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IN THE COURT OF APPEAL OF NEW ZEALAND

CA297/2013
[2014] NZCA 67

BETWEEN	MARK GARRAWAY Appellant
AND	THE QUEEN Respondent

Hearing:	5 March 2014
Court:	Randerson, Venning and Cooper JJ
Counsel:	R M Gould for Appellant T A Simmonds for Respondent
Judgment:	5 March 2014
Reasons:	12 March 2014

JUDGMENT OF THE COURT
(REASONS)

A **The time to appeal is extended until the date of filing.**

B **The appeal against conviction is allowed.**

C **The convictions on the counts of sexual violation by rape, sexual violation by unlawful sexual connection (2) and' indecent assault are quashed.**

D A retrial is ordered on all counts.

E Any question of bail is to be dealt with in the District Court.

REASONS OF THE COURT

(Given by Randerson J)

[1] We heard this appeal against conviction on 5 March 2014 and issued a results judgment that day with reasons to follow.[1] These are those reasons.

Background

[2] The appellant was found guilty in November 2011 after a jury trial in the District Court of one count of sexual violation by rape, two counts of sexual violation by unlawful sexual connection and one count of indecent assault. He was acquitted on two charges under the Misuse of Drugs Act 1975.

[3] The offending was said to have occurred in 2002. The complainant J was then a 17 year old woman and the appellant was in his forties. J alleged that she was approached by the appellant and invited to visit him at his residence. The appellant had been involved in the strip club industry for some years and his brother owned a strip club. The appellant offered J employment as a stripper. During J's visit to the appellant's home, she alleged that the appellant digitally penetrated her, performed oral sex on her, had her perform oral sex on him, and finally raped her. She stayed overnight at the appellant's house. She alleged that the following day, the appellant indecently assaulted her.

[4] J did not complain about these events until 2009. She said she complained at that point having seen the appellant around that time. The appellant did not deny sexual activity had occurred. His defence was that J had consented to the activity or that he reasonably believed she had consented.

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1 *Garraway v R* [2014] NZCA 53.

[5] In circumstances which we discuss in more detail below, the presiding Judge at the appellant's trial, Judge Marshall, ruled that the Crown could call propensity evidence from another young woman (H) relating to sexual offending by the appellant against her. The appellant was convicted in January 2009 on one count of unlawful sexual connection in relation to H's complaint. The offence was committed on 14 January 2007 and involved digital penetration. H was then aged 18 or 19. The propensity evidence was placed before the jury by the production of the formal record of the appellant's conviction and a six page written statement by H giving her account of what had happened.

[6] Either shortly before the trial or during it, the appellant told his trial counsel that he wished to call evidence from his parents that the complainant J and her sister S had approached them wanting money in return for dropping the allegations against the appellant. It is common ground that Mr Kaye advised the appellant not to raise the issue and that the appellant reluctantly accepted Mr Kaye's advice to that effect. However, after his conviction for the sexual offending against H, the appellant said he learned for the first time of two police job sheets and a statement to the police by S. The appellant considered that the job sheets tended to confirm that J and her sister had been pestering his parents for money. He maintained that if he had been aware of the job sheets, he would have insisted that the money issue be raised with the complainant and her sister with a view to damaging their credibility.

[7] Both the appellant and Mr Kaye filed affidavits for the purposes of this appeal and were cross-examined before us.[2] Mr Garraway maintained the position as just outlined but Mr Kaye gave evidence that he had discussed the job sheets with the appellant prior to the time that he advised the appellant not to raise the issue.

[8] The key issue for us to decide was whose account should be accepted. If the account given by the appellant were accepted, then Ms Gould submitted on the appellant's behalf that his instructions to Mr Kaye were not given on a fully informed basis. In the circumstances, a miscarriage of justice had resulted since

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[2] Other affidavits were filed by the appellant's parents and brother. We received *de bene esse* an affidavit handed up at the hearing sworn by M R D Guest but it was unnecessary to consider it.

there were reasonable prospects that J's credibility could have been undermined in the minds of the members of the jury.

[9] Ms Gould raised a number of other grounds of appeal but, in the end, our decision was made on the basis of this key issue.

The sequence of relevant events

Events in 2010

[10] It is not in dispute that there were communications between S and the appellant's parents. Some of these were direct and others through intermediaries. A police job sheet dated 23 September 2010 records details of a telephone conversation between J's sister S and Detective Constable Skedgwell. S told the officer that she had spoken to the appellant's brother Tony Garraway about March that year. Tony had said that he needed to arrange something relating to the incident between J and the appellant. There was no mention of money but S had the impression that Tony Garraway was going to offer some money.

[11] The next documentary evidence produced before us was a document dated 21 October 2010 headed:

> [J] and [S]
>
> V's
>
> Mark Galloway (sic).

[12] This document read:

> In regards to this matter
>
> An out of court settlement has been reach (sic).
>
> Therefore we no longer wish to pursue this matter any further though a court of law (sic).

