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IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA180/2015
[2016] NZCA 70**

BETWEEN ASMAT AHMADI
Appellant

AND THE QUEEN
Respondent

Hearing: 3 March 2016

Court: Randerson, Peters and Collins JJ

Counsel: S K Green for Appellant
J Murdoch and M J Hammer for Respondent

Judgment: 15 March 2016 at 2:30 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Background

[1] Mr Ahmadi was convicted on one charge of sexual violation by rape and one charge of sexual violation by unlawful sexual connection following a trial presided

over by Judge Spear which concluded in the Hamilton District Court on 16 February 2015.¹ Mr Ahmadi was sentenced to seven years and six months imprisonment.²

[2] This was the second trial for Mr Ahmadi. An earlier trial which commenced on 22 July 2014 could not be completed due to inadmissible evidence having been inadvertently placed before the jury.

[3] At the time of the offending, the complainant Ms V was 15 years old and Mr Ahmadi was 18 years old. They both attended a party in Hamilton on 16 February 2013. Ms V was drinking and became intoxicated. During the course of the evening Ms V had consensual sex with another man.

[4] At around 2 am on 17 February 2013 the party began to break up. When Ms V went to leave the party she became separated from her friends.

[5] The Crown case was that as Ms V was walking down the street she was grabbed by Mr Ahmadi, who forced her against a wall at a property not far from where the party had been held. He then inserted his penis into Ms V's anus. Ms V tried to escape but was restrained by Mr Ahmadi, who threw her on the ground and inserted his penis into her vagina. There was also evidence Ms V could recall sitting on a deck facing Mr Ahmadi when his penis was in her vagina. Ms V also gave evidence that Mr Ahmadi put his penis in her mouth.

[6] The Crown case was that after violating Ms V, Mr Ahmadi walked to a car being driven by someone else and left the scene while Ms V talked to a man before she was found by her friends and taken away.

[7] When interviewed by the police Mr Ahmadi initially denied any sexual contact with Ms V. After the police told Mr Ahmadi his DNA was found in Ms V's vagina he continued to deny he had any sexual contact with Ms V. At trial, however, Mr Ahmadi changed tack and said he had consensual vaginal intercourse with Ms V.

¹ Under ss 128(1)(a) and 128(1)(b) of the Crimes Act 1961. Mr Ahmadi was acquitted of a third charge which alleged sexual violation by unlawful sexual connection between the complainant's mouth and Mr Ahmadi's penis.

² *R v Ahmadi* [2015] NZDC 5711.

He denied he had penetrated Ms V's anus or that he had inserted his penis into her mouth.

[8] Dr Bradley examined Ms V on the evening of 17 February 2013. In her evidence-in-chief, Dr Bradley explained that Ms V's groin was "very markedly tender"; that Ms V had bruising on her groin and perineum; swelling and bruising on the "left side ... from the hymen going out into [her] labia"; a laceration on the left side of the fourchette at the entrance of her vagina; and a laceration in her "perianal area that appeared to go into [her] anus".

[9] Dr Bradley explained that the injuries she observed were "consistent with pressure" and "forceful contact". Dr Bradley said the injuries she observed would have been painful, but that it was not possible to say if the injuries she observed were consistent or inconsistent with non-consensual contact.

Grounds of appeal

[10] There are three grounds of appeal:

- (1) First, that Mr Ahmadi's convictions were unsafe because evidence that could have undermined the credibility of Ms V was not called at trial.
- (2) Second, that Mr Ahmadi's conviction for sexual violation by unlawful sexual connection could not be supported by the evidence.
- (3) Third, the language used by Dr Bradley and the Crown to describe Ms V's vaginal and anal injuries was misleading and resulted in a miscarriage of justice.

First ground of appeal

New evidence

[11] Mr Ahmadi has sought leave to admit two affidavits on appeal, which he says contain new evidence.

[12] The first affidavit is from Ms Xie, who is Mr Ahmadi's former girlfriend. Ms Xie explains in her affidavit that she first met Mr Ahmadi in late 2010 and that from that time through to Mr Ahmadi's conviction their relationship was fraught and intermittent.

[13] The essence of Ms Xie's affidavit is that she drove Mr Ahmadi and two of his friends to the party on the evening of 16 February 2013. Ms Xie said she waited outside the party in her car and eventually drove Mr Ahmadi home.

[14] Ms Xie says that about 20 minutes before she and Mr Ahmadi went home a woman, who Ms Xie now says was Ms V, got into her car and had a casual conversation with her. A short time later Mr Ahmadi came to Ms Xie's car and seemed surprised to see Ms V. Ms Xie says that at this stage Mr Ahmadi was not wearing his shirt and that he got into the car with Ms V and Ms Xie.

[15] In her affidavit, Ms Xie says a short time later Mr Ahmadi told Ms V to get out and that he and Ms V both got out of her car and had a conversation for about one minute.

[16] Ms Xie explains in her affidavit that she did not know what charges Mr Ahmadi was facing until after he was convicted, even though her relationship with Mr Ahmadi had resumed during the period leading up to the second trial. Ms Xie says that following Mr Ahmadi's conviction she learnt the name of Ms V and contacted her via Facebook. In cross-examination, Ms Xie acknowledged that the message she sent Ms V on 19 February 2015 included a threat of civil proceedings being brought against Ms V by Mr Ahmadi.

[17] Ms Xie explained in her affidavit the steps she had taken to contact Mr Ahmadi's lawyer and the police after Mr Ahmadi was convicted.

[18] The second affidavit is from Mr Ahmadi. He says the evidence from Ms Xie contradicts Ms V's evidence when she said that after the alleged offending she only spoke to another man before being found and taken away by her friends.

[19] In his affidavit Mr Ahmadi acknowledges he instructed his trial counsel not to talk to Ms Xie. Mr Ahmadi says he did not think Ms Xie would be a helpful witness because of the strained nature of their relationship and because he felt guilty about having been unfaithful to Ms Xie.

[20] The purpose of the new evidence from Ms Xie and Mr Ahmadi is to try to undermine the credibility of Ms V, on the basis that the new evidence differs from her account of events. Ms Green, counsel for Mr Ahmadi in this Court, also submitted the new evidence demonstrates that during the time Ms V was supposedly sitting in Ms Xie's car, she was acting in a way which was inconsistent with her having just been raped and sexually violated.

Cross-examination

[21] Mr Ahmadi and Ms Xie were cross-examined by Ms Murdoch, senior counsel for the Crown. Ms Murdoch's cross-examination laid the foundation for the Crown to submit the proposed new evidence was not credible.

Test for the admission of new evidence

[22] In *Bain v R*, Lord Bingham explained on behalf of the Privy Council that a miscarriage of justice is established if the submitted evidence is fresh, credible and significant enough in conjunction with the evidence at trial, that it might lead a reasonable jury to have returned a different verdict.³ The test in *Bain* was applied by this Court in *S v R*.⁴

[23] The test for determining if new evidence justifies a new trial was elaborated upon further by the Privy Council in *Lundy v R*, where Lord Kerr for the Board said:⁵

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

³ *Bain v R* [2007] UKPC 33, (2007) CRNZ 71 at [103].

⁴ *S (CA88/2014) v R* [2014] NZCA 583 at [15]. See also *Noble v R* [2010] NZSC 85 at [2].

⁵ *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

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 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.

[24] In assessing whether new evidence is credible, it is necessary to decide if it is plausible and “capable of belief”.⁶ In making that assessment, the appellate court must take care not to usurp the function of the jury.⁷ But where, as here, the Court of Appeal has had the opportunity of seeing and assessing the witnesses who proffer the new evidence, it may be possible for the Court to form a definitive view on their credibility.

Is the new evidence credible?

[25] We have had the advantage of seeing Mr Ahmadi give evidence. We are satisfied his proposed evidence is not credible. First, Mr Ahmadi made no reference to Ms V going to Ms Xie’s car when he spoke to the police or when he gave his evidence. Mr Ahmadi’s latest explanation is the third conflicting account he has given about the events in question. We are satisfied it has been invented after his conviction.

[26] Second, when cross-examined by Ms Murdoch, Mr Ahmadi denied discussing his proposed new evidence with Ms Xie. Ms Murdoch established, however, that there were 12 telephone calls between Mr Ahmadi and Ms Xie during the three week period following Mr Ahmadi’s convictions. It is inconceivable that Mr Ahmadi and Ms Xie did not discuss the evidence they now put forward during the course of their telephone conversations. We reject Mr Ahmadi’s evidence on this point. We are satisfied he and Ms Xie have colluded in an attempt to present a false account of what happened.

[27] Ms Xie was also cross-examined before us. We are equally satisfied her proposed evidence is not credible. There are four principal reasons for reaching this conclusion.

⁶ *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [18].

⁷ At [17]; *Lundy v R*, above n 5, at [144]-[149].

[28] First, we consider it implausible that Ms Xie did not know about the charges Mr Ahmadi was facing until after he was convicted. Ms Xie and Mr Ahmadi were still in their relationship during the course of Mr Ahmadi's trial. It defies belief for Ms Xie to say she did not know what charges her boyfriend was facing. We reject her evidence on this point.

[29] Second, as already noted, we are satisfied Ms Xie and Mr Ahmadi discussed their proposed new evidence during the weeks after Mr Ahmadi was convicted, in light of the numerous phone calls we have referred to.⁸

[30] Third, despite their attempts to concoct a false account, part of Ms Xie's evidence is inconsistent with what Mr Ahmadi claims in his affidavit. In particular Mr Ahmadi makes no mention of all three having a conversation while in the car.

[31] Fourth, when cross-examined, Ms Xie purported to recall the events of the night in question in considerable detail despite the fact they had occurred more than two years before. However, she acknowledged she did not know if Mr Ahmadi was wearing trousers or shorts when he returned to her car. In our view, it is highly unlikely she would recall other matters in such detail but fail to remember whether her boyfriend was wearing trousers or shorts.

[32] In our assessment, the proposed new evidence is not credible and fails the first limb of the test set out in *Lundy*.

Is the new evidence fresh?

[33] We are also satisfied the evidence in question is not fresh. This was acknowledged by Ms Green, counsel for Mr Ahmadi in this Court.

[34] Clearly, Mr Ahmadi knew Ms Xie was waiting in her car near where the offending occurred. Mr Ahmadi, by his own choice, instructed his trial counsel not to obtain evidence from Ms Xie. The proposed new evidence clearly could have been obtained prior to Mr Ahmadi's trial.

⁸ At [26].

[35] There is no special element in the circumstances which excuses Mr Ahmadi's failure to adduce the evidence at the trial. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation.⁹

[36] The proposed new evidence fails the second limb of the test set out in *Lundy*.

[37] As the proposed new evidence is neither credible nor fresh, it is not admissible. The first ground of appeal accordingly fails.

Second ground of appeal

[38] The second ground of appeal challenges the conviction for sexual violation by unlawful sexual connection. Mr Ahmadi says the jury could not have been satisfied to the requisite standard that he penetrated Ms V's anus. The question we have to consider is whether a jury, acting reasonably, and having regard to all the evidence, ought to have entertained a reasonable doubt as to the guilt of the appellant.¹⁰

[39] We are satisfied there is no merit to this ground of appeal.

[40] The victim's explanation provided the following evidence in support of anal penetration:

- (1) "He just pushed me back down and he went in from both sides and I remember it hurting all over".
- (2) "I never felt it before so I was figuring it was the anal and in the morning when I hurt there, kind of just thought yeah".

⁹ *R v Bain* [2004] 1 NZLR 638, (2003) 20 CRNZ 637 (CA) at [22].

¹⁰ *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [5].

- (3) Ms V said she did not have anal (or painful) sex with the man whom she had consensual vaginal sex with earlier in the evening.

[41] Ms V's evidence was supported by the evidence of Dr Bradley, who explained Ms V had a laceration that went from her "perianal area and appeared to go into [her] anus". This evidence was entirely consistent with Ms V's evidence that she had been subjected to anal penetration. The second ground of appeal must accordingly fail.

Third ground of appeal

[42] The third ground of appeal takes issue with Dr Bradley having said the injuries she observed were consistent with "pressure" and "forceful contact". Issue is also taken with parts of the Crown's closing address in which Ms Foster, trial counsel for the Crown, said Ms V's "injuries" were consistent with having been caused by force.

[43] We can see no basis for criticising the approach taken by Ms Foster because Dr Bradley's evidence provided a clear evidential foundation for the submission that Ms V's lacerations and bruising were "injuries" and were caused by pressure, force or both.

[44] Nor do we consider any miscarriage of justice occurred by Dr Bradley's assessment that the injuries she observed were consistent with "pressure" and "forceful contact". Dr Bradley made it very clear that the injuries she observed to Ms V's anal genital region could be found in cases of consensual sexual contact. This point was reinforced by the Crown and the trial Judge, who said in summing up that Dr Bradley's evidence did not mean the injuries to Ms V were caused by non-consensual sex. The trial Judge said:

[41] ... as the doctor said, "That, by itself, is not evidence of non-consensual sex." She accepted that those injuries, if you want to call it that, could equally have come about through vigorous consensual sex. So the medical evidence is what we call consistent but not conclusive nor supportive of the complaint of non-consensual sex. It does not help or harm the Crown case except it is consistent or supportive of her account of events.

This was not a case in which Dr Bradley's reference to the injuries to Ms V being caused by pressure and force could have led the jury to assume this was evidence of non-consensual sex.

[45] Having examined the transcript, the trial Judge's summing-up and the closing submissions of the Crown and Mr Ahmadi's trial counsel, we are not satisfied that the jury were in any way misled by Dr Bradley's evidence or anything said by the trial Judge or Ms Foster in relation to the charges of rape and sexual violation by unlawful sexual connection. The third ground of appeal must accordingly fail.

Conclusion

[46] The application to adduce further evidence on appeal is declined.

[47] Mr Ahmadi's appeal against conviction is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent