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 67/2012
[2014] NZSC 165

BETWEEN	ASHLEY DWAYNE GUY Appellant
AND	THE QUEEN Respondent

Hearing:	7 October 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and O'Regan JJ
Counsel:	R M Lithgow QC, A J D Bamford and N Levy for the Appellant A Markham for the Respondent
Judgment:	19 November 2014

JUDGMENT OF THE COURT

The appeal is allowed, the conviction is quashed, and a new trial is ordered.

REASONS

	Para No
Elias CJ and Glazebrook J	[1]
McGrath and William Young JJ	[66]
O'Regan J	[82]

ELIAS CJ AND GLAZEBROOK J
(Delivered by Elias CJ)

[1] After the appellant had been found guilty by a jury of a charge of sexual violation by unlawful sexual connection, it was discovered that, by error, the jury had been provided in the jury room with two documents which had not been introduced in evidence. The fact that the documents were in the jury room was not known to the Judge or to counsel. Both documents, stamped with exhibit numbers,

were in plastic sleeves within an envelope and were included with the exhibits produced at the trial when placed in the jury room by the court taker. When they were discovered, the two documents had been taken out of the envelope but were within the plastic sleeves. It is not known whether they were looked at by members of the jury but it has been common ground that it is necessary to consider the appeal on the basis that the documents were read by the jury.

[2] The first document was a 16-page transcript of an interview conducted by police with the appellant and recorded by video. The appellant's counsel had objected to admission of the video interview as evidence at the trial because the police officer conducting it had continued to put the complainant's allegations to the appellant after he had indicated at the outset that he did not wish to make a statement. Because of the objection, Crown counsel did not seek to produce the video interview or the transcript of it at trial but instead, without objection, led short evidence from the interviewing officer that the appellant had been spoken to but had said he was not in a position to "make an honest clear statement" because he did not remember what had happened. Evidence was however also given without objection of an earlier statement made by the appellant to another police officer and recorded in summary in his notebook by the officer. In that brief statement, the appellant said that he had been asleep on a couch in the television lounge of the backpacker's hostel where the incident occurred and had been woken up by a "smack in the head" from the complainant, who was "going nuts at [him]".

[3] The second document in the jury room by error was the transcript of a statement made to the police by the complainant. Crown counsel had not attempted to put the statement in evidence at the trial. It was inadmissible under s 35(1) of the Evidence Act 2006 as a previous consistent statement unless it was necessary to respond to a challenge to the complainant's veracity or accuracy based on a previous inconsistent statement or claim of recent invention[1] or it would provide the court with information that the complainant was unable to recall.[2] Neither reason was identified at the trial to justify admission of the statement. The transcript of the

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1 Evidence Act 2006, s 35(2).

2 Section 35(3)(b). To be admissible, the statement would also have to meet the reliability requirements set out in s 35(3)(a).

interview with the complainant was approximately 17 pages long. It did not differ in substance from the evidence given by the complainant at trial. In both, she said she had gone to sleep alone on a couch in the television lounge, where others were also present, and had woken to feel "something moving inside", in her vagina. She was not sure what it was and said in evidence that it "could be his fingers or […] his penis". The complainant discovered the appellant lying behind her and said he was "pulling his pants [on]". She got up, slapped the appellant, and shouted at him.

[4] The Court of Appeal dismissed the appellant's appeal against conviction on the basis that there was no miscarriage of justice to justify setting aside the conviction under s 385(1)(c) of the Crimes Act 1961,[3] whether the errors in inclusion of each of the documents were considered separately or together.[4] The Court accepted that the provision of the transcripts to the jury raised a "powerful argument" that the trial had miscarried,[5] but concluded that, in the unusual circumstances of the trial as a whole, there was no risk of a miscarriage of justice.[6] The appellant appeals with leave to this Court.[7]

[5] In disagreement with the view taken in the Court of Appeal and for the reasons given in what follows, we consider that the error in providing the statements to the jury in the circumstances constituted a miscarriage of justice under s 385(1)(c) of the Crimes Act because it undermined the fairness of the trial and its integrity since it provided to the jury significant material which was directly relevant to the issues for trial without notice to the Judge or counsel and without production in the public hearing. Because the material bore on the critical issues in the case, it constituted fundamental breach of the principles of natural justice. That in itself was a miscarriage of justice.

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3 Section 385 of the Crimes Act 1961 was the applicable section at the relevant time. Section 385 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011. The replacement provision is s 232 of the Criminal Procedure Act 2011.

4 *Guy v R* [2012] NZCA 416 at [34] (Arnold, Wild and Miller JJ).

5 At [9].

6 At [34].

7 The appeal was heard on 10 April 2013 before a court comprising Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ. Chambers J died on 21 May 2013 while the matter was reserved and before judgment was delivered. The remaining judges, acting under s 30(1) of the Supreme Court Act 2003, decided that the proceeding should be reheard. The rehearing took place on 7 October 2014.

Background

[6] The appellant and the complainant had become acquainted during the months the complainant, who was visiting New Zealand on a working holiday, had been living at the backpacker's hostel in Nelson. The appellant, a New Zealander, had been living there also, on and off.

[7] The long-stay group at the hostel had held a "pimps and prostitutes" Valentine's Day party at the hostel on the night of the incident which led to the charges. In keeping with the theme, most at the party were clad in underwear and skimpy clothing (as was confirmed by photographs taken of the party which were produced in evidence). Most, including the complainant and the appellant, had been drinking. The complainant said that she had drunk a bottle of wine and two beers.

[8] Two witnesses who had been at the party gave evidence. Witness N described seeing the appellant and the complainant dancing together and said that the appellant touched the complainant intimately and simulated sexual activity (as others were doing, in keeping with the theme of the party) without apparent objection by her. (His evidence on this point was denied by the complainant.)

[9] At about 4 am, the complainant went to sleep on a couch in the television lounge of the hostel, with others present. She often slept in the television lounge, preferring it to the dormitory room in which she was staying.

[10] In his first statement to the police, the appellant said that he had put a flag over the complainant as a covering and had curled up beside her on the couch. He said he had gone to sleep and had woken, shortly afterwards, when hit by the complainant who was very upset, shouting at him.

[11] Witness L, who was in the television lounge at the time, described seeing the complainant asleep on the couch and said that the appellant had come in and sat next to her. She saw that the complainant's legs were touching the appellant (the witness variously described the appellant as sitting between the complainant's legs or the complainant's legs as being over the appellant's legs). The witness described the appellant as having been awake, but stated that she did not see his hands and could

not tell if he was doing anything with them. She then said that the complainant jumped up and accused the appellant of trying to rape her and that the appellant had responded that "he didn't do anything" and had said something to the effect that he had not done anything the complainant had not wanted.

[12] Witness N, who was also in the television lounge at the time, described seeing the appellant "crouching" at the foot of the couch while the complainant was sleeping. The witness said that when the appellant was crouched over the complainant he was making "rubbing […] movements" with his arm on the complainant's legs. The witness said he had dropped off to sleep and that when he woke he saw that the appellant was still crouched over the complainant. The witness said that "at some point I saw his hand […] making movements, like coming and going in her crutch area". The witness said that he "could see that at least one finger was inside of her". The complainant then woke up and started screaming, "[y]ou're raping me". Witness N acknowledged in cross-examination that in the statement he made to the police he had not mentioned the hand movements between the complainant's legs and had said that a blanket was covering the complainant's legs.

[13] The two witnesses who gave evidence described the complainant as being "very upset" and "crying and screaming" when she woke. The state the complainant was in was also confirmed by CCTV footage when she went through to the reception room of the hostel. The police were called immediately.

[14] In his initial interview with the police, at around 5.40 am, approximately an hour after the alleged assault, the appellant claimed to have been asleep when he had been woken by the complainant's accusation. In the police officer's notes of the interview, which were signed as correct by the appellant and evidence of which was given by the officer at trial, the appellant described how he had covered the complainant with a flag he had retrieved for the purpose from his van and had himself "[c]urled up on the couch together" with the complainant and gone to sleep. What the appellant then described as having happened is recorded in the notes taken by the officer as:

> Woke up half-asleep when got smack in head. Foreign chick going nuts at me. […] Wearing real short skirt. Good night out having fun. Woke up to a smack in the head. I was asleep. It's not just tonight. Been hanging out together. […] Thought her and I were friends.

[15] The transcript of the statement from the complainant which was wrongly included with the exhibits was taken from an evidentiary video conducted with her in the Nelson police station between 10.27 am and 11.56 am that morning, with two or three pauses for breaks. The transcript records that the complainant was "tearful" and "crying" at a number of points during the interview and needed to take time to compose herself. The transcript is generally consistent with the evidence later given by the complainant at the trial.

[16] After the interview with the complainant, the police officer who had conducted it, Detective Heathcote, conducted a video interview with the appellant. Neither the video nor a transcript of it was put in evidence. The transcript was that wrongly included in the materials given to the jury. The interview with the appellant began at 2.15 pm and concluded at 2.46 pm.

[17] The appellant had seen a lawyer before the interview and confirmed that he knew he was entitled to speak to a lawyer at any stage and was not obliged to make a statement. Detective Heathcote then explained that the interview was "an opportunity for you to give your … account of what happened":

> The Police are already in possession now of … an account from the girl that's made a complaint and also other witnesses and this is your opportunity to give your side of the … story, for want of a better word.

[18] In response to the invitation to "tell me everything that occurred last night", the appellant said:

> I'm not in a situation where I can make a clear statement so I don't want to make any comment regarding it[.]

When asked to explain what he meant, the appellant said that the reason he couldn't make "an honest clear statement" was "[c]os I don't remember […] I've spent how many hours sitting in a cell trying to work out what's happened and I'm no closer to an answer". The officer then tried to prompt the appellant by asking if he remembered the party and inviting him to "just tell me everything that you can

remember". This elicited the repeated response of "I don't wanna make a statement", with the further explanation, "I might as well just read you a fairy tale and what, what's the point of me trying to recollect stuff I don't remember, piecing together bits that I do remember". The appellant went on to say:

> … we all got really drunk um … we were all getting out of shape you know
>
> […]
>
> … there you have it
>
> […]
>
> You know I don't … I don't think anything I say I … I can't say it with certainty
>
> […]
>
> I mean from what you've just told me about this morning's events since you picked me up, I don't re-recollect all of that properly either so … how, how am I supposed to recollect stuff when I was in a far more intoxicated state than I was at whatever, 10 past 7 you said this morning

[19] The officer then asked the appellant about his friendship with the complainant. He described having got to know her when he first stayed at the hostel a few months earlier but said that "I don't actually know her that well to be perfectly honest. […] I thought her and I were friends". When asked "how good friends" they were, the appellant said "I dunno … dunno I don't wanna make a comment about anything eh".

[20] Despite the indication that the appellant did not want to make a further statement, the Detective then put to the appellant allegations made by the complainant and two of the witnesses:

> HEATHCOTE: Alright, okay, what I'm gonna do is … I'm [going to] put to you the allegation um … that we're now ah in receipt of and if you wish to make a comment then ah … you're more than welcome to
>
> Okay [the complainant] went to sleep on a couch in TV room at [the hostel] in the early hours of this morning and she awoke to find something penetrating her vagina and you laid behind her on the couch. Explain that to me?
>
> GUY: I can't … explain something I don't recollect

HEATHCOTE: [The complainant] was asleep at the time and therefore could not give any consent that allowed you the right to touch her … ah … you, you inserted either your penis or fingers into her vagina, explain that to me?

GUY: No, same as before you're asking me to explain something I don't recollect, you might as well ask me how … to explain splitting an atom … atom, I don't know

HEATHCOTE: Okay … I just need to clarify in my… my own mind ah where you're coming from there, when you say you, you don't recollect, are you saying, are you telling me that ah you don't recollect because of the condition you're in?

GUY: Presumably, I'm …

HEATHCOTE: I dunno is … is that what you're telling me, you, you don't recollect because you were so intoxicated as you described before, is that what you're telling me?

GUY: Em

HEATHCOTE: Okay ah … [witness L] [who was] also present in the TV room has given a statement to Police in which she states she heard [the complainant] screaming and saying that you had raped her and you yelling back something like um … um … "I didn't do anything that you can describe as rape". Explain that to me?

GUY: (Shrugs) I know I don't remember making the comment

HEATHCOTE: Ah … now [witness N] has also given a statement to Police saying that um … ["][the complainant] was asleep on the couch and about 20 minutes before she screamed [the appellant] put a blanket over her and squeezed on the couch beside her. She was totally passed out and they were in the foetal position. He looked like he wanted to get it on with her, she then woke up screaming[".] [A]gain can you explain that to me?

GUY: No

HEATHCOTE: Okay … okay … ah … as I said at the start ah … the allegation against you is a serious allegation of sexual assault um … it's alleged that you've ah either inserted your penis or your fingers into the vagina of [the complainant.]

GUY: (Nodding)

HEATHCOTE: … ah while she's asleep without her consent and the witnesses in the room at the time have either seen or ah … heard the reaction to [the complainant] waking up. Is there anything you wanna tell me about this incident at all that you can remember?

GUY: My … my first recollection point is getting hit

HEATHCOTE: Okay

GUY: … so as I said I don't know how I'm supposed to recollect something that

HEATHCOTE: Yeah

GUY: … I simply don't have a memory of

HEATHCOTE: Okay well would you like to tell me from your recollection of getting hit what transpired, what happened after that and where you were hit, how you were hit?

GUY: Oh more of a … I woke up to being hit um and … and my reaction was to get up and leave and some woman's fucken hitting me and yelling at me about stuff and which I'm not sure where it came from.

HEATHCOTE: Okay well I've put the allegation to yah, this is an opportunity for you to give your side of the story alright… um…

GUY: I appreciate that but as I said I don't … I don't …

HEATHCOTE: Yeah

GUY: … I've had hours sitting down in a cell trying to recollect what happen, the course of events during the night and I'm no clearer, in fact I'm probably less clear now than I was because all I've had to do is being able to run every scenario I could think of in … in my head

HEATHCOTE: Yeah

GUY: … to try and work out how this has occurred

HEATHCOTE: Yeah

GUY: … alright, as I said before, I … I thought her and I were friends, I … I don't think I'm the kind of person that would do that to an enemy, let alone a friend, I also would've thought that [the complainant's] not the kind of person who would make these allegations if there wasn't something there so I've had all that running through my head downstairs and I'm no closer to understanding what's happened

HEATHCOTE: Yeah

GUY: … so I can't, I don't know what I'm supposed to say

HEATHCOTE: Okay

GUY: … you know …

HEATHCOTE:	… ah is it possible that this could have occurred and you just can't remember it?
GUY:	Anything's possible isn't it … um …
HEATHCOTE:	Anything's possible but …
GUY:	… you know I mean people get up in the middle of the night and go for drives that they don't remember about, I mean anything's possible
HEATHCOTE:	Alright … okay … um …
GUY:	I know I used to get up in the middle of the night [and] smoke cigarettes, I only know because they're in the ashtray beside my bed so …
HEATHCOTE:	Yeah
GUY:	… you know I've … I've been told I had a really good New Years Eve … um … I remember getting on the bus going to town and that's about the … the recollection of my entire New Years Eve so … it has occurred where I've been on the booze and don't remember parts or all of my night
HEATHCOTE:	But tell me about going out ah to your van to bring the flag in?
GUY:	It was to cover [the complainant], cos she often sleeps in the TV room and is exposed so …
HEATHCOTE:	What happened to that flag?
GUY:	I don't know, she got up and started hitting me, it's what I woke up to and there's… there's a woman going irate at me over something, I don't know where it came from so I left, I … I didn't want to stand there and continue to be abused over something I … you know, don't … don't, you know … I'm quite confused as to how the situation got to what she's alleging

[21] Following this, the Detective asked for a sample of DNA, pointing out that the appellant had 48 hours from the request to give a sample voluntarily. The discussion recorded in the transcript relating to the request included the provision to the appellant during the interview of a notice of request to supply a bodily sample. The discussion carries on for some pages and includes references to the appellant's reluctance to consent to a sample on the basis that he was "still quite um foggy and confused about what's going on so I don't wanna consent to anything […] at this stage".

The trial

[22] The issues for the jury at trial were whether there had been penetration of the complainant's genitalia by the appellant's finger; whether the complainant had consented to any such sexual connection; and, if she had not consented, whether the appellant had believed on reasonable grounds that she had.

[23] The appellant did not give evidence at the trial. He relied on evidence of the behaviour at the party and his denials of assault, both at the time and in his statement to the police when first interviewed shortly after the incident.[8] The evidence of the events in the lounge was given by the complainant and the two witnesses, who had been lying or sitting on another couch in the television lounge.

[24] The Crown case, as summarised by the Judge in the notes he provided to the jury before they retired to consider their verdict was:

> As far as penetration is concerned, [the complainant] felt something inside her vagina from behind. Given the body positions and the observations of others, the Crown say it was the accused's finger or fingers.
>
> [The complainant] was asleep and in no position to consent.
>
> The accused must have known she was asleep so he could not have believed, on reasonable grounds, she consented.

[25] The defence case, as summarised in the same document by the Judge was:

> [The complainant] and the accused knew each other fairly well and were on friendly terms.
>
> During the Valentine's Day party both of them, along with others, were dressed and behaved in a sexually provocative way.
>
> When they were together at the end of the evening on the couch in the lounge she consented to whatever sexual touching occurred. The evidence of actual penetration is unsatisfactory, as is the evidence she was actually asleep. She may have participated willingly and only reacted in the way she did to make it look like the accused's sexual advances were unwanted to save face with others.

[26] Although there was potentially important corroboration of the complainant's evidence in the evidence of the two witnesses (if accepted by the jury), the evidence

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[8] See above at [14].

indicated that neither had the complainant under observation continuously and both were affected by alcohol.[9] Witness N, who gave the account of seeing penetration, had not mentioned it in his statement to the police. He had been asleep on and off while the complainant and the appellant were on the couch together. There were differences between the witnesses in their accounts. And witness N's account was inconsistent with his earlier statement not only in respect of the observation of penetration but also in relation to where the appellant was on the couch (in his interview he had described the appellant as lying on the couch whereas in his evidence he had described him as "crouching" by it) and whether the complainant's legs were covered by a blanket. The witness was cross-examined on these discrepancies.

[27] Although the jury was entitled to accept the evidence of the two witnesses, the differences between them, the shifts in the account of witness N, and the general background meant that what the jury made of the evidence of the complainant was critical. So too was any impression obtained of the appellant from the evidence.

The decision of the Court of Appeal

[28] In its reasons, the Court of Appeal considered that the complainant's previous consistent statement could have been admitted under the exception in subs (2) of s 35 of the Evidence Act (to counter a claim of recent invention, on the basis explained in *Hart v R*[10]) because it had been put to the complainant in defence cross-examination that, because she was in another relationship, she had lied in denying that she had consented to the sexual contact alleged.[11] The Court of Appeal expressed the opinion that the admission of the statement was necessary to respond to that challenge to the complainant's veracity put in cross-examination.[12]

[29] We doubt that this view is correct. Whether the proof of a previous consistent statement is "necessary", in terms of s 35(2) of the Evidence Act, to respond to a claim of recent invention requires consideration of its logical connection to the claim of recent invention, assessed in context. The complaint of sexual violation was made

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[9] It was also suggested in evidence that witness N may also have been affected by cannabis.
[10] *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.
[11] *Guy v R* [2012] NZCA 416 at [13]–[15].
[12] At [15].

immediately by the complainant, and the police were called straight away. Her *subsequent* confirmation of the complaint in the statement she made to the police adds nothing which "tend[s] to rebut" any suggestion of recent invention in that immediate complaint.[13] It is not probative for the purposes of rebuttal, even if the attack on the immediate complaint and the complainant's motive is properly characterised as one of "recent invention" (a point on which there may be room for doubt).

[30] More importantly, we do not think the admissibility of the statement can be relevant to the question of miscarriage in issue here: the inadvertent (and unknown) provision of the previous consistent statement.

[31] It is not clear what effect the Court of Appeal thought its view that the statement was admissible had on the serious error in process in providing the statement to the jury. We do not think it right to infer, from the speculation that the statement could have been admitted, a view by the Court of Appeal that admissibility as a matter of law could itself cure the error that occurred here. It seems highly unlikely that the Court of Appeal meant to suggest that, if the statement were legally admissible, such admissibility would cure the error in its having been left in the jury room without notice to counsel or the Judge and without the Judge having been asked to rule on admissibility. Indeed, if the statement had been admitted in evidence, it would have been with a direction as to the purpose for which it was relevant and admitted and a warning that it did not provide independent corroboration of the complainant's account.

[32] The reasons given by the Court of Appeal for holding that there was no miscarriage of justice seem to us to be the same in relation to both statements: that each was insufficiently material in the context of the trial to be capable of affecting the verdict. In relation to the appellant's interview, it was said by the Court of Appeal that it did not create the impression that the appellant was being evasive.[14] In concluding that the complainant's previous statement did not add materially to the evidence, the Court of Appeal referred to the complainant's immediate reaction to

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13 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [51].

14 At [32].

the incident and her distress, her prompt complaint to the police, and her consistency:[15]

> … the jury would not have been surprised that the complainant told the police what had happened in similar terms to those she had expressed contemporaneously. The existence of the transcript simply confirmed what the jury would have assumed in any event.

Denial of fair trial

[33] Most flaws in trials do not amount to miscarriages of justice justifying the quashing of a conviction. Many errors can be put right within the context of the trial. And uncorrected errors in themselves will not generally amount to a miscarriage of justice unless, collectively or singly, they are capable of affecting the verdict.[16] Even then, a trial will not be quashed if the appellate court is satisfied, in terms of the proviso to s 385 of the Crimes Act, that "no substantial miscarriage of justice has actually occurred", a conclusion that requires the appellate court itself to feel sure of the guilt of the accused.[17] The assessments of miscarriage and application of the proviso are undertaken by the appellate court in the context of all the evidence and conduct of the trial. That point is not, however, reached if the errors are such that the trial itself is properly characterised as unfair.

[34] In *R v Matenga*, this Court made it clear that before applying the proviso the Court would have to be "satisfied that the trial was fair and thus that there was no breach of the right guaranteed to the accused by s 25(a) of the [New Zealand Bill of Rights Act 1990]".[18] Where a trial is properly characterised as unfair, there is no question but that there has been a miscarriage of justice and no question of application of the proviso. This approach is consistent with that taken in Australia.[19]

[35] Thus in *Wilde v The Queen*, the High Court of Australia accepted that the equivalent Australian proviso was not intended to provide "in effect, a retrial before

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15 *Guy v R* [2012] NZCA 416 at [18].
16 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31].
17 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31].
18 At [31]. See also *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [34] per Lord Carswell for the majority; and *Randall v The Queen* [2002] UKPC 13, [2002] 1 WLR 2237 at [28].
19 *Wilde v The Queen* (1988) 164 CLR 365; and *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300.

the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all":[20]

> It is one thing to apply the proviso to prevent the administration of the criminal law from being "plunged into outworn technicality" …; it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso … .

[36] The threshold on which it may be concluded that a trial is unfair is set at a high level; the operation of the proviso is "not to be stultified".[21] But, in considering whether a trial is indeed fair, the inquiry is on the right to fair trial itself, not the proviso question whether the appellate court is satisfied of the guilt of the accused on the basis of the evidence.[22]

[37] The right to fair trial is for the benefit of the public as well as for the benefit of the accused who is presumed to be innocent until found guilty by fair trial. Lord Rodger and Sir Andrew Leggatt explained why that is so in *R v Howse*:[23]

> [44] The right exists for the benefit of all those who are charged with a crime – for those who actually committed it just as much for those who did not. No one is to be convicted and punished unless his guilt has first been established in a fair trial according to law. The safeguards which the law provides in such a trial are designed to ensure, so far as possible, that the guilty are convicted and the innocent acquitted. The particular safeguards that apply in New Zealand are to be found in a mixture of common law and statutory rules. When trials are conducted according to those rules, people respect the verdicts because they have been reached in conditions which the law regards as fair. Observance of the rules therefore serves the wider public interests as well as the interests of the accused.

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20 *Wilde v The Queen* (1988) 164 CLR 365 at 372–373.

21 *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [37] per Lord Carswell for the majority.

22 At [56] per Lord Rodger and Sir Andrew Leggatt, who dissented as to the assessment of gravity of the errors but did not differ from the majority approach on the question of principle: see the reasons of the majority at [35]–[36], approving the approach taken by the High Court of Australia in *Wilde v The Queen* (1988) 164 CLR 365. See also *Quartermaine v The Queen* (1980) 143 CLR 595 at 600–601 per Gibbs J with whom Stephen and Murphy JJ agreed.

23 *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433.

[38] Whether errors are so radical or fundamental as to undermine the integrity of the trial, so that the accused has been denied a fair trial, is a question of degree.[24] There is:[25]

> … a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe.

[39] In deciding whether defects are "so gross, or so persistent, or so prejudicial, or so irremediable" as to amount to denial of fair trial, the critical question is not the strength of the prosecution evidence or the weakness of the defence, but the effect of the defect on trial fairness. In that assessment, important background to what constitutes a fair trial is the statement of the "minimum standards of criminal procedure" recognised in s 25 of the New Zealand Bill of Rights Act and the "right to justice" contained in s 27 of that Act.

[40] Minimum standards of criminal procedure include "the right to a fair and public hearing by an independent and impartial court",[26] "the right to be presumed innocent until proved guilty according to law",[27] and "the right to examine the witnesses for the prosecution".[28] The "right to justice" recognised by s 27 is a right "to the observance of the principles of natural justice by any tribunal … which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law".[29] These rights affirm principles recognised as fundamental to the common law before enactment of the New Zealand Bill of Rights Act. All were implicated in the error by which the two statements were given to the jury without the knowledge of counsel or the Judge.

[41] The provision of the two interview transcript documents with the exhibits provided to the jury for the purpose of its deliberations was a serious error in trial

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24 *Driscoll v The Queen* (1977) 137 CLR 517 at 527 per Barwick CJ; and see *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [33] per Lord Carswell for the majority; and at [49] per Lord Rodger and Sir Andrew Leggatt; and *Randall v The Queen* [2002] UKPC 13, [2002] 1 WLR 2237 at [28] per Lord Bingham.

25 *Randall v The Queen* [2002] UKPC 13, [2002] 1 WLR 2237 at [28] per Lord Bingham.

26 New Zealand Bill of Rights Act 1990, s 25(a).

27 Section 25(c).

28 Section 25(f).

29 Section 27(1).

process. It is an essential principle of criminal justice that a criminal charge must be established only on evidence produced at trial,[30] as is implicit in the presumption of innocence affirmed by s 25(c) of the New Zealand Bill of Rights Act. For that reason, the judge is obliged in criminal trials to impress upon the jury that it must consider only the evidence before the court and nothing else. It has been said by the Supreme Court of the United States that the requirement to consider the guilt of the accused only on the evidence "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury".[31]

[42] In New Zealand, too, the right to trial by jury for serious criminal offences is recognised as a human right and fundamental freedom by s 24(e) of the New Zealand Bill of Rights Act. Breach of the principle that jury decisions are based only on evidence adduced in court, unless the breach is immaterial in the context of the trial, undermines the right to a fair and public hearing affirmed as a human right and fundamental freedom in s 25(a) of the New Zealand Bill of Rights Act.

[43] The inclusion of the two statements in the material available to the jury without the knowledge of the accused, counsel, or the Judge breached fundamental principles of natural justice and was inconsistent with the requirement that the jury must consider only the evidence adduced at trial. It deprived the appellant of the ability to be heard by the Judge in relation to questions of exclusion and excision and in relation to any directions to be given to the jury. It also deprived the appellant of the opportunity to have his counsel address the jury in relation to any view adverse to the appellant able to be taken from the unauthorised material. And it precluded reconsideration of the conduct of the defence in the light of the information provided.

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30 See John Henry Wigmore *Evidence in Trials at Common Law* (Chadbourn revision) (Little, Brown and Company, Boston, 1981) vol 9 at 530.

31 *Turner v State of Louisiana* 379 US 466 (1965) at 472.

[44] As was recently said by the Court of Appeal of England and Wales of breach of natural justice principles in *R v Karakaya*, "[i]t is easy, but superficial, to dismiss these rules as purely technical or procedural":[32]

> In truth, they reflect something much more fundamental. If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision-making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge and, in an appropriate case, [the appellate court]. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reaching its verdict. Such an opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally, however, we need to remind ourselves of them.

In that case it was held that a trial was unfair where "information, potentially relevant to the outcome of the case" had been made available to the jury without being publicly adduced at trial and without the knowledge of the judge and counsel.[33]

[45] Where evidence is wrongly admitted by the judge at trial, an appellate court has the confidence of assessing the materiality of the error in the context of a process that has not miscarried except in the admission of the evidence. Where additional information is received by the jury without the knowledge of judge or counsel, assessing whether the error was capable of affecting the verdict entails the sort of speculation the rules of natural justice, affirmed by s 27 of the New Zealand Bill of Rights Act, are designed to preclude for reasons explained by Megarry J in *John v Rees*.[34]

[46] There may be cases where the provision of extraneous material to the jury is immaterial. That is not the case here. The statements wrongly provided to the jury were those of the two people who were central to the issues at trial and bore on the critical issues: what had occurred between the complainant and the appellant; whether it was consensual; and whether the appellant believed on reasonable

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32 *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 3 at [24]–[25]. See also *R v Thompson* [2010] EWCA Crim 1623, [2011] 2 All ER 83.

33 At [27].

34 *John v Rees* [1970] Ch 345 (Ch) at 402.

grounds that the complainant consented to the sexual contact of which she complained.

[47] The admissibility of both statements was contestable. First, the complainant's previous consistent statement was presumptively inadmissible under s 35(1) of the Evidence Act and the Crown did not seek to put it in evidence. It is controversial, for the reasons touched on in [29], to suggest the rationalisation now offered (that the statement could have been admitted because it was necessary to respond to a claim of recent invention). Second, in relation to the appellant's interview transcript, defence counsel had already indicated an intention to object to the interview being admitted if it should be offered by the prosecutor (as, following his objection, it was not).[35] It was well arguable that the appellant's statement was inadmissible because the interview should have been discontinued as soon as the appellant indicated he did not want to make a statement. Even if the challenge to the admissibility of the whole of the statement had failed, the opportunity to seek exclusion of parts of the interview on the basis that they were inadmissible or unfair was lost to the appellant.

[48] The fact that the unauthorised provision of the statements was not known also deprived the appellant of the opportunity to be heard on the appropriate directions to be given to the jury. Again, this is not a theoretical concern only. If the complainant's previous consistent statement had been admitted at trial, it would have been necessary for the Judge to direct the jury as to the use to which it could properly be put. In particular, the Judge would have been obliged to direct the jury that the statement was not additional evidence independent of the complainant and corroborative of the evidence she had given at trial but simply evidence which might assist it in determining a challenge to her veracity based on recent invention. We do not accept the rationalisation after the event that the Judge's similar direction in relation to the complainant's assertions when she confronted the appellant (that the jury should remember they were not independent of the complainant's evidence) can be treated as adequate to counter any illegitimate use of the previous consistent statement. It is, we think, entirely unsafe to speculate that the jury would have brought the direction to mind in connection with the statement included with the

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[35] *Guy v R* [2012] NZCA 416 at [23].

exhibits, because the direction was made in respect of different statements altogether. Because the error in provision of the previous consistent statement was unknown, neither the Judge nor counsel had opportunity to consider the adequacy of the direction actually given and counsel was deprived of the opportunity to be heard on the point.

[49] Similarly, if the transcript of the interview with the appellant had been adduced in evidence, notwithstanding his objection, counsel for the appellant may well have sought a direction from the Judge as to the need for caution in concluding from any impression adverse to the appellant taken from the transcript that the appellant was guilty of the charge. The course of events meant that he was deprived of an opportunity to be heard on this matter. Again, this is not fanciful. In our view there would have been a legitimate concern at the possible effect on the jury of the 16 pages of the interview transcript (if admitted) as against the brief summary of the interview actually given in evidence.

[50] In the same way, the lack of knowledge of the provision of both statements deprived defence counsel of the opportunity to address the jury to counter any adverse inference that might be available from the unauthorised material. In the case of the transcript of the interview with the appellant, this may well have included comment upon the questioning which led the appellant to acknowledge that "anything's possible", given that he claimed no recollection of what happened. Conceivably, it may also have affected the conduct of the trial by defence counsel on such matters as whether to call the appellant, whether to seek to have the video of the appellant's statement put in evidence rather than the transcript, and the course of cross-examination.

[51] We consider that the error in proper process was radical enough to deprive the appellant of a fair trial. A narrow inquiry as to whether, in substance, the jury obtained through the two statements any information adverse to the defence which was not already in evidence at the trial[36] is inadequate to reflect the law's long experience that observance of the rules of procedure and natural justice which were

[36] In any event, we consider that there was added material, particularly in relation to the appellant's statement.

breached in the present case are essential to fair trial and just outcomes. It is also inconsistent with the approach taken in the cases cited at [34] to [38] above.

[52] In *Ridge v Baldwin*, Lord Morris said of the principles of natural justice: "here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case".[37] In addition to the denial of a fundamental human right to the accused, the breach deprives the community of the assurance that the verdict has been reached on a basis that is fair. Such breach is not a "technicality" requiring further assessment of whether the irregularity or error in the circumstances of the trial constituted a miscarriage of justice. It is itself a miscarriage of justice. Because the error is fundamental to the system, there is no scope for application of the proviso to s 385 because there has been an unfair trial.[38]

Materiality of the statements

[53] If, as we think, the error in trial process was such that the appellant was deprived of a fair trial, it is strictly speaking unnecessary to consider further whether the additional material provided to the jury was information capable of affecting the verdict. But, in addition, the inherent unfairness in the process in this case resulted in an unsafe verdict because the material provided was capable of affecting the verdict and its provision to the jury was itself a miscarriage of justice.[39]

The complainant's prior consistent statement

[54] The presumptive inadmissibility under the Evidence Act of a prior consistent statement is based on two policies.[40] The first is to avoid prolonging trials with evidence that is repetitive. The second, more substantive, reason is to avoid the impression that repetition bolsters the credibility of evidence. It is the second reason

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[37] *Ridge v Baldwin* [1964] AC 40 (HL) at 114.

[38] *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31].

[39] At [31]. See also *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [150], where the Privy Council expressed the view that this formulation of the test for miscarriage now aligns New Zealand and English law (contrary to the divergence noted in *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71) on the basis that the formulation in *Matenga* is no different from that expressed in the English cases: whether the absence of the error "might reasonably have led to an acquittal". The Australian position is broadly the same: *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300 at [41].

[40] These policies were considered in *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [9] per Elias CJ; and in *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [46] per Blanchard, Tipping, McGrath and Wilson JJ.

that makes it necessary for a judge to warn the jury that the evidence goes to rebut the attack on the credibility of the witness and does not provide independent support for the substance of the evidence given where, exceptionally, evidence of a previous consistent statement is admitted to counter an attack on veracity based on recent invention.

[55] McGrath and William Young JJ acknowledge the "apparent cogency" of the appellant's argument that the provision of the statement was capable of affecting the verdict because it may have been treated by the jury as adding to the complainant's credibility (as is, we think, implicit in the policy of exclusion in s 35(1) of the Evidence Act). They nevertheless find that the provision of the statement was not material for two reasons.[41] First, it is said that given the complainant's behaviour immediately afterwards and the absence of any suggestion in cross-examination that she had been inconsistent, it would have been "perfectly obvious to the jury" that what the complainant said in her statement would have been consistent with "both her initial reaction and what she said in evidence". Secondly, it is said that the jury had been "sufficiently put … on notice" that any statement made by the complainant was not evidence independent of her by the direction the Judge had given the jury that her immediate claim of rape on waking was not itself evidence "truly independent of her" and that its truth should be considered in the light of "all the surrounding circumstances, what she said, what she did, the context, his reaction, the reaction of others".

[56] The first reason cannot in our view be sound. The consistency of the complainant's evidence is the very reason for the rule, based (like most rules of evidence and procedure) on the commonly recurring experience that consistency in a previous statement may be treated as substantiation of credibility in the evidence given. For that reason, the provision of a previous consistent statement (especially of a complainant in a case of this nature) is generally excluded and, if admitted, must be accompanied by directions that it does not bolster the credibility of the complainant in the evidence given.

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41 See below at [76].

[57] The second reason given to suggest that the error was not material is that any material prejudice was sufficiently met by the warning given by the Judge (in relation to the claims of rape made by the complainant at the time) that the complainant's statements were not independent of her evidence. We have already indicated in [48] that we cannot accept that a direction dealing with a very different statement was adequate to deal with the real risk (legislatively recognised in s 35(1)) of impermissible reliance on the very different statement erroneously included with the exhibits.

[58] The evidence of the complainant at trial was critical to the case against the appellant. The potential risk which lies behind the rule of exclusion in s 35(1) was not overcome by explicit directions to the jury (as would have been required if the evidence had been ruled admissible and admitted). In those circumstances, we consider that the provision of the complainant's previous consistent statement with the exhibits was an error that must be treated in the statutory context and in the context of the particular case as one capable of affecting the verdict. We would accordingly hold that it gave rise to a miscarriage of justice.

The transcript of the appellant's interview

[59] We consider there was a real risk that the lengthy transcript of the interview with the appellant could have given the jury the impression that he was evasive or prevaricating. No direction by the Judge countered the risk of unfair adverse inference, because the Judge had no knowledge that the transcript would be provided to the jury. Nor was it countered by evidence or submission from the defence. Given the importance in the context of the trial of the impression the jury had of the appellant from the evidence, any such impression adverse to the appellant was capable of affecting the verdict.

[60] Nor do we think it can safely be assumed that the jury would not have obtained some additional information adverse to the appellant, as opposed to an impression of him that was adverse, not available in evidence. The acknowledgement by the appellant that something might have happened that he could not remember (illustrated as it was by him by reference to previous occasions

when he had no recollection of events) was an acknowledgement not otherwise before the jury. It could potentially have been taken as an acknowledgment by the appellant that the actual sexual assault had occurred, especially coupled with the statement just before that the complainant was not the sort of person to make things up. Unaddressed by the Judge, counsel, or the appellant himself, we do not think it can be confidently said that such acknowledgement was incapable of affecting the verdict. It was capable of undermining the immediate reaction the appellant relied on, that he had done nothing to warrant the complainant's reaction.

[61] The provision of the transcript to the jury was in our view a miscarriage of justice. It was a significant error in trial process and in the context of the issues in the particular trial which was capable of affecting the verdict.

Conclusion on materiality

[62] In this Court, McGrath and William Young JJ would dismiss the appeal because they "can see no rational basis for thinking that the approach of the jury would have been any different had the transcripts not been made available to them".[42] Although the language is not used, in application of the approach in *Matenga*, this means that the provision of the transcripts is regarded as an inconsequential or immaterial error or irregularity, not capable of affecting the verdict. In addition, although accepting that the reception of material not adduced in evidence may often be unfair, the minority takes the view that there is no such unfairness here because "the material in question added nothing to what the jury already knew and thus had no relevant prejudicial potential".[43]

[63] We are unable to agree with the view that the inclusion of additional material which bore directly on the essential issues at trial could be characterised as an error which was immaterial or incapable of affecting the verdict. Nor can we agree with the suggestion that it can be safely inferred that the material had "no relevant prejudicial potential" because it "added nothing to what the jury already knew".[44]

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42 See below at [79].
43 See below at [80].
44 See below at [80].

Conclusion

[64] The errors here were indeed radical enough to leave us with the view that the appellant was deprived of a proper trial. This was a case where what went wrong with the procedure was fundamental, breaching natural justice and undermining the fairness of the trial. Where the integrity of the trial has been compromised by departure from the essential requirements of the elements of fair trial, so that the accused has been denied the right to a fair and public trial, there is no room for the application of the proviso to s 385(1).[45] The errors mean that the conviction is unsafe.

[65] In accordance with the views of the majority, the appeal is allowed, the conviction is quashed, and a new trial is ordered.

McGRATH AND WILLIAM YOUNG JJ
(Delivered by William Young J)

Introduction

[66] Mr Lithgow QC, for the appellant, maintained that the appeal should be allowed on two overlapping grounds:

(a) the irregularity which occurred when the jury was provided with the transcripts resulted in a substantial miscarriage of justice for the purposes of s 385(1) of the Crimes Act 1961; and

(b) the same irregularity meant that the trial was unfair.

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[45] See *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601, cited with approval in *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [53]. See also *Wilde v The Queen* (1988) 164 CLR 365 at 372.

The irregularity argument

The test

[67] The irregularity argument falls to be determined under s 385(1) of the Crimes Act 1961,[46] which provides:

> (1) … the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
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> …
>
> (c) that on any ground there was a miscarriage of justice; …
>
> …
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[68] Under the approach in *R v Matenga*,[47] the question for the Court of Appeal was – and thus for us now is – whether there had been a miscarriage of justice for the purposes of s 385(1)(c).[48] In context, this turns on whether the making available to the jury of the transcripts "could … have affected the result of the trial".[49] If of the opinion that the error could not have affected the result of the trial, the Court of Appeal was entitled to dismiss the appeal on the basis that there was no miscarriage of justice.

[69] This was the basis upon which the Court of Appeal decided the appeal and it was accordingly unnecessary for that Court to address the proviso. We propose to take the same approach.

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46 Section 385 of the Crimes Act 1961 was the applicable section at the relevant time. Section 385 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011. The replacement provision is s 232 of the Criminal Procedure Act 2011.

47 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

48 *Guy v R* [2012] NZCA 416 at [34] (Arnold, Wild and Miller JJ).

49 *R v Matenga*, above n 47, at [30].

The general context

[70] It is important to keep steadily in mind the narrow compass of what was in issue at the trial. There was little or no dispute about the contextual evidence, for instance as to the appellant and the complainant being casually acquainted, what had happened at the party (at least in general terms) and the subsequent course that events took, with the complainant going to sleep on the couch and the appellant joining her there.

[71] As to the absence of consent and belief on reasonable grounds in consent, the Crown case was that the complainant was asleep. The narrative of events given by the complainant in her evidence was simple and straightforward and there were no gaps in it which needed to be, or could be, supplemented by what she had said in her police interview. The appellant's case was also simple – he had gone to sleep on the couch and had become fully aware of what was going on only when the complainant slapped him. He could not be certain (because he could not remember) what had happened immediately before he was slapped. That this was his position was apparent from both what the jury was told and what was in the transcript of his interview.

[72] The case started on 15 December 2011 and concluded on 19 December 2011. Allowing for the intervening weekend, it was a three day trial. The jury saw the complainant and the other witnesses. So in assessing the materiality of the two statements, there is a good deal of other live evidence to be allowed for. The jury heard addresses from counsel and the Judge's summing up. They also had with them in the jury room the exhibits which had been produced and a transcript of the evidence which had been given at the trial.

Admissibility of the complainant's statement to the police under s 35

[73] It will be recalled that the Court of Appeal addressed whether evidence of what the complainant said in her police interview was admissible under s 35 of the Evidence Act 2006. The Court was of the view that the evidence was admissible and

saw this as supporting its conclusion that there had not been a miscarriage of justice.[50]

[74] We are not quite sure why the Court saw the admissibility of the transcript of the complainant's interview as relevant. We suspect that it was in the negative sense that if the transcript had been inadmissible because of possible prejudice to the appellant, this would have enhanced the appellant's argument that its provision to the jury caused a miscarriage of justice. We see the question whether it was admissible under s 35[51] as something of a distraction and for this reason do not propose to address it.

The transcript of the complainant's interview

[75] Assuming that members of the jury read the transcript of the interview, all they would have learned which went beyond what they had heard in court was that, when interviewed, the complainant had given an account of events which was the same as that given in evidence. We accept that the current (and former) rules around recent complaint evidence are premised on the assumption that consistency may be of significance when assessing the credibility of a complainant. There have been many cases where appeals have been allowed because a complainant's prior consistent statement had been inappropriately admitted in evidence. It might be thought to follow that making the complainant's prior consistent statement available to the jury carried an unacceptable risk of prejudice compared to the way in which the jury might have approached its task in ignorance of the prior consistent statement. This, in essence, is the argument for the appellant.

[76] Despite the apparent cogency of the appellant's argument, we do not regard it as persuasive. The stand-out feature of the evidence was the vehemence of the complainant's response to the appellant's conduct. The complainant's account at trial was entirely congruent with her behaviour in the immediate aftermath of the incident. That she had been angry and distressed was obvious from that behaviour

[50] See the reasons of Elias CJ and Glazebrook J above at [28]–[31].

[51] We are inclined to the view that the only reason why the statement may not have been admissible was because there was already so much evidence before the jury, by way of rebuttal of the allegation of recent invention, that further evidence was not "necessary" for the purposes of s 35(2) of the Evidence Act 2006.

and the CCTV footage shown to the jury. The evidence made it clear that she had been interviewed at the police station after the appellant's arrival but before he was interviewed by Detective Heathcote. In light of these considerations, and allowing as well for the absence of any suggestion in cross-examination of any inconsistency in her evidence, it would have been perfectly obvious to the jury that what she had told Detective Heathcote must have been consistent with both her initial reaction and what she said in evidence. And the directions given by the Judge as to her post-awakening evidence sufficiently put the jury on notice that what she said (and did) after the offending was not evidence that was independent of her.[52]

The appellant's statement to the police

[77] Similar considerations apply in relation to the appellant's statement. His statement was accurately paraphrased in evidence. Accordingly, making available to the jury the transcript of what he said added nothing to the material the jury knew anyway.

[78] On this aspect of the case we agree with the conclusions and reasons of the Court of Appeal.[53]

[79] As is apparent from what we have said, we can see no rational basis for thinking that the approach of the jury would have been any different had the transcripts not been made available to them. Accordingly, we are satisfied that the jury would have returned the same verdict if the irregularity had not occurred.

An unfair trial?

[80] A trial in which the jury received material which had not been adduced in evidence will often be able to be stigmatised as unfair. But here the material in question added nothing to what the jury already knew and thus had no relevant prejudicial potential. In our view, the conclusions reached in relation to the irregularity argument dispose of this ground of appeal.

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[52] See the reasons of Elias CJ and Glazebrook J above at [48].
[53] See *Guy v R*, above n 48, at [28]–[33].

Conclusion

[81] We would therefore dismiss the appeal.

O'REGAN J

[82] I agree with Elias CJ and Glazebrook J that the appeal should be allowed. My reasoning differs in some respects from theirs and in this judgment I set out briefly why I have concluded that there was a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961.[54]

[83] I think it is common ground among all of us that the mere fact that the jury had access to material that had not been part of the evidence at the trial does not automatically mean that the trial was unfair or that there was a miscarriage of justice. In other words, there is no absolute rule that the presence of such material in the jury room requires that an appeal against conviction be allowed.

[84] The essential basis for the conclusion reached by Elias CJ and Glazebrook J is that, because significant material bearing on the critical issues in the case was provided to the jury without having been put in evidence, this constituted a breach of the fundamental principles of natural justice, which rendered the trial unfair.

[85] I prefer to approach the case on the same basis as both the Court of Appeal did and McGrath and William Young JJ do. I see that as being consistent with the approach set out in this Court's decision in *R v Matenga*.[55] That approach starts from the proposition that not every flaw in a trial renders the trial unfair or constitutes a miscarriage of justice.[56] In a case such as the present case, where material that was not in evidence is provided to, or becomes available to the jury during its deliberation, the question which must be answered is whether the availability of this material to the jury was "*capable* of affecting the result of the trial".[57] If the answer is that the provision of the material to the jury was capable of affecting the result,

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[54] Section 385 of the Crimes Act 1961 was the applicable section at the relevant time. Section 385 was repealed as of 1 July 2013 by s 6 of the Crimes Amendment Act (No 4) 2011. The replacement provision is s 232 of the Criminal Procedure Act 2011.

[55] *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

[56] *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].

[57] *R v Matenga*, above n 55, at [31] (original emphasis).

then there will have been a miscarriage of justice in terms of s 385(1)(c). I consider that the trial will have been rendered unfair only if this test is met. I do not believe that the provision of the information to the jury in circumstances where that did not have the capacity to affect the result can be said to make the trial unfair and thereby occasion a miscarriage of justice. In that respect, I differ from Elias CJ and Glazebrook J.

[86] As the Court of Appeal acknowledged, the availability to the jury of transcripts of interviews that were not the subject of evidence at the trial "raises a powerful argument that the trial miscarried in an important respect".[58] However, the Court of Appeal then went on, correctly in my view, to consider whether, given the content of the transcripts that were provided to the jury and the evidence that was properly available to the jury, that irregularity led to a miscarriage of justice.

[87] Mr Lithgow QC relied on the judgment of the Court of Appeal of England and Wales in *R v Karakaya* to which Elias CJ and Glazebrook J refer in their judgment at [44] in support of a submission that the irregularity was a failure of process that rendered the trial unfair and thereby caused a miscarriage of justice.[59] Ms Markham, counsel for the Crown, did not take issue with the observations made by the Court in *Karakaya*, but pointed out that the Court did not find that the mere availability of material that had not been led in evidence to the jury made the convictions in that case unsafe. The material that became available to the jury in that case was described by the Court as being "potentially relevant to the outcome of the case".[60] That is not markedly different from the *Matenga* test of "*capable* of affecting the result".[61] The Court in *Karakaya* undertook an assessment of the material that was before the jury and, only after having done so, concluded that the convictions in that case were not safe.

[88] I agree with Elias CJ and Glazebrook J that the availability of the transcripts to the jury was capable of affecting the verdict, for the reasons they give at [54] to [61]. I acknowledge that the Crown case was strong and that the jury already

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58 *Guy v R* [2012] NZCA 416 at [34] (Arnold, Wild and Miller JJ) at [9].
59 *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App R 5.
60 At [27].
61 *R v Matenga*, above n 55, at [31].

had before it material along the same lines as that contained in the transcripts. It is possible the approach of the jury would have been the same whether or not the transcripts were available to, and read by, members of the jury. But the possibility that the jury's approach was affected by the availability of the transcripts cannot be ruled out. The issue is whether the availability of the material to the jury could have affected the outcome, not whether it did in fact do so.

[89] In those circumstances, I agree with Elias CJ and Glazebrook J that a miscarriage of justice has occurred in this case.

[90] That leaves only the question of the proviso to s 385(1) of the Crimes Act. In *Matenga*, this Court made it clear that the proviso could be applied only if the appellate court considers that, notwithstanding that there has been a miscarriage of justice in terms of s 385(1)(c), "the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence".[62] The Court also made it clear that in a case turning on the assessment of the honesty and reliability of witnesses, the appellate court would often be unable to feel sure of an appellant's guilt and therefore unable to apply the proviso.[63] Like *Matenga*, the present case turns on the credibility and reliability of the evidence of the complainant and of the other witnesses who were present in the room where the alleged sexual violation occurred. It is not, therefore, an appropriate case for the use of the proviso.

[91] For these reasons, I agree with Elias CJ and Glazebrook J that the appeal should be allowed, the conviction should be quashed and a new trial should be ordered.

Solicitors:
Bamford Law, Nelson for Appellant
Crown Law Office, Wellington for Respondent

62 At [31].
63 At [32].