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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA347/2017
[2018] NZCA 80

BETWEEN	B(CA347/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	28 February 2018
Court:	Gilbert, Simon France and Whata JJ
Counsel:	S D Cassidy for Appellant J E L Carruthers for Respondent
Judgment:	10 April 2018 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Whata J)

[1] B was convicted of rape. He was sentenced to eight years and six months' imprisonment.[1] This is an appeal against conviction. B's central complaint is that the Judge's summing up was unbalanced and unfair to him. Four key errors are claimed. These are noted at [11].

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1 This sentence also accounted for unrelated domestic violence offending. The sentence end point for the sexual violation charge was seven years' imprisonment.

Alleged facts

[2] B and C are cousins. Between 28 and 29 December 2015, B texted C on several occasions suggesting they have sex. C told B that it was not going to happen. On 30 December 2015, B, C, and other family members were at a family reunion. Plenty of alcohol was consumed. C went to sleep in her grandmother's bedroom. B went into the bedroom while she was asleep, and removed her pants and underpants. She woke up to find him having sex with her. When she protested he headbutted her and told her to shut up. C did not complain at the time, but told her partner and family members a few days later about what she said happened. There was a family hui about it. B acknowledged they had had sex, but said it was consensual. He denied raping her. C then complained to the police. In his statement to the police, B maintained the sex was consensual. When confronted with the text messages from him to C asking for sex, B initially claimed he could not remember sending them.

Crown case

[3] The Crown case was simple. There was no consent or reasonable belief in consent. C was asleep when B took advantage of her and so could not have consented to the sex. Various text messages from B to the victim in the days leading up to the alleged offending show he wanted to have sex with C, including:

> I wish you weren't my cuz
>
> Cos I would so do you
>
> I'm horny
>
> I'll still do you
>
> … no one will know, protection and we do it once, what you reckon?

[4] C's responses to the texts showed she was not interested, including:

> It's not going to happen it will be weird, worse than [two other cousins in a relationship] cos we're first cousins.
>
> Stop it egg you're not gonna get it.

[5] There was evidence of C's repeated attempts to avoid B on the day of the offending, telling him at one stage to "piss off". C's evidence about what happened immediately prior to the alleged offending was corroborated by other witnesses, namely, that she went to bed first in her grandmother's room, contrary to B's claims that he went to bed first. Conversely, B's evidence about this was not corroborated by other witnesses.

[6] Texts from B shortly after the alleged offending support C's account, including:

> I'm sorry cuz
>
> You hate me cuz

[7] Other evidence relating to subsequent events supports C's account, including an apology by B at the family hui. B's text messages do not support his account that he had an intimate relationship with her prior to the alleged rape.

Defence case

[8] The defence case was also simple. This was consensual sex, which both regretted, because they were cousins. Several reasons were offered in support of this theory. The texts do not show C unambiguously rejecting B's requests for sex. There were significant differences between C's account and her father, D's, account of what happened in the evening before the alleged rape. D did not corroborate her account about sleeping arrangements. C's account of who she told and when, is not supported by the evidence.

[9] C's claim about being headbutted was not consistent with the absence of evidence of physical injury. The text messages did not "come out of nowhere" and B's account of his relationship with C and what happened was supported by the evidence:

[a] There was evidence that their relationship sometime prior to the present events may have ended C's marriage.

[b] There is evidence of a kiss at a marae which preceded the texts.

[c] B's immediate denial of the rape when it was raised by C at the subsequent family hui was corroborated by an uncle, E.

[10] Finally, D's evidence directly contradicted C's evidence on the circumstances and timing of the alleged rape. Contrary to her account, D said he woke up first, did a head check, and saw C asleep lying on a mattress and B asleep on the bed. Shortly after this another family member arrived and everyone got up.

Grounds

[11] Mr Cassidy submits the summing-up was unbalanced and unfair to B. In argument before us he relied on four key complaints:

[a] The Judge unduly elevated the significance of the text messages and placed his own interpretation on them in a way which caused unfair prejudice to the conduct of the defence case.

[b] The Judge unfairly used B's interview response about the text messages for his lies directions.

[c] The Judge did not properly explain a key part of the defence case, namely, D's evidence about what happened on the morning of 30 December 2015. Aggravating this, the Judge improperly undermined D's evidence about who got up first by raising doubts about its reliability.

[d] The Judge unduly dismissed evidence given by E, about statements made by B, which corroborated statements made by B in his evidential interview.

Assessment

[12] We will address each claim, dealing first with the claims which have little merit. However, as will become apparent we have identified two problems with the summing-up. We assess the significance of these errors individually at [21] and [32] and cumulatively at [34].

Lies

[13] We do not accept Mr Cassidy's related criticism that the texting was used improperly in the lies direction. Judge Sainsbury said:

> [58] All right, I want to deal with an issue of in the event that you were concerned that there had been a lie and in this case what I'm talking about is that when [B] was questioned by the police it may be that you would think that he was not truthful about whether he texted [C] or the nature of the texts. Well first of all you've got to consider whether you think there was a lie about this, in this case him being untruthful about the text messages, playing them down, claiming both of them wanting to hook up was in the texts and even when confronted by the texts, when the book was put in front of him remember that in the police interview and he was saying, "Well I don't talk like that", and he was trying to argue on two occasions that it wasn't his texts. Well now you might think well perhaps he's just forgotten the exact texts, he's not lying and that's fine if that's the case but if you consider he was being untruthful to the police about this then you need to remember that people lie for various reasons, to avoid unjust suspicion, out of embarrassment, so here it may be he knew what was in the texts, "This is going to be terrible, it makes it sound like I wanted to have sex with my cousin", so even if you conclude that he lied you should not necessarily conclude that he's guilty, so that's the important thing, it just doesn't automatically follow. You would need to be sure that the lie cannot be innocently explained away before you consider it's any indicator of guilt and in the end the lie is just a piece of evidence and you attach weight to it as you think it merits and you remember it's the Crown who proves all the elements beyond reasonable doubt regardless of whether the defendant lies.
>
> [59] Now here the Crown says he lied about acknowledging the texts because he knew they were damning, he knew what was in there and he was hoping that no-one would find them because he thought they'd been deleted and even when he had the horror of, "Here is a booklet full of them", even then he was trying to duck away from them. Well the police say well it's not even clear it was him, the defence say it's not even clear it was a lie, he's sprung with this in a police interview for goodness sake and in any event what the texts reveal was a persistent attempt to convince his cousin to have sex and that's embarrassing, so there's reasons why he would want to distance himself from the texts, quite different from guilt so you can't just jump to that sort of conclusion. Well it's one piece of evidence, it's up to you to what you make of it.

[14] The direction at [58] is orthodox. The narrative at [59] simply elaborates on the respective positions adopted by the Crown and the defendant in relation to a claim that the texts were evidence of a lie. In combination, they properly address a live jury issue favourably to B.

E's evidence

[15] We can also deal with this ground summarily. E gave evidence that B told those present at the family hui what he later told the police, namely, that the sex was consensual. He also stated that B referred to a kissing incident "up North in Christmas". The Judge was critical of E, doubting whether he was in fact at the hui. Even so, the probative value of E's evidence was negligible. Furthermore, there was no issue about what B said at the hui. This ground of complaint has no merit.

Text messages

[16] Some of the text messages between B and C identified by the Crown in closing are noted at [3], [4] and [6] above. In summarising the Crown case about the significance of these texts, the Judge used the words "infatuation", "obsession", "infatuated" and "sexual obsession". He said:

> [65] All right. Ms Pridgeon for the Crown, the Crown case is that we have [B] who it seems is infatuated or it was sexual obsession with his cousin. It is simply from him, she has no interest back. They have had this estrangement for a number of years and then they meet up in Auckland and it's following that that this texting starts and the Crown say the texting is incredibly important for you in this case, the Crown say the texting, it gives one of those anchor points to the case, it's something that you know is there, it's not just someone's memory, it's been committed to writing albeit in a strange language but there you go and you can read it and you can work out about what it means…

[17] And further:

> [66] … Well the Crown say, "Why would he go in there, there's no need to sleep there, there's an empty bedroom?" He's gone in there because he takes the opportunity to fulfil his infatuation and obsession, that's what they are saying. She's asleep, he just doesn't care, he just wants to have sex with her, you know as he charmingly put it, "do it once and no one need know".

[18] We agree with Mr Cassidy that the Judge was wrong to characterize the text messages in the way he did. While the texts were a key part of the Crown case, there was no suggestion B was obsessed. Rather, Ms Pridgeon largely let the texts speak for themselves. She closed to the jury as follows:

> Recall the text messages sent by the defendant before the offending indicating he was sexually interested in her but that she wasn't. Recall also the text messages sent by the defendant afterwards apologising and the complainant telling him that she hated him. The Crown says that these text messages after the defendant had sex with her are about what had happened in the bedroom and prove that the defendant knew he went too far.

[19] By adding emotively charged descriptors, the Judge left a much stronger, and different impression of the significance of the evidence than that left by the Crown. The sentencing notes reveal it was an impression the Judge had, in fact, formed of the evidence. He said in sentencing B:

> For some reason, you, [B] became obsessed with the idea of having sex with the victim. The text traffic between the two of you made this clear. What is also clear from that text traffic is that the victim did not want to have sex with you, she told you that repeatedly but you would not accept that.

[20] We are troubled by this. A "sexual obsession" literally connotes the persistent intrusion of sexual thoughts, against the will of the person obsessed. It strongly supports an inference that B was more likely to have acted on this obsession and sexually violated C. The reference to "charmingly" also implies personal criticism of the defendant. The Judge was wrong to add these glosses to the Crown case.

[21] But, in the full context of a lengthy summing-up, we do not consider the Judge's comments on the text messages would have materially affected the jury. First, the text messaging was highly damaging to the defendant's case with or without the Judge's gloss on it. The evidence showed that, as Mr Cassidy put it in closing to the jury:

> There is no doubt whatsoever, none whatsoever, when you consider those texts messages, that [B] took an active and leading role in what took place, and he pursued his cousin for sex …
>
> he was the one that was hassling her to engage in sexual intercourse and … she was clearly the more reticent or reluctant of them…

[22] Second, the Judge spent a considerable amount of time in summing up addressing the defence response to, among other things, the text messages. This mitigated the likely impact of the Judge's mischaracterisation of the Crown's position. He outlined the following aspects of the defence case:

[a] The inconsistencies in the evidence as to the sleeping arrangements that night.

[b] The lack of medical evidence to corroborate C's claim that B headbutted her.

[c] The other inferences which could be drawn from the text messages between B and C.

[d] The argument that the apologies offered by B might mean that he regretted having sex, not that it was non-consensual.

[23] Third, the question trail left with the jury included a summary of the Crown and defence cases regarding the texts. It reads:

> Crown case
>
> Leading up to the early morning of 31 December 2015 [B] consistently pressured [C] to have sex with him. She consistently told him she would not consent to have sex with him. She had no sexual interest in him and never had any sexual interest in him at any time. [C] awoke to find [B] having sex with her. Sexual intercourse started while [C] was asleep and intoxicated. When [C] awoke to find [B] having sex with her, she told him to get off more than once and told him no. When she tried to get up he headbutted her and continued to have sex with her.
>
> Defence case
>
> There had been a history of sexual byplay between [B] and [C]. He had made it clear to her leading up to the early morning of 31 December 2015 that he was interested in having sex with her. [C] came into the room where [B] was going to sleep in her grandmother's room. She talked with him, they started kissing. She actively participated in the sex. While she may have been disinhibited by alcohol, she was not too drunk to consent.

[24] This summary accurately records the Crown's position, without embellishment, together with an accurate summary of the defence case in relation to

the texts. In our view, this left the clearest impression of the relevance and significance of the texts with the jury.

[25] Accordingly, we do not consider the Judge's summing-up on the texts, in isolation, amounted to a material error or raises scope for the jury to be in doubt on the key issues at trial, namely consent or reasonable belief in consent, being the threshold test for miscarriage adopted by the majority in *Christian v R*.[2]

D's evidence

[26] As noted, the defence closed to the jury highlighting evidence that D was first up on the morning of the alleged offending and observed C and B asleep in separate beds. D also said everyone got up, including C, after his noisy brother arrived. This account was not challenged in cross-examination. The significance of this, Mr Cassidy submits, is that D's evidence is completely at odds with C's account as to the timing and circumstances of the rape — namely, that D was still asleep on the couch when she left the bedroom shortly after the alleged rape. Mr Cassidy complains the Judge undermined the significance of this evidence to the jury by doubting the reliability of the evidence of who woke up first. Compounding the prejudice, he says, the Judge did not refer to D's evidence when summarising the defence case to the jury.

[27] We agree with Mr Cassidy that the Judge's treatment of D's evidence in summing-up lacked balance. C's description of what happened soon after the alleged rape appears inconsistent with D's account and the accounts of other witnesses as to who was awake when C left the room. C says she left her room soon after the alleged rape and saw her father, D, lying on the couch. Initially she said her brother had already left to collect her daughter, but conceded under cross-examination that her brother's account is more likely to be accurate as to where he was and his movements. Her brother's account was that he got up first, and woke everyone up because he wanted to go. He also accepted however that his father's account of who was up first could be correct. C's cousin's account was that, when she got up, C's brother was in the lounge on the couch and D was doing the

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2 *Christian v R* [2017] NZSC 145 at [37].

dishes. She did not see C or B. This largely accords with D's account. He stated in his interview and maintained in evidence that he got up first and saw C and B in their grandmother's room with C asleep on the mattress and B asleep on the bed next to her. D said everyone woke up when his brother arrived.

[28] The Judge first addressed this evidence in the context of a discussion about credibility and reliability. He said:

> [43] I suggest we've got a couple of examples perhaps of that in this case, take for example the various accounts about who got up first in [D's] house. It seems that everyone's saying, well apart from about I think [B's] exception, almost everyone seemed to think they'd got up first. Now I don't think they were here trying to lie to you about that necessarily at all but they may not have got it right and there could be some obvious reasons for that given the amount of alcohol consumed the night before, so you've just got to assess that, someone may be quite credible but they may not be particularly reliable.

[29] D's evidence on this issue is then mentioned by the Judge when summarising the Crown case on what happened after the alleged rape. He stated:

> The Crown then say well what happens after that, she becomes angry, she yells at him and there's some corroboration of that because her brother hears yelling, as to the timing it would seem it must be the morning, all she knows is she went to sleep and woke up when this happened, afterwards when she went out it was light. *There may well be differences about who was up first and who was where and how or what but that's really neither here nor there. Maybe [D] came past and saw them asleep in there, maybe that happened before this all occurred given it happened in the morning seemingly around the time where everyone was getting up.* The Crown would then say well her reaction is consistent, her reaction, her being upset is consistent and his is not.
>
> (Emphasis added)

[30] The Judge does not otherwise refer to D's evidence when summarising the defence case, except obliquely. The Judge noted:

> Other things the defence point to is that well according to [B's] account this all happened at night, he goes in, she comes in, they get talking and have sex, that would make sense with people being intoxicated and making a poor decision. Waking up in the morning and hung-over and deciding to have sex doesn't make so much sense while the house is up and everyone's moving around. *So the defence says you step back at this and you say well there is different conclusions you can draw from this, her account about the morning doesn't make a lot of sense in terms of who was up* and where and how, her account about going to bed doesn't make a lot of sense and her reaction is

> explainable, it's explainable because of the embarrassment, the humiliation, the fear of people finding out about this, all of those factors and you can't exclude that.
>
> (Emphasis added)

[31] In the result, the Judge:

[a] Identified an issue about the reliability of the evidence of who woke up first — which must include D's evidence;

[b] Explained the Crown's view of D's evidence; and

[c] Did not clearly explain the significance of D's evidence to the defence case.

[32] However, the significance placed by the defence on D's evidence should have been obvious to the jury, given Mr Cassidy's closing address. The Judge also referred to the dispute in the evidence about who got up first and the potential for inconsistency with C's account. Moreover, while Mr Cassidy sought to place great weight on D's evidence, even if it was accepted as true, it was weak evidence that C was lying and only ever of marginal relevance to the key remaining issues in dispute, namely, consent or reasonable belief in consent. In short, it does not directly or cogently bear on C's overall credibility on these matters. Furthermore, as the Crown submits, as summarised at [22] above, the Judge drew together the key threads of the defence case on the central issues of consent and reasonable belief in a comprehensive way.

[33] We are satisfied, therefore, that the apparent lack of balance in the summing-up in terms of D's evidence does not, by itself, occasion a miscarriage of justice.

Miscarriage for lack of balance?

[34] While we are satisfied the problems with the Judge's summing-up were not individually material to the outcome at trial, we have considered whether, as

Mr Cassidy claims, the summing up was so unbalanced overall that the trial miscarried.

[35] The general requirements of trial judges when summing up to juries was summarised in *R v Keremete.*[3] This Court noted:

> [18] The other ground of appeal against conviction was that the Judge's summary of the defence case was inadequate and dismissive. A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not for the judge. Rival contentions with respect to the factual issues will normally be summarised (*R v Miratana*, 4 December 2002 CA 102/02) but there is a wide discretion as to the level of detail to which the judge descends in carrying out that task. Treatment of matters affecting the cogency of evidence is not required as a matter of law: *R v Foss* (1996) 14 CRNZ 1 (CA) at p 4.
>
> [19] The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other: *R v Hall* [1987] 1 NZLR 616 (CA). A judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact (*R v Hall*, supra, at p 625). Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms: *R v Daly* (1989) 4 CRNZ 628 (CA). Inevitably these are ultimately matters of degree and judgment.

[36] We consider that an issue of lack of balance, of the type mentioned in *Keremete*, is arguably present in this case. As noted, the Judge used unduly and improperly emotive language in explaining the significance of the texts. The summing-up also suffers from a failure to summarise to the jury a key plank of the defence case, namely, D's evidence of what happened in the morning after the alleged offending. Consequently, B's case was explicitly and implicitly undermined at two levels — the summing-up elevated the Crown case by improperly suggesting there was a cogent basis for concluding B was "sexually obsessed" with C, and downplayed contextual evidence that might support B's version of events.

[37] Did this apparent lack of balance overall create a real risk the outcome of the trial was affected or the trial was otherwise unfair? In the context of a very fulsome summing-up, their combined significance is substantially reduced. The Judge

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[3] *R v Keremete* CA247/03, 23 October 2003.

explained at length those matters that might cogently support B's defence, including detailed references to (among other things):

[a] evidence of B's prior relationship, of "sexual byplay", with C that might explain the texts more favourably to B;

[b] evidence of what happened prior to the alleged offending that appeared to contradict C's account;

[c] the absence of corroborative evidence supporting C's account of what happened prior to the offending;

[d] the defence theory of the disinhibiting effect of alcohol and that C was embarrassed and later regretted what had happened; and

[e] the absence of evidence supporting the headbutt claim.

[38] In this regard, it is noteworthy C's claim about the headbutting was rejected by the jury. This supports the view that the jury was not led astray by the Judge's gloss on the evidence or failure to highlight the significance of D's evidence to them. Overall therefore, while a prima facie case for lack of balance has been established, we are satisfied that the trial did not miscarry.

Result

[39] The appeal therefore is dismissed.

Solicitors:
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