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 153/2016
[2017] NZSC 37

BETWEEN	KAMAL SINGH Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Arnold and Ellen France JJ

Counsel: W C Pyke for Applicant
M H Cooke for Respondent

Judgment: 24 March 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty at trial of sexual violation by rape and sexual violation by unlawful sexual connection. His subsequent appeal to the Court of Appeal was dismissed[1] and he now seeks leave to appeal to this Court. The application for leave to appeal is advanced on the basis a substantial miscarriage of justice has occurred.[2] That is because it is said the Court of Appeal was wrong to conclude evidence of the complainant's sexual activity with another man, E, shortly after sexual intercourse with the applicant was inadmissible because of the limits on admissibility of such evidence under s 44 of the Evidence Act 2006.

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1 *Singh v R* [2016] NZCA 552 (Winkelmann, Duffy and Whata JJ).

2 Section 13(2)(b) of the Supreme Court Act 2003, which applies to this application despite the repeal of that Act: Senior Courts Act 2016, sch 5 cl 10.

[2] Section 44(3) provides that, before permitting the admission of evidence of the complainant's sexual experience with a person other than the defendant, the Judge must be satisfied "that the evidence … is of such direct relevance to facts in issue" so "that it would be contrary to the interests of justice to exclude it".

Background

[3] The facts are set out in the judgment of the Court of Appeal.[3] For present purposes we note that in the early hours of one morning in March 2015 the complainant parked her car off the road in an area near the Auckland Harbour Bridge after she realised she was too intoxicated to drive. She became unwell. On two occasions she vomited. On the second of these occasions she was assisted by the applicant, a security guard patrolling the area. His attentions concerned her and she locked the car.

[4] The complainant then climbed into the back seat of her car and texted E. Until very recently, E had been her boyfriend. When he did not respond, she tried without success to call him and a female friend.

[5] The complainant fell asleep and was woken by the applicant knocking on the car window. She wound down the window. After a brief discussion, the applicant opened the car door and began touching her. She said no when he indicated he wanted to have sex with her. He got into the vehicle and she said he raped her.

[6] While the applicant was still there, E rang. The complainant said she told the applicant to leave and then spoke to E. E's evidence was that the complainant was hysterically crying. E came and collected her. He found her upset and crying. She did not tell him what had happened but because of her distress he thought it must have been something "really bad". They went to his parents' boat nearby and slept there overnight. They had sexual intercourse soon after they arrived at the boat and again in the morning.

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3 *Singh v R*, above n 1, at [3]–[10].

[7] Later the next day the complainant went to the police and made a complaint of rape. In the course of a subsequent medical examination she told the doctor that after the assault she experienced some minor discomfort. When questioned by police, the applicant initially denied that sexual intercourse had occurred. Later, he acknowledged that it had, but said it was consensual.

[8] Defence counsel[4] had applied for leave to cross-examine the complainant about her consensual sexual intercourse with E. But the application was not proceeded with when the Crown confirmed it would not prosecute the case on the basis the complainant was too intoxicated to consent.

[9] At trial, it was common ground the applicant had sex with the complainant. The Crown case was that she had not consented. The defence was that the complainant consented or that reasonable belief in consent had not been negated. On the latter aspect, the Crown drew in aid the complainant's circumstances as supporting her account that the applicant did not have a reasonable belief in consent. For example, the prosecutor in closing referred to "[a] drunken woman, back of the car, 3.00am in the morning, vomiting". The submission was that no reasonable person could have believed she was consenting.

[10] The defence maintained the complainant consented whilst affected by alcohol but later regretted it. Trial counsel challenged the complainant's credibility and in this context questioned her about a text she had sent to a friend earlier in the evening which canvassed a plan to "slut it up" that evening. Defence counsel also contended the complainant may have wanted to "hook up" with E for the night, referring to the proximity to him of the place in which she chose to park.

[11] In the Court of Appeal, the appeal was advanced on the basis trial counsel erred in not pursuing the application to cross-examine the complainant about her sexual intercourse with E on the boat and on the fact she and E had intercourse in the back of a car some four months earlier.

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[4] Not the applicant's counsel on the present application.

[12] The Court of Appeal accepted the Crown submission leave would not have been granted to cross-examine the complainant on these topics under s 44(3). In reaching this conclusion, the Court addressed the three bases on which the evidence of sex with E was said to be directly relevant as follows:

(a) The Court rejected the argument that evidence of sexual intercourse with E was relevant to the applicant's belief in consent because it could have served to negate the prosecutor's submission that no reasonable person would consider she was consenting. This was because of the different contexts in which the events with the applicant and E occurred, including the pre-existing sexual relationship between the complainant and E.[5]

(b) It could not be argued that sex with E was probative of the fact the complainant consented to intercourse with the applicant. That was impermissible reasoning in terms of s 44 because it was based on the proposition the complainant's willingness to have sex with E showed she was "the sort of person who would consent to sex with a stranger".[6]

(c) The argument that the applicant should have been able to submit to the jury that it was "unlikely a person who has been raped will have consensual sex shortly thereafter" was dismissed shortly.[7] The Court emphasised the lack of any support for the proposition a woman who had been raped would not want to have consensual intercourse afterwards.

[13] Finally, the Court of Appeal found that any connection between the defence case and the evidence about sex in the car with E some four months earlier was "so tenuous as to fall far short" of the s 44 threshold.[8]

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5 *Singh v R*, above n 1, at [20].
6 At [22].
7 At [23].
8 At [25].

The proposed appeal

[14] The proposed appeal would largely replicate the case made in the Court of Appeal. In challenging that Court's analysis of the relevance of the evidence, the applicant points to an account of events in a statement made to the police by E and emphasises the connections in time, place and circumstance between the sexual activity with the applicant and that on the boat shortly thereafter.[9] The applicant also relies on the fact the Crown put in issue the complainant's willingness to have sex, her appearance of willingness and the issue of the confined space of the back seat of the car. It is also submitted that the evidence may have provided a basis for challenging E's evidence the complainant appeared distressed when he picked her up from her car. Finally, the applicant refers to the medical evidence and submits sex with E might also account for the material in the doctor's report.

[15] We see no appearance of a substantial miscarriage of justice. It is accepted admission of the proposed evidence comes within s 44. The approach of the Court of Appeal to the high threshold in s 44 was orthodox[10] and the result unsurprising. Nothing put forward by the applicant suggests a risk the Court may have come to the wrong conclusion about the speculative nature of any connection between sex with E and issues of consent or reasonable belief in consent. Similarly, the suggestion the evidence may be directly relevant to E's account of how the complainant presented rests on untested assumptions about how a victim of rape might react. The same observations can be made in relation to the medical evidence which was, in any event, not central at trial and comprised a very brief reference to the complainant's account.

[16] The application is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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9 We do not have any information as to what the complainant might say about matters such as the timing of events.

10 See *B (SC12/2013) v R* [2013] NZSC 151; [2014] 1 NZLR 261 at [53] per Arnold J delivering the judgment of McGrath, Glazebrook and Arnold JJ.