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

I TE KŌTI PĪRA O AOTEAROA

CA269/2019
[2020] NZCA 251

	BETWEEN	RYAN ANTHONY GRAHAM JONES Appellant
	AND	THE QUEEN Respondent

Hearing:	30 April 2020
Further submissions:	18 May 2020
Court:	Gilbert, Wylie and Muir JJ
Counsel:	M J Taylor-Cyphers for the Appellant J E L Carruthers for the Respondent
Judgment:	24 June 2020 at 9.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed

REASONS OF THE COURT

(Given by Muir J)

Introduction

[1] Following a trial by jury before Judge Jelas, Mr Jones was convicted of indecent assault.[1] He was at the same time acquitted of sexual violation by unlawful sexual connection.[2] He was sentenced in the District Court at Auckland to four months' community detention.[3]

[2] Mr Jones appeals his conviction on the sole basis that the Judge erred in partially declining an application to adduce expert evidence about the potential effect of the drug ketamine, either alone or in combination with alcohol, on a person's memory.[4] He submits that, as a result, a miscarriage of justice has occurred.[5]

Background

[3] The complainant and Mr Jones were friends. On the evening of the offending they were celebrating the complainant's admission to the Bar at a restaurant and, later a house party. Significant amounts of alcohol were consumed — to the point the complainant remembered little of what had occurred during the latter hours of the party. She was not, in the words of one of the witnesses, however, "messy drunk or anything".

[4] At around 10.00 pm a friend of the complainant, who lived at the address, put her to bed. Another friend later helped her to the bathroom and moved her to a different bedroom. At around midnight Mr Jones and his girlfriend left the party and went back to their own flat. However, at around 12.30 am Mr Jones decided to return, having inadvertently left his cellphone behind. Before doing so, he said that his girlfriend suggested he check whether the complainant wished to spend the night with them.

---

1 Crimes Act 1961, s 135.
2 Section 128(1)(b).
3 *R v Jones* [2019] NZDC 9671.
4 *R v Jones* DC Auckland CRI-2017-004-7902, 28 August 2018 (Ruling No 10 (Results)), *R v Jones* District Court Auckland CRI-2017-004-7902, 28 August 2018 (Ruling No 10 (Reasons)) and *R v Jones* DC Auckland CRI-2017-004-7902, 29 August 2018 (Minute No 19).
5 Criminal Procedure Act 2011, s 232(2)(c).

[5] Shortly after 12.30 am the complainant was awoken by Mr Jones. She agreed to go with him to his apartment although she said she would have preferred to stay where she was. They arrived back at Mr Jones' apartment at around 1.00 am.

[6] As to what happened next, there were two competing accounts. The complainant said that she saw Mr Jones' girlfriend asleep in bed, climbed in next to her and quickly fell asleep. However, she awoke a short time later to find Mr Jones removing her pants and telling her she could not sleep in her clothes. This made the complainant uncomfortable, but she reminded herself that she was with friends and went back to sleep while Mr Jones tidied up. She said she next woke when Mr Jones got into bed and began to run his hands over her body. She pretended to be asleep and waited for him to stop, which he eventually did. When he fell asleep she got out of bed, collected her belongings and left the apartment. On her way home, she posted a message to a friend on Facebook in which she relayed what had happened.

[7] Mr Jones' account was very different. He said that he, his girlfriend and the complainant had previously discussed having a shared sexual experience and that the events which unfolded were their attempt to act this out. He said that his girlfriend and the complainant started kissing when the complainant initially got into bed and a limited amount of consensual sexual activity followed when he joined them. He said this came to an end when his girlfriend and then he fell asleep. The complainant was not there when they woke up.

[8] At trial the complainant was unable to recall much of what had occurred at the party, but evidence was given by others that sometime between 9.00 pm and 10.30 pm she and at least two, but possibly three others, had consumed a tablet or capsule allegedly containing ketamine, which had either been cut into three or four pieces. There was conflicting evidence as to whether this consumption was oral or by nasal inhalation. The complainant had no memory of having consumed the drug. She only became aware of having done so after discussions with the friends whom she had shared it with. Although thought by these friends to have been ketamine, the substance was not tested. None had had previous experience with the drug.

[9] Both the Crown and defence called expert evidence, the former from Dr Schep, a toxicologist, and the latter from Dr Menkes, an academic psychiatrist. The ruling of the Judge challenged in this appeal was in relation to Dr Menkes' proposed evidence which had been exchanged with the Crown in written form and which was the subject of a voir dire on the ninth day of trial. No notes of the voir dire are seemingly available.

Ruling No 10

[10] This ruling was given after the voir dire – initially on a "results" basis with reasons to follow. Our discussion focuses on those reasons.

[11] The Judge commenced the ruling by positing the question:[6]

> Will the proposed evidence from Dr Menkes regarding the possible effects [of] ketamine and alcohol on the complainant's memory be substantially helpful to the jury?

[12] Subsequently she refined the relevant inquiry to be one into whether "expert evidence of the co-effects of alcohol combined with ketamine" could be described as substantially helpful.[7] She concluded that the proposed evidence was not in this category. Three reasons were advanced.

[13] First, she said there was an insufficient evidential basis for the submission that the complainant was affected by ketamine. She based this conclusion on the absence of any testing of the substance and on the fact that, as one of the witnesses described it, what was shared was — "small. It was supposed to be just … for one person" — divided among three or four. She noted the evidence of one of the others who had consumed part of the pill — that she did not feel any different after taking it — and evidence that the complainant did not herself act differently after consumption. She also noted the fact that a significant period of time had elapsed between ingestion of the substance and the indecent assault, and the fact that the complainant's memory

---

6 Ruling No 10 (Reasons), above n 3, at [1].
7 At [21].

recall was significantly more detailed about the events which had occurred at Mr Jones' flat, than those that had occurred earlier at the party.[8]

[14] Secondly, the Judge said that she was not satisfied there was a credible, robust scientific basis for the evidence of interaction between alcohol and ketamine. She noted the evidence of Dr Schep that there had been no clinical trials on the effects of the combined use of ketamine and alcohol (accepted by Dr Menkes in the voir dire) and that there were no reported case notes in respect of such effects. She recorded Dr Menkes' evidence of observations, apparently made by colleagues he had spoken to, and his belief that multiplier effects could be anticipated because alcohol and ketamine entered the brain through similar pathways. She noted Dr Menkes' opinion that it could be readily inferred that, as a result, alcohol and ketamine "have a combined amplifying effect upon each other".[9]

[15] She said she found that evidence unsatisfactory:[10]

> While I reached this decision after I heard Dr Menkes' evidence, my view of his written brief and materials did not improve with oral evidence. I find it wholly unsatisfactory that he was reporting on what his colleagues had observed. His colleagues are people who work with those suffering [from] alcohol and drug addiction. Those case studies are not analogous with the complainant or [the complainant's friend] who were first time users. As both experts appear to agree, the level of use of either substance would have some effect upon both substances being consumed.

[16] She said she preferred Dr Schep's evidence that the lack of reported case studies "was indicative of there being no reputable solid medical evidence for the two substances interacting as opposed to the effects of each running alongside".[11]

[17] Thirdly, the Judge concluded that there was no obvious evidence that the complainant had confabulated her memory by "filling in the gaps" with a self-serving testimony.[12] To the contrary, she noted that, when the complainant left Mr Jones' flat, she texted a close friend with a summary of events substantially consistent with her evidence at trial.

---

8 At [22]–[29].
9 At [30]–[31].
10 At [32].
11 At [33].
12 At [34].

[18] The Judge therefore concluded that the proposed expert evidence would not be substantially helpful. She considered:[13]

> The jury are well placed to consider the effects alcohol and any drug may have had on the complainant's memory as it may have had on that of the defendant and [his girlfriend].

Minute No 19

[19] As indicated, the ruling was given on the ninth day of trial. This was before the Crown had called Dr Schep. After his evidence was called, however, the Judge clearly considered it appropriate to revisit her ruling to some extent. This is recorded in her Minute No 19 which relevantly provided:[14]

> [1] At the conclusion of the Crown expert witness Dr [Schep's] evidence, I spoke with counsel about the proposed evidence to be led by Dr Menkes.
>
> [2] This was prompted by some of the more detailed and pointed questions put to Dr Schep in cross-examination about the effects of ketamine on memory.
>
> [3] I have ruled on the admissibility of some of Dr Menkes' evidence (refer ruling 10). Counsel only had the benefit of hearing the result of that ruling when that was given yesterday; the ruling in full and its reasons are not yet available to counsel. It appears there may have been some misunderstanding as to what I have ruled inadmissible. The heading of the ruling is "Defence application to lead expert evidence on the effects of ketamine and alcohol on memory".
>
> [4] With counsel, I have gone through the original brief of Dr Menkes and his subsequent addendums. It is agreed that there may be a general reference to the effect ketamine may have on memory, along with other effects it can have on a user, but the issue of memory and ketamine should not be explored to [sic] in any depth.
>
> [5] Dr Schep has given evidence about the combined effects of alcohol and ketamine consumption. That topic may also be touched upon by Dr Menkes given it was led from Dr Schep.
>
> …

Mr Jones' case

[20] Ms Taylor-Cyphers for Mr Jones submits that as a result of the Judge's Ruling No 10 the jury was deprived of relevant, admissible and substantially helpful evidence

---

13 At [36].
14 Minute No 19, above n 3.

relating to the impact of ketamine on memory, and on the contraindication of alcohol and ketamine, and the likely or known impact of that combination on memory. She says that a miscarriage of justice arises to the extent that, absent the ruling, the jury may have entertained reasonable doubt as to whether the complainant's account amounted to confabulation.

[21] In what she describes as a "subsidiary point" she argues that, in relation to one of the questions which the Judge asked Dr Menkes, the Judge descended into the trial arena to the extent that the jury was left with the impression that the Judge was critical of, and did not accept, Dr Menkes' evidence. She says that the question was unnecessary and served to undermine the evidence by challenging, in the style of cross-examination, the defence witness. She says this adds weight to her overall submission that a miscarriage of justice resulted.

Discussion

Ruling No 10

[22] We do not consider it necessary to examine in detail whether Ruling No 10 was correct or not. We accept that s 25 of the Evidence Act 2006, by reference to a requirement that expert evidence be substantially helpful, recognises a gatekeeping role for the Court which is not simply limited to assessments of relevance but includes probative value and reliability of the evidence.[15] Arguably, although Dr Menkes had acknowledged expertise in the interaction of psychotropic medications with alcohol, the basis for his conclusion that alcohol and ketamine taken together produced "additive" effects on memory was so weak (based essentially on anecdotal evidence from colleagues whose practice involved working with alcohol and drug addicts)[16] that its probative value was insufficient to meet the s 25 gateway test.

---

15 *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41], referring to *Mahomed v R* [2010] NZCA 419 at [35].

16 In his evidence-in-chief Dr Menkes relied on both this anecdotal evidence and various academic articles. He acknowledged the absence of any generally accepted body of research, attributing this to ethical considerations in conducting relevant studies. Under cross-examination and in response to a question from the Court he said that his conclusions about the effects of the interaction of ketamine and alcohol were "based on a communication of that clinical input [that is, from his colleagues] but more particularly evidence from the literature". Subsequent cross-examination substantially undermined the relevance of such literature. Dr Menkes at that point re-emphasised the "clinical impressions" which he described as "overwhelming" — "I guess you could say a whole lot of anecdote, people describe that those two

[23] However, Ruling No 10 did not ultimately govern the course of the trial. Having heard from the Crown's expert Dr Schep, who addressed in detail not only the extent to which he considered ketamine affected memory, but his reasons for concluding that ketamine and alcohol did not interact together in an "additive" way, the Judge clearly considered it appropriate to revisit the Ruling. She did so in her Minute No 19 where she allowed exploration at trial of the effect of ketamine on memory and of multiplier effects to be occur, albeit adding the rider that this was not to be "in any depth".[17]

[24] At that point Dr Menkes was called. His evidence-in-chief comprises 17 pages, his cross-examination 11 and re-examination three. He addressed in detail and on multiple occasions the effect of ketamine on memory. For example, he stated:

> The other thing is that, during the period of intoxication, people are really, to use a vernacular term, they're "out of it", and, as a consequence, they're often not very aware of what's going on around them, even though they might be awake, they're outside of their body, they're experiencing hallucinations, and so, rather unsurprisingly, they often have a very poor memory for events that happened during the period of use.

[25] Later in his examination-in-chief, the following exchange occurred:

> Q. So, I think, putting aside the k-hole [the effect experienced on ingestion of a high dose of ketamine], what effects might someone experience that are less than the k-hole, if they've taken a dose of ketamine. I guess that's the question, perhaps.
>
> A. That would be what people talk about as being the "common recreational use range", which might be just short of the k-hole experience, and there, you would still get out of body experiences, that profound dissociation that people seem to seek. You might feel a sense of self-transcendence, where the boundaries between the individual and other people and the environment tend to dissolve. You'd certainly be prone to experience perceptual changes, possibly as dramatic as frank hallucinations, and you'd almost certainly have a degree of distorted memory for that whole experience.

[26] In respect of the alleged "additive" effects he stated in his evidence-in-chief:

---

drugs do functionally interact and when you take them both together the effects are magnified". As the cross-examination established, the value of that anecdotal evidence was significantly reduced by the fact that the observations of Dr Menkes' colleagues were in the context of drug and alcohol addicts, for whom it was acknowledged changes to brain structure were common.

17 Minute No 19, above n 3, at [4].

> Yes. Well, alcohol and ketamine are — both have profound effects on the brain and it is a great interest of psychiatrists and neuroscientists to understand how these drugs work and bring about their effects on the brain. And as a consequence, studies in both humans and in animals have identified a number of systems in the brain that are specifically interfered with by these two drugs. And so it looks like, although they have a slightly different mechanism, they both ultimately interfere with a receptor called NMDA. And it is through that mechanism, it seems, that both the euphoric effects of those two drugs can be brought about, as well as the memory impairing effects.

[27] Under cross-examination he then said that the combination of alcohol and ketamine was an extremely common one and that there was strong anecdotal evidence that:

> … those two drugs do functionally interact and when you take them both together the effects are magnified.

[28] Later he said that it would be "extraordinary if the two did not interact when they interfere with the same specific neurotransmitter receptor" and that "the effects of one are very likely to enhance or exaggerate the effects of the other".

[29] Significantly, at no stage in either examination-in-chief, cross-examination or re-examination did the Judge attempt to limit the ambit of the evidence given by Dr Menkes. Although the Judge may have sought to impose some restrictions in that respect in her Minute No 19, they were not enforced. As a result, the jury were presented with comprehensive Crown and defence expert evidence. This ostensibly aligned in respect of the dissociative and amnestic consequences of ketamine consumption but parted company on whether the contemporaneous consumption of ketamine and alcohol augmented memory deficits.

[30] Defence counsel then closed on the basis of Dr Menkes' evidence:

> The key issue I suggest really is going to be thinking about the use of Ketamine that night and the impact on memory.
>
> …
>
> Critically in this case you've heard that one of the effects of Ketamine is impairment on memory.
>
> …
>
> You heard from Dr Menkes that Ketamine has an additive effect with alcohol. This makes sense I suggest, both drugs have an impact on a person in

an additive way. … I don't think that you'll have too much trouble accepting that taking Ketamine after alcohol would have more effect than just taking alcohol alone.

…

When [the complainant] arrives back at [the appellant's apartment] it is around 1.00 am, about two and a half hours after she took that Ketamine. The effects would absolutely have been wearing off at that time by all accounts. But it may still have had an impact on her memory.

[31] The Judge then addressed the issue squarely in her summing up. She stated:

[45] … And Dr Schep and Dr [Menkes] expressed opinions about ketamine, about what its effects can be, type of dosages you might need, how long the effects might last and whether it may or not combine with alcohol to produce a different effect.

…

[48] There is, of course, the issue too, as to how ketamine may or may not have reacted with the alcohol and the two experts on this point differed quite substantially. Dr Schep said well, there's no reported medical case notes of these types of reactions together. Ketamine's been around a long time. If there were some well-known effects of the two acting together then he'd expect it to be in these medical case notes that he had consulted. And he's unaware of any clinical studies.

[49] Dr [Menkes] acknowledged that there's no clinical studies but said well that's unrealistic to expect there would be, for ethical reasons, but he has spoken to colleagues who work in this area and he's relayed to you their accounts and experiences of how the two might react together. He also cited some research, but it will be a matter for you as to whether you place any weight on those research papers in light of the questions and answers he gave in cross-examination.

[50] Dr [Menkes] also said well look both ketamine and alcohol are processed through the brain, through similar pathways, and therefore it's reasonable to infer that they would have a compounding effect on each other. …

[51] So, all of those factors are relevant to you, but I suggest do not forget the evidence of the witnesses, do have regard to the expert evidence but you need to satisfy yourself that there was some drug substance taken and that it had some effect on the witness when you're looking at their reliability and credibility assessment. Obviously, the defence rely on it and you need to have regard to those submissions.

[52] Now what I've said shouldn't be interpreted in any way as suggesting the effects of ketamine should not be part of your deliberations, what I'm suggesting is you just need to look closely at the evidence and decide is there relevant, reliable evidence about its use and, if so, what its possible effects were on, particularly, [the complainant].

[32] At the hearing of the appeal we invited Ms Taylor-Cyphers to identify specifically what evidence Mr Jones might have wished to call from Dr Menkes that he was not ultimately able to give at trial. She was not in a position to do so because she did not at that stage have access to Dr Menkes' original statement of evidence and two addenda subsequently prepared by him. She was given the opportunity to clarify this issue. In its minute dated 1 May 2020, this Court recorded counsel's agreement to provide it with:[18]

(a) a copy of the brief of evidence prepared by Dr Menkes prior to the admissibility ruling on 28 August 2018;

(b) any other relevant evidence given by Dr Menkes at the voir dire to determine the admissibility of his evidence; and

(c) a joint memorandum drawing attention to any material differences (noting the relevant references) between the proposed evidence and the evidence admitted at the trial.

[33] Subsequently, Dr Menkes' statement of evidence and two addenda were made available.

[34] We have reviewed each of Dr Menkes' written statements. His original statement of evidence comprised largely uncontentious information about the association of alcohol with disinhibition and cognitive and memory impairment. It also described the dissociative properties of ketamine, alternative methods by which ketamine might be ingested and the duration of intoxication.

[35] In the first addendum he stated that he had been asked to expand on the impacts of alcohol intoxication on memory and to consider "how ketamine could aggravate alcohol-induced memory impairment". He concluded that when taken together with alcohol, ketamine aggravated "behavioural disinhibition and toxic effects on memory". He then described what he said was a "pervasive tendency" in human beings to "unconsciously fill in memory gaps" and that this is "a well-studied

[18] *Jones v R* CA 269/2019, 1 May 2020 at [3].

phenomenon that commonly follows and, in a sense, compensates for the memory-impairing effects of alcohol intoxication".

[36] In his second addendum he expanded on the methods by which ketamine might be consumed and described what level of intoxication might occur on the alternative scenarios that the contents of a standard 500 mg capsule were shared between four people, by either (a) snorting or (b) orally ingesting the drug.

[37] He then made some additional comments under the heading "[k]etamine and alcohol and comments on memory/confabulation". Ms Taylor-Cyphers relies in particular on [11] and [12]:

> 11. The phenomenon of confabulation (involuntary filling in of memory gaps caused by alcohol intoxication) can be likewise seen following ketamine intoxication.
>
> 12. The combination of alcohol and ketamine would be expected to cause similar, or worse, problems with amnesia and confabulation than either drug alone.

[38] She says that the "exclusion" of this properly admissible evidence has led to a miscarriage of justice.

[39] We do not agree. Although Dr Menkes did not specifically use the word "confabulation" in his oral evidence, he referred variously to ketamine consumption resulting in "very poor memory for events that happened during the period of use", "distorted memory for that whole experience", absence of "clear memory", memory impairing effects, and enhanced or exaggerated effects on memory when taken in combination with alcohol.

[40] The Judge's summing up in turn put the issue of "reconstruction of events" squarely before the jury.

[41] As the trial in fact unfolded, we cannot therefore identify any material respect in which Dr Menkes' proposed evidence was constrained in a way which resulted in the risk of justice miscarrying. Dr Menkes' opinions, both as to the effects ketamine may have on memory and the cumulative effects when consumed with alcohol, were comprehensively developed.

The subsidiary point

[42] Mr Jones takes issue with the Court's intervention during the cross-examination of Dr Menkes as follows:

> **CROSS-EXAMINATION CONTINUES: MS WOOLLEY**
>
> A. Okay. I did have a conversation recently with someone from the NZ Drug Foundation, if that's relevant but up to —
>
> Q. I guess that comes back to my question, there's no reporting of any of this information, it's just all passed on to you in general conversations?
>
> A. I haven't seen a specific written report, if that's what you're saying.
>
> Q. Yes. Now you've again talked about information that your colleagues have passed on to you but here and now, we're not privy to any of the exact parameters of that information. So for example, we wouldn't know if the people they've told you about are long-term addicts of drugs or alcohol or how that may affect their body in any observations seen?
>
> A. I'm not sure I understand the question.
>
> Q Do you follow my long question? No, okay. I suppose the point I'm making is, with published studies we can read and see quite clearly the people involved, the subjects of the study.
>
> …
>
> Q. The parameters of that study, the scope of the study, that sort of thing.
>
> A. Oh, … methodology of the study, yes.
>
> Q. Yes and with anecdotal reports from colleague to colleague, that sort of thing isn't known?
>
> A. Well are we talking about the facts of ketamine now or interaction with alcohol.
>
> **THE COURT:**
>
> Q. No, the personal history of the user that has been relayed to you, I think the point is that when you're talking to your colleague you don't necessarily know the personal history of that user who has given these reports of effects, would that be fair?
>
> A. Yes, that would be fair, but I guess I should clarify that my source of information about ketamine effects and the interaction with alcohol is based on a communication of that clinical input but more particularly evidence from the literature, I just wanted to make that distinction because I think Ms Woolley was perhaps pointing out that my source of information about capsule sizes in New Zealand was more based

> on anecdote and that is true, I think the effects of ketamine are rather on firmer ground.

[43] We do not consider the Judge can be criticised on this account. Section 100(1) of the Evidence Act recognises her right to ask witnesses questions that, "in the opinion of the Judge, justice requires". The way in which the cross-examination proceeded had left the witness confused — to the point where he was required to ask trial counsel a question. What counsel was in fact seeking was information as to whether the anecdotal evidence on which Dr Menkes relied was derived from work with long term addicts and what effect their addiction might have had on such observations. Counsel was simply attempting to make the point that without knowledge of the "exact parameters" of each individual case the information was of limited relevance. The Court merely clarified that this was the point being made and asked whether it was a fair one. The witness accepted it was.

[44] We consider the exchange falls significantly short of indicating judicial criticism of the evidence or descent into the trial arena.

[45] Again therefore, no miscarriage arises.

Result

[46] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent.