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

CA157/2017
[2017] NZCA 510

BETWEEN	DANIEL PAUL SIMPSON Appellant
AND	THE QUEEN Respondent

Hearing:	5 October 2017
Court:	Asher, Brown and Collins JJ
Counsel:	M E Goodwin and A C Cresswell for Appellant Z R Johnston for Respondent
Judgment:	13 November 2017 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant, Mr Simpson, appeals against his convictions for sexual violation by rape and sexual violation by unlawful sexual connection. The appeal is advanced on the basis of a number of alleged errors by his trial counsel, Ms Mason.

[2] Mr Simpson and the complainant were related. The complainant had been out drinking with friends one evening and had invited Mr Simpson to join them. Later that evening the complainant and Mr Simpson had returned to Mr Simpson's address where they continued to drink alcohol. Eventually the complainant went to sleep in Mr Simpson's bed. She was fully clothed.

[3] Shortly after, Mr Simpson changed into some night garments and got into the bed. The complainant had fallen asleep. She woke up to find Mr Simpson behind her with his arms wrapped around her in a position she described as "spooning". He was squeezing her tightly and the front of his body was facing her back. She said he moved his hand down the front of her pants and pulled her pants and underwear down to around her thighs. He then put his fingers inside her vagina. He removed his fingers and put his penis inside her. The complainant became distressed and got out of bed and ran to her nearby home. She was found by her mother crying and told her mother that she had been touched inappropriately by Mr Simpson.

[4] The next day Mr Simpson went over to the complainant's home. There was an exchange with the complainant and her mother and Mr Simpson went home. He was then confronted at his home by the complainant's sister and the police were called. The police then became involved in investigating the rape complaint.

[5] Later testing of a vaginal swab taken from the complainant showed that DNA found in the complainant's vagina was at least 130 times more likely to have come from Mr Simpson than from any unrelated member of the public. However, the testing did not demonstrate that the DNA had come from semen. Semen not identified to any person had also been found in the complainant's vagina. Whilst Mr Simpson could not be excluded as the possible source of this semen, the testing was unable to establish whether it was in fact his semen. There was also a semen stain on the complainant's underwear. Testing established that Mr Simpson was the source of that semen. The fact that sexual intercourse had occurred was not conceded by Ms Mason, Mr Simpson's counsel at both trials, as the DNA evidence did not conclusively establish that penile penetration by Mr Simpson had occurred.

[6] Defence counsel called evidence from Mr Simpson's current and former partners to the effect that the sexual intercourse could not have happened with Mr Simpson in a spooning position in the way the complainant described it, given their experience of his physical characteristics. The effect of the evidence was that, given the small size of Mr Simpson's penis, physical co-operation from the female partner was necessary before sexual intercourse could occur in that position.

[7] However, the primary defence at trial, was sexsomnia. Sexsomnia is a form of sleepwalking, where the person who is asleep has sex or carries out sex-related actions with another person. The defence was that Mr Simpson was asleep in that position at the time of the sexual offending and the sexual actions, if they occurred as the complainant alleged, were done under a form of automatism. Expert evidence was called to support this contention and Mr Simpson's current and former partners also gave evidence about particular episodes of Mr Simpson's sexsomnia.

[8] Mr Simpson was interviewed by the police and gave his explanation of what had happened. He said he woke briefly at 3 am and was in a "compromising position" with the complainant. He mentioned that he was on the drugs tramadol and panadol for a toothache and suggested to the police that this affected his recollection. He explained further in a handwritten statement to the police later that day that he had gone to sleep in the same bed with the complainant, and "I woke up and my hand was on [the complainant's] bum which freaked me out".

[9] There was a first trial that resulted in a hung jury. Then, when the second trial began, there was a difficulty with the jury which led to that trial being aborted. The Crown then began what in effect was the third trial that gave rise to the guilty verdicts. Mr Simpson was convicted after a four day hearing, and was ultimately sentenced to four and half years' imprisonment. There is no appeal against sentence.

[10] It is always possible after an unsuccessfully defended jury trial to second-guess advice given and decisions that were made by trial counsel. However, the ultimate question is whether justice has miscarried.[1] If the alleged incompetence raised would

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1 *Hall v R* [2015] NZCA 403 at [1].

not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary.[2]

The issues

Failure to address a misstatement of the DNA evidence

[11] Mr Goodwin for Mr Simpson submitted that a miscarriage of justice occurred because the Crown stated in closing that Mr Simpson's semen was found in the complainant's vagina, when the DNA evidence at trial did not support this. Trial counsel agreed to the DNA evidence being presented as an agreed statement of facts, and did not discuss this with Mr Simpson, and did not challenge the Crown's incorrect statement about the presence of Mr Simpson's semen.

[12] We agree that the prosecutor's statement that there was "literally evidence of the defendant's semen being inside her vagina" was not strictly accurate. However, as we have set out, a separate swab found that DNA (not proven to be part of the semen) that was 130 times more likely to belong to Mr Simpson than an unrelated member of the public was found in the complainant's vagina. Moreover semen that was identified as his semen was found on her underpants. The only male who had been close to her that night was Mr Simpson. It was therefore close to an irresistible inference that, given Mr Simpson's non-semen DNA inside her vagina, and his actual identified semen on her underpants, the semen that was inside her vagina that was not identified to any particular person was likely to be his semen. It could not have been the semen of anyone else, as the evidence did not show that any other male had been in close physical proximity to the complainant that night.

[13] Moreover, the prosecutor's statement was not, when taken in context, absolute. This was reflected by the prosecutor in his address to the jury referring to the "varying probabilities" of the semen being Mr Simpson's semen. This position was clearly reiterated by the Judge in summing-up, when he characterised the prosecutor as having spoken of the "odds" that the semen inside the complainant's vagina came from Mr Simpson.

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2 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70].

[14] It is not surprising in these circumstances that Ms Mason sought to deal with the DNA evidence by way of an agreed summary of facts, and did not criticise the Crown for its submission that it was Mr Simpson's semen inside the complainant's vagina. Such a denial was likely to seem silly to the jury, in the light of the proven facts. Moreover any error in this area cannot be seen as having given rise to any miscarriage of justice. While the fact that sexual intercourse occurred was not conceded by the defence, there was no strong challenge to this at the trial. Nor could there be, given the strength of the circumstantial evidence that we have referred to.

[15] We record that we accept Ms Mason's evidence that she discussed the need for an agreed statement of facts with Mr Simpson. Although she did not recall having shown the agreed facts to Mr Simpson, she had formed the view that the agreement appropriately reflected the defence's challenges as to what the DNA evidence did and did not establish during the first trial. In these circumstances, her failure to obtain Mr Simpson's approval of those facts was not a material error.

A confused defence

[16] It was submitted that trial counsel ran a confused defence case contrary to Mr Simpson's instructions. Mr Simpson deposed that he had always instructed counsel that he did not know if sexual intercourse had occurred and, if it had, he maintained he had no memory of it. It must have been done by him in his sleep. Trial counsel therefore ran the defence of sexsomnia and called an expert, Dr Fernando, to give evidence that on the material before him Mr Simpson could have suffered sexsomnia on the night in question.

[17] In addition to running this defence, defence counsel also raised with the jury the possibility that the complainant had consented to any sexual activity that had taken place. Mr Goodwin submitted that the defence of consent was at odds with the defence of sexsomnia, and that running the two together could have given the impression that Mr Simpson was trying a number of defences that were not genuine. He submitted that there was confusion and inconsistency in the defence strategy. The jury may have been left with the impression that Mr Simpson may have been awake when the

offending occurred and should therefore have been able to comment on whether the complainant was consenting.

[18] We do not think that this is a fair criticism of the defence position. Mr Simpson maintained strongly and consistently that he had no recollection of there being any sex, save for him having his hand down the complainant's pants when he woke up. The DNA evidence plainly showed that his sexual actions had gone further than a touching to the exterior of the complainant's body. The presence of Mr Simpson's DNA in her vagina indicated that there had been penetrative sex, and the presence of his semen on the complainant's underpants indicated that there had been more than touching.

[19] Therefore, as trial counsel rightly conceded before the jury, something sexual happened. The sexsomnia defence was an explanation as to why Mr Simpson did not remember having sex. However, there was also a narrative available that the sex that had occurred was consensual. There was the fact that the complainant had willingly gone and laid down in Mr Simpson's bed. Her version of events as it was told to the interviewer, and under cross-examination, varied considerably on the details. There was also the evidence from Mr Simpson's current and former partners that sex in the position described by the complainant would have required the complainant's co-operation, given Mr Simpson's physical characteristics. The defence could have been criticised for not raising consent, given those facts.

[20] We do not agree that the jury would have been left confused by the defence raising consent alongside the defence of sexsomnia, or that it was left thinking that Mr Simpson was alleging consent because he actually recalled sex taking place. In the defence opening statement, which set the scene for the defence, sexsomnia was put forward as the main defence. The issues of whether full sexual intercourse took place, and whether it could be correct that the complainant did not physically cooperate, were raised as subsidiary points. It was clear that these two points were subsidiary to the main defence, and were being put forward without any knowledge of what actually happened on Mr Simpson's part. Although in the closing address counsel could have put the defences more clearly, we do not consider that this was a significant error given

the clear opening. The need for multiple defences really arose from the position of Mr Simpson stating that he could not remember what happened.

Erroneous advice not to give evidence

[21] It is common ground that Ms Mason discussed with Mr Simpson the question of him giving evidence in relation to both trials. In both trials he signed written instructions to her that he did not wish to give evidence. Ms Mason made it plain in her affidavit and her evidence that she advised Mr Simpson against giving evidence, and did not think it wise for him to do so. Given that he could not remember what had happened, and had said so, his evidence could add little to what was already before the Court in his statement to police. The defence expert, Dr Fernando, supported his sexsomnia evidence. There was already evidence before the Court of Mr Simpson taking tramadol, which could have made it more likely that he suffered from sexsomnia.

[22] Mr Goodwin submitted that because Mr Simpson did not give evidence, the Crown evidence that he had apologised when he went over to the complainant's home could not be challenged. Mr Simpson could have clarified that his apology to the complainant related to him waking up with his hand down her pants, not to any rape. However, Ms Mason explained that she did not think it would advance Mr Simpson's case for him to give evidence on this point, because a relative of the complainant who lived with her had given strong credible evidence that he had appreciated what he was apologising for. He would have ended up in a direct credibility contest with a strong witness that he was unlikely to win. It was better to leave that evidence unchallenged to protect Mr Simpson's credibility.

[23] In our view this was an entirely legitimate position for Ms Mason to take. As she said, getting into a credibility contest with a strong Crown witness would have been pointless and damaging. The apology could still be interpreted by the jury in the context of Mr Simpson's lack of memory, and the fact that he woke up with his hand down the back of the complainant's pants.

[24] In recommending against giving evidence, Ms Mason also took the view that Mr Simpson had suffered a significant head injury, was forgetful and easily confused. She was justifiably concerned how he would fare under cross-examination.

[25] The documents that Mr Simpson signed acknowledging he did not wish to give evidence referred to the fact that if he gave evidence and raised the issue of his character, this could result in the admission of Crown evidence about an earlier incident. Some years earlier Mr Simpson had faced an allegation of sexually interfering with a young girl. No charges had been laid and he did not stand trial. Ms Mason was concerned that Mr Simpson could be careless in answering questions and could inadvertently mention his character, and the Crown could then have put to him that he had been involved in this earlier incident.

[26] We accept Mr Goodwin's point that there may have been good arguments to resist Mr Simpson being cross-examined on his character. However, they might not have succeeded. We conclude that Ms Mason was acting responsibly when she advised Mr Simpson that a possible downside if he gave evidence was that he could be cross-examined along these lines.

[27] Mr Simpson in his affidavit indicated that he wished to give evidence and was pressured not to do so. We have heard nothing in the evidence that gives us any cause for concern under this head. Ms Mason undoubtedly gave clear advice as to why she did not think he should give evidence. But equally clearly we accept her evidence that it was always left to Mr Simpson to choose, and that he made the decision not to give evidence. On an objective test, his end decision was not at all unreasonable or foolish. It was made on two separate occasions, with the involvement of his supporters, and without undue pressure.

Failure to call Mr Simpson's stepfather to give evidence

[28] Mr Goodwin argued that Ms Mason should have called Mr Simpson's stepfather as a witness. His stepfather saw him the day after the incident and could have given an account of Mr Simpson's distraught state as a result of finding out what it was said had occurred.

[29] Ms Mason deposed that Mr Simpson never mentioned his stepfather as a possible defence witness. We found Ms Mason to be a credible witness and we accept her evidence on this point. Further, the stepfather's evidence would have had very limited probative value. He was not a witness of any of the crucial events. There was a possibility that the stepfather's evidence to the effect that Mr Simpson was "very distraught" could be contested by credible Crown witnesses. It is also possible that evidence of his distress could be counter-productive in that it could undermine Mr Simpson's position that he did not recall any sexual intercourse. We conclude that there were risks in calling the stepfather and that to do so would not have materially helped Mr Simpson's defence.

Misstated sexsomnia timeframe

[30] The Crown had stated to the jury in closing that there was no evidence of Mr Simpson engaging in sexual intercourse while asleep in "six and a half or so years". The point was picked up by the Judge is his summing-up. Mr Goodwin submitted that trial counsel should have raised the fact that it was two years before the incident in question that the last episode of sexsomnia had occurred with Mr Simpson's former partner, and that the six and a half years referred to the time between the last sexsomnia episode and the trial. Without this correction the jury would have been influenced against Mr Simpson by the apparently long gap between episodes of sexsomnia.

[31] This point has no substance. It is far from clear to us that the jury would have been in any way misled by what the Crown said. The jury had heard from the witness that there had been sexsomnia only a few years prior to the alleged rape. Knowing that, the jury would have realised that the six and a half years was a timeframe measured to the time of the trial. There would have been little point in Ms Mason revisiting this issue in her closing.

Overview

[32] There were some general suggestions that Ms Mason lacked focus at trial because of a recent bereavement. However, on the material we have read we are satisfied that counsel was fully focused throughout the trial.

[33] The case against Mr Simpson was strong. There was powerful DNA evidence indicating that sexual intercourse had taken place. Mr Simpson himself had to admit some degree of sexual activity. His defence started from the position that an indecent assault, Mr Simpson having his hand down the complainant's pants, was admitted. The defence had an unenviable job, given the strength of the case against Mr Simpson, and his lack of recollection. Hard choices had to be made. This was never going to be an easy case to defend. It is our overall assessment that Ms Mason did all that could be expected of counsel. The evidence falls far short of showing significant error that could have affected the outcome of the trial. Indeed, as we have pointed out, no error at all has been shown on the part of Ms Mason.

Result

[34] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent