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

CA729/2015
[2016] NZCA 194

BETWEEN	PETER WAYNE TAULA Appellant
AND	THE QUEEN Respondent

Hearing: 14 April 2016

Court: French, Asher and Williams JJ

Counsel: J G Krebs for Appellant
K Laurenson for Respondent

Judgment: 11 May 2016 at 3.30 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] Peter Taula appeals his conviction on two charges of doing an indecent act on a young person, following a jury trial at the Auckland District Court presided over by

Judge David Sharp. Before us he reduced the grounds of appeal to a single ground. It was submitted by his counsel, Mr Krebs, that the convictions should be quashed as there was fresh expert evidence that would have led to a different result had it been offered at trial.

[2] Mr Taula had faced nine charges at his trial relating to two complainants. He was ultimately acquitted of all charges involving the first complainant and convicted of two charges of doing an indecent act on the second complainant (the complainant). The complainant is related to him.

[3] The complainant was 15 years old and from a troubled background. She went to stay for a few nights at Mr Taula's home with her grandmother. He lived there with his wife and family. The grandmother and the complainant were to help babysit the children the next day.

[4] By all accounts there was a pleasant family night and the complainant stayed up late. By arrangement she went to sleep on the couch in the living room. She was wearing her underwear and a nightie. It was her evidence that she awoke at about 4.30 am to find Mr Taula beside her on the couch. He placed his hand inside her underpants. He went away and came back to her again. He then placed his hand down the back of her underwear and started to rub between her buttocks and around her anus. She heard him breathing and moving and believed he was masturbating. He went away and then came back a third time and proceeded to place his hand on her breast and to rub her nipple. She believed he masturbated again. Throughout this time she was pretending to be asleep. She heard Mr Taula's wife's voice and he then got up and went out of the house, it would seem to get some milk.

[5] The complainant's evidence was that when Mr Taula left, the door slammed and it woke up her grandmother. The complainant was crying and when her grandmother asked her what was wrong she told her Mr Taula had touched her. Mr Taula came back with milk and the complainant angrily accused him of touching her. A scene developed, which culminated in the complainant calling the police. Mr Taula was charged with two counts of doing an indecent act on a young person,

the first relating to the touching on the buttocks and the second relating to the touching of the breast.

[6] Mr Taula's defence at trial was that the incident described by the complainant did not happen at all, and that the incidents of touching were either deliberately made up by her and were lies or alternatively were artefacts of her memory, either from a dreaming process or through some other psychological process that resulted in her believing the incident had occurred when it had not.

The new evidence

[7] At the trial the complainant was cross-examined on her prior use of cannabis. She had been consuming cannabis since she was 13, and had smoked cannabis some two or three days before the alleged assaults. She also admitted having dreams of sexual matters. She was asked about having dreamed the assaults, an allegation that she very firmly rejected.

[8] The proposed new evidence of Professor Nicholas Birch is related to this cross-examination. Professor Birch is an Emeritus Professor of Biomedical Science from the United Kingdom. Mr Krebs submitted the Professor's evidence would provide a scientific basis on which the jury could consider the complainant's reliability.

[9] An affidavit of Professor Birch, annexing his report, was filed in this Court. He stated:

> I have been instructed to prepare a report on the cannabis consumed by [the complainant] with particular reference to the possibility that this may have contributed to her perception of the events at issue.

[10] His report contains a 16-page discussion of cannabis and its pharmacology, sleep and sleep disorders. He then gives his opinion. The Professor stated that cannabis can cause marked changes in subjective mental status, brain functioning and neuropsychological performance. He noted that the complainant had used cannabis two or three days before the incident, and had experienced sexually explicit dreaming prior to the incident. He noted Mr Taula's evidence that the complainant

was snoring when he first entered the living room in the morning and that he noted her buttocks were partially exposed and put a blanket over her. She was whimpering and making noises similar to those made by young children. Professor Birch noted the complainant did not respond to the alleged sexual assault by shouting at Mr Taula to get off or to leave her alone, contrary to her later angry accusations when he returned from getting the milk. The Professor's interpretation was that she was suffering from sleep paralysis and that the whimpering indicated she had the sensation of a malevolent "presence" in the room. Mr Taula's attempts to cover her with a blanket "may have been incorporated into a tactile hallucination involving her buttocks". This produced the delusion she was being sexually assaulted. The door slam "may have been the awakening stimulus triggering the sleep paralysis episode". Having said the Court must decide which of the issues was likely to be paramount, Professor Birch concluded his report by stating:

> [The complainant] was likely to have been suffering from the effects of sleep paralysis partially triggered by her previous usage of cannabis but also characteristic of a young person of her age at the time. As a consequence what she reported was based either on a dream which was consolidated into memory or based on hypnopompic experiences, with auditory, visual, proprioceptive and tactile hallucinations or, indeed, both effects combined.

[11] The Crown did not contest that Professor Birch is an expert in psychiatric drugs and their effects, the physiological aspects of sleep including parasomnias, and the influence of cannabinoids on sleep and dreams. Mr Krebs accepted the more conclusory aspects of Professor Birch's report would have to be altered.

Approach

[12] In assessing whether to admit new evidence the test elaborated on by the Privy Council in *Lundy v R* applies:[1]

> The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but

[1] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

> not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[13] A miscarriage of justice is established if the evidence put forward the first time on appeal is fresh, credible and significant enough in conjunction with the evidence at trial that it might have led a reasonable jury to have returned a different verdict.[2]

[14] The new evidence of Professor Birch may, therefore, fall into three categories. First, that the evidence is not credible; second, that it is evidence that could not have been obtained for the trial with reasonable diligence and is therefore fresh, and is also credible; or third, it is not fresh, but it is credible. In all cases the Court must assess the strength of the evidence and its potential impact on the safety of the conviction. If there is a risk of a miscarriage of justice were the evidence to be excluded, it should be admitted even if it is not fresh.[3]

[15] In this case there is a further test that must be applied. Under s 25(1) of the Evidence Act 2006, expert opinion evidence is admissible if the fact-finder is likely to obtain "substantial help" from the opinion in understanding other evidence or in ascertaining any fact that is of consequence to the determination of the proceeding. Professor Birch's affidavit is agreed to be expert evidence.

Analysis

[16] The Professor relied on various components that he put together to reach his view. These included the complainant's age, her long-term consumption of marijuana, her specific consumption of marijuana two to three days earlier, and the fact she had had sexualised dreams, coupled with her account of what happened.

[17] The cannabis use and dream scenario were before the jury at the trial. The possibility that the complainant might have dreamt the event was firmly put to her in cross-examination and she firmly rejected it. Indeed, defence counsel closed on the

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2 See *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [103].
3 *D (CA95/2014) v R* [2015] NZCA 171 at [22]; *Zhang v R* [2013] NZCA 87 at [28].

basis that very realistic dreams were a matter that the jury would be familiar with, and gave a personal example of a dream seeming real. He put to the jury the possibility of the door slamming and her waking up from a sexual dream that she now put forward as fact.

[18] In these circumstances, Professor Birch's evidence could only give support to the existing ideas put before the jury that it is possible young persons of the complainant's age who have used cannabis can in some circumstances have intense sexual dreams and consider events that were dreamt were real.

[19] The jury did not need an expert to understand it was possible for a young person to be affected by marijuana and to have such sexualised dreams, and on occasions to have difficulty distinguishing between dreams and reality. Importantly, despite the conclusory language of Professor Birch, we are satisfied his evidence did not preclude the possibility that the evidence of the complainant was true. It was a matter for the jury to weigh up, based on their experience and knowledge as members of the community, of how people can function and act in particular situations.

[20] In our view, it is not substantially helpful for expert scientific evidence to be used to put forward a proposition about how people may think and act that a jury could itself already comprehend and weigh. This Court has held for example that to the extent memory is a matter of ordinary human experience, expert evidence about memory is not substantially helpful to a jury and so is inadmissible.[4] A jury will know that cannabis can affect sleep, that young people can have sexualised dreams, and that on occasions dreams can be confused with reality. This sort of evidence can be distinguished from counterintuitive evidence where a jury might naturally assume the opposite inference to the proposition put forward by the expert.[5]

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4 *D (CA95/2014) v R*, above n 3, at [28], and see *B (CA196/2010) v R* [2011] NZCA 654 at [22] as an example.

5 Even with such counterintuitive evidence it is not necessarily the best solution to put forward expert evidence rather than some sort of an agreed direction or memorandum. See *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [104] and [113]; and *M (CA23/09) v R* [2011] NZCA 191 at [33].

[21] We therefore do not see how the proposed evidence could have materially assisted the jury in determining whether or not the complainant was dreaming or telling the truth. Professor Birch's evidence was of a factual possibility that was already before the jury. He supported that possibility with a detailed neuropsychological explanation. The explanation might have assisted the jury's scientific understanding of what it already knew from experience, but this assistance falls well short of the "substantially helpful" test. For that reason we have reached the view that it is not admissible under s 25(1).

[22] We record also this was evidence that could have been obtained for the trial, but was not, so it was not fresh.[6] For the reasons given we have no fears that in its absence there is a risk of a miscarriage of justice or doubts as to the safety of the conviction.

[23] If expert evidence can be called in relation to these sorts of workings of the mind, it will likely add to the cost and delay of litigation. The Crown could be expected to start calling rebuttal evidence and much time could be spent on the issue without the jury in the end being better informed.

Result

[24] The application to adduce further evidence is declined.

[25] The appeal is dismissed.

Solicitors:
Gifford Devine, Hastings for Appellant
Crown Law Office, Wellington for Respondent

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6 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25], citing *R v Bain* [2004] 1 NZLR 638 (CA) at [22], which was endorsed in *Bain v R*, above n 2, at [34].