NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA390/2014
[2015] NZCA 301

BETWEEN	HENRY WALTER PIKAAHU Appellant
AND	THE QUEEN Respondent

Hearing: 9 June 2015

Court: Harrison, Andrews and Gilbert JJ

Counsel: I A Jayanandan for Appellant
B D Tantrum and S R Jacobs for Respondent

Judgment: 10 July 2015 at 12 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Andrews J)

Introduction

[1] On 28 March 2014, following a trial in the Auckland District Court before Judge Johns and a jury, Henry Pikaahu was convicted on one charge each of sexual violation by rape, sexual violation by unlawful sexual connection, threatening to cause grievous bodily harm, and male assaults female. He was acquitted on a charge

of indecent assault, and a second charge of male assaults female. On 29 April 2014, Mr Pikaahu was convicted and sentenced to imprisonment for nine years.[1]

[2] Mr Pikaahu appealed against conviction and sentence. The appeal against sentence was abandoned on the morning of the appeal hearing.

Background

[3] The complainant (C) knew Mr Pikaahu. On the day of the offending, Mr Pikaahu knocked on C's door to make an inquiry. C invited him into the kitchen. Once in the house, Mr Pikaahu talked in a way that gave C concern as to whether he would harm himself. She offered to drive him home but he declined.

[4] The Crown case was that Mr Pikaahu then approached C and went to grab her hands. She asked him to step back but he grabbed her. There was a struggle, but C could not get away. Mr Pikaahu then dragged C along the hallway to a bedroom. C was fighting and trying to yell out. Once in the bedroom, Mr Pikaahu shut the door, took hold of C around the head, and pulled her to the ground. He put his foot on her head, and had his hand over her mouth and nose. Mr Pikaahu said "I'm gonna break your neck, stop it I'm gonna break your neck".

[5] C feared what was going to happen, and decided she would be seriously hurt if she continued fighting. She had the impression that Mr Pikaahu did not care about any consequences. Mr Pikaahu then removed his and C's clothes, performed oral sex on her, and raped her a number of times. Mr Pikaahu left the house when a friend of C's arrived there.

[6] Mr Pikaahu's defence at trial was that C had consented to having sex. It is evident from the verdicts that the jury rejected that defence.

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1 *R v Pikaahu* DC Manukau CRI-2013-092-9461, 29 April 2014 at [10].

Appeal issues

[7] Ms Jayanandan alleged four errors on the part of the trial Judge, the combined effect of which, she submitted, was that there had been a miscarriage of justice. We deal with each alleged error in turn.

(a) Refusal to abort the trial

[8] In the course of Ms Jayanandan's cross-examination of a prosecution witness (a cousin of Mr Pikaahu), the witness gave evidence that she had been drinking with Mr Pikaahu and others the night before and the day of the offending. She was asked if she could confirm that Mr Pikaahu was "very down and sad" at the time. The witness responded:

> Ah, he was upset about his relationship with [his girlfriend], um, he was also upset about going in and out of jail. That's what he was talking to me about.

[9] Shortly thereafter, Ms Jayanandan asked the Judge to abort the trial because of the witness's reference to Mr Pikaahu "going in and out of jail", but the Judge refused. However, in her summing-up the Judge directed the jury (in the course of her direction against being influenced by sympathy and prejudice) as follows:

> On that note, you will recall that [the witness] mentioned that the defendant was worried about being in and out of jail. That has absolutely no relevance to this trial, members of the jury, and you must put that completely out of your minds. It cannot form part of your deliberations because to do so would allow prejudice against Mr Pikaahu.

[10] We do not accept that the Judge erred in refusing to abort the trial. She was best placed to evaluate what, if any, adverse effect the witness' reference to Mr Pikaahu's distress about going to prison – with the inference that he had served a prison term or terms – might have had on his defence. We are satisfied that the witness' statement was insignificant in the context of the trial, and was dealt with appropriately by way of the Judge's direction.

(b) Intervention in the trial

[11] In her evidence-in-chief, C said she had two dogs and in cross-examination she said that they had not barked during the incident, but had "shot off".

Ms Jayanandan then put to C that the reason the dogs had not barked was because "there was no fighting, … no attempts to knee any groin and there was just an amicable move into the bedroom". C's response was that the dogs had not barked because they were "useless". Ms Jayanandan returned to the topic of dogs on two further occasions, putting to C that the dogs had not barked when she was fighting Mr Pikaahu, and asking C where the dogs were during the incident and putting to her that they were not disturbed by anything.

[12] Ms Jayanandan later put to C that the sexual activity was consensual:

> Q: The sexual acts that were done in the house, they're not rape are they?
>
> A: Yes they are, anything without consent is rape.
>
> Q: It's not rape and that's why the dogs didn't bark, correct?
>
> A: Incorrect.

[13] The Judge then intervened:

> Oh Ms Jayanandan, give me a break. To suggest that dogs would bark if it's rape, come on that's a ridiculous proposition.

[14] The Judge's observation was unfortunate but its spontaneity obviously reflected a degree of frustration at what had become an unnecessarily repetitive line of cross-examination. We do not accept that the intervention unfairly prevented Ms Jayanandan from cross-examining C on a relevant point. While the point Ms Jayanandan was endeavouring to make (that if the violence alleged by C had occurred, it might be expected that C's dogs would have barked) was valid, it had already been made repeatedly and Ms Jayanandan's questions on the subject were verging on the oppressive. Further, there was no evidential basis on which it could be put to C that a rape would cause the dogs to bark. C had already said in an answer to Ms Jayanandan's questions that the dogs had departed at an early stage in Mr Pikaahu's assault on her.

[15] Further, the Judge referred to the point when summarising the defence case:

> Although it was not put directly to [C], [Ms Jayanandan] submits to you that there was no assault. You could expect her dogs to react if there was

> assaults, that there was no threats, that what happened was sex that was consensual or, at the very least, sex that took place in a way that Mr Pikaahu either thought or had reason to believe that she was consenting. …

[16] We do not therefore accept that the intervention caused any miscarriage of justice.

(c) Error in summing-up

[17] In summarising the Crown case, the Judge said that the prosecutor had said in his closing address "If you stand back, use your common sense, why would this occur in a spare room, she had her own room" and had then submitted to the jury that "this was not a consensual act in any shape or form".

[18] It was common ground on appeal that the prosecutor had not referred to the sexual activity taking place in a spare bedroom as supporting a conclusion that the sexual activity was not consensual. Ms Jayanandan acknowledged that the error was not raised with the Judge at the end of the summing-up, when it could easily have been remedied.

[19] We do not accept that the Judge's error has led to a miscarriage of justice. The Judge's statement could not have been understood by the jury as being the Judge's own hypothesis on the evidence, presented as if it were part of the Crown case, as Ms Jayanandan suggested.[2] The Judge was clearly endeavouring to summarise the Crown case, albeit did so incorrectly.

(d) Answer to jury question

[20] The Judge directed the jury on the onus and standard of proof in orthodox terms.[3] The jury subsequently asked a question:

> Is the following interpretation of "beyond reasonable doubt" accurate?
>
> - In the absence of definitive proof …
> - That there is reasonable certainty?

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2 Citing *Kumar v R* [2014] NZCA 58 at [58] and [60].
3 See *R v Wanhalla* [2007] 2 NZLR 573 (CA).

- That it is true, not just probably true?
- That it is likely, not just most likely?

(Obviously after careful consideration and applying robust commonsense)

[21] After discussing the question with counsel, the Judge directed the jury as follows:

> If I can start by saying that none of the proposed definitions listed in this are correct. I note that one of the questions you ask is, "In the absence of definitive proof that there is a reasonable certainty." On that issue of definitive proof, you can convict the defendant on the evidence of the complainant alone provided it satisfies you beyond reasonable doubt and I will come to that in a moment.
>
> I was concerned by that use that maybe you think there needs to be some corroborating evidence from an independent witness; there does not. And obviously in sex cases any sex offence is not usually committed in front of anybody else.
>
> So in terms of that definitive, none of these definitions are right. I am going to go back and give you the direction that we give all juries and, hopefully, that will help you understand what it is. It is not an overly complicated concept. I know the definition we give you is wordy but if you think about it, it is a common sense standard.
>
> But, as I said to you, that proof beyond reasonable doubt is a very high standard, as it must be because obviously these are serious criminal charges and the Crown will have only met that high standard of beyond reasonable doubt if you are sure of his guilt in relation to any of the charges.
>
> If I could just reiterate, it is not enough for the Crown to persuade you that he is probably guilty, that is not enough, or even that he is very likely guilty of the offences. But, of course, in anything involving human beings you could never prove anything to an absolute certainty, it is just not possible.
>
> What is a reasonable doubt? Well, as I said to you earlier, a reasonable doubt is an honest and a reasonable uncertainty left in your mind about the guilt of a defendant after you have given careful and impartial consideration to all the evidence that you have heard in this case. So, if you isolate the evidence, decide the facts, consider the facts, consider the law, and you are sure that he is guilty then you find him guilty. But if you are unsure you would not be satisfied beyond reasonable doubt. It is as simple as that, I do not – I mean this will obviously sound stupid, but it is not a hugely complicated task and that is probably the simplest way I can do it. So if you are unsure you would have a reasonable doubt and the defendant must be given the benefit of that.

[22] We do not accept that the answer given by the Judge was inadequate, and did not sufficiently explain the concept in a way the jury could understand. The Judge's

answer carefully emphasised the high standard of proof beyond reasonable doubt, and was fair and appropriate. It is also significant that Ms Jayanandan did not object to or question the answer.

Decision

[23] As set out above, none of the grounds of appeal has succeeded. Accordingly, the appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent