sic] changed intentional – I didn't get the place at [the first university] – so that's pretty bad!

> But today I got the message that I can start studying at [the other university] – that's nice, but it means heaps of organising and stress for me now: choose classes, get to know the uni, find a job and a flat, … all that kind of things you need!!! And I have to get it as soon as possible.
>
> That is to say I definately [sic] can not come to New Zealand! I am just not able to! I've got to be at [the second university] at the latest on 15.10.2007 … if I wouldn't be there at this time I can forget my place at university.
>
> I am honestly really sorry, but you know it is not my fault!
>
> I remember that the Police told me it would be possible to record my statement here in Germany and send it to you, to New Zealand.
>
> I think thats the only possible way a.t.m., I know it is very short-term decision but it was unexpected!
>
> By the way it would be too much psychological and emotional and physical stress for me in this situation now.
>
> I hope we/you can find a way to get through this.
>
> I am verry [sic] sorry, please forgive me!
>
> Kind regards,
>
> [Complainant's name]

[14] After receiving the e-mail, Detective Johnstone spoke to B by telephone. B told him that the second university was 500 kilometres from her home town and that she needed to organise accommodation as well as attend enrolment at the university on 15 October 2007. She confirmed that there was an enrolment period for the university which, if missed, would result in her not getting a place. She also said that the "psychological, emotional and physical stress of enrolling in university and of flying halfway across the world to give evidence at a trial is too much and she felt she had to go ahead with her university career rather than go ahead with the trial".

[15] Detective Johnstone asked about her availability for a video link and she confirmed that she would be willing to give evidence by that means.

[16] Judge Singh noted that the two previous trial dates had been vacated: the first because a fixture had only been made for two days, when it was considered that three were required; and the second, because both counsel were instructors at the Litigation Skills Programme at the relevant time.

[17] Having recorded the position of the parties, including the opposition by the defence, the Judge noted that the defence case was that the sexual intercourse had been consensual, and that identity was not in issue. He concluded that allowing the complainant to give evidence by video link would minimise the stress on her and that given her study commitments, requiring her to travel to New Zealand for the trial would exacerbate her stress. He expressed the view that a fair trial would not be compromised by allowing the complainant to give evidence via video link.

[18] Mr King noted that Judge Singh had expressed concern about what he called the "paucity and the poor quality of the evidence in support of the application": at [11]. He argued that the absence or likely absence of B from New Zealand at the time of the trial should not have been determinative. Full arrangements had been put in place to bring her to New Zealand and her "absence" was simply the result of her unwillingness to be present arising from reasons to do with her personal convenience. He argued that the evidential basis for the ruling was wholly inadequate and there was no evidence that any steps had been taken to attempt to address her concerns about being absent from the second university at the relevant time (such as speaking to the university).

[19] The consequence of allowing the application had been that the jury did not see and assess B in person. Their only view of her was on a relatively small television screen, on which it would have been difficult to assess her demeanour. In addition, there had been actual problems during the trial when an attempt had been made to show her the incident report and she had been unable to read it on the screen.

[20] In cross-examination Mr King had asked B about her reluctance to return to New Zealand. At one stage she said that the police had told her in February 2006 that it would be possible to give evidence by a video link. Mr King suggested that from the outset B had been contemplating not returning to New Zealand for the trial. Had the defence known that she was not intending to come to New Zealand, it would not have consented to the earlier adjournments which had been made prior to the Evidence Act 2006 coming into force.

[21] For the Crown, Mr Horsley pointed out that the complainant had been prepared to travel to New Zealand to give evidence at the previous fixtures allocated for the trial. It was only the fact that she had missed her place at the first university and needed to be present for enrolment at the second that had caused her to state she would be unavailable for the October 2007 trial. The Crown's application had been based on the statutory criteria contained in ss 103 to 105 of the Evidence Act, and had been properly granted by the Judge. Mr Horsley pointed out that one of the grounds upon which an order that a witness give evidence in an "alternative way" may be made is the absence or likely absence of the witness from New Zealand (s 103(3)(i)).

[22] Under s 103(4), a Judge asked to direct that a witness give evidence in an alternative way must have regard to the need to ensure that there is a fair trial, the need to minimise stress on a witness and the need to promote the recovery of a complainant from the alleged offence (s 103(4)(a) and (b)). Mr Horsley argued that, with the exception of the "fair trial" consideration, which was neutral, the other considerations supported the grant of the application. He also pointed out that juries in New Zealand had been making assessments on the credibility of complainants giving evidence from outside the courtroom for many years, especially in cases involving child complainants where evidence has often been given by way of closed circuit television.

[23] Section 103 of the Evidence Act provides:

> **103 Directions about alternative ways of giving evidence**
>
> (1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.
>
> (2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.
>
> (3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
>
> (a) the age or maturity of the witness:

(b) the physical, intellectual, psychological, or psychiatric impairment of the witness:

(c) the trauma suffered by the witness:

(d) the witness's fear of intimidation:

(e) the linguistic or cultural background or religious beliefs of the witness:

(f) the nature of the proceeding:

(g) the nature of the evidence that the witness is expected to give:

(h) the relationship of the witness to any party to the proceeding:

(i) the absence or likely absence of the witness from New Zealand:

(j) any other ground likely to promote the purpose of the Act.

(4) In giving directions under subsection (1), the Judge must have regard to—

(a) the need to ensure—

(i) the fairness of the proceeding; and

(ii) in a criminal proceeding, that there is a fair trial; and

(b) the views of the witness and—

(i) the need to minimise the stress on the witness; and

(ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding.

[24] The alternative ways of giving evidence are set out in s 105. They include, under s 105(1)(a)(ii) a witness giving evidence from "an appropriate place outside the courtroom, either in New Zealand or elsewhere".

[25] On the facts of this case, we consider that an order was appropriately made under s 103(1). Plainly, B's absence from New Zealand gave jurisdiction to grant the order and in that respect we note that s 103(3) of the Act sets out the grounds on which orders may be made. The drafting is such that if one of the grounds applies,

that is sufficient for the making of an order provided that, before making the order, the Judge has had regard to the matters referred to in subs (4). Section 103(4)(b)(ii) plainly contemplates that considerations relevant to the recovery of complainants may well justify choice of an alternative means of giving evidence. On the present facts, that provision was at least indirectly relevant as was the reference in s 103(4)(b)(i) to the need to minimise stress on the complainant.

[26] Given the unexpected turn of events concerning the complainant's choice of tertiary institution in Germany and her fear that coming to the trial would cause her to forfeit a place at the second university, we have no doubt that it would have added greatly to her stress and potentially hampered her psychological recovery from the alleged offence had she been required to travel to New Zealand for the October 2007 trial. On the other hand, apart from the general assertion that the appellant was denied the opportunity of confronting the complainant in person before the jury, there is no real showing of prejudice. There is force in Mr Horsley's observation that evidence by video link has not previously been seen as adversely affecting an ability to assess credibility.

[27] Mr King was able to point to the practical difficulties that were encountered during the trial when it was sought to show the complainant a copy of the "Incident Form" that she had filled in at the hostel. Notwithstanding those difficulties, however, Mr King was able to obtain the answers that he wanted in that part of the cross-examination because she accepted his propositions as to what she had written in the form. The difficulties were also only a matter of timing, in that while initially the complainant could not read the document, later she was able to do so. We do not consider that there can be any suggestion in this case that the result of the order was an unfair trial.

[28] Although s 103(4)(a)(ii) refers explicitly to criminal proceedings, that does not mean that subs (4)(a)(i) does not apply in the case of criminal trials. Rather, the intent is to apply that provision to both civil and criminal proceedings. In the case of the latter paragraph, we have no doubt that the "fairness" of a proceeding can properly include the need to be fair to a complainant in a prosecution for sexual violation where, as in the present case, the complainant has indicated willingness to

come from overseas to New Zealand for the purposes of two previously arranged fixtures, and those fixtures have been vacated for reasons not of her making. In the present case there would be an additional element of unfairness if B had been required to attend on the third trial date given the difficulties that she might face as a consequence with her university studies.

[29] In our view, the order under s 103 was justified, and has resulted in no miscarriage of justice.

Use of prior consistent statement

[30] The appellant's second ground of appeal is that a miscarriage of justice arose because the trial Judge permitted the Crown prosecutor to re-examine the complainant from a prior consistent statement. At the trial, and again on appeal, the emphasis of counsels' arguments has been on s 35 of the Evidence Act. For reasons that we will explain later, it would have been better simply to apply s 97 of the Act.

[31] The prior consistent statement in question was the incident report form to which reference has previously been made. In that statement, the complainant described the incident as ending in the following way:

> Then he stopped and said that he don't has a condom – I said that we can't have sex then. Then he put his trousers on and leave the room.

[32] In her evidence in chief she said:

> Um, Mr Simi said something about that, he hasn't got a condom and, yeah it was so quickly that he stopped and he, withdraw his penis from my vagina and he buttoned up his trousers and then he left, all of a sudden, he was gone.

[33] There was no mention of the words "we can't have sex then" which, according to the incident report, she had said to the appellant.

[34] In cross-examination, B gave evidence that the appellant had referred to not having a condom, and "then he stopped". Mr King asked her what she had said after the appellant had said that he did not have a condom. The complainant answered

that she could not remember, and "I don't know if I said anything". Mr King then pointed out that in the incident form she had written "then he stopped and said that he don't has a condom. I said that we can't have sex then. Then he put his trousers on and left the room." The complainant agreed that that is what she had written.

[35] In re-examination, the Crown sought to put other statements from the Incident Form to the complainant. Mr King objected to that course being followed because it would involve the Crown leading from the witness something she had said in a previous statement that was consistent with her evidence given in Court.

[36] Judge Behrens ruled that the proposed questions could be asked, having regard to s 35(2) of the Evidence Act. In other words, the evidence could be led to respond to a challenge to the witness's veracity or accuracy based on what the accused would say was a previous inconsistent statement of the witness.

[37] As a result of the ruling made by Judge Behrens the re-examination then proceeded as follows:

> Q Mr King has asked you about the incident form that you filled out at the backpackers. You remember?
>
> A Yes, I remember.
>
> Q Now, he's asked you about a couple of small portions from it and I'm just going to ask you about another portion okay?
>
> A Okay, yes.
>
> Q Did you also say in that document, "He put his penis in me. I don't do anything. I just let him make it, then I tell him that I don't like it. I said no, I don't want it?"
>
> A Yes, that's right, that's the truth.

[38] Mr King submitted that his cross-examination had not opened the door to allow the Crown to re-examine on this portion of the complainant's prior statement. That was because his questioning had been confined to the end point of the sexual intercourse. Recent fabrication had never been suggested to the complainant and in allowing the Crown to re-examine on this aspect of B's prior statement the Judge had allowed a prior consistent statement to be given in evidence on the critical issue in

the trial. Mr King then pointed out that the result of his cross-examination had been that the complainant accepted that she had said, in the incident report, that after the appellant had said he did not have a condom she had said "we can't have sex then". Consequently, there was "no inconsistency left" by the time re-examination occurred. In the circumstances, there had been no basis for permitting the Crown to re-examine, as occurred.

[39] Mr Horsley pointed out that the reason why the defence were endeavouring to lead evidence of the complainant having said "I said that we can't have sex then", was to show that, when she filled in the incident form at the time, she was stating that the sex terminated when she said that she did not want it. However, this failed to take into account the other parts of the statement which had been put to the complainant in re-examination. The Crown had simply, and legitimately, re-examined in response to what had been a challenge to the complainant's veracity, which challenge had been based on a previous inconsistent statement.

[40] Mr Horsley argued that s 35 of the Evidence Act permitted the prosecutor to refer back to the previous statement on the basis that B's veracity or accuracy had been challenged by use of a previous inconsistent statement.

[41] Section 35 of the Evidence Act provides:

> **35 Previous consistent statements rule**
>
> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.
>
> (2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.
>
> (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) the statement provides the court with information that the witness is unable to recall.

[42] It can be seen that, under s 35(2), where the witness's veracity or accuracy has been challenged on the basis of a previous inconsistent statement, a previous statement of the witness that is consistent with the witness's evidence at trial is admissible to the extent that the statement is necessary to respond to that challenge.

[43] Here, the defence challenged both the accuracy and veracity of the complainant's evidence to the Court. The issue as to her accuracy arose from her omission, until questioned in cross-examination, to refer to the statement in the incident report that she had said to the appellant "well we can't have sex then" at which point the appellant put his trousers on and left. It needs to be borne in mind, however, that a challenge to the appellant's veracity was implicit and present throughout her evidence because she maintained that she had been raped and the appellant's position was that any sexual intercourse had been consensual.

[44] Mr King maintained that once B gave the appropriate answer in cross-examination, any challenge to her accuracy or veracity based on the previous statement had effectively been met, and there was no need to call evidence about other parts in the prior statement. Putting that another way, his argument was that once that point had been reached, there could be no authority derived from s 35(2) to adduce other parts of the statement in re-examination, because it could no longer be said to be necessary to do so in order to respond to the challenge to the witness's veracity or accuracy.

[45] In our view, that argument is artificial. While it is true that, as a result of the cross-examination, an omission in the complainant's evidence (when compared with her prior statement in the incident report) had been made good, there remained the defence contention that the sex had been consensual until she had said "we can't have sex then" at which point the appellant stopped. B's complaint of rape remained. The defence still challenged her veracity, but after the cross-examination the challenge no longer concerned her failure to give the evidence she had omitted from the incident report. Now, available to the defence as a result of the cross-examination, was the contention that as soon as she said "we can't have sex then" the appellant withdrew. That would be a challenge to the veracity of B's claim of rape.

[46] It therefore remained necessary for the prosecution, if they could, to respond to that challenge. The effective way of doing that was to lead evidence of parts of the prior statement which showed she had protested at an earlier stage. That is what the re-examination amounted to. It is, with respect, fallacious for Mr King to argue that he had confined the cross-examination to the point in time when the sex ended. His only object in doing so was to further the argument available to the defence that as soon as the appellant said "we can't have sex", the appellant desisted. It was, in the circumstances, perfectly legitimate for the Crown to refer to the complainant's protests earlier in the episode that she did not want sex.

[47] In summary, the questions in re-examination involved relying on another part of the prior statement to respond to the challenge to B's veracity that had effectively arisen in cross-examination. It follows that the evidence was admissible under s 35(2).

[48] Quite apart from that reasoning, however, we consider that the appellant's argument would also be defeated by s 97(1)(a) of the Evidence Act. That section provides that on re-examination, the witness:

> [M]ay be questioned about matters arising out of evidence given by the witness in cross-examination, including any qualification in cross-examination of evidence given by the witness in examination-in-chief.

[49] That provision provided all the authority that was necessary for the disputed part of the re-examination in this case. It was the defence that brought up the prior statement and the prosecution had not previously sought to introduce it. The manner in which the defence questioned the complainant on her prior statement gave rise to answers which, if not supplemented, might have left the jury with a false impression of the content of the statement as a whole. Ensuring that a wrong impression is not left by the answers to carefully framed and limited questions in cross-examination is the classic function of re-examination. The extent of re-examination is controlled by the rule that questions in re-examination must be related to matters arising out of evidence given in cross-examination. That was clearly the case here. In our view, it was in the circumstances unnecessary for authority to be sought for the re-examination in s 35(2).

[50] Consequently, the second ground of appeal also fails.

Content of prosecutor's closing address

[51] The third ground of the appeal is that the Crown prosecutor's closing address to the jury was inappropriately emotive and inflammatory, leading to a miscarriage of justice. Mr King complained that the prosecutor had repeatedly "personalised" the case both as far as the complainant was concerned and also by putting forward his personal views. He referred to repeated references to the complainant by an abbreviated form of her first name, compared with constant reference to the appellant as "Mr Simi". In addition, Mr King complained of successive assertions that the Crown had met the required standard of proof.

[52] The appellant's criticisms began with the manner in which the prosecutor commenced his opening address. According to Mr King, he had stood, greeted the jury and then immediately pointed to the accused in the dock stating:

> **This man**, Natas Simi, had sex with [the complainant] on 22 February last year at the [backpacker hostel].

[53] Mr King also submitted that in concluding his address the prosecutor had again pointed to the accused, referring to him as "this man":

> The Crown says you can be satisfied of that. Her story was solid and her evidence compelling. Her behaviour in the following day and during her evidence was consistent and could not have been faked, I would suggest. In stark contrast, Mr Simi's story contains inherent implausibility's and lies. If you agree, a matter entirely for you of course, then **this man**, Natas Simi, is guilty of rape, and on that basis I ask you to convict.

[54] Mr King complained that throughout his address the prosecutor had repeatedly placed reliance on the complainant's demeanour when giving evidence suggesting that, "it could not have been faked". He gave various instances also of the prosecutor personalising the case, not only so far as the complainant was concerned, but also having regard to the prosecutor's own personal views. Among the passages to which he referred were the following:

> I would suggest that she was a fairly straightforward, focussed young lady with a sense of clarity about what happened given that it was so long ago. She appeared an honest person, she made no attempt to embellish her story, she was happy to admit if she wasn't sure of detail. Ask yourselves, did [complainant's first name] strike you as a liar. If she is lying, if she is telling you that Mr Simi raped her, when in fact he didn't, that makes her a spiteful, vindictive, rather wicked person. Ask yourselves if she came across that way. I would suggest that in no way did she appear that sort of person.
>
> Think about [complainant's first name] reaction as she told you about being raped and when she was cross-examined. Did those tears, did her upset, her obvious upset, strike you as being some kind of plan to tell a lie? Crocodile tears? I would suggest not. That reaction was genuine distress at having to recall what Mr Simi did to her, and it had the unmistakable air of reality to it.
>
> …
>
> Some of the things she told you about have have [sic] or had a real ring of truth to them, the sorts of things that just sound right and couldn't have been made up…
>
> Those passage [sic] and those emotions, I would suggest, have a real ring of truth to them. Real descriptions of real feelings coming through even over the airwaves and even in a second language. You just can't make that up.

[55] As to the Crown repeating assertions that it had met the required standard of proof, Mr King pointed to passages in the address which included the following:

> I'll talk to you about some aspects of evidence that the Crown says proves beyond reasonable doubt that Mr Simi is guilty.
>
> …
>
> The Crown is well aware of the required standard and has brought this charge precisely because it believes it can reach it.
>
> …
>
> As you know, juries up and down the country reach that standard and find people guilty on a daily basis.

[56] Mr King submitted that, overall, the conduct of the prosecutor went well beyond what is acceptable and that the appeal should be allowed on this ground alone. That submission was based in part on what was said about the prosecutor's role by Rand J in the Supreme Court of Canada in *Boucher v R* [1955] SCR 16 at 23 and 24:

> It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.

> Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of wining or loosing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[57] That dictum was referred to in *Randall v The Queen* [2002] 1 WLR 2237 in which the Privy Council drew attention to the fact that the duty of prosecuting counsel is "not to obtain a conviction at all costs, but to act as a minister of justice": at [10](1).

[58] For the Crown, Mr Horsley accepted that while small portions of the prosecutor's closing address could properly be subject to criticism of the kind made in *R v Mussa* [2008] NZCA 290, any departures from best practice were insignificant in the overall context of the address. He argued that this was not a case where the departures were "so gross, persistent or prejudicial as to require them to condemn the trial as unfair": *Huggins v The State* [2008] UKPC 32 at [34] summarising *Randall v The Queen* at [28] – [29].

[59] We adopt the approach recently articulated in *R v Mussa*. In that case it was said that:

> [19] In assessing the content of closing addresses against complaints about prosecutorial conduct in previous cases, this Court has considered matters such as the use of emotive and inflammatory language, improper moral pressure, inappropriately personal observations, inaccuracies, and any invitation to use improper propensity or bad character reasoning (see, for example, *R v Roulston* [1976] 2 NZLR 644 at 654-656, *R v Thomas* CA305/98 15 December 1998 at 7-10 and *R v Hodges* CA435/02 19 August 2003 at [8-15]).

[60] Ultimately, the question is whether there is a real risk of a miscarriage of justice as a result of what has occurred at the trial.

[61] Our attention has not been drawn to any invitation to use improper propensity or bad character reasoning in the address. But there were instances of each of the other categories of wrong conduct mentioned in the passage just quoted.

[62] Mr Horsley responded to the various criticisms made by Mr King contending that although some of the language used had been inappropriate, the address was not such as would give rise to a real risk of a miscarriage of justice. For example, in relation to the comment about the Crown being well aware of the required standard of proof, and that it had brought the charge because it believed the standard could be reached, he conceded that the comment was unhappily worded. However, he submitted it was excusable for the prosecutor to express himself in this way because he was discussing the Crown's obligation to prove the case "beyond reasonable doubt" describing it as not "some kind of mythical or impossible standard" but one which was routinely applied.

[63] These observations of the prosecutor had drawn a robust response from Mr King in his own closing address:

> And my friend saying that the Crown has brought this charge because it believes the charge is proven beyond reasonable doubt, for my friend to say he has absolutely no hesitation in inviting you to convict is completely and utterly irrelevant. It's not even true. The Crown will bring a charge against an individual of the State if there is a *prima facie* case. That's the test. At first blush is there sufficient evidence for the case to go to trial? It has never been the test in New Zealand that cases only go to a jury trial if the Crown is satisfied it can prove it beyond reasonable doubt, but I'm not going to waste your time talking about that.

[64] As to Mr King's complaints about the prosecutor pointing to the accused in the dock, and referring to him as "this man" Mr Horsley was instructed that the pointing was simply an open-handed gesture in the direction of the accused.

[65] Another particular criticism made by Mr King, as we have mentioned, was as to the use by the prosecutor of an abbreviated form of the complainant's real name. The prosecutor in fact told the jury that he was going to use the abbreviated form of the name because he found the full German name of the complainant difficult to pronounce. Thus, early in his closing address, when the prosecutor was giving an outline of the subjects that he would cover, he noted that he would be referring to the complainant:

> [W]ho I'm going to refer to as [abbreviated version of the complainant's first name] because I find her name difficult to say… .

[66] Given that explanation, we doubt that the jury would have been influenced by the use of the abbreviated name, or by any contrast that they noted between that and the use of the more formal "Mr Simi" for reference to the accused.

[67] As to the submission that the prosecutor "repeatedly personalised the case", we agree that language was used which would have been better avoided. There were plainly also instances of language which, as Mr King submitted, was inappropriately emotive and inflammatory. The phrase "every woman's worst nightmare" has previously been highlighted by this Court as an expression that should not be used in a sexual violation case. It is regrettable that the prosecutor repeated it in this case. Overall, we consider that there were many respects in which the address fell short of the objective and impartial standards expected of prosecutors as explained in the various cases to which we have referred.

[68] However, in the end we do not consider that what occurred was sufficient to create a real risk of a miscarriage of justice. We accept Mr Horsley's submission that a degree of robustness was appropriate given that the trial involved a contest of credibility because of the sharp conflict between the evidence of the appellant and the complainant whose descriptions of what occurred were at opposite ends of a pole.

[69] We have not been persuaded that the prosecutor's conduct meant that the trial was unfair.

Judge's summing up

[70] At the conclusion of addresses, Mr King raised with the trial Judge some concerns about the prosecutor's address. He said that he had never been in a trial in which the Crown had stressed so often that it had met the requisite standard of proof. Mr King emphasised that what the Crown thought on that issue was completely irrelevant and expressed the belief that in addressing it in response he had not "over stepped the mark".

[71] The Judge's summing up proceeded along standard lines. Perhaps because of the very forceful way in which Mr King had responded in his own closing address, the Judge made no criticism of the conduct of the prosecutor. He avoided, however, repetition of any of the excessive aspects of the prosecutor's address in summarising the Crown's case.

[72] Mr King submitted that specific directions should have been given to overcome the prejudice which the prosecutor's address would have caused. In the context of this case and consistent with the conclusion we have reached on the third ground of appeal, we do not think it was necessary for the Judge to take any particular action.

Result

[73] All of the grounds of appeal have failed and the appeal is dismissed.

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