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

CA490/2021
[2024] NZCA 434

BETWEEN	DAMIEN LINDSAY PAISLEY Appellant
AND	THE KING Respondent

Hearing:	31 July 2024
Court:	French, Jagose and Grice JJ
Counsel:	R A Harrison and E J Riddell for Appellant M J Lillico for Respondent
Judgment:	11 September 2024 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to adduce the report of Dr Justin Barry-Walsh is granted.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Paisley was convicted of five charges of sexual offending against an adult woman following a trial in the District Court.[1] He was sentenced to a term of imprisonment of six years.[2]

[2] Mr Paisley now appeals his convictions on various grounds relating to the trial Judge's jury directions, the conduct of his trial counsel and the conduct of the prosecutor.[3]

The Crown case

[3] The complainant and Mr Paisley met on a dating app. There was regular online contact that became increasingly sexualised. Unbeknownst to the complainant, during a video chat, Mr Paisley recorded her doing an intimate act.

[4] When the complainant subsequently visited Mr Paisley's house, he then allegedly used the recording to induce her consent to four sexual acts by threatening to publish the recording online. The sexual acts in question comprised inserting his penis once into her vagina, then twice into her mouth, as well as attempting to insert his penis into her anus. It was also alleged that during the two occasions of forced oral sex, Mr Paisley assaulted the complainant by slapping her face.

[5] When interviewed by police in the presence of his lawyer, Mr Paisley said there had been sexual activity but it was all consensual and limited to oral sex. When asked whether there were any explicit videos on his phone, he said he would rather not talk about that. In a later segment of the interview after the officer had put the complainant's allegations to him in more detail, the officer reminded Mr Paisley that the police would be examining his phone and laptop to see if there was any evidence of a compromising video. The officer acknowledged that Mr Paisley didn't want to

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1 Mr Paisley was convicted, pursuant to the Crimes Act 1961, of three charges of sexual connection induced by threat (s 129A(1)) and one charge of attempted sexual violation (s 129(1)). Mr Paisley pleaded guilty to making an intimate visual recording (s 216H). He was acquitted of two charges of male assaults female (s 194(b)).

2 *R v Paisley* [2021] NZDC 14377 [sentencing notes] at [38] and [42].

3 An appeal against sentence was filed but not pursued.

comment on that but pointed out it might change the police's "thinking a little bit if [they did] find something".

[6] There was then a short break in the interview during which the police officer left, leaving Mr Paisley and his lawyer alone in the room. On resumption of the interview, Mr Paisley stated that he did have a video of the complainant "playing with herself" but denied ever using it to blackmail the complainant. He said all that happened was that he and the complainant had a jokey conversation about blackmail and whether he still had the video or had deleted it. He stated he had deleted it that same night or in the morning. He was under the impression he and the complainant would be meeting again.

[7] On the first day of the trial, Mr Paisley pleaded guilty to a charge of making an intimate visual recording. He maintained his not guilty plea to the other charges. The defence was that he did not blackmail the complainant with the video, that there was only limited sexual activity at the house and it was consensual.

[8] The jury acquitted him of the two assault charges but found him guilty of the four charges of sexual offending.

[9] As indicated, Mr Paisley raises several grounds of appeal which it is said either individually or in combination render the convictions "wholly unsafe". We now turn to address each ground.

Alleged prosecutorial misconduct

Unfair focus on motive to lie

[10] Mr Harrison submitted, on behalf of Mr Paisley, that the complainant's lack of a motive to lie was a strong theme of the prosecutor's closing address. It was, he argued, a theme developed through the closing reaching a "crescendo" when the prosecutor said:

> Finally, why — she said to you, "well, why would I put myself through this". That's a matter for you to assess. People do things for various reasons and my friend might have a suggestion as to why this happened, but it is a brutal process. She went to the police immediately afterwards…

[11] Mr Harrison says, at the point this comment was made, the prosecutor shifted the burden of proof to the appellant. The comment, in Mr Harrison's submission, required a firm intervention from the trial Judge. But that, he contends, did not happen.

[12] As the Crown acknowledges, there is always some risk for a prosecutor in raising lack of motive to lie for the very reason that the jury might be led into thinking the onus of proof has been reversed.[4] However, we are not persuaded there was any risk of that being the case here.

[13] First, the closing needs to be seen against the backdrop of a trial where the complainant was extensively cross-examined and it was repeatedly put to her that she was lying. It was therefore appropriate for the prosecutor in closing to rebut this by focusing on the complainant's credibility, to highlight as he did the detail of her testimony and to ask whether it was plausible to suggest she had fabricated that detail to make her account more believable. That was the theme of the closing and in our view, it was entirely proper. We accept that the comment quoted above is capable of being interpreted as a reversal of the onus of proof but, as Mr Lillico for the Crown submitted, it was a fleeting and diffident comment; not so much a crescendo as a single note. It was not made a "special feature" of the Crown's closing address.[5] We therefore reject the contention there was an "unfair focus" on motive to lie.

[14] The second point is that even if the comment viewed in isolation was capable of misleading the jury, it is most unlikely to have dispelled the effect of what were strong directions on the onus of proof given by the Judge, first in a written preliminary memorandum he provided to the jury before the evidence commenced and again in summing up. In his summing up, the Judge explained the presumption of innocence and onus of proof before telling the jury that the "defendant has no need to prove innocence or anything at all". In addition, the Judge's question trail contained a reminder at the outset that "[o]n all charges the burden of proof lies with the Crown" and a note under each charge reminding the jury that the burden of proof rested on the

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[4] *Glassie v R* [2018] NZCA 308 at [42]; and *Penman v R* [2015] NZCA 364 at [31]–[33]. See also *Gharbal v R* [2010] NZCA 45 at [81] per Glazebrook J, with whom Gendall and Asher JJ agreed (at [93]).

[5] *R v M (CA199/2000)* (2000) 18 CRNZ 368 (CA) at [11], affirmed in *P (CA672/2013) v R* [2015] NZCA 96 at [32].

Crown. We note too that both the prosecutor and defence counsel in closing also made reference to the onus of proof.

[15] In light of all that, we reject the argument that the prosecutor's comment and the Judge's failure to give a specific motive to lie direction has led to the risk of a miscarriage of justice.

Breach of s 32 of the Evidence Act 2006

[16] Section 32 states:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
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> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
>
> (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
>
> (b) to disclose a defence before trial.
>
> (2) If subsection (1) applies,—
>
> (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
>
> (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.
>
> (3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

[17] Mr Harrison contends that the prosecutor breached s 32 by making the following observations to the jury in his closing address:

> Brief comment about the defendant, you have got his statement which you can read. He accepted that the complainant had come to watch a video. When he is asked: "Is there a video?" His initial response is: "I'm not going to talk about that." You might wonder why that comment was made at that stage, because if there wasn't anything too untoward about the video, if it hadn't been used, I suggest, in the way that he knew it had been used, what he could have said, "oh, yeah, there was a video, yeah, she masturbated online and we had all this sexual contact by phone or Messenger and then she came over and she was really up for everything that happened, yeah, no problem, no, oh, that's

> fine". But he doesn't. Why, the Crown says? Well, he is aware, there is an inference that he is aware that he knew he had used that video inappropriately: "I am not going to talk about that," because he can say that, he can do that. But he eventually says: "Oh, yeah, there was a video," probably because he realises [the] video can be found, evidence deleted, who knows, but he then admits, "yes, yes".

[18] In applying s 32, the courts have adopted a distinction between drawing an inference about a defendant's credibility which is permitted under s 32 and drawing an inference of guilt which is not permitted.[6] The distinction is acknowledged to be a very fine one and notoriously difficult to draw.[7]

[19] In this case, Mr Paisley had of course waived his right to silence and answered police questions. He initially declined to answer questions about the video but after taking legal advice did so.

[20] The prosecutor did not at any point invite the jury to infer guilt from Mr Paisley's initial reluctance to talk about the video. Rather, he suggested it went to his credibility, including the credibility of his story that he and the complainant had a jokey discussion about the video. The prosecutor told the jury that it was a matter for them.

[21] We note too that the Judge expressly directed the jury that it was Mr Paisley's right to choose not to answer some questions in his police interview.

[22] Perhaps aware of these difficulties, Mr Harrison placed heavy reliance on an additional factor in this case, namely that Mr Paisley was interviewed before the complainant underwent her evidential video interview. This resulted in what Mr Harrison says was a misleading question put to Mr Paisley in the first part of the interview about the video. The officer told Mr Paisley that the allegation was that the complainant had sent him a video and that he (the officer) thought "it might have been quite a bit silly of her um, waving a, a vibrator around on her face".

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6 See *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421 at [42]; *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [16]; *Mihaka v Police* [2015] NZHC 1318 at [14]–[16], referring to *R v Coombs* [1983] NZLR 748 (CA) at 751–752; and Mathew Downs (ed) *Adams on Criminal Law — Evidence* (online ed, Thomson Reuters) at [EA32.02(1)]. See generally *Hamdi v R* [2017] NZCA 242, (2017) 28 CRNZ 319 at [20]–[25].

7 *Hamdi v R*, above n 6, at [23]; *E (CA727/2009) v R* [2010] NZCA 202 at [59]–[60]; and see *R v Coombs*, above n 6, at 751–752.

[23] According to Mr Harrison, given that the interviewing officer got it wrong there should not have been any comment on Mr Paisley's initial refusal to respond about the video. To then harness it and criticise Mr Paisley for exercising his right to silence in response to a misleading question and for his change of approach at the end of his interview to be highlighted by the Crown was "wholly unfair and a misuse of his right to silence".

[24] We do not accept these submissions.

[25] First, they are not an accurate reflection of the interview as will be apparent from our summary of it at [5]–[6]. The passage relied on by Mr Harrison was not in fact Mr Paisley's initial response about the video. Before the allegedly misleading question, there had been the following exchange between the interviewer and Mr Paisley:

> [Interviewer] … Were there any um, explicit videos sent in any way?
>
> [Mr Paisley] I'd rather not talk about that
>
> [Interviewer] Okay. Alright. Um, as an aside, like, you're, you're aware we've got your phone and things like that?
>
> [Mr Paisley] Yeah
>
> [Interviewer] Okay, so we're gonna have an extraction on that to see if
>
> [Mr Paisley] Yeah
>
> [Interviewer] Anything's there
>
> [Mr Paisley] Yeah
>
> [Interviewer] Just giving you the opportunity to say if there's anything there that
>
> [Mr Paisley] Yeah, I'm not gonna talk about that
>
> [Interviewer] Okay. That's alright. …

[26] Having read the interview transcript in its entirety, we consider it is simply not tenable to suggest that Mr Paisley was confused which video was being referred to. It is clear he knew very well.

[27] We also disagree with a further submission made by Mr Harrison that given the emphasis placed on Mr Paisley's "change of tack" in the interview, consideration should have been given to a lies direction under s 122 of the Evidence Act. However, Mr Paisley did not lie about the video or its existence by declining to talk about it. To have given a lies direction would have been unfair and more likely to have harmed the defence, rather than assisted it.

Allegedly unbalanced summing up

[28] Mr Harrison acknowledges that the Judge fairly summarised the Crown and defence cases. However, he contends the summing up was weighted towards the Crown because the Judge pointed the jury to specific lines in the complainant's transcript of evidence that supported each charge and told the foreperson to note the relevant page references for one of the charges. The Judge did not give the jury the page references in the cross-examination where she was challenged on her evidence. This meant, in Mr Harrison's submission, that "the jury had the specifics of the Crown case on tap once they got to the jury room, but not the defence case".

