NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA378/2011
[2013] NZCA 592

	BETWEEN	SAMMY DOUGLAS WINIKEREI Appellant
	AND	THE QUEEN Respondent

Hearing: 13 June and 29 October 2013

Court: O'Regan P, Miller and MacKenzie JJ

Counsel: N Levy for Appellant
M E Ball and M J Inwood for Respondent

Judgment 28 November 2013 at 3 pm

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by MacKenzie J)

Background

[1] The appellant was convicted following a trial in the High Court at Rotorua before Priestley J and a jury in May 2010, on one count of kidnapping and one count of rape. The jury was unable to agree on a verdict for a second count of rape and the appellant was subsequently discharged on that count. He appeals against his conviction. The notice of appeal included an appeal against sentence, but this appeal was not pursued at the hearing and is formally dismissed.

[2] The Crown case was that the appellant and the complainant were long standing friends and that the complainant would often transport the appellant in her car around the North Island.

[3] On the evening of Friday,17 October 2008 in the course of one such road trip the appellant directed the complainant to the home of a female friend of the appellant near Putaruru. There was no one home. They went into the house and were alone together. After they had been there for some time the complainant indicated that she wished to leave. The appellant refused to let her leave. He became angry and violent. He punched her and dragged her by the hair down into the laundry.

[4] The complainant tried to use the telephone on three occasions. On two occasions the appellant took the phone from her and hung it up. On the third, the complainant hung up after hearing the 111 operator's voice, because she feared that the appellant would hear. The appellant told the complainant to stay put and behave. She complied because she was too scared to leave and because he had taken the keys to her car.

[5] During the course of that Friday evening, the appellant raped her in the lounge.[1]

[6] The complainant stayed in the house with the appellant all through Saturday. She said that on the Saturday evening she was again raped by the appellant.[2] On the Sunday morning, the complainant dissolved some pills in the appellant's coffee. When he became drowsy she took the keys and, after getting directions at a local service station, drove to the nearest police station. She went there to let them know she was okay as she presumed they were looking for her as a result of texts which she had sent earlier.

[7] The defence case was that the complainant was not held in the house against her will, and that all sex which took place between them was consensual.

---

1 The count on which the appellant was convicted.
2 The count on which the jury was unable to agree and the appellant later discharged.

[8] The ground of appeal is that trial counsel for the appellant did not take adequate steps to locate a number of witnesses who could have given relevant evidence at trial.

[9] The notice of appeal listed seven witnesses the appellant wished to call on his appeal. An affidavit from a private investigator was filed. It recorded that the investigator had contacted four of these witnesses and taken statements from them. Their unsworn statements were attached as exhibits to the investigator's affidavit. At the hearing of the appeal, the focus was on the evidence of two of those witnesses. The appellant submits that his trial lawyer, Mr Simpkins, failed to follow his instructions in relation to those witnesses. The extent of the instructions given to Mr Simpkins about those two witnesses was in contention.

[10] Both the appellant and Mr Simpkins had sworn affidavits. Mr Simpkins was not available to attend the appeal hearing on the initial date, 13 June 2013. Counsel had filed a joint memorandum dated 10 June noting their agreement that the matter be dealt with on the basis of the affidavits filed, without the immediate need for cross-examination of the appellant and Mr Simpkins. The memorandum noted that if any difficulty arose then counsel for the appellant would ask that the matter be adjourned part heard so that cross-examination could occur.

[11] The hearing on 13 June ended on the basis that the Court would consider whether the appeal could be dealt with on the material then before the Court. We concluded that cross-examination of the appellant and Mr Simpkins on their affidavits was necessary. We also considered that affidavits from the two potential witnesses principally relied upon, Dion Haitana and Wiremu Winikerei, should also be obtained and they should be available for cross-examination if required. We issued a minute on 14 June 2013 dealing with these matters. The hearing of the appeal was resumed on 29 October 2013. Mr Haitana and Wiremu Winikerei have both sworn affidavits setting out the evidence which they could give. Mr Haitana was required for cross-examination by the Crown. Both the appellant and Mr Simpkins were also cross-examined.

Further evidence

The principles

[12] There are three controls which the Court applies in considering whether evidence not called at the trial should be admitted or taken into account on appeal. They are that the appellant must demonstrate that the new evidence is:[3]

(a) sufficiently fresh, in that the evidence could not, with reasonable diligence, have been called at the trial;

(b) sufficiently credible, which is a question to be determined having regard to both inherent and contextual credibility; and

(c) sufficiently cogent, in the sense that the evidence is such that it might reasonably have led to a finding of not guilty if called at the trial.

[13] Evidence will meet the test for freshness if it could have been obtained before the trial, but the failure to do so resulted from an error on the part of counsel, such as to raise the risk of a wrong verdict.[4] We consider the evidence of both Dion Haitana and Wiremu Winikerei in the light of those three controls, particularly those of freshness and cogency.

Dion Haitana

[14] The evidence of Mr Haitana is not fresh. It was known to the appellant before trial. It could pass the first screen of freshness only if the failure to call it resulted from an error on Mr Simpkins' part. There is a conflict of evidence between Mr Simpkins and the appellant on the instructions given to Mr Simpkins about obtaining the evidence of Mr Haitana. The appellant's evidence is that he wanted a private investigator to speak with a number of witnesses including his son Wiremu and Mr Haitana. Mr Simpkins' evidence is that he was instructed that Mr Haitana could give evidence of having delivered cannabis to the house on the weekend of the

---

3 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25] affirming principles enunciated in *R v Bain* [2004] 1 NZLR 638 (CA).

4 *Fairburn* at [33]. See also *Lundy v R* [2013] UKPC 28 at [125]–[126]. *R v Sungsuwan* [2006] 1 NZLR 730 (SC) at [69].

offending. He impressed upon the appellant that he should provide details for Mr Haitana so that Mr Simpkins could consider what admissible evidence he would be able to provide. Details for Mr Haitana were not provided by the appellant and because of that Mr Simpkins was unable to contact him. He did not make any further enquiries.

[15] Mr Simpkins' evidence is supported by his contemporary file notes. He interviewed the appellant in Northland Prison on 22 April 2010. He took a file note of his discussions which includes the entry "SW critical of Utting due to PI not engaged to speak to Dion Haitana".[5] The file note does not record any further instructions being given at that meeting about contacting Mr Haitana. Mr Simpkins recorded a file note of a discussion with the appellant on 28 April. That reads: "Suggests Dion Haitana spoken to. He to provide details."

[16] We accept Mr Simpkins' evidence that he was not given instructions to engage a private investigator to contact Mr Haitana, rather the matter was left on the basis that the appellant would provide contact details for him.

[17] We do not accept the appellant's evidence that it was necessary to engage a private investigator to contact Mr Haitana because the appellant was unaware of his contact details. The appellant knew where Mr Haitana lived, as he had visited him on the weekend of the offending, about 18 months prior to the time of giving instructions to Mr Simpkins. Mr Haitana's evidence before us was that he still lives in Putaruru, and had lived in that house for five to seven years. The appellant's evidence does not explain why he was unable to give Mr Simpkins contact details for Mr Haitana.

[18] For these reasons, we consider that the evidence of Mr Haitana cannot be regarded as fresh, and that the requirement for freshness cannot be excused on the basis of some fault on the part of the appellant's counsel.

[19] The evidence that Mr Haitana would give is that he had known the appellant for many years. Both are patched members of the Mongrel Mob though of different

---

[5] Ms Utting was a lawyer previously instructed on behalf of the appellant.

chapters. Mr Haitana lives in Putaruru. At the time of the events in 2008, the appellant called to his home to see Mr Haitana. The appellant was on his own. He stayed for about half an hour. The appellant told him that he was catching up with an ex-girlfriend called Christine Patterson. The appellant said that he had another woman with him, but did not give her name. The appellant asked to purchase some tinnies and Mr Haitana agreed to sort some out for him. That evening, at about 6 pm, he went to Ms Patterson's house and met up with the appellant. Present at that house were Ms Patterson, the appellant, two children and another woman, who he was told was the appellant's new girlfriend. She appeared friendly towards the appellant and looked happy and he did not notice anything unusual about her. He was there for about half an hour. He had his 18 year old son with him.

[20] Mr Haitana was cross-examined before us. It was put to him that Ms Patterson in her evidence at trial had never mentioned seeing Mr Haitana that weekend and never mentioned him or his son visiting her at home. It was also put to him that none of the witnesses at trial had mentioned any children being present at the house on the weekend of the offending.

[21] Because Mr Haitana's evidence does not meet the criterion of freshness, its admission could be justified only if it was sufficiently cogent that it might reasonably have led the jury to an acquittal. His evidence is said to be important on two aspects.

[22] The first is his evidence that the appellant visited his house. Evidence of the appellant having left Ms Patterson's house, where the complainant was, on the Saturday would be relevant to the issue of whether the complainant was unlawfully detained at Ms Patterson's house, or whether she might of have had an opportunity to leave. However, Mr Haitana's evidence is vague as to the timing. We are not satisfied that it is of such cogency as to give rise to a risk of a wrong verdict, and so justify its admission despite its not being fresh.

[23] The second aspect is Mr Haitana's evidence that he visited the appellant at Ms Patterson's house later the same day. His description of his visit to Ms Patterson's house later the same day is inconsistent with the evidence of other

witnesses who gave evidence at trial. Again, we are not satisfied that the high cogency hurdle which this evidence must meet, because of its lack of freshness, is met.

Wiremu Winikerei

[24] Wiremu Winikerei is the appellant's son. Wiremu's evidence supports the proposition that there had been consensual sex between the appellant and the complainant on an earlier occasion. His evidence is that he has seen the appellant and the complainant together many times and has travelled in the same car as them many times. Wiremu first met the complainant when he was living with his father in Taupo. He saw her again when he visited his sister in Taumarunui. A couple of days after that he, the appellant and the complainant drove in her van from Taumarunui to Auckland up to Kaitaia. They stayed in Kaitaia for a couple of days. Wiremu stayed on in Kaitaia while the appellant and the complainant went off for a couple of days. They returned and then all three drove down to Auckland and then to Te Kuiti. They stayed a night at Te Kuiti. Wiremu slept in the same bed as the appellant and the complainant, who had sex. A couple of days later the appellant and the complainant went to Putaruru.

[25] His evidence is not fresh. It was obviously known to the appellant before trial, and there is no evidence that he would have had any difficulty in knowing how to contact his son. The appellant in his affidavit includes Wiremu among the witnesses he said he wanted a private investigator to speak to. He gives no reason why he could not have given Mr Simpkins contact details for his son. Mr Simpkins' evidence is that he was not instructed to call Wiremu or any other family member. His evidence is that the evidence that Wiremu was present while consensual sex took place between the parties on other occasions was not made available to him prior to trial. He was not made aware that Wiremu could give evidence of this nature. We accept Mr Simpkins' evidence in this regard. We therefore do not accept that the first control of freshness is excused because of the fault of trial counsel.

[26] Because the evidence is not fresh, the threshold as to cogency is high. The fact that there had been consensual sex between the parties on an earlier occasion

was of some relevance to whether the complainant may have consented, or the appellant may reasonably have believed that the complainant was consenting, to sexual intercourse on the occasion of the alleged offending. The relevance was however limited, because the relevant issue was consent (or reasonable belief in consent) at the time of the offending. Evidence of consensual sex some time earlier was of limited probative value. The cogency of the evidence is further limited by the fact that there was other evidence called by the appellant at trial on that point. A Mr Pene gave evidence of the appellant and complainant having stayed with him on a number of occasions and having slept together in his house. We do not consider that Wiremu's evidence would have added significantly to that evidence, which was not seriously challenged by the Crown in cross-examination.

Result

[27] For these reasons, we are satisfied that the evidence of both witnesses falls well short of satisfying the test for admissibility at this stage. The appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent