NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 81/2012
[2013] NZSC 18

CAMERON JOHN LEEF

v

THE QUEEN

Court: Elias CJ, William Young and Chambers JJ

Counsel: C B Wilkinson-Smith for Applicant
M J Lillico for Crown

Judgment: 14 March 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty of having sexual connections with two girls (C and E) under the age of 16. His subsequent appeal to the Court of Appeal was dismissed[1] and he now seeks leave to appeal to this Court.

[2] It was common ground that the applicant had had sex with both complainants when they were under 16 and in respect of each, the defence[2] was that: (a) he had taken reasonable steps to find out whether she was 16 or over, (b) he believed on reasonable grounds that she was and (c) she consented.

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1 *Leef v R* [2011] NZCA 567.
2 Under s 134A of the Crimes Act 1961.

[3] The application for leave to appeal is addressed to the evidence adduced in relation to C. Her evidence was that she had sex with the applicant on approximately six occasions. On the first occasion, she was taken by surprise, shocked, unable to complain and pinned down. She said that on the other occasions she had neither initiated, nor wanted sex and was not an active participant. But although consent was thus in issue (for the purposes of s 134A), the primary questions for the jury were as to the applicant's state of mind as to C's age. C said that he knew she was under 16 because she had told him. At his interview with the Police, the applicant admitted that this was so – that she had said she was 15 – but at trial claimed that she had said she was 16.

[4] There had been a pre-trial ruling as to the admissibility of an exchange of text messages between C and the applicant in which:

(a) She had said she had not wanted to lose her virginity "but you just took it" and he apologised; but

(b) He separately denied that she had said it was her first sexual experience as she had apparently referred to having sex with other people on other occasions.

The Judge, on the application of counsel for the applicant,[3] excluded the evidence.

[5] At trial:

(a) C gave some rather general evidence as to her state of mind at the time of the events in question which could be taken to suggest that she had not previously had sex with anyone else but more directly was to the effect that she had not previously been pressured over sex.

(b) More significantly, C's mother, despite being told not to do so, gave evidence to the effect that C had been a virgin when she first had sex with the applicant.

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3 *R v Leef* DC Auckland CRI-2010-004-006357, 9 June 2010 at [16]–[17]. .

Defence applications for a mistrial, made after each incident, were dismissed.

[6] Sometime after the mother's evidence the jury asked:

> How many boyfriends did she have before [the applicant]?
>
> Age of boyfriends?
>
> Had she had sex before she met [the applicant]?

The Judge said that the questions were not relevant and that questions about prior sexual experience are prohibited by law. She was not invited by defence counsel to direct on the issue in summing up and did not do so.

[7] The argument in support of the application for leave to appeal does not challenge the way the Judge dealt with the evidence which was given. Rather the complaint is that the applicant was not permitted to advance the proposition that C had told him of her earlier sexual experiences – either generally as part of his defence or at least by way of rebuttal once the evidence referred to in [5] was given. The argument is that s 44 of the Evidence Act 2006 is being applied too restrictively.

[8] Section 44 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.
>
> ...
>
> (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.
>
> ...

[9] The applicant maintains the evidence as to what had passed between the applicant and C as to her prior sexual experience ought to have been admitted. As will be apparent from what we have said, this is something of a change of stance

from that adopted before trial when the admissibility of this evidence was challenged by the applicant. We are, however, prepared to accept that the evidence given by C's mother means that this consideration is not of controlling significance, at least in relation to the possibility of rebutting the evidence of the mother.

[10] According to counsel for the applicant the evidence in question was relevant to:

(a) Whether C consented to sex; and

(b) Whether the applicant believed on reasonable grounds that C was 16.

[11] The evidence as to what had passed between C and the applicant was perhaps faintly relevant to those issues. But any such relevance was at best indirect and thus, does not satisfy the "direct relevance" test mandated by s 44(3) of the 2006 Act. The mother's evidence did not warrant the Judge admitting "rebuttal" evidence which itself was inadmissible. To have allowed such evidence to be given would have only compounded the problem and resulted in a distracting and at best marginally relevant inquiry into (a) whether C was a virgin when she first had sex with the applicant and (b) what had passed between them as to her prior sexual history. We see the proposed appeal as raising no question of public or general importance and there is no appearance of a miscarriage of justice.

[12] The application is accordingly dismissed.

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