[29] We are not persuaded that the giving of page references rendered the summing up unbalanced or unfair. It is the context of the summing up as a whole that matters.[8]

[30] The Judge was required to explain to the jury the elements of the various offences charged.[9] He did so in general terms and then, as he was also required to do, he related the complainant's specific allegations to those elements.[10] The complainant's evidential interview, as is standard practice, took the form of a free-ranging narrative running to some 62 pages. Giving the jury the relevant page references would have assisted them. Importantly in giving those page references, the Judge specifically reminded the jury they must consider the whole of the

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8 See for example *Kupa-Caudwell v R* [2010] NZCA 357 at [41], citing *R v K (CA97/06),* 19 September 2006 at [41], *R v Mitchell* CA327/2005, 31 October 2005 at [35] and *R v Shire* CA400/05, 3 July 2006 at [24]. See also *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457 at [46] per Elias CJ, Ellen France and Arnold JJ.

9 Mathew Downs (ed) *Adams on Criminal Law — Trial Procedure* (online ed, Thomson Reuters) at [TP16.01(3)].

10 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [79] per Elias CJ; *Thompson v R* [2019] NZCA 297 at [21]–[22]; and Jeremy Finn and Don Mathias *Criminal Procedure in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2019) at [10.05].

complainant's evidence, including cross-examination. There was never any suggestion they should only look at the page references.

[31] We therefore reject this ground of appeal.

Trial counsel error

[32] Mr Paisley elected not to give evidence at the trial. He now says his election was not an informed decision because he was not told about the possibility of having a communication assistant and because his trial counsel did not advise him this was a case where he needed to give evidence.

[33] In support of this ground of appeal, Mr Paisley has sworn an affidavit and also provided a psychiatric report from Dr Barry-Walsh which says it is likely Mr Paisley suffers from a delusional illness.

[34] Mr Paisley's illness is considered to have developed in the two years since the trial. Given that lapse of time, Dr Barry-Walsh says it is difficult to be more specific or detailed about Mr Paisley's mental health problems at trial other than to say there is psychiatric evidence to support Mr Paisley's contention that he would have been highly anxious and that his capacity to stand up in Court and give evidence would have been less than most people.

[35] Trial counsel was Mrs Stevens KC. She has also filed an affidavit in which she deposes to the following.

[36] She had no difficulty in taking instructions from Mr Paisley. He gave her detailed instructions in writing. These written instructions contained a coherent, workable account and were consistent from her first contact with him up to and including trial. She treated them as a brief of evidence and based her cross-examination on them. In addition to the written instructions, there were telephone discussions with Mr Paisley as well as at least three lengthy interviews prior to trial where they went over line by line the complainant's account and his account.

[37] As regards Mr Paisley's level of anxiety, she considered he had a level of anxiety proportionate with anyone who was facing criminal charges and the real possibility of imprisonment. She did not feel the need for a communication assistant. Throughout the trial, Mr Paisley was keeping track of the evidence and understood what and why they were proceeding in the way they did. The reason she agreed with his decision not to give evidence was because of concern his contempt for the complainant and his rigid attitude would work against him in the eyes of the jury. She was not concerned about his consistency or his ability to state what happened.

[38] The possibility of his giving evidence had been discussed from their first meeting. Mr Paisley was firm in not wanting to give evidence. He did not think the jury would like him. She told him the final decision as to whether he should give evidence would not be made until the end of the Crown case because it was only at that point they would know if there was something that could only be answered by oral evidence from him. She explained from the outset the burden of proof and the standard of proof, as well as the advantages and disadvantages of giving evidence.

[39] In accordance with her invariable practice, at the end of the Crown case, she asked Mr Paisley, whether there was anything he could tell the jury that would improve on where they were now. Mr Paisley told her he had nothing to add. He felt the cross-examination should have raised a reasonable doubt. He then confirmed his decision not to give evidence in writing.

[40] Mrs Stevens is a very experienced and competent criminal barrister. She was not required to attend at the appeal hearing for cross-examination and we have no reason to doubt the contents of her affidavit. We have also reviewed the trial transcript. It shows that Mrs Stevens' cross-examination of the complainant lasted a full day. It was extensive and robust, identifying inconsistences in the evidence and laying the foundation for submissions of inherent implausibility.

[41] While accepting this, Mr Harrison contended that relying on the cross-examination of the complainant as a reason for there being no need to give evidence was nevertheless problematic. First, the jury would have been aware as a result of a judicial direction that propositions put to the complainant but which she

rejected were not evidence. Secondly and most importantly of all, because Mr Paisley's police interview preceded that of the complainant, it was incomplete and needed supplementing which could only be done by him giving oral evidence. To illustrate the point, Mr Harrison prepared a table detailing assertions put to the complainant, the latter's response and alongside that whether the police interview had provided Mr Paisley with the opportunity for a response.

[42] We consider that Mr Harrison understates the level of detail Mr Paisley provided to the police. It was much more than blanket denials. We are also not persuaded that the table demonstrates anything other than that the core allegations with sufficient detail were addressed by Mr Paisley in his police interview. Had some of the matters in Mr Harrison's table been raised by police with Mr Paisley (for example as to the point in time at the house where he first made the blackmail threat), he would have simply responded that he never made any threat. The evidence that this was his firm response was already very clear. Other matters — whether for example the complainant ever told him where she worked (which she said she did) — were peripheral. Any benefit that might have been gained by him giving evidence would have been minimal and not outweighed by the very real disadvantages and risks of doing so.

[43] There was, as Mr Lillico submitted, a clear pathway to acquittal without the need for Mr Paisley to give evidence. He noted the references in Mrs Stevens' closing to the jury "clear examples" why the complainant should not be believed. In his submissions, Mr Lillico described those examples as follows:

> …
>
> 33.3 [The complainant] said that Mr Paisley threatened to publish the [video] but he did not raise that in the messages between them. In fact, it was the complainant who raised the question of blackmail and Mr Paisley responded "LOL no". The notion he would need to blackmail her to get her to have sex with him was ridiculous given her highly sexualised behaviour towards him.
>
> 33.4 [The complainant] said she was being harassed and badgered by Mr Paisley and yet waited until she went to the police to block him[.]
>
> 33.5 [The complainant] accepted a telephone call from Mr Paisley after being, she says, physically and sexually assaulted by him for seven

> hours. After those assaults [the complainant] suggested to Mr Paisley that they "misunderstood one another".
>
> 33.6 [A medical examination of the complainant] the day after the assaults … recorded no bruises. Further, [the examining doctor] recorded that [the complainant] told her that Mr Paisley ejaculated but in evidence [the complainant] denied that he had.
>
> 33.7 When Mrs Stevens demonstrated to [the complainant] in cross-examination that it was she who introduced the subject of sex toys rather than Mr Paisley, [the complainant] replied "so what?"

[44] Mr Lillico also referred to the fact Mrs Stevens asked the jury to consider:

> [34] … the assertive way that [the complainant] had presented in the witness box, interrupting, disagreeing and slipping in comments. This was at odds with [the complainant] being induced to do anything …

[45] As Mr Lillico also pointed out, the existence of a pathway to acquittal in this case is evidenced by the fact of the two not guilty verdicts. It was therefore not a case where Mr Paisley should have been advised he "had to" give evidence, otherwise he had no prospect of acquittal.

[46] As regards the need for a communication assistant, there was no indication to Mrs Stevens that one was needed. In addition to her own interactions with Mr Paisley, she would also have been aware from his video interview with police that he was capable of answering questions under pressure. It is noteworthy that in the course of that interview, Mr Paisley was sufficiently astute to correct the police officer's understanding of one of his answers, pointing out that he was not saying the video never existed but rather that he was not saying anything about it.

[47] Significantly too, we have not been provided with any assessment explaining what a communication assistant would do or whether in fact one would have been recommended.

[48] We conclude that allegations of trial counsel error are not well founded, that Mr Paisley's decision not to give evidence was an informed one and made freely by him and that the absence of a communications assistant did not render the trial unfair.

[49] We therefore also reject the ground of appeal based on trial counsel error.

[50] In our view none of the grounds of appeal, whether viewed individually or collectively, warrant appellate intervention. The appeal is accordingly dismissed.

Outcome

[51] The application for leave to adduce the report of Dr Justin Barry-Walsh is granted.

[52] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent