NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 121/2015
[2015] NZSC 197

BETWEEN	RILEY CAMPBELL Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: P L Borich for Applicant
S K Barr for Respondent

Judgment: 17 December 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] The applicant faced charges of wounding the complainant with intent to cause grievous bodily harm, attempted sexual violation and indecent assault. He pleaded guilty to the charge of wounding and went to trial on the other two charges. He was found not guilty of attempted sexual violation but guilty of indecent assault. A later appeal to the Court of Appeal against conviction was unsuccessful and he now seeks leave to appeal to this Court.[1]

---

1 *Campbell v R* [2015] NZCA 452 [*Campbell* (post-conviction)].

[2] The charges arose in this way. The applicant was accompanying the complainant home after a social occasion. While doing so he seriously assaulted her. As a result she suffered appreciable head injuries and was rendered unconscious. The attack had sexual overtones but the complainant has not been able to give a consistent and coherent account of what happened save that, from the outset, she identified the applicant as her attacker. A significant component of the case against the applicant on the sexual charges was that his semen was located in the complainant's underwear and on a vaginal swab. This material could only have been deposited at the time of the assault or within the preceding seven days.

[3] At interview, the applicant admitted the assault but denied any sexual offending. He claimed to have previously had sex with the complainant but not within the month preceding the assault. At the time of the interview, the testing of the material taken from the complainant was not complete. So the identification of his semen and the time frames within which it could have been deposited were not put to the applicant. In light of the scientific evidence which later emerged, his claim not to have had sexual contact with the complainant in the month preceding the assault was awkward for him as it was not consistent with there being an innocent explanation for the semen which was found.

[4] When interviewed, the applicant was aged 16 years and four months and accordingly s 215 of the Children, Young Persons and their Families Act 1989 was engaged. The background to the interview was that the applicant was arrested at his home and taken to the police station. At the time he was arrested, his rights were explained to him and he indicated his understanding of them by repeating them in his own words. He nominated his father to be present at the interview. The interview was conducted by a detective under the general supervision of a detective sergeant. It focussed first on the assault and the applicant was not questioned about the sexual component of what was thought to have happened until after he had made admissions in relation to the assault. Before he was so questioned, the interview was suspended, with the detective sergeant speaking to his father to alert him to what was to follow. The applicant and his father were given an opportunity to confer together in private. It was when the interview resumed that the applicant denied any sexual

offending and claimed that there had been no sexual contact with the complainant in the month before the assault.

[5] Pre-trial challenges to the admissibility of the statement were dismissed in the District Court[2] and on appeal in the Court of Appeal[3] as was a post-conviction appeal in which admissibility issues were re-examined.[4]

[6] The applicant now seeks to challenge the dismissal of his post-conviction appeal on the basis that:

(a) The statement should have been ruled to be inadmissible because the police did not (a) raise the issue of the alleged rape until well into the interview, which was unfair,[5] and (b) make it clear that the applicant was entitled to have a support person and a lawyer present with him during the interview rather than simply one or other; and

(b) The trial Judge wrongly refused to permit the applicant's counsel to cross-examine the complainant on the proposition that they had engaged in sexual activity after the applicant had been released on bail following his arrest.

As well, he has sought leave to appeal out of time in relation to the admissibility determination of the Court of Appeal on the pre-trial appeal.

[7] We are of the view that there is no requirement for the applicant to challenge the pre-trial Court of Appeal judgment and that any arguments which are fairly available to him in relation to the admissibility ruling would be available if we were to grant leave to appeal against the Court of Appeal judgment dismissing his conviction appeal.

---

2 *R v Campbell* DC Manukau CRI-2013-292-203, 4 July 2014

3 *R v Campbell* [2014] NZCA 376 [*Campbell* (pre-trial)]

4 *Campbell* (post-conviction), above n 1.

5 In the application for leave to appeal there was also a complaint that he was not re-advised of his rights when the police first raised the sexual complaint with him almost two hours into the DVD interview. This complaint was not pursued in the written submissions and appears to be inconsistent with, or at least answered by, [55] and [56] of the *Campbell* (post-conviction) judgment, above n 1.

Admissibility

[8] In the pre-trial admissibility hearing in the District Court, the Judge heard evidence from the police as to the state of the investigation at the time of the interview and as to the circumstances surrounding the interview. In both the pre-trial and post-conviction judgments, the Court of Appeal was satisfied that all statutory entitlements had been explained to the applicant and understood by him. The Court of Appeal was also satisfied that, on the basis of the material available to the police, the interview strategy of dealing first with the assault and then with the suspected sexual offending was fair and that there had been no unfairness in not alerting the applicant to their suspicions as to sexual offending at the outset.[6] The Court also addressed and dismissed complaints as to the actions of the applicant's father.[7]

[9] Counsel for the applicant suggests that the approach taken by the Court of Appeal was inconsistent with prior authority; in relation to the staging of the interview, with *R v Tihi*[8] and *R v Tawhiti*;[9] and as to the requirements of s 215, with *R v Z*[10] and *Elia v R*.[11] These judgments, however, were carefully analysed by the Court of Appeal in the context of the facts relating to the applicant's interview. The facts are very particular and we do not see the approach taken by the Court of Appeal as detracting from, or inconsistent with, the earlier authorities. In those circumstances, we see nothing in the arguments which the applicant wishes to raise as to admissibility which gives rise to a question of general or public importance and no appearance of a miscarriage of justice.

Cross-examination

[10] The applicant's counsel suggested to the complainant in cross-examination that there had been sexual contact between her and the applicant right up to the time of the assault. Unless there had been such contact within the seven days preceding the assault, there could be no innocent explanation for the evidence as to the applicant's semen. She denied that there had been any recent sexual contact. The

---

6 See *Campbell* (post-conviction), above n 1, at [54]–[62].
7 At [47]–[53].
8 *R v Tihi* [1990] 1 NZLR 540 (CA).
9 *R v Tawhiti* [1993] 3 NZLR 594 (HC).
10 *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342.
11 *Elia v R* [2012] NZCA 243.

applicant did not give evidence in his own defence. This meant that the only evidence before the Court was that there had been no such contact. Counsel for the applicant maintains that if it was the case that the complainant had engaged in sexual activity with the applicant after his release, it rendered more probable the assertion – which, as we have noted, was denied by both the complainant and applicant and for which there was no other evidence – that there had been sexual activity shortly before the assault. The Court of Appeal dismissed this argument on the basis that there was no factual foundation for the proposition that there had been such activity.[12]

[11] The line of cross-examination which was ruled out related to sexual activity between the complainant and applicant and was thus not precluded by s 44 of the Evidence Act 2006. The Judge, however, was entitled to stop the cross-examination if it was irrelevant (see s 44(6)). Given the extremely tenuous logic of the alleged materiality of the questions, we see this aspect of the proposed appeal as not giving rise to a question of law of general or public importance and we are also of the view that there is no appearance of a miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent

[12] *Campbell* (post-conviction), above n 1, at [68].