THE ORDER OF THE COURT OF APPEAL PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS "MS A" REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2015
[2015] NZSC 105

BETWEEN	MOHAMMED MUNIF SAHIB Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: D P H Jones QC for Applicant
A Markham for Respondent

Judgment: 20 July 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The case arises out of events which occurred in the early hours of 21 July 2011. The complainant had taken a taxi home late one night but had been dropped off short of her home because she had insufficient money for the full fare. The applicant pulled his motor vehicle over beside her and offered her a lift home. On her evidence he indecently assaulted her, drove past the turn off to the street she lived in, took her to a rural area where he stopped and then further sexually offended against her. He subsequently drove back into Hamilton and dropped her off at a supermarket. Her distressed condition was noticed by some young men who called the police and they stayed with her until the police arrived.

[2] The applicant's defence at trial was as follows: when the complainant got into the car, she made sexual advances to him and indicated that she would have sex for money; he paid her $100; and the sexual activity – on his evidence more limited than that asserted by the complainant – which occurred was consensual.

[3] The Court of Appeal rejected an appeal against sentence and conviction.[1] The applicant now seeks leave to appeal in this Court against conviction. The proposed appeal relates to two particular aspects of the case:

(a) The complainant had worked in a brothel as a prostitute between 2009 and the winter of 2010. At trial defence counsel was not permitted to cross-examine her as to this.

(b) The Crown called propensity evidence from a young woman whom the applicant had picked up three weeks earlier as she was walking home in the early hours of the morning. On her evidence, the applicant made sexual advances, offered to pay for sex and would not stop the car to let her out. She escaped by grabbing the gear lever, putting the car into park and running off. The applicant tried to grab her and then followed her in his car but she was able to evade him.

[4] On the first issue, the Court of Appeal concluded[2] that the case fell to be determined under s 44(1) and (3) of the Evidence Act 2006 as relating to prior sexual experience; disagreeing on this point with the trial Judge who had seen s 44(2) (dealing with sexual reputation) as primarily applicable.[3] The Court accepted that the complainant's prior experience as a prostitute was relevant to the defence that the sexual activity which occurred was consensual and for money.[4] But given the time which had elapsed since the complainant had worked as a prostitute and the differences between that work (which was in a brothel and thus a controlled

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1 *Sahib v R* [2015] NZCA 112 (Stevens, Asher and Williams JJ) [*Sahib* (CA)]
2 At [22].
3 *R v Sahib* DC Hamilton CRI-2011-019-5616, 11 February 2014 (Judge Marshall) at [30].
4 *Sahib* (CA), above n 1, at [24].

environment) and what was alleged by the applicant, it saw the relevance of the evidence as marginal and concluded that the s 44(3) test was not met.[5]

[5] A ruling in the District Court that the propensity evidence was admissible was the subject of an unsuccessful challenge in the Court of Appeal prior to the final disposition of the trial.[6] In the post-trial appeal to which we have referred, the Court of Appeal saw the propensity evidence as tending to show that the applicant had the tendency of taking advantage of young women by inviting them into his car at night and persisting with sexual activity despite evident lack of consent.[7]

[6] The applicant challenges the approach taken to s 44 and, as well, the Court of Appeal's analysis of the propensity evidence and its relevance and maintains that in any event that the prosecutor at trial put too much weight on the propensity evidence and that the directions given by the Judge to the jury were inadequate.

[7] The case raises no question of general principle. Rather what is in issue is the way in which accepted principles were applied.

[8] We see no appearance of a miscarriage of justice:

(a) The approach of the Court of Appeal to s 44 was orthodox and unsurprising in the result arrived at.

(b) On her evidence, the propensity witness was in effect kidnapped (in that the applicant would not let her out of the car) and pursued by him when she managed to get away in a context in which the applicant was making unwelcome sexual advances to her. The circumstances were remarkably similar to those involving the offending against the complainant which occurred only three weeks later. There are various ways in which the relevance of the propensity evidence could be explained and we are not persuaded that there is an apparent error in

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5 At [25]–[30].
6 *Sahib v R* [2013] NZCA 231.
7 *Sahib* (CA), above n 1, at [39].

the way in which it was analysed by the Court of Appeal[8] or advanced at trial by the prosecutor.

(c) The directions of the Judge were positioned sub-optimally as they were given in the part of the summing up which dealt with the Crown case. But they dealt with the relevance of the propensity evidence appropriately. The defence contentions were put and an appropriate warning was given.

Solicitors:
Cook Morris Quinn, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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8 At [35]–[40]. It is true that the interactions between the applicant and the propensity witness did not get as far as actual sexual activity but given that the context involved unwelcome sexual overtures and was an effective kidnapping, we have no difficulty with the use by the Court of Appeal of the phrase "sexual activity".