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

CA197/2016
[2016] NZCA 552

BETWEEN	KAMAL SINGH Appellant
AND	THE QUEEN Respondent

Hearing:	16 November 2016
Court:	Winkelmann, Duffy and Whata JJ
Counsel:	W C Pyke for Appellant I R Murray for Respondent
Judgment:	25 November 2016 at 10.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] Following a jury trial in the Auckland District Court before Judge Paul, Mr Kamal Singh was convicted of charges of sexual violation by rape and sexual violation by unlawful sexual connection. On 13 April 2016 Judge Paul sentenced Mr Singh to six years' imprisonment.[1] Mr Singh appeals against his conviction on the grounds that trial counsel erred in not seeking to introduce evidence that the

1 *R v Singh* [2016] NZDC 6238 at [21].

complainant had sexual intercourse with her friend E twice in the hours immediately following the alleged rape, and also that she had sexual intercourse with E some months earlier in circumstances said to be similar to the rape.

[2] In his evidence in support of this appeal, Mr Singh says he accepted trial counsel's advice that any application for leave to cross-examine the complainant in respect of these matters should not be pursued. It is now argued that advice was wrong. The Crown has elected not to obtain an affidavit from trial counsel because it says the real issue is whether a miscarriage of justice has occurred because the jury did not hear this evidence, rather than why that was. The Crown's position is simple. It says leave would not have been granted to cross-examine the complainant on these topics because the heightened relevance threshold in s 44 of the Evidence Act 2006 would not have been met. Accordingly, no miscarriage of justice has occurred.

Background facts

[3] On 7 March 2015 the complainant and a friend had drinks prior to a planned trip into town. When that plan changed the complainant drove her friend home. Although she had been drinking she felt able to drive. She refused an offer to stay at her friend's house because she wanted to get home. However, as she approached the Auckland Harbour Bridge she realised she was too drunk to drive. She pulled off under the motorway and stopped near Westhaven Marina so she could sober up before driving home.

[4] The complainant began to feel unwell and vomited out of her car. After that she either passed out or fell asleep. She was woken by a security guard, Mr Singh, knocking on the passenger window. While she was speaking to him she again felt ill and vomited out of the door. Whilst she was vomiting and then afterwards, Mr Singh comforted her — putting his arm around her and rubbing her shoulders and back. He then started touching her in a more sexual way. The complainant said this made her feel uncomfortable. He said he would continue his rounds and come back and check up on her. Worried about his behaviour, the complainant locked the car.

[5] She then climbed into the back seat and texted E, who until very recently had been her boyfriend. She asked him to call her as she wanted him to come and pick her up. Receiving no response she then tried to call both E and the friend whose house she had been at earlier. She was not able to get hold of either of them.

[6] The complainant then fell asleep and again was woken by Mr Singh knocking on the car window. She wound down the window and Mr Singh told her that she had to move her car because she was on private property. He offered her a Panadol and water, an offer which she declined.

[7] Mr Singh then opened the car door and began touching the complainant, rubbing her back, thighs and arms. He indicated that he wanted to take her to his place but she refused. He then put his hands down her leggings and made comments which indicated he wanted to have sex with her. She said no multiple times. He then got into the vehicle and raped her. When he had finished he ejaculated on her leg and on the seat. He then wiped it off with a page of a map book that was in the car.

[8] In response to her attempts to contact him, E rang the complainant. This happened when Mr Singh was still present. The complainant said she told Mr Singh to leave and then spoke to E. E's account of the conversation was that the complainant was hysterically crying. E could not understand what had happened but he managed to get from her where she was.

[9] E travelled to the Marina, which was close to his home. He found the complainant extremely upset and crying. Although he asked her what had happened, she was unable to give him more information other than that she was scared and upset. She was drunk but E thought her communication problems were due to her distressed state. He comforted her for a time and they then went to his parents' boat nearby and slept there for the remainder of the night. They had sexual intercourse soon after they arrived at the boat and then again in the morning when they woke.

[10] Later the next day the complainant went to the police and made a complaint of rape against Mr Singh. It is common ground that, when confronted with the

allegation, Mr Singh initially denied having sexual intercourse with the complainant. Later he admitted it but said that the intercourse was consensual.

[11] Defence counsel applied for leave to cross-examine the complainant in respect of her consensual sexual intercourse with E as relevant to the issue of consent, assuming the Crown would prosecute on the basis that the complainant was too intoxicated to consent. The Crown confirmed it would not (if she could consent to sex with E, why not with the appellant?) and accordingly the application was not proceeded with.

[12] At trial therefore, the Crown case was that the complainant had not consented. Although the Crown did not run the case on the basis that she was too intoxicated to consent, it did rely upon the complainant's circumstances as bolstering her account that she did not consent and that Mr Singh could not have had a reasonable belief she was consenting:

> A drunken woman, back of the car, 3.00 am in the morning, vomiting. The Crown says [no] reasonable person could have believed she was consenting.

[13] The defence at trial was that the complainant had consented to sexual intercourse whilst under the influence of alcohol but then regretted it and that such regret explained her complaint. Defence counsel attacked the complainant's credibility to undermine her account that the intercourse was non-consensual and referred to a text that she had sent earlier in the evening which discussed a plan to "slut it up" on the night out. The defence said this could be interpreted as a desire to have random sex with a stranger. Defence counsel raised her choice of the Westhaven Marina as a place to park and postulated that she might have wanted to hook up with E for the night.

[14] Against that background, Mr Pyke for Mr Singh submits that the evidence relating to the sexual intercourse with E in the hours following was relevant to the defence in the following ways:

(a) A jury might think it unlikely a woman would have consensual sexual intercourse so soon after being raped.

(b) The evidence could have been viewed by the jury as relevant to reasonable belief in consent. If E saw the complainant as drunk and thought she was consenting, such a belief was relevant to the argument the Crown advanced that no reasonable person could have believed she was consenting to sex.

(c) Proximity in time and place between the sexual intercourse with Mr Singh and the intercourse with E is probative in the way that propensity evidence is: a jury may view the evidence as supporting a submission the complainant was keen for sex that night.

(d) The fact that E had sexual intercourse with the complainant so soon after he says he found her in an upset and emotional state may have caused the jury to doubt his account of just how distressed she was.

[15] Finally, Mr Pyke argues that evidence the complainant had sex with E in the back seat of the car several months earlier could be viewed by the jury as making it more likely that she had consensual sexual intercourse with Mr Singh in the back seat of the car.

Relevant principles

[16] As is acknowledged by Mr Pyke, leave would have been required before either topic could have been explored with E or the complainant. Section 44(1) of the Evidence Act provides:

> **44 Evidence of sexual experience of complainants in sexual cases**
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> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

[17] As to the threshold for leave, it is high. Section 44(3) provides:

> (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the

> issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

[18] This threshold is often referred to as the heightened relevance test. The purpose of the provisions in s 44 was described in the majority judgment in *B (SC12/2013) v R* as follows:[2]

> [53] Section 44 largely replicates s 23A of the Evidence Act 1908, New Zealand's original "rape shield" provision enacted in 1977. Rape shield provisions control the extent to which complainants in sexual cases may be questioned about their previous sexual history. Such provisions are intended to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based on erroneous assumptions arising from a complainant's previous sexual history. In *Bull v R*, the majority of the High Court of Australia identified two erroneous lines of reasoning that might arise in this context: because a complainant has a particular sexual reputation, disposition or experience, either (1) he or she is the kind of person who would be more likely to consent to the activity which is the subject of charges or (2) he or she is less worthy of belief than a complainant who does not have those characteristics. Against these concerns, however, must be balanced the defendant's right to a fair trial and the right to present an effective defence in particular.
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> (Footnotes omitted.)

[19] The case advanced for Mr Singh on appeal is that the evidence of the complainant's consensual sex with E on the night was relevant to the issue of Mr Singh's reasonable belief in consent. It was also likely to undermine the credibility of the complainant's account that she did not consent and of E's account as to how distressed the complainant was when he came upon her.

[20] It cannot seriously be argued that the evidence of sexual intercourse with E on the night in question is directly relevant to Mr Singh's belief in the complainant's consent (the purpose described at [14(b)] above). Her subsequent conduct with E does not bear logically on the Crown case that, at the time of the rape, she would have presented to a stranger as drunk and vomiting and that no reasonable person could have believed she was consenting. The sexual intercourse between E and the complainant took place in an entirely different context. E was comforting her. The two were friends, had a pre-existing sexual relationship and were in bed together at the time.

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2 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

[21] Nor can it be seriously argued that the fact the complainant had sex with E that night means that she was "keen for sex" in a propensity reasoning kind of way (the purpose described at [14(c)] above). Having described this as propensity reasoning, Mr Pyke then backed away from characterising this as evidence the complainant had a tendency or disposition to have sex on that night. He sought to rely upon the case of *R v McClintock*, a case decided under the predecessor to s 44 — s 23A of the Evidence Act 1908 — where this Court said:[3]

> … acts of intercourse with other men may be so closely connected with the alleged rape, either in time or place, or by other circumstances, that evidence of those other acts may be probative of the fact that the complainant consented to the intercourse with the accused, or to the fact that the accused believed that the witness was consenting: *Gregory v R* (1983) 151 CLR 566; *R v Viola* [1982] 3 All ER 73. In the language of the New Zealand section there will then be such *direct* relevance to facts in issue that to exclude the evidence would be contrary to the interests of justice. Ultimately whether a case is in this category can only be a question of degree.

[22] The case does not assist Mr Pyke. Mr Pyke cannot point to any basis upon which the fact the complainant had consensual sexual intercourse with her friend E later on that night is directly relevant to whether she consented to sexual intercourse with Mr Singh, a complete stranger, earlier in the evening. As the Crown submits, properly analysed, the argument Mr Singh wished to be able to advance to the jury on the strength of this evidence was that the complainant was the sort of person who would consent to sex with a stranger; because she had sex with E, she was "keen for sex". This proposed use of the evidence falls squarely within the policy behind s 44.

[23] Mr Pyke also says this evidence was important to an argument Mr Singh should have been free to make to the jury: that it is unlikely a person who has been raped will have consensual sex shortly thereafter (the purpose described at [14(a)] above). But Mr Pyke could articulate no logical connection between the act of rape and a complainant's preparedness to have consensual sex thereafter — however shortly thereafter. It would be a submission in substance that victims of rape do not behave this way. There is no proper foundation upon which a submission could be made that a woman, having been raped, would not want to have consensual sexual intercourse thereafter. It is not therefore of direct relevance to the issue of consent.

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3 *R v McClintock* [1986] 2 NZLR 99 (CA) at 104.

[24] Finally, Mr Pyke says that this evidence was relevant to an assessment of E's credibility (the purpose described at [14(d)] above). Defence counsel should have put this evidence before the jury so he could make a submission that the complainant could not have been in a very distressed state if E was prepared to have sex with her. However, we do not see the evidence of what occurred between E and the complainant as relevant in any way to an assessment of the credibility of E's evidence of the complainant's distressed state when he first came upon her that evening. The consensual sexual intercourse between E and the complainant occurred some time later and in the context of E continuing to comfort the complainant. The proposed evidence is therefore not directly relevant to an attack upon the credibility of E's evidence on this point.

[25] We turn then to the second topic in respect of which Mr Singh argues leave should have been sought — the evidence that the complainant had sexual intercourse with E, her then boyfriend, in the back seat of her car some months prior to the incident. Mr Pyke argues that the defence should have been able to make a submission to the jury on the basis that, if she had sexual intercourse in the back seat of the car with her boyfriend, she was more likely to consent to similar sexual intercourse with Mr Singh. The two events bear little relation to each other. The evidence is simply not directly relevant to the issue for the jury as to whether she was consenting on the evening in question. Any connection is so tenuous as to fall far short of the high threshold for leave under s 44.

[26] We therefore conclude that, as the Crown submits, leave would not have been granted to defence counsel to produce evidence that the complainant and E had sexual intercourse both on a boat following the rape and months earlier in the vehicle where the rape occurred. Neither is of such direct relevance to facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it. Accordingly, it follows that no miscarriage of justice has occurred.

Result

[27] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent