NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS WITNESSES PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA492/2015
[2017] NZCA 102

BETWEEN	CLINTON JOHN TE KANI Appellant
AND	THE QUEEN Respondent

Hearing:	21 February 2017
Court:	French, Mallon and Duffy JJ
Counsel:	N Levy for Appellant D R La Hood and R Georgiou for Respondent
Judgment:	3 April 2017 at 2.30 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Mallon J)

[1] Mr Te Kani appeals against his conviction on two counts of sexual violation by unlawful sexual connection[1] and one count of sexual violation by rape[2] following a jury trial before Judge Morris in the Wellington District Court.[3] He appeals on the ground of trial counsel error.

[2] The alleged error concerns a decision not to call Mr Te Kani's partner to give evidence disputing the complainant's claim to ownership of underwear containing DNA from Mr Te Kani's semen. Mr Te Kani says the complainant's claimed ownership of the underwear was pivotal evidence against him and that there is a real risk the failure to call the partner affected the outcome of the trial.

[3] The Crown submits there was no trial counsel error and, in any event, counsel's decision not to call Mr Te Kani's partner was incapable of affecting the outcome.

Background

[4] The complainant was 15 years old. Mr Te Kani knew her through family connections. She and a friend had run away from their own homes on the evening of 10 May 2013. The complainant contacted Mr Te Kani by text shortly after 9 pm. They exchanged texts over the next half hour or so. In the course of those text messages Mr Te Kani suggested the complainant go to his house, by herself, at about 10.45 pm when he would be there. Mr Te Kani also sent a text to his friend, Mr Atkinson, asking him to come to the "old boys" (the place where Mr Te Kani was socialising), to make out like he had a mission to do in front of Mr Te Kani's "miss's" and to ask if Mr Te Kani was keen to join him. Mr Atkinson replied "yep".

[5] Later that evening the complainant arrived with her friend at Mr Te Kani's house and went inside through the unlocked back door. About 10 to 20 minutes later Mr Te Kani arrived. Mr Atkinson drove him to his house but did not come inside. Mr Te Kani told the complainant and her friend that their parents were looking for them. He sent a text to the friend's father, Mr S, telling him she was at his house.

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1 Crimes Act 1961, ss 128(1)(b) and 128B (maximum penalty 20 years' imprisonment).
2 Sections 128(1)(a) and 128B (maximum penalty 20 years' imprisonment).
3 *R v Te Kani* [2015] NZDC 12273.

Mr S came straight away. He stayed for about 10 to 15 minutes before leaving with his daughter at about 11.25 pm.

[6] Mr Te Kani told the complainant he would be back later and not to turn on the lights. He then left with Mr Atkinson. The complainant, now alone at Mr Te Kani's house, went into the bedroom to watch a movie. The complainant alleged that Mr Te Kani returned to the house soon after. She alleged Mr Te Kani made her perform oral sex on him, performed oral sex on her and raped her. She said Mr Te Kani did not ejaculate in her, but he did so into a towel afterward. He then left the property.

[7] The complainant put on her clothes, including her underwear, after Mr Te Kani left. She remained in the bed that night. She woke up to find Mr Te Kani's partner in the bed with her. She went to Mr S's house and told her friend about the oral sex but not the rape. She had a shower, changed and put her clothes out to be washed at Mr S's house. On 16 May 2013 she told another friend about the oral sex and the rape. This led to her mother finding out. She was taken to a doctor for examination. On 20 May 2013 she was interviewed by police. After the interview, she and her mother returned to Mr S's house to retrieve the clothes she had been wearing on the night she spent at Mr Te Kani's house. They retrieved her underwear and a jacket from the washing machine. They were both wet, having recently been washed.

[8] The underwear was analysed for DNA. The expert evidence at trial was that Mr Te Kani's spermatozoa, the cellular component of semen, was located in the underwear. It was located in the central crotch area, where you would most likely find vaginal drainage. Spermatozoa may survive in fabric after a wash. It is present in both ejaculate and pre-ejaculate. If Mr Te Kani did not ejaculate into the complainant, its presence in her underwear could be explained if his pre-ejaculate had entered her vagina and then drained into her underwear. It followed that if the jury was sure the underwear belonged to the complainant, the only reason Mr Te Kani's spermatozoa would have been present was if he had sexual intercourse with her.

[9] In the same central crotch area, trace DNA was found which "could" have come from the complainant. However, the results were so low that no further conclusion could be taken from this. For the purposes of this appeal the underwear was subject to re-testing. Following those results, counsel considered nothing materially new had arisen from the re-testing for the purposes of the appeal.

Huia Spooner's evidence

Initial police statement

[10] On 22 May 2013 Huia Spooner, the partner of Mr Te Kani, gave a statement to the police. She said that on the evening of 10 May 2013 she and Mr Te Kani had taken some methamphetamine. They were with a group of others at a friend's place. They all had dinner together. About 9 or 10 pm Mr Te Kani told her of a text message asking if anyone had seen the complainant and her friend as they had run away. She told Mr Te Kani to look for them.

[11] She did not remember how long Messrs Te Kani and Atkinson were gone but it was only a "short time". She was sleepy. Messrs Te Kani and Atkinson told her they had driven past the house and saw the lights go on and off. Mr Te Kani went inside and found the girls. The complainant's friend was picked up by her father. Mr Te Kani had told the complainant to come with him but she wanted to stay at the house. Mr Te Kani came back to the place they had been socialising and they stayed there the rest of the night.

[12] At about 7 am Ms Spooner returned home. She found cannabis and tobacco on the kitchen bench. She found the complainant asleep in her bed. The complainant woke up much later; Ms Spooner believed the complainant to be hung-over and stoned. There was vomit on a towel on the bedroom floor. The complainant stayed in the house all day. Ms Spooner and the complainant both went back to sleep in Ms Spooner's bed. As to the complainant's clothing at the time, Ms Spooner recalled: "I think she wore a black dress to her waist. No trousers or jeans, I guess she had undies on." The complainant eventually got up later in the day and left.

Ownership of underwear

[13] On 28 October 2014, after he had been charged and was awaiting trial, Mr Te Kani told Detective Mackle that his DNA was in the underwear because the underwear belonged to his partner. He asked the Detective if this meant the charges would be dropped. The Detective told Mr Te Kani he would need to speak to his lawyer.

[14] Mr Te Kani's trial counsel, Mr Blathwayt, recalls discussing this with Mr Te Kani at one of their meetings prior to trial. He also believes he discussed it with Ms Spooner. He recalls it was one of the things which needed to be decided at trial. He understood this was potentially important evidence if it was accepted by the jury. He discussed this again with Mr Te Kani and Ms Spooner at the trial. He showed photographs of the underwear to Ms Spooner. Ms Spooner said she had identical underwear. Mr Blathwayt put to the complainant in cross-examination that Ms Spooner had identical underwear, and the underwear she produced as evidence and identified as belonging to her in fact belonged to Ms Spooner. The complainant denied these assertions. It was also put to the complainant's mother that she had uplifted the underwear from Ms Spooner's house and produced it to the police. The mother denied this suggestion.

[15] Mr S gave evidence confirming the complainant and her mother had come to his house a few days after the night of the alleged offending. He recalled they were looking around the house. He remembered they were screaming and yelling at each other and he tried to calm them down.

[16] A decision needed to be made about whether to call Ms Spooner. Mr Blathwayt regarded her evidence as lacking some precision; for example, as to why she believed the underwear to be hers. At the appeal hearing before us Ms Spooner asserted Mr Blathwayt had only ever shown her black and white photographs of the underwear. This was contrary to her affidavit filed for this hearing which attached the coloured photographs of the underwear she said she was shown. Mr Blathwayt also gave evidence at the appeal hearing. His evidence was given before Ms Spooner. He had not been asked whether Ms Spooner was shown

coloured or black and white photographs. Nor was he recalled after Ms Spooner's evidence to address this.

[17] In any case, Mr Blathwayt's concern about calling Ms Spooner was that the prosecutor would cross-examine her about Mr Te Kani having taken methamphetamine that evening. If it were not for this, he would have called Ms Spooner to give evidence about the underwear despite its lack of precision. He discussed the matter with the prosecutor, who confirmed she would cross-examine Ms Spooner about their use of methamphetamine.

[18] The defence at trial was founded on the basis that the allegations made by the complainant had come out of the blue, it was a strange thing to allege against Mr Te Kani whom she had known all her life and was on good terms with, and it was the sort of thing she might have dreamt up given her difficult background. Mr Blathwayt considered that, if the jury learned Mr Te Kani had smoked methamphetamine that night, it may consider this provided an explanation for the alleged behaviour. He advised Mr Te Kani he considered the methamphetamine use would come out in cross-examination and likely would be fatal to the defence. Mr Te Kani accepted this advice and instructed Mr Blathwayt not to call Ms Spooner.

[19] Mr Blathwayt accepted he could, and perhaps should, have first sought a ruling from the Judge about whether the methamphetamine evidence was admissible before advising Mr Te Kani against calling the complainant. However, he did not make the application because he considered it would not succeed.

Legal test

[20] The appeal is brought on the basis of trial counsel error which is said to have created a real risk that the outcome of the trial was affected.[4] It is therefore necessary to consider whether there has been an error on the part of counsel and, if so, whether there is a real risk it affected the outcome and rendered the verdict unsafe. Where counsel has made a tactical or other decision which was reasonable

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4 Criminal Procedure Act 2011, s 232(4)(a).

in the context of the trial, no miscarriage of justice ordinarily arises. However there will be rare cases where an appeal will be allowed, although there was no counsel error, because there is nevertheless a real risk of miscarriage of justice.[5]

Our assessment

Counsel error?

[21] Ms Levy, Mr Te Kani's counsel on appeal, submits his trial counsel erred in his view that Mr Te Kani's methamphetamine use would be admissible. She submits drug use was not relevant to Mr Te Kani's defence denying any sexual activity. Had it been relevant, the Crown would have called Ms Spooner to give evidence of that. Ms Levy submits further that evidence Mr Te Kani took Class A drugs would plainly be prejudicial because a jury was likely to reason from it that Mr Te Kani was of bad character, and this prejudicial effect would outweigh any probative value of the evidence.[6] She submits the trial Judge was alert to the risk of illegitimate prejudice because he had ruled against admitting text messages showing Mr Te Kani supplying cannabis to the complainant.[7]

[22] We do not accept Ms Levy's submission that if the Crown considered the evidence relevant it would have called Ms Spooner. The Crown was entitled to consider her evidence was not necessary to prove the case but, if she was to be called by the defence, it was entitled to cross-examine her on any relevant matter. We agree with the Crown's submission that it is finely balanced whether it would have been admissible that Mr Te Kani had smoked methamphetamine earlier in the evening of the events at issue.

[23] Arguably Mr Te Kani's use of methamphetamine was relevant in three ways. First, as relevant to Mr Te Kani's conduct and state of mind in the context of which he allegedly sexually violated the complainant. Secondly, as relevant to bolster the credibility of the complainant, who described Mr Te Kani's eyes as "bloodshot" and

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5 See generally *R v Scurrah* CA159/06, 12 September 2006 at [17]–[18] summarising the effect of *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730. See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [56] concluding the same approach applies to s 232 of the Criminal Procedure Act as that which applied under s 385 of the Crimes Act.

6 Evidence Act 2006, s 8.

7 *R v Te Kani* [2015] NZDC 4799.

"glassy" and as having "big" pupils. Thirdly, as casting doubt on Mr Te Kani's ability to recall details and the timing of his movements that night.

[24] On the other hand it can be said the probative value of this evidence is low. That is because it is speculative to conclude that taking methamphetamine earlier in the evening would cause Mr Te Kani to sexually offend against the complainant, the complainant was not challenged on her description of Mr Te Kani's eyes which, in any event, might have been explained by the possibility Mr Te Kani had consumed alcohol and/or cannabis, and there was little dispute about the timing of events because the text messages largely resolved those matters.

[25] We also accept there is some prejudice associated with evidence of methamphetamine use. On the other hand, a jury would be directed by the trial judge not to apply prejudice and to keep in mind that just because someone uses methamphetamine does not mean they will rape someone, and the jury could be expected to follow such a direction.

[26] Given the methamphetamine issue it can be said that Mr Blathwayt acted reasonably in deciding not to call Ms Spooner. It was arguably an error not to apply to the trial Judge for a ruling to exclude the methamphetamine evidence before advising Mr Te Kani on the question of calling his partner as a witness. However, any such error was of no consequence unless the application would have succeeded. There was no guarantee of that. A majority of our panel consider the evidence was admissible and Mr Blathwayt was correct in his assessment that an application to the Judge for a ruling to exclude the evidence would not have succeeded.

Miscarriage of justice?

[27] In any event we consider the failure to call Ms Spooner did not give rise to a real risk that it affected the outcome of the trial. Her evidence that she owned the underwear was not cogent. To accept her evidence would lead to a number of unanswered questions and an unlikely series of events leading to the retrieval of the underwear.

[28] For example, if the underwear belonged to Ms Spooner why did she not notice they were missing well before October 2014 when Mr Te Kani first informed the police that they belonged to Ms Spooner? Why was it that Ms Spooner did not say she had found the complainant's underwear in her room? Did Ms Spooner take the underwear off before getting into the same bed as the complainant that morning? If she had taken them off, or if they were different underwear to that which she was wearing, why were they lying next to the complainant's other clothing when she got dressed? Why did Ms Spooner not tell Mr Blathwayt when and where she had purchased or obtained the underwear until the appeal hearing (when she told the Court she had stolen them from Cotton On, the same retail chain the complainant said in her evidence she had purchased them from)? Was it simply a coincidence that the underwear retrieved wet from the washing machine a week or so later from Mr S's house had Mr Te Kani's DNA on it? Were the complainant and her mother lying about the underwear being retrieved from the wet washing some days later? If so, was it coincidence that their evidence was corroborated to some extent by Mr S (a reluctant Crown witness who had not answered his summons)? And if they were lying about this, how did the complainant and her mother obtain the underwear?

[29] We add that we did not find Ms Spooner a credible witness. Aspects of her evidence before us were not only inherently implausible and contradictory but had the hallmarks of someone trying to fill in gaps. Her claim, for the first time at the appeal hearing, that she had only seen black and white photographs of the underwear for example appeared intended to explain Mr Blathwayt's view that her evidence lacked precision. Her claim, also for the first time at the appeal hearing, of having stolen the underwear from Cotton On appeared intended to explain how she had obtained them without there being any documentary evidence of purchase.

[30] We conclude there was no realistic conclusion Ms Spooner's evidence would have led the jury to have a reasonable doubt about Mr Te Kani's guilt. No miscarriage of justice arose.

Result

[31] The appeal against conviction is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent