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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA384/2021  
[2022] NZCA 366**

BETWEEN JOEL CRISPIN RAPOSO  
Appellant

AND THE QUEEN  
Respondent

Hearing: 21 July 2022

Court: Collins, Lang and Downs JJ

Counsel: J N Olsen for Appellant  
R K Thomson for Respondent

Judgment: 10 August 2022 at 9.30 am

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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## REASONS OF THE COURT

(Given by Collins J)

### Introduction

[1] Following a jury trial conducted in the District Court, Mr Raposo was convicted of raping “Anthea”. He was sentenced by Judge Dawson to four years and six months’ imprisonment.<sup>1</sup>

[2] Mr Raposo appeals his conviction on three grounds:

- (a) His trial counsel, Ms Mortimer, erred by advising Mr Raposo to consent to the introduction by the Crown of evidence concerning a complaint of sexual abuse made by Anthea against “Peter”, her former partner, and in cross-examining Anthea about her withdrawal of her allegations against Peter.
- (b) The trial Judge erred when he allowed the evidence of Anthea’s complaint against Peter to be adduced.
- (c) There were multiple concerns about Anthea’s communication difficulties, including that:
  - (i) The jury should not have been permitted to see Anthea lapse into “catatonic” states when giving her evidence.
  - (ii) The jury should have been directed to ignore those lapses.

[3] As will become apparent, the grounds we have summarised at [2(a) and (b)] are interrelated.

[4] Mr Raposo initially filed an appeal against sentence. That appeal was abandoned on 17 March 2022.

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<sup>1</sup> *R v Raposo* [2021] NZDC 12903 [Sentencing notes] at [25].

## **Narrative**

### *Mr Raposo and Anthea*

[5] Mr Raposo and Anthea met on a dating website in 2018. Their first physical encounter occurred on 21 September 2018, when Mr Raposo visited Anthea at her home where she lived with her two daughters. They had consensual sex that evening, after which Mr Raposo returned to the house where he lived with his wife.

[6] After their first physical engagement, Mr Raposo and Anthea exchanged text messages, which led to Mr Raposo visiting Anthea again, at her house, on 24 September 2018. He explained that when he arrived, Anthea greeted him wearing just a bathrobe. They went to her bedroom where again they had consensual sex.

[7] Mr Raposo also claimed that he went to Anthea's house on 1 January 2019 and they again had consensual sex on that occasion, although Anthea denied ever meeting him on this date.

[8] At about 5.20 pm on 10 January 2019, Mr Raposo telephoned Anthea and asked if he could visit her. At the time, Anthea was in the habit of recording her telephone conversations. The record of the telephone call establishes:

- (a) Anthea explained to Mr Raposo she did not want to see him that evening as she was dealing with issues relating to Peter, who was trying to have the Family Court discharge a protection order Anthea had obtained against him.
- (b) Anthea said she was having sexual abuse counselling.
- (c) Mr Raposo persisted in getting Anthea to agree that he could visit her.
- (d) Anthea relented and said Mr Raposo could come to her house and talk about her issues.

[9] Mr Raposo arrived at Anthea's house at about 8.08 pm. They sat together in the lounge and watched television. Anthea told Mr Raposo that Peter had sexually abused her. They then began cuddling and kissing each other.

[10] According to Anthea, when Mr Raposo started fondling her breasts, she told him to stop. He continued his sexual advances and in due course put on a condom and had intercourse with Anthea without her consent. Anthea would later say that she protested at each stage and told Mr Raposo she did not want to have sex and that she said "no" to Mr Raposo but "[her] no wasn't good enough".

[11] After having sex, Mr Raposo left Anthea's house, saying that he had to let his flatmate into his house but that he would return to Anthea later that evening. Instead, Mr Raposo went home to his wife.

[12] Anthea said in her evidence that the rape occurred shortly after she finished a telephone call at about 9.05 pm.

[13] Mr Raposo's account is that when he started to fondle Anthea's breasts, she removed her top. He then put on a condom and she performed oral sex on him. Mr Raposo says the oral sex occurred before 9.00 pm. He said he left Anthea's home after she performed oral sex on him and went to a supermarket at about 9.25 pm on his way home. The supermarket is about five to seven minutes' drive from Anthea's home.

[14] It is common ground that while Mr Raposo was with Anthea on the evening of 10 January, she exchanged about 10 text messages with a friend between 8.00 pm and 9.00 pm. Those text exchanges related to Anthea's complaints about Peter, with Anthea saying to her friend that she had suffered "[s]exual assault throughout [her] relationship [with Peter]". Anthea also said this was "not major" and that Peter did things to her without her consent. She did not mention Mr Raposo to her friend that evening.

[15] There is evidence Anthea also made a four-minute telephone call that commenced at 9.01 pm. As we have noted at [12], Anthea says Mr Raposo was still

with her at that time. Mr Raposo says, however, that he left Anthea before that telephone call.

[16] Anthea made a second telephone call that commenced at 10.14 pm on the evening of 10 January. That telephone call lasted for one hour and 11 minutes. It is accepted Mr Raposo was not with Anthea when she made that telephone call.

[17] The next communication between Anthea and Mr Raposo was a two-word text message she sent to him on 13 January, in which she said “[h]ey baby”. He did not reply. A few weeks later Mr Raposo telephoned Anthea. She quickly ended the telephone call.

[18] Anthea spoke to her mother on 22 January and was encouraged by her mother to speak to the police about Anthea’s concerns that Mr Raposo had raped her.

[19] On 24 January 2019, Anthea spoke to Detective Headifen about her complaint concerning Peter and the events of 10 January. Anthea told Detective Headifen that Mr Raposo had raped her on 10 January. Around about this time, Anthea withdrew the complaint of sexual abuse she had previously made in relation to Peter.

[20] Anthea participated in an evidential video interview (EVI) with the police on 4 March 2019, during which she again said Mr Raposo had raped her during the evening of 10 January.

[21] Mr Raposo was interviewed by the police on 24 July 2019. He explained that he and Anthea had enjoyed consensual sexual activity on two occasions in September 2018 but that he did not think they had sex on the last occasion they met. He said he went to Anthea’s home on the evening of 10 January because they were friends and that he was concerned she was distressed about the actions of Peter.

[22] Mr Raposo was arrested and charged with having raped Anthea. He was also charged with two other sexual offences involving another complainant, M. The charges involving M were in due course severed from the charge concerning Anthea.<sup>2</sup>

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<sup>2</sup> *R v Raposo* [2020] NZDC 16459 at [19].

[23] Mr Raposo would later say at his trial that he made a mistake when he spoke to the police and that Anthea had performed consensual oral sex on him on 10 January, and that he did not want to have intercourse with her that evening because he was distracted by her texting and her comments about having been sexually abused by Peter.

*The Crown's application under s 44 of the Evidence Act 2006*

[24] In April 2020, the Crown filed an application under s 44 of the Evidence Act to allow it to adduce evidence from Anthea about her telling Mr Raposo that she had been sexually abused by Peter. The Crown submitted this evidence was relevant to its contention Anthea did not consent to having sex with Mr Raposo on 10 January and whether Mr Raposo reasonably believed Anthea consented. The Crown wished to be able to explain to the jury why the events of 10 January were significantly different from the earlier occasions when Anthea and Mr Raposo had consensual sex. Ms Mortimer advised the Court that the Crown's application could be made by consent. The application under s 44 of the Evidence Act was granted by Judge Dawson on 27 April 2021, which was the day the trial started.

[25] The s 44 ruling was limited to questions being put by the Crown to Anthea at the end of her evidence-in-chief, in which she confirmed she had told Mr Raposo that Peter had sexually assaulted her during their phone call on 10 January 2019 and when Mr Raposo came to her house on that day.

*Communication assistant*

[26] During her EVI on 4 March 2019, Anthea explained that she suffered from a medical condition, which could cause her to seize up when she was suffering from stress.

[27] Following her EVI, arrangements were made for Anthea to be assessed by Ms Horrocks, a speech language therapist and communication assistant.

[28] In her report, Ms Horrocks explained that during her interview, Anthea appeared to lapse into a "dissociative state on three separate occasions. These

episodes, while relatively brief (between 3-5 minutes each) significantly affected her ability to communicate and participate in the assessment”.

[29] Ms Horrocks explained in her report that:

... [Anthea] has good communication skills HOWEVER in a high emotion, stressful context such as giving evidence in court, these skills may be compromised by the emotional load AND if she experiences dissociation or panic attacks she will not be able to engage until she is sufficiently calm, reorientated to her environment, and can demonstrate that she is ready and able to continue. The experience of answering questions on the sensitive topics that may need to be discussed may also impact on the effectiveness of her engagement, comprehension and ability to express her ideas coherently and completely, most significantly if it was to trigger episodes of dissociation.

[30] Ms Horrocks made various recommendations concerning how a communication assistant could assist Anthea to manage the effects of any panic attack she might suffer in court.

[31] The Crown’s application to have a communication assistant appointed to assist Anthea was opposed by Ms Mortimer. The District Court determined, however, that Anthea should have a communication assistant when she gave her evidence.<sup>3</sup> The Crown’s application was granted at the same time the charges based on the allegations by M were severed from the trial concerning Anthea’s complaint.

### *The trial*

[32] At the trial, Anthea gave her evidence via CCTV. Ms Horrocks was present and could be seen by the jury. A support person, Anthea’s sister, was also in the room when she gave her evidence, but she was not visible to the jury.

[33] During the course of cross-examination, Anthea suffered dissociative episodes, which ultimately led to the communication assistant recommending to the Judge that the Court adjourn for the day.

[34] We understand that the episodes that Anthea suffered involved her seizing up. The jury would have seen long pauses in Anthea’s evidence.

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<sup>3</sup> *R v Raposo*, above n 2, at [6].

[35] Ms Mortimer commenced her cross-examination of Anthea by referring to the s 44 evidence in which Anthea discussed with Mr Raposo her complaint of sexual offending by Peter.

[36] Ms Mortimer then began to question Anthea about her retracted complaint against Peter, which was a subject that had not been addressed in the s 44 ruling. The Crown objected. Ms Mortimer then made an oral application under s 44 of the Evidence Act to enable her to question Anthea about her withdrawn complaint about Peter. That application was granted by Judge Dawson.

[37] Ms Mortimer's cross-examination continued and established:

- (a) Anthea had complained that Peter had raped her after she had attended sexual abuse counselling.
- (b) Anthea retracted her complaint against Peter after being told that it would be difficult to prove the charge against him.

[38] Ms Mortimer also cross-examined Anthea about what Ms Mortimer would submit to the jury were inconsistencies in Anthea's account when she sent text messages and made telephone calls on the night of 10 January, but did not make any complaint about rape until almost two weeks later when she spoke to her mother.

[39] Ms Mortimer suggested to Anthea that she had invented her allegation of rape against Mr Raposo because she was upset he never returned to her home on the night of 10 January.

[40] Mr Raposo gave evidence. He explained that he was upset and confused when he was spoken to by the police and had forgotten that Anthea had performed oral sex on him on the evening of 10 January. When questioned about what was different about the events of 10 January when compared to the earlier occasions on which he had visited Anthea's house, Mr Raposo said:

So this meeting [on 10 January], when I was with her, her cellphone was by her side and it was beeping and I was put off by the beeping and also the fact



that she told me that her ex and her were going to court so I was a bit tensed  
...

[41] Mr Raposo also said he had never seen Anthea seize up when he was with her.

[42] The jury deliberated for seven hours before finding Mr Raposo guilty of rape.

### **First ground of appeal**

[43] The first ground of appeal alleges Ms Mortimer erred when she advised Mr Raposo to consent to the Crown's application under s 44 of the Evidence Act, and in cross-examining Anthea about the withdrawal of her allegation against Peter.

[44] In his affidavit in support of his appeal, Mr Raposo says Ms Mortimer told him that allowing the jury to know about Anthea's issues with Peter and that she had withdrawn her complaint that Peter had sexually abused her would assist his defence.

Mr Raposo says:

I accepted Ms Mortimer's advice and agreed with her. I had no reason to doubt her advice. She did not suggest any downfall in the admission of this evidence; in fact, the contrary, it was made clear that it would strengthen my defence.

[45] Mr Raposo also says that following his discussions with Ms Mortimer:

... a tactical decision was made to include the information about [Peter] to show [Anthea] was:

1 – not credible

2 – would lie under oath ...

3 – would make up and retract allegations.

[46] Mr Olsen, counsel for Mr Raposo in this Court, criticised Ms Mortimer's advice on the following four grounds.

[47] First, the Crown's application under s 44 of the Evidence Act should have been opposed. The "essential points that [Ms Mortimer wished to make] could adequately be done without reference to the s 44 material".

[48] Second, the s 44 material and Ms Mortimer's cross-examination undermined Mr Raposo's defence because:

- (a) There was no basis to suggest Anthea had previously lied under oath.
- (b) The police records show Anthea was uncertain as to whether or not Peter had raped her.
- (c) The evidence did not show Anthea would "make up and retract allegations".

[49] Third, the cross-examination was "at odds with the brief and evidence of Mr Raposo that [Anthea] performed oral sex on him".

[50] Fourth, the fact Anthea was sending text messages during the evening of 10 January "did not require the introduction of the s 44 evidence. These texts (aside from the content) could properly be put before the jury without infringing s 44".

[51] Mr Olsen submitted that Ms Mortimer's strategy was "flawed" and based on "factors that were plainly wrong". Furthermore, it was argued, Ms Mortimer failed in her duty to Mr Raposo when she omitted to explain to him the risks of consenting to the admission of the s 44 material and cross-examining Anthea about withdrawing her complaint about Peter.

[52] In her affidavit in reply, Ms Mortimer says that she:

... always [goes] through the pros and cons of a decision like this with my clients. Mr Raposo was a very engaged and responsive client who came to our meetings well prepared and full of questions. While I do not have an email or file note stating the pros and cons in a concise list, I am confident that we went through them with him.

[53] Ms Mortimer was assisted by two other lawyers when preparing for Mr Raposo's trial. Ms Mortimer explains:

[Mr Raposo] was a very hands-on client needing regular reassurance. [My] [j]uniors, Ms McIntyre or Ms Papp, and I met with him frequently. His mother, father and/or sister often joined him for these meetings. Particularly in the weeks leading up to trial, these meetings were very long

and detailed. Both he and his support person usually arrived with a prepared list of questions.

[54] The pre-trial preparation included the drafting of a brief of evidence for Mr Raposo. Ms Mortimer also explained s 44 of the Evidence Act to Mr Raposo and his parents when she told them that usually courts do not allow references to be made to a complainant's prior sexual history.

[55] Ms Mortimer also explained her concerns about the risks of questioning Anthea about her experiences with Peter. Those risks were, Ms Mortimer said:

- (a) “the sympathy it might engender in the jury for a woman who had previously been abused”; and
- (b) “it would suit the Crown narrative – that [Anthea] would be unlikely to want to engage in sex if she was upset about a pending court case regarding sexual abuse”.

[56] Ultimately, Ms Mortimer concluded that it would be very difficult for Mr Raposo to put his defence to Anthea and to advance his theory that Anthea was an unreliable witness, who had previously fabricated her complaints about Peter, unless the s 44 application was granted and Anthea was cross-examined about having withdrawn her complaint about Peter.

[57] When cross-examined by Ms Thomson in this Court, Mr Raposo continued to say Ms Mortimer did not explain the risks in questioning Anthea about her allegations that she had been sexually abused by Peter. Ms Mortimer was, however, very certain when cross-examined that she had explained to Mr Raposo the risks of cross-examining Anthea about her complaints in relation to Peter.

[58] Having had the benefit of observing the cross-examination of Mr Raposo and Ms Mortimer, we find that Ms Mortimer explained to Mr Raposo the advantages and disadvantages of consenting to the Crown's s 44 application and in cross-examining Anthea about her retracting allegations of sexual offending by Peter.

[59] It is very clear Ms Mortimer and her junior lawyers spent a considerable period of time preparing for the trial and in discussing trial tactics with Mr Raposo and members of his family. Those discussions included how to approach the Crown's s 44 application. It is highly unlikely Ms Mortimer would have agreed to that application without obtaining Mr Raposo's consent to do so and that consent would have been given after careful deliberation that would have included an assessment of the "pros and cons" of questioning Anthea about her complaints against Peter.

[60] More importantly, we do not think that the strategy recommended by Ms Mortimer can be criticised, let alone reach the threshold of trial counsel incompetence.

[61] We make the following four points:

- (a) As we shall explain at [64] to [69], the Crown's application under s 44 of the Evidence Act was highly likely to have been granted, regardless of whether it had been opposed.
- (b) Letting the jury know that Anthea had previously alleged Peter had sexually abused her and then withdrawn her allegation would have supported the defence theory that Anthea was not a credible or reliable witness.
- (c) As the Supreme Court explained in *Sungsuwan v R*,<sup>4</sup> and this Court said in *Hall v R*,<sup>5</sup> appellate courts will be slow to second guess the way trial counsel cross-examine witnesses. Cross-examination is an area in which counsel must be permitted to exercise their own judgement on how best to advance their client's defence.
- (d) We must approach our task by assessing whether or not Ms Mortimer's cross-examination of Anthea was something that was reasonable in the context of the trial. This is an objective evaluation that is not assisted

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<sup>4</sup> *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730.

<sup>5</sup> *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [127].

by speculating on whether or not an alternative approach may have produced a different outcome.<sup>6</sup>

[62] We are very satisfied Ms Mortimer's conduct of the trial was well within the bounds of what was reasonable and that all key tactical decisions concerning the defence were made with Mr Raposo's consent. Mr Olsen's speculation about how the trial might have been conducted differently and what the impacts of a different tactical approach may have been falls well short of demonstrating that Ms Mortimer failed to adhere to the standards reasonably expected of a lawyer in her position.

[63] The first ground of appeal does not disclose any miscarriage of justice.

### **Second ground of appeal**

[64] The second ground of appeal focuses upon the decision of Judge Dawson to allow the Crown's application under s 44 of the Evidence Act.

[65] Mr Olsen submits that because Mr Raposo's defence was no sexual intercourse took place, consent was not in issue. Mr Olsen said it was therefore unnecessary for the Crown to have adduced evidence about Anthea's previous complaint of sexual abuse by Peter and that the Judge failed to consider and apply the stringent criteria for admitting evidence under what was then s 44(3) of the Evidence Act.

[66] There are three reasons why this ground of appeal cannot succeed:

- (a) It was an integral part of Anthea's narrative of events that, on the evening of 10 January 2019, she was stressed and upset about Peter's conduct. For this reason, she did not want Mr Raposo to come to her home, and only allowed him to do so in order to discuss her issues about Peter. The reason why Anthea was upset on the evening of

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<sup>6</sup> See *Sungsuwan v R*, above n 4, at [116]; and *Hall v R*, above n 5, at [11].

10 January was also an important explanation as to why she did not consent to sex with Mr Raposo that evening.

- (b) The Supreme Court has made very clear juries need to be instructed on the essential elements of the crime of rape, including absence of consent or reasonable belief in consent, even in cases where the defence is that the alleged sexual acts did not occur.<sup>7</sup>
- (c) Regardless of how the defence chose to run its case, the Crown was therefore entitled to address all essential elements of the crime of rape, including Anthea's lack of consent.

[67] Regardless of how the defence was run, the law of consent had to be explained to the jury. Furthermore, the Crown's case that Anthea did not consent was underpinned by her anxiety about Peter's conduct and her explanations to Mr Raposo about how Peter had treated her.

[68] The Judge was entitled to rely on the assurances of counsel for the Crown and the defence that the evidence the Crown wished to adduce pursuant to s 44 was relevant and ought to be admitted.

[69] No miscarriage of justice arose when the Judge granted the Crown's application under s 44 of the Evidence Act.

### **Third ground of appeal**

[70] In the District Court, Ms Mortimer opposed the appointment of a communication assistant. On appeal, Mr Olsen acknowledged that a communication assistant was required in this case, but he submitted that the communication assistant should have been a psychologist or psychiatrist. Mr Olsen also submitted that a miscarriage of justice arose because the jury saw Anthea lapsing into "catatonic" states, and that steps should have been taken to pre-record Anthea's evidence and then edit out from her evidence the times when she seized up.

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<sup>7</sup> *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [35]–[36].

Alternatively, Mr Olsen said that the Judge erred by not directing the jury to ignore the catatonic states that they saw during the course of Anthea's evidence.

[71] We will address both the written and oral submissions made by Mr Olsen in relation to the third ground of appeal.

[72] Ms Horrocks was appointed communication assistant pursuant to ss 80 and 81 of the Evidence Act, which entitle a witness to communication assistance "to enable that witness to give evidence" unless "the witness can sufficiently understand questions put orally and can adequately respond to them".

[73] Communication assistance is defined in s 4 of the Evidence Act as including assistance that enables or facilitates communication with a person who "has a communication disability". That concept is not defined in the Evidence Act. This Court has explained, however, that communication disability includes "a condition impinging on a person's ability to speak, hear, listen, understand, read or write in a way that materially affects their ability to participate meaningfully in court proceedings".<sup>8</sup>

[74] Ms Horrocks' report to the District Court established that Anthea had a condition that prevented her from answering questions when she felt stressed or overwhelmed. In such circumstances she was at risk of sliding into a dissociative state, which meant that she would either freeze or begin talking to herself.

[75] Anthea clearly qualified for a communication assistant.

[76] Mr Olsen submitted that Anthea should have been assisted by a psychologist or a psychiatrist, rather than Ms Horrocks. There is, however, no evidence before us to support that submission.

[77] Nor, is there any basis for the submission that the jury would have concluded that Anthea was "disabled" and held that against Mr Raposo. Judge Dawson, in his opening remarks to the jury, directed them to the fact that Anthea had "some difficulty

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<sup>8</sup> *T (CA26/2020) v R* [2020] NZCA 626 at [84].

concentrating for long periods of time” and that she would therefore have the assistance of a communication assistant. He emphasised there was nothing about the presence of a communication assistant that was out of the ordinary and that the presence of Ms Horrocks was not relevant to Mr Raposo’s guilt or innocence.

[78] As we have noted at [34], the jury probably saw Anthea freeze up for periods of time when she was giving her evidence. Counsel did not consider it necessary to ask the Judge to direct the jury to ignore the lapses suffered by Anthea. It was only Ms Mortimer who suggested in her closing address that Anthea had suffered “catatonic episodes”. Ms Mortimer addressed any possible risk of an adverse inference being drawn by the jury about Anthea’s lapses by adducing from Mr Raposo that he had never seen her lapse into such states when he was with her.

[79] We are satisfied that the Judge and both counsel dealt with Anthea’s lapses in an appropriate way. This was not a case of the kind envisaged by this Court in *Aitchison v R*,<sup>9</sup> in which we suggested that in some instances it may be advisable to pre-record the evidence of a witness who requires the assistance of a communication assistant. Anthea’s lapses were not dramatic and were unlikely to have been misused by the jury in the way now suggested by Mr Olsen.

[80] The third ground of appeal does not disclose any miscarriage of justice.

## **Result**

[81] The appeal is dismissed.

Solicitors:  
Tucker & Co, Auckland for Appellant  
Crown Law Office, Wellington for Respondent

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<sup>9</sup> *Aitchison v R* [2020] NZCA 657 at [143].