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 59/2017
[2017] NZSC 124

BETWEEN	DENNIS RANGIAHO HOHUA Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: N Levy for Applicant
P D Marshall for Respondent

Judgment: 21 August 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Hohua was convicted of sexual violation (digital penetration) of the complainant and sentenced to a term of imprisonment of three years and five months.[1] His appeal to the Court of Appeal failed.[2] He now seeks leave to appeal to this Court.

[2] The Crown case at the trial was that Mr Hohua was present at a party at the house at which the complainant lived. Mr Hohua was 45; the complainant was 20. The complainant went to bed alone around 4 am. Some time later Mr Hohua came

1 *R v Hohua* [2015] NZDC 24012 (Judge Hastings).
2 *Hohua v R* [2017] NZCA 89 (Kós P, Courtney and Williams JJ).

into her room uninvited and offered her cannabis. She said she declined and told him to leave, which he did, and she went to sleep. She says she woke a few hours later to find Mr Hohua vigorously inserting his fingers into her vagina and kissing her neck and breasts. She could not say whether Mr Hohua had also raped her because she had no recollection of this.

[3] Mr Hohua's version was that, contrary to what the complainant said, she had agreed that he would come back to her room with cannabis. He had done so and after a period of talking there had been consensual sexual intercourse.

[4] Mr Hohua was charged with both rape and digital penetration, but convicted only on the latter. The Court of Appeal's analysis was that the jury believed the complainant's version of events and rejected Mr Hohua's. Hence he was convicted only on the count in respect of which she was able to give her own account of what happened.[3]

[5] Mr Hohua applied to lead evidence of a previous incident involving the complainant. That incident occurred three years earlier when the complainant was 17 and involved another man (X) who was older than her and suffered from Tourette's syndrome. The complainant's version of events was that X had harassed her at a party at a rural venue and had forcibly dragged her into a tent that he had pitched on the property and raped her. X said the complainant had consented to sex after she had made strong advances to him on the dance floor. X's version of what happened on the dance floor was largely corroborated by five eye-witnesses. But there were no eye-witnesses to what happened inside the tent. The complainant made a complaint to the police but they decided not to prosecute.

[6] The application to call evidence relating to the earlier incident was declined by the District Court, relying on the Court of Appeal decision in *Best v R*.[4] The Court of Appeal in the present case upheld the refusal to admit this evidence, applying this Court's decision in *Best v R*.[5]

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3 At [27].

4 *R v Hohua* [2015] NZDC 21842 (Judge Tuohy); *Best v R* [2015] NZCA 159.

5 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

[7] The application for leave does not seek to challenge the District Court and Court of Appeal decisions. In effect it asks this Court to consider a different application from that made in the District Court and upheld in the Court of Appeal. Mr Hohua wishes to argue that he should have been permitted to call evidence of what happened on the dance floor in the earlier incident, but not in relation to the sexual encounter that occurred inside the tent. The argument is that this would not lead to the difficulties caused by the "he said/she said" situation dealt with in this Court's decision in *Best v R*, because it would involve evidence of eye-witnesses to the events that occurred on the dance floor as well as the evidence of the complainant and X.

[8] We are not satisfied that the point the applicant seeks to raise meets the test for the grant of leave by this Court.[6] We agree with the submission for the respondent that it is artificial to have evidence about one part of the incident involving X, but not the sexual encounter that prompted her complaint to the police. The reason for admitting evidence of an earlier false complaint is to provide a basis for a submission that the complainant has a history involving false complaints of sexual assault. What the applicant seeks to argue is that a jury should hear evidence that would found a submission that the complainant has on a previous occasion embellished her version of the exchange that occurred before a sexual encounter that, on her evidence, was rape and on the accused man's evidence was not. We see that as different in character from evidence that a complainant has made a false complaint on a previous occasion. Whether the proposed evidence would be substantially helpful is doubtful and would, in any event, be a matter of assessment that raises no point of principle. Nor do we see any appearance of a miscarriage if leave is not granted.

[9] We dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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[6] Senior Courts Act 2016, s 74 and Supreme Court Act 2003, s 13.