[13] The document has two signatures. The appellant said they are the signatures of J and S although this is not entirely clear. The document is witnessed by a Deputy

Registrar of the District Court in Hamilton and bears a District Court stamp dated 22 October 2010.[3]

Events in 2011 prior to trial

[14] The appellant's trial was due to commence on 31 October 2011. For present purposes, the relevant events prior to trial commenced on 28 September 2011. The first of the two job sheets at issue records a conversation on 28 September 2011 between J and Detective Constable Skedgwell. The purpose of the meeting was primarily to serve J with a summons. The job sheet records J as stating:

- Around June/July this year she received text messages from her sister [S]
- These text messages from [S] indicated that she was 'working' on getting money from the GARRAWAY's
- She did not say whether she got any money
- She had deleted the text messages
- Just after Xmas [S] phoned her and said she had gone to [an entertainment venue] with a forged note. This note said that there had been a mistaken ID (in regards to Mark GARRAWAY). She had signed it, forging [J]'s signature
- She had offered this note to Tony GARRAWAY in return for money
- Tony declined to give her any money and she ripped the note up

[15] On 20 October 2011 S gave the police a written statement. The effect of this was that she had been approached by a stripper by the name of M. Through M, she met the appellant's brother Tony. Her understanding was that she was being asked to see J and inquire whether she was interested in being paid out and not going to trial. She said Tony Garraway told her he would contact his mother and that M would speak to S again a little later. M contacted the appellant's mother and S spoke to the appellant's mother as well. The conversation had turned nasty in S's view and a friend of hers, Mr Sullivan, had then "[taken] over the proceedings".

[16] She was later informed by Mr Sullivan that there was $10,000 on offer if J signed a piece of paper to withdraw the charges. She [S] had then printed off a letter

[3] It has not been suggested that the appellant was unaware of this document.

to the effect that J no longer wished to go through with the charges against the appellant. She had discussed this with her sister J but not in detail. J was interested in the "deal" but she did not wish to be involved herself at the time.

[17] Another letter was drafted by S. S signed it in J's name and it was given to M. M gave Mr Sullivan the phone number of the appellant's parents. S and Mr Sullivan met with M again. The letter was handed back by M with some suggested changes to the wording written on the back of it. S said that there had been a subsequent conversation between Mr Sullivan and the appellant's mother about when the money would be paid but this resulted in a disagreement. S told J the "deal was off". She said J's response was that "the Filthy Few would deal with it". Thereafter S said she had not had any further contact with the appellant's family.

[18] The second of the two job sheets at issue is dated 21 October 2011 and records what took place at a meeting that day between J, Detective Constable Skedgwell and the Crown prosecutor. The main purpose of the meeting was for the prosecutor to meet J. The job sheet records J stating:

> She had told [S] she was not going to go to Court and [S] said she could take a letter to Tony GARRAWAY
>
> She gave [S] permission to sign a letter on her behalf, this was when they (the GARRAWAY's) wanted her to say she had lied
>
> She [J] never signed anything
>
> She stated it got to the point where she was scared, embarrassed and disgusted, pretending for 10 years nothing had happened
>
> [S] had gotten into fights in Hamilton in regards to this matter and she was scared of what was going to happen to her
>
> In the end she didn't want any money and just wanted to move on with her life

[19] The job sheet and the statement made by S were disclosed by the Crown to Mr Kaye by letter sent to him on 21 October 2011. Although it seems that Mr Kaye had arranged to see the appellant on 20 October 2011 at Waikeria Prison, that visit was evidently cancelled. Mr Kaye has an entry in his diary saying that he was to visit the appellant in prison on 26 October 2011. Although it was suggested to him

that he did not visit the prison on that date, Mr Kaye's recollection was that he did visit the appellant that day.

Events at trial

[20] Mr Kaye accepted that it was not until 25 October 2011 (the day before his visit to Waikeria) that he informed the Crown that there was an objection to the propensity evidence. This had been flagged the year before as an issue but does not seem to have been acted on by either the prosecution or defence. In consequence, it was necessary for the admissibility of the propensity evidence to be determined on the first day of the trial, 31 October 2011. The jury was empanelled that day and then sent away. After hearing argument, Judge Marshall determined that the propensity evidence was admissible and set out his reasons in a judgment dated 1 November 2011.[4]

[21] The Crown opened on 1 November 2011 and called the complainant J. Her evidence occupied the first day, the Court adjourning soon after 4.00 pm. That evening, the appellant drafted a letter to Mr Kaye after he had returned to prison overnight. We regard this letter as important to the resolution of the conflict of evidence as between the appellant and Mr Kaye. The letter commences:

> I have been giving some thought to trial up to this point. I feel obliged to give some instructions.

[22] The first paragraph continues with reference to the appellant's disappointment that a witness [KM] had not been called. This has no direct relevance for present purposes. But the next two paragraphs state:

> I feel under a great deal of pressure during trial and cant understand why this attempt by [J] and her sister to extort money off my Mum. We have a document signed by [J] and [S][5] and an affidavit off my Mum and Dad, I require this is put to the jury.
>
> I honestly believe, by avoiding this we deny the jury what has gone on with these girls. And will surely leave them wondering why these allegations have been made. I do apoligise (sic) but cannot understand your reluctance to call my Mum & Dad as they are simply telling the truth. They even

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4 *R v Garraway* DC Hamilton CRI-2010-019-2210, 1 November 2011.

5 The appellant referred to J and S by other names they had apparently adopted.

> contacted M Rhodes [a private investigator engaged on the appellant's behalf] for his advice when it happened.

[23] It is a reasonable inference that the reference to a document signed by J and S is to the document of 21 October 2010 referred to at [11] and [12] above. We also infer that the affidavits from the appellant's parents (referred to in the letter but not produced) would have been along similar lines to affidavits they each filed for the purposes of this appeal. In those affidavits, the appellant's parents deposed to having been pestered by a series of calls from J and S demanding money in exchange for the withdrawal of their allegations.[6]

[24] A critical feature of the letter of 1 November 2011 from the appellant to Mr Kaye is the absence of any reference to the job sheets or to the statement of 20 October 2011 made by S.

Factual determinations

[25] In his affidavit filed in this Court, Mr Kaye maintained that the appellant had full disclosure. He did not accept that the appellant had not seen the relevant job sheets. He did not elaborate in his affidavit as to when or where the issue of the job sheets had been discussed. In evidence before us, he told us he no longer had his file and could not say whether he had made any file notes about this issue. None have been produced. He acknowledged that he was speaking from recollection but he said the fact that the Crown prosecutor was present at the meeting with J on 21 October 2011 had jogged his memory. It gave him confidence that he had indeed discussed the job sheets with the appellant. He was unable to pinpoint when this occurred except to say that the approaches concerning money were a live issue during the trial.

[26] Mr Kaye acknowledged that the appellant was taking an intense interest in all the details of his case and we were satisfied that if the appellant had been aware of these documents during the trial, he would not have accepted Mr Kaye's advice that the money issue should not be raised. We accepted the appellant's evidence that, if he had been aware of these documents, he would have instructed Mr Kaye to raise

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[6] A record of a telephone discussion between the appellant's mother and S gives some support to the mother's evidence.

the issue in cross-examination of both J and S, and that he would have insisted on evidence being called from his parents and possibly from his brother, Tony Garraway.[7]

[27] Although it is not in dispute that Mr Kaye discussed with the appellant whether to raise the money issue and advised him against it, we were satisfied that Mr Kaye was mistaken in his recollection that he discussed the job sheets and S's 20 October 2011 statement with the appellant, either before or during the trial.

[28] For the reasons outlined, we accept the appellant's evidence that he was not aware of the job sheets and S's 20 October 2011 police statement until after the trial.

Did a miscarriage of justice arise?

[29] Ms Gould submitted first that, if the money issue had been raised and the relevant documents placed before the jury, the Judge may well have refused to admit the propensity evidence of H. We did not accept that submission. First, we agreed with Mr Simmonds for the Crown that there was a strong case for the admission of H's evidence on a propensity basis for all the reasons the Judge set out in his careful decision. Second, Ms Gould eventually accepted that there was no evidence of collusion between J and H. Third, although the job sheets and other material may have affected J's credibility as we shortly discuss, we were confident that the Judge would properly have decided that credibility issues were for the jury to determine.

[30] Ms Gould was on firmer ground in submitting that raising the money issue, backed by the material in the job sheets, may have caused the jury to doubt whether J's account was credible. It would also have enabled the appellant to submit to the jury that J's complaint (made seven years after the relevant events) was motivated by a desire to obtain money from the appellant. This in turn would have undermined the weight to be attached to the propensity evidence. It could have served to explain why it was not a coincidence that two young women would make similar complaints against the appellant.

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[7] Tony Garraway swore an affidavit for the purposes of this appeal.

[31] It was not for us to determine how a jury might have interpreted the potentially conflicting evidence in relation to the money issue. In particular, it was not for us to determine whether the appellant's family were being pestered for money by J and/or her sister or whether there was an offer of money initiated on behalf of the appellant in exchange for the allegations being withdrawn. It was enough for us to determine, as we have, that if this material had been placed before the jury as the appellant wished, there was at least a prospect that the jury may have reached a different verdict.

[32] We accept, as Mr Kaye said, there was also a risk that raising the money issue could have seriously backfired on the appellant. However, the essential point is that it was for the appellant, on a fully informed basis, to decide whether to take that risk. If, as we have found, the appellant would have instructed Mr Kaye to raise the issue and to put the job sheets and other relevant documents to J and S, then Mr Kaye would have been obliged to follow those instructions notwithstanding his proper misgivings about the wisdom of doing so.[8]

Conclusion

[33] It was for these reasons that we determined there was a material risk of a miscarriage of justice. In consequence we allowed the appeal and made the other orders detailed in our results judgment.

[34] We also extended the time to appeal until the date of filing.

Solicitors:
Crown Law Office, Wellington for Respondent

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[8] *R v S* [1998] 3 NZLR 392 (CA) at 394 and *Condon* v R [2007] 1 NZLR 300 (SC) at [28].