NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA530/2015
[2018] NZCA 475

BETWEEN	MATEO MELINA NIXON Applicant
AND	THE QUEEN Respondent

Court: Asher, Brown and Clifford JJ

Counsel: S J Gray and N P Chisnall for Applicant
A Markham for Respondent

Judgment: (On the papers) 5 November 2018 at 10.30 am

JUDGMENT OF THE COURT

The application to recall this Court's judgment in *Nixon v R* [2016] NZCA 589 is declined.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In July 2015 Mr Nixon pleaded guilty to 13 charges of sexual offending in respect of six complainants. He was sentenced in the District Court at Dunedin to a term of 14 years' imprisonment with a minimum period of imprisonment (MPI) of

eight years.[1] His appeal against conviction to this Court in November 2016 was dismissed but his sentence was set aside and substituted by a sentence of 13 years' imprisonment with an MPI of six years and six months.[2] An application for leave to appeal to the Supreme Court was declined.[3]

[2] In respect of five of the 13 counts to which he pleaded guilty Mr Nixon now seeks a recall of this Court's judgment dismissing his appeal against conviction. He contends that the original appeal 'misfired' as a consequence of an alleged lack of full disclosure of transcripts of the complainants' evidential interviews (EVIs) with the police.

Jurisdiction

[3] The jurisdiction conferred on this Court by statute does not include the power to rehear appeals which have been finally disposed of. However the Court has an inherent power to revisit earlier decisions. In *R v Smith* the nature of that power was explained in this way:[4]

> The Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

[4] Ms Gray for Mr Nixon contends that the threshold described in *Smith* is met because there was a fundamental error in procedure during the first appeal that will, if not corrected, risk a substantial miscarriage of justice. Given that the Supreme Court has declined leave to appeal to that Court, Ms Gray submits that the only effective remedy is for this Court to revisit its 2016 judgment.

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1 *R v Nixon* [2015] NZDC 16756.
2 *Nixon v R* [2016] NZCA 589 [CA judgment].
3 *Nixon v R* [2017] NZSC 56 [SC judgment].
4 *R v Smith* [2003] 3 NZLR 617 (CA) at [36].

The judgment of this Court sought to be recalled

[5] The basis of Mr Nixon's appeal to this Court contending that his guilty pleas ought to be set aside and his convictions quashed was that he suffered from autistic spectrum disorder (ASD) and that his counsel failed to put forward a tenable defence based on a reasonable belief that the complainants consented to sexual activity. It was argued that his ASD led him to misread the social cues that were before him.

[6] Early in the judgment the Court referred to the summary of facts in this way:

> [4] The facts were fully set out in a summary of facts that was ultimately, after the charges were laid, agreed to between the Crown and Mr Nixon's then lawyer, Ms Bulger. The summary of facts is a lengthy document. Aspects of those facts are relevant to our determination. Therefore we set out as Appendix A to this judgment a table that isolates the charges relating to each complainant, a description of the offending from that summary, the complainants' position in relation to the offending, and Mr Nixon's response to the allegations in this police interview.

Appendix A comprised a four page table which addressed each of the 13 charges.

[7] With reference to the pleas of guilty in the District Court the judgment recorded:

> [13] The pleas of guilty were entered on 9 July 2015. An affidavit has been filed by Mr Nixon's counsel, Ms Bulger, following the waiver of privilege. She states that she met with Mr Nixon on five occasions prior to him entering his plea of guilty.
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> [14] Prior to the entry of a plea, Ms Bulger sent a detailed letter to Mr Nixon of 15 May 2015 setting out the potential defences that could be raised. She observed in that letter from what Mr Nixon had told her the most likely defence that he would want to run was consent. She advised that to run that defence Mr Nixon would need to give evidence. She did not expressly discuss reasonable belief in consent, and we discuss that issue later in the judgment.
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> [15] Ms Bulger stated in her affidavit that she had no concerns about Mr Nixon's functioning intelligence ability, his ability to communicate or understand, or his fitness to take part in the proceedings. Mr Nixon is regarded by the experts as intelligent. He never suggested to her that he believed that a person who is asleep can nevertheless be seen as consenting to sex. And his instructions were that he believed the complainants were consenting (as distinct from them actually consenting).
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> [16] Ms Bulger exhibited Mr Nixon's record of instructions to plead guilty, which included some detail about the sentencing process. Importantly, he

> accepted the summary of facts (save for one aspect not relevant to this appeal). Ms Bulger could not attend the entry of the plea because of weather conditions, and instructed another barrister to appear.

[8] Ms Bulger's affidavit also annexed a memorandum for the District Court recording that the summary of facts was for the most part agreed and providing particulars of the single disputed fact issue. It related to charge 9 concerning complainant TR and is not relevant to the present application.

[9] The Court noted at [19] that it was not suggested that Mr Nixon had not read and understood the summary of facts. The judgment further stated:[5]

> As the summary in Appendix A shows, he asserted occasions of mutually consensual sex, and had no recollection of any complainant saying to him that they did not want sex. There was no suggestion by him that he had misread their signals. The obvious defence open on his version of events was actual consent on the part of the complainants. The difficulty was that the agreed summary of facts, still not challenged on appeal, had most of the complainants specifically telling Mr Nixon that they did not consent.

[10] The gravamen of the current application is that the summary of facts was inaccurate and did not reflect the content of the EVI transcripts. That complaint is directed at charge 2 in respect of complainant PQ and charges 10 and 11 in respect of complainant MB. However prior to considering that complaint it is convenient before leaving the review of this Court's judgment to address the argument advanced with reference to complainant NB.

[11] The submissions for Mr Nixon suggest in the summary of argument that this is not a case where he seeks to argue a ground of appeal that he could have raised in the earlier appeal. That proposition is demonstrably incorrect in so far as the charges relating to complainant NB are concerned.

[12] Those charges, being numbers 5 and 6, both alleged sexual conduct with a young person under 16 in contravention of s 134(3) of the Crimes Act 1961. The submission presently made is that those charges should be amended to charges of indecent assault under s 135 of the Crimes Act because, it is said, the Crown could not prove that NB was under 16 years of age at the time of the incidents.

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5 CA judgment, above n 2, at [25].

[13] Precisely that contention was addressed by this Court in its 2016 judgment:

> [34] Mr Chisnall after the hearing sought leave to file further submissions to amend the charge of sexual conduct with a person under the age of 16, pursuant to s 134 of the Crimes Act, as the Crown cannot prove that the complainant was under the age of 16 years old at the time of the offending. He submitted that if convicted, Mr Nixon will face long-term and disproportionate punishment for the offence. We decline leave. The summary of facts was explicit that the relevant complainant was under the age of 16. This summary was accepted by Mr Nixon when he pleaded guilty. Our review of the statements indicates there was a proper factual basis for the statement that the relevant complainant was under the age of 16.

It is abundantly plain from the transcript of NB's interview that she claimed to be 15 years old at the time of the offending.

[14] We note that Mr Nixon's application for leave to appeal to the Supreme Court did not address this issue or seek to challenge this Court's judgment in that respect.

[15] Contrary to the submission presented for Mr Nixon, the request to have this Court recall its judgment on this issue amounts to an attempt to relitigate an issue previously determined, the effect of which would be to undermine the general principle of finality.

The claimed fundamental error in procedure

[16] The submissions of Ms Gray for Mr Nixon in support of the application explain:

> 7. The "misfire" upon which the applicant relies is that the agreed summary of facts, in certain key respects, does not accurately reflect what two complainants said. Contrary to what this Court concluded at [25] of its judgment, there is evidence supporting Mr Nixon's position in his police statement regarding actual consent and reasonable belief in the same; namely that "… the complainants did not oppose sex, or showed concrete actions previously indicating consent."

The two complainants referred to are PQ and MB.

[17] Mr Nixon's complaint is that the EVI transcripts were only made available "mere days" before the appeal was heard in this Court. The submission goes on to state:

> 12. It is not the case that the potential relevance of the variances between the EVIs and the agreed summary of facts was not made known to the Court. In the short time available, counsel prepared a synopsis of each complainant's evidence, which was handed up to the Court on 1 November 2016. It highlighted aspects of the evidence that undermined the agreed summary of facts. However, those variances were not addressed in this Court's conclusions, at [25] of its judgment.
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> 13. The question, therefore, is whether this Court might have reached a different view regarding the cogency of the applicant's defence had it directly addressed the material differences between the agreed summary and the EVIs of the two complainants whose evidence forms the subject-matter of the charges, above. Simply put, it is submitted that, in the context of Charges 2, 10 and 11 the issue goes beyond whether Mr Nixon has a tenable defence — but rather raises the question whether there was, in fact, sufficient evidence to sustain the particular offence charged by the Crown. …

[18] The Crown responds that the transcripts were disclosed to Ms Bulger prior to Mr Nixon entering his pleas and they were referred to both in Ms Bulger's affidavit and in the Crown's submissions filed on 17 October 2016. When counsel appearing on the appeal requested further copies of the transcripts on the afternoon of Friday 28 October 2016, these were supplied by the Crown within an hour.

[19] The Crown notes that Mr Nixon's own evidence contradicted the assertion that the EVI transcripts had not been available earlier. It points to the fact that Mr Nixon's unsworn affidavit filed in the Supreme Court contained no allegation that he had not seen the complainants' evidence prior to entering his pleas. Indeed to the contrary, he annexed an email which he had sent to his psychologist in June 2015 referring to a 15 centimetre high stack of disclosure. The Crown further suggested that Mr Nixon's "fresh evidence" expert at the appeal hearing appeared to have had access to the transcripts.

[20] Hence the Crown contends that if counsel for Mr Nixon did not seek to review the transcripts until 28 October 2016 that was no fault of the Crown. In any event counsel had the weekend to review them. No request was made to amend the grounds of appeal or to adjourn the fixture. Furthermore, as Ms Gray's submissions noted, at the fixture additional written submissions for Mr Nixon addressing the EVIs were handed up by his counsel.

[21] The hand-up comprised a four page document entitled "Analysis of Crown's submissions". It referred to various excerpts from the transcripts (with references footnoted) relating to the allegations by all six complainants. However this document was not of direct relevance in the Court of Appeal conviction challenge, which concerned Mr Nixon's ASD condition and its effect on his reasonable belief in consent.

[22] In the submissions in support of Mr Nixon's application for leave to appeal to the Supreme Court it was said that the summary of facts was inaccurate on some charge events and did not provide important context. Annexed to those written submissions was a reproduction of Appendix A to this Court's judgment with an additional column containing some excerpts from each of the complainants' EVIs.[6]

[23] In declining leave to appeal the Supreme Court observed:[7]

> [6] Second, the summary of facts to which the applicant pleaded guilty records that four of the six complainants said they "positively indicated that they did not want sex or communicated that his behaviour was unacceptable immediately after the incident". Two of the complainants said they were asleep when the applicant initiated sexual conduct and four were either "drowsy or under the influence of alcohol and drugs".
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> [7] The applicant did not challenge the summary on appeal. He now submits the complainants' accounts were significantly different to the summary of facts on a number of key events and says that there was insufficient discussion with his counsel on the summary despite the applicant's concerns. In relation to two of the complainants, the applicant's analysis of the complainants' interviews indicates variations which may have been potentially significant to the question of reasonable belief in consent. But the analysis before us does not suggest any link between that issue and the applicant's disability.

[24] In our view the circumstances described do not reveal a failure in the appellate process. The application therefore fails for the reasons that there was no procedural breach. In any event, if there was a breach, it was capable of being remedied by the Supreme Court. Given the basis upon which leave to appeal was sought there is force to Ms Markham's submission for the Crown that the present application is an attempt to subvert the Supreme Court's decision.

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6 Confusingly the anonymisation of a number of the complainants was changed.

7 SC judgment, above n 3 (footnotes omitted).

A substantial miscarriage of justice?

[25] For the sake of completeness we now briefly address the issue of miscarriage of justice with reference to the charges in respect of complainants MB and PQ.

Complainant MB

[26] Charges 10 and 11 in respect of MB alleged sexual violation by rape. In its judgment this Court stated that when sexual contact was initiated by Mr Nixon, MB was drowsy or under the influence of alcohol and drugs.[8] That may have understated MB's state.

[27] In the transcript of her interview she said with reference to the first incident that she was unsure if she had actually gone to sleep or passed out or just had a blackout. However when she regained consciousness or awoke Mr Nixon was on top of her having sex with her. She further stated that she was scared of what he would do if she tried to make him stop.

[28] With reference to the second incident she was very drunk and had only a vague memory of what had transpired. The next morning when Mr Nixon's partner asked him in MB's presence if he and MB had had sex again, Mr Nixon said yes. However in her interview MB said "I don't remember it and I still don't".

[29] In its judgment this Court recognised the relevance of s 128A of the Crimes Act, stating:

> [31] We record that s 128A of the Crimes Act 1961 casts some light on the issue before us. It provides that a person does not consent to sexual activity if it occurs when that person is asleep or unconscious, but says nothing about reasonable belief.[9] Nevertheless, this Court has held that if a complainant is unconscious or asleep, there cannot be a reasonable belief in consent.[10]

[30] We would add that s 128A(4) states that a person does not consent to sexual activity if the activity occurs while the person is so affected by alcohol or some other drug that that person cannot consent or refuse to consent to the activity.

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8 CA judgment, above n 2, at [6(b)].
9 Crimes Act 1961, s 128A(3).
10 *R v Pakau* [2011] NZCA 180 at [30].

Furthermore, s 128A(2)(c) provides that a person does not consent to sexual activity if the person allows the activity because of the fear of the application of force.

[31] The Crown does not dispute that there were aspects of MB's overall account that would have provided material for a defence lawyer to work with at trial if a defence of reasonable belief in consent was pursued. However, observing that that will be the case in many sexual violation trials, Ms Markham submitted that does not mean there was insufficient evidence to support the charges.

[32] We agree with that submission. We consider that the evidence of MB's state on both occasions together with the circumstantial features of the offending was sufficient that a properly directed jury could reasonably convict Mr Nixon.[11]

Complainant PQ

[33] The submissions for Mr Nixon commenced by noting that, while three incidents occurred in relation to PQ, it is only the second incident that is "expressly" relied upon in this application. For the avoidance of doubt we record that there is no suggestion in the application for recall or the written submissions that Mr Nixon takes any issue with this Court's judgment in relation to the first and third incidents concerning PQ.

[34] As this Court's judgment recorded, PQ was asleep on each of the three occasions when sexual contact was initiated by Mr Nixon.[12] When she awoke on the first and third occasions she expressly said "no" to his overtures.[13] The charge in respect of the second occasion was sexual violation by unlawful sexual connection — that is, Mr Nixon placing his finger inside PQ's vagina. As explained above, PQ could not consent to that activity given it occurred when she was asleep.[14]

[35] The point which Mr Nixon wishes to pursue is that, on waking on the second occasion, PQ proceeded to have consensual sexual intercourse with him. In his

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11 See *R v Hong* [2018] NZCA 97; and *Hong v R* [2018] NZSC 63 declining leave to appeal.
12 CA judgment, above n 2, at [6(a)].
13 At [5].
14 Crimes Act, s 128A(3).

unsworn affidavit in relation to his application to the Supreme Court he stated with reference to PQ that the summary of facts did not mention that PQ willingly had sex with him after the conduct alleged in charge 2. In her interview PQ explained by reference back to an earlier incident:

> [S]o I thought I can't be bothered like going through the drama of it and so I got, I jumped on top to just try and y'know, I just thought get it over with.

[36] As the Crown's submissions noted, the subsequent sexual intercourse was not the subject of any charge. That subsequent activity does not provide any basis for contending that PQ consented to the earlier digital penetration while she was asleep. We do not accept the proposition implicit in the argument for Mr Nixon that consent given for subsequent sexual activity amounts to ratification for prior conduct undertaken without consent and without a proper basis for a reasonable belief in consent. No substantial miscarriage of justice can be said to have occurred in respect of the charge which was directed only to the prior conduct.

[37] Finally, we note the Crown submission that more fundamentally Mr Nixon's focus on the complainants' evidence is misplaced. His account to the police was of actual, enthusiastic consent by fully conscious women, not "reasonable belief". His unsworn affidavit is criticised as being vague as to specifics, tending to focus on disputed peripheral details and fails to address his police interview. We consider there is force in the Crown's submission that Mr Nixon has provided no alternative account of events to support an argument of "reasonable belief" in consent in respect of either MB or PQ.

[38] Consequently we reject the contention that there would be a risk of a substantial miscarriage of justice if Mr Nixon's application for recall is declined.

Conclusion

[39] In *Smith* this Court observed that there may be cases where it is a close call whether recourse to the exceptional power to revisit is appropriate.[15] This is not such a case. We do not consider there is any proper basis for entertaining the exercise of

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15 *R v Smith,* above n 4, at [37].

this Court's inherent power to revisit its decision in respect of the five charges to which Mr Nixon pleaded guilty which are the subject of his present application.

Result

[40] The application to recall this Court's judgment in *Nixon v R* [2016] NZCA 589 is declined.

Solicitors:
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