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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA705/2014
[2015] NZCA 302

BETWEEN	W (CA705/2014) Appellant
AND	THE QUEEN Respondent

Hearing: 9 June 2015

Court: Harrison, Andrews and Gilbert JJ

Counsel: J Mather for Appellant
M D Downs for Respondent

Judgment: 13 July 2015 at 12 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Following a trial before Judge Thorburn and a jury in the Auckland District Court in August 2014, the appellant (W) was found guilty of one count of attempting to rape his daughter (S) and two counts of sexually violating her. He was also found

guilty of sexually violating his daughter's friend (B). These offences all occurred on the same occasion in November 2000 when the victims were both aged 13.

[2] W appeals against his conviction on the ground that the Judge misdirected the jury regarding the DNA evidence that was presented at the trial and this has resulted in a miscarriage of justice. An appeal against a sentence of six years eight months imprisonment was not pursued in oral argument before us and we dismiss it.[1]

The evidence

[3] It is necessary to review the key evidence presented at the trial, including the DNA evidence, before considering the alleged error in the Judge's summing-up and determining whether or not there has been a miscarriage of justice.

[4] The victims and W consumed a large amount of alcohol following which they all decided to sleep on the floor of S's bedroom. B's evidence was that she awoke to find that her t-shirt had been removed and W was rubbing her breasts. She said that he then started rubbing her vagina with his fingers. At that point she got up and went into the single bed.

[5] S's evidence was that when she awoke, she noticed that her underwear and boxers had been removed. W was touching her around her vaginal area and penetrating her vagina with his fingers. He then attempted to penetrate her vagina with his penis. She said that she experienced some pain in her vaginal area. She said that she must have blacked out at that stage and when she awoke a second time, she became aware that W was performing oral sex on her. S said that, when she realised what was happening, she ran to her mother's bedroom in a state of panic. S's mother said that when S came into her room S was hysterical. She said that her father had raped her and she wanted her to call the police.[2]

[6] S was examined by a doctor approximately 24 hours later. The doctor found some redness on the inside surface of S's labia minora and a superficial laceration or

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1 *R v [W]* DC Auckland CRI-2012-044-4846, 10 November 2014 at [31].

2 S abandoned her complaint after her mother became pregnant to W. Ultimately S did not proceed with her complaint until about 12 years later.

tear of the posterior fourchette which was still oozing blood. The doctor considered that this was a recent injury caused by some form of direct trauma. There was no challenge to this evidence.

[7] A possible saliva stain on the underwear that S was wearing at the time she was examined by the doctor was subsequently tested by ESR along with a blood sample taken from W. The forensic biologist at ESR who undertook the analysis, Susan Vintiner, gave evidence that the possible saliva stain on the underpants contained DNA from more than one person, one male and one female. Although there was approximately three times as much female DNA as male, the DNA from both contributors was present in quantities greater than trace level. She said that the male DNA was two million times more likely to have originated from W than from any other male chosen at random from the general population.

[8] Ms Vintiner confirmed that the test for saliva involves a test for the enzyme alpha amylase. Although this enzyme is found in very high concentrations in saliva, it can also be found at elevated levels in normal vaginal discharge. For this reason, although the test confirmed the presence of alpha amylase, she could not tell whether this was from saliva or from vaginal secretion. Even if she had been able to determine that it was a saliva stain, she would not be able to say whether the source of the saliva was the male or the female. In other words, she could not say whether the male DNA was present in the saliva, if there was saliva, or whether it came from another source.

[9] Ms Vintiner was asked whether the test results could be explained by saliva having been deposited on S's skin around her vagina and then transferring to her underpants after she put these on. Ms Vintiner confirmed that this was a possible scenario that could explain the test results but there were other possible explanations.

[10] In cross-examination, Ms Vintiner accepted that DNA testing does not enable one to say with certainty that a person has left their DNA on any item and, if so, when this occurred. She acknowledged that it is possible for DNA to come free from clothing fibres in the laundry process and be recaptured in different places on the same garment or on other garments. However, she said that if this did occur, it

would usually be at a "very, very low level", not consistent with the level of male DNA detected in the sample.

[11] Ms Vintiner concluded by saying that the male DNA in the sample could have come from saliva if this was present. The presence of male DNA on the garment could be accounted for by some alternative, direct or indirect, contact between the male and the garment, such as by handling the garment.

[12] W gave evidence. He denied the offending and claimed that the victims' evidence was a fabrication.

Closing submissions

[13] The trial commenced on 18 August 2014 and the evidence concluded three days later. Closing addresses and the Judge's summing-up were given the following day, on the morning of 21 August 2014.

[14] The Crown did not place particular emphasis on the DNA evidence. The prosecutor commenced his closing address by acknowledging that there was no "silver bullet" that would solve the issues the jury had to decide. He submitted that it was the combination of all of the evidence that was important. He focused primarily on the evidence of the two victims and that of W. With reference to the DNA evidence, the prosecutor said:

> The ESR scientist told you, "Look, it is possibly saliva although it could be another bodily fluid, such as a vaginal secretion." They told you that male DNA is present in that stain, a ratio, for every three parts female there's around about one part male in that stain. So far more than trace levels of DNA. That male DNA is two million times more likely to be [W's] DNA than another randomly selected male from the New Zealand population. The scientist told you that those findings can be explained or fit the situation whether the accused has licked [S's] genitalia, she had then put the underpants on at some stage, transferring some of that saliva with the accused's DNA, and obviously her DNA because it's her skin, onto the underpants.

[15] In his closing address, Mr Mather reminded the jury of the acknowledged limitations of the DNA evidence discussed above and provided references to the relevant pages in the notes of evidence. He invited the jury to look carefully at the

cross-examination of Ms Vintiner during the course of their deliberations and concluded by saying that the evidence "isn't elevated anywhere near to where the prosecution would like to see you elevate it to".

The Judge's summing-up

[16] In the course of his summing-up, which immediately followed, the Judge made the following statements to the jury about the DNA evidence:

> [9] … I will talk about that because that has been referred to at some length but at this stage, just in summary, there was male DNA on the knickers, possibly from saliva; there was a controlled sample of [W] against which the male DNA could be compared with the conclusion that the male DNA on her knickers is two million times more likely to be his when compared to another randomly selected male from the community.
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> …
>
> [59] The DNA – I am going to talk to you about the DNA and perhaps, with deep respect, revisit some of Mr Mather's concerns, because the DNA situation, I suggest, is actually very simple, indeed. The Crown do not suggest that the DNA proves that [W] did this to [S]. The Crown puts up the evidence for what it is worth and it amounts to this, as I understand it. This is for you: On these knickers there was a stain detectable which was analysed and which was found to contain a substance called amylase. Amylase is in saliva, the most predominant source is in saliva, and this is in the evidence from the scientist. It comes in from women too, though, in vaginal discharge or secretion. In these knickers there was a three to one ratio of DNA, male and female, three times female DNA, one time male, but that is enough to be more than just a token. It is enough to be significant, according to the scientist.
>
> [60] The male DNA was derived from the presence of amylase, the female DNA was derived from the presence of amylase. Amylase is in saliva, amylase in women is in saliva and also most notably, for the purpose of the knickers, in vaginal secretion.
>
> [61] There was a sample of DNA taken from [W] against which to compare the male DNA in the knickers. And the conclusion is very simply that the male DNA in the knickers is two million times more likely to come from [W] than another random male in the community. That's all. That's it, as I understand it – there is nothing more to know about it and the Crown say to you, well whilst that does not prove he did it, it is consistent, isn't it, with what she says?
>
> [62] So it is a matter for you to decide what weight to put on that and if you think it is not good enough, because we do know that DNA can transfer from one garment to another, sometimes in the washing if the washing is not good enough and there are all sorts of things but, in this particular case, those are the facts – a stain, amylase, male and female, male DNA ties in two million against one chance that it is attached to and from [W].

[17] After the jury retired, the Judge asked counsel whether there were any matters requiring correction in his summing-up. Crown counsel referred to what the Judge had said in [60] and pointed out that this was not entirely accurate. The relevant discussion on this issue was as follows:

> **MR McCAUGHAN:**
> … One thing that Your Honour did say though Sir, is that the, you used the phrase, "The male DNA was derived from the saliva, the female DNA was derived from the saliva," it was just a fleeting reference Sir and obviously the ESR's position is (a) they can't tell –
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> **THE COURT:**
> No that's right.
>
> **MR McCAUGHAN:**
> - but (b) they also can't say whether the male DNA came from that –
>
> **THE COURT:**
> Came from – that's right.
>
> **MR McCAUGHAN:**
> But it may well be it's more of a concern for my friend Sir, but I thought I'd at least raise it. But to me Sir, the way it was explained in terms of how the jury may well – Your Honour's overall description of the DNA evidence was, in my submission, completely accurate and how the jury could go about using it, if they wanted to place weight on it, was also accurate but it may well be my friend has a slightly different view.
> …
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> **MR MATHER:**
> … I know in closing, I wasn't scientific in my dissection of the evidence but I did point out to them very, I think at least twice, that they needed to read those passages and it was for them, and I know Your Honour said it was for them as well.

[18] The jury was asked to return to the court so that the Judge could give a further direction on an unrelated issue. However, in view of the fact that neither counsel suggested that it was necessary to make any correction in relation to the DNA evidence, this was not done.

Has there been a miscarriage of justice?

[19] We accept Mr Mather's submission that what the Judge said in the first sentence at [60] of his summing-up was not strictly accurate. However, we are satisfied that there was no miscarriage of justice for the reasons which follow.

[20] The DNA evidence was not particularly complicated and it was explained clearly by Ms Vintiner. The evidence was given the day before counsel's closing addresses and the Judge's summing-up and it would have been fresh in the minds of the jury.

[21] The limitations of the DNA evidence were not disputed. Contrary to Mr Mather's submission to the jury, the Crown did not attempt to overplay the significance of this evidence and emphasised to the jury that there was no "silver bullet".

[22] Mr Mather reminded the jury of all of the limitations of the DNA evidence and provided page references to the notes of evidence where they could find the passages he wished to emphasise. He asked the jury to consider this evidence carefully during their deliberations.

[23] Despite the error in one sentence, the Judge's summing-up on the DNA evidence was, overall, accurate. Experienced counsel considered at the time that the error was immaterial and this is why no correction was requested. We agree with that assessment.

Result

[24] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent