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

IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2014
[2014] NZSC 164

BETWEEN	TOESE TU'UAGA Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: C B Wilkinson-Smith for Applicant
S K Barr and K J Cooper for Respondent

Judgment: 20 November 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty of two counts of sexual violation. His appeal against conviction having been dismissed by the Court of Appeal,[1] he now seeks leave to appeal to this Court.

[2] On the Crown case, he had met the complainant at a bar in Auckland in the early hours of the morning. She wished to go to another bar to meet a friend and the applicant offered to drive her there. But instead of driving her to the other bar, he took her to the Auckland Domain where the offending occurred in the applicant's car. Afterwards, the complainant, who had been left at the Domain, sought assistance from the occupants of a passing car who took her to the Central Police Station. The

1 *Tu'uaga v R* [2014] NZCA 304 (White, Keane and MacKenzie JJ).

complainant's general description of the offender matched the applicant but he was not located until a year later when his DNA was matched with semen found when the complainant was medically examined. The evidence was that this semen must have resulted from a sexual encounter within the preceding 48 hours.

[3] When the applicant was arrested he denied abducting and raping the complainant and said that he had had many consensual "hook-ups" with girls from nightclubs. He denied having been at the Auckland Domain and denied ever having sex in his car.

[4] The defence to be advanced at trial was that the applicant had had sex with the complainant at the bar (or nearby) and that the complainant's account of what happened at the Auckland Domain was either (a) a complete fabrication or (b) referable to the actions of an unknown offender who must have picked up the complainant after she had consensual sex with the applicant and had abducted and sexually offended against her at the Domain, albeit without depositing any semen.

[5] The defence was not put squarely to the complainant. It was suggested to her that she had had consensual sex with the applicant within the preceding 48 hours but it was not specifically put to her that this was at or near the first bar. Nor was the other offender theory put explicitly to her. The defence as run at trial was summarised by the Judge in this way:

> The defence say that Mr Tu'usaga can only speak generally, but he can say with clarity that he did not go to the Domain and he did not sexually violate or rape anybody. … The defence submit that what happened was consensual sex or [the complainant] just cannot remember it.

[6] In the Court of Appeal, the appeal was advanced primarily on the basis that the Judge had not put the other offender theory to the jury. This challenge was dismissed on the basis that the other offender theory had not been advanced by defence counsel.[2] The Court also concluded that even if the other offender theory had been advanced, the improbability of, and the lack of an evidential foundation for,

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2 At [19]–[21].

this theory meant that absence of a direction did not give rise to a miscarriage of justice.[3]

[7] The application for leave to appeal from the Court of Appeal decision proceeds on the basis that defence counsel's failure to advance the other offender theory was an error which resulted in a miscarriage of justice. This represents a shift in emphasis at least from the argument advanced in the Court of Appeal, where counsel then acting for the applicant disavowed any reliance on counsel error.

[8] There was no evidential basis for the other offender theory. The most that could properly have been advanced on the basis of the applicant's statement was that the DNA located on the complainant may have resulted from a consensual encounter which did not occur at the Auckland Domain. A proposition to this effect was put to the complainant and she denied it. The correlative of that proposition was that the complainant's narrative of events was untrue. In her closing address, defence counsel addressed this in very general terms, in effect by asserting that the complainant was "not being truthful" – by which she meant lying – or could not remember what had happened. Any more specific defence theory would have (a) been speculative at best and (b) invited a plausibility analysis which would not have assisted the applicant.

[9] It is rare that we will give leave to appeal on grounds not advanced in the Court of Appeal.[4] Moreover, in the particular circumstances of this case, we see no appearance of a miscarriage of justice. Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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3 At [25].
4 See *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].