NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 62/2020
[2020] NZSC 107

BETWEEN	ASHER PRADEEPKUMAR RATNAM Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: Applicant in person
K S Grau for Respondent

Judgment: 7 October 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a jury trial of four charges of indecent assault and one of sexual violation involving digital penetration. He was acquitted on one other charge of sexual violation. He was sentenced to a term of imprisonment of two years and four months.[1] He appealed to the Court of Appeal against both conviction and sentence, but both appeals were dismissed.[2] He now seeks leave to appeal to this Court against conviction only.

1 *Police v Ratnam* [2019] NZDC 24067 (Judge Farnan).
2 *Ratnam v R* [2020] NZCA 314 (Brown, Simon France and Mallon JJ) [CA judgment].

Grounds of appeal

[2] The applicant wishes to raise three grounds in the event that leave to appeal is granted. These are that:

(a) the closing address of the prosecutor was unfair;

(b) the verdicts were unreasonable; and

(c) evidence that traces of an unknown male's DNA were found in the complainant's underwear ought to have been led at the trial, but was not.

Leave criteria

[3] The applicant does not suggest that any point of public importance arises. His application for leave is advanced on the basis that a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.[3]

Facts

[4] The facts are set out in the judgment of the Court of Appeal and it is unnecessary for us to repeat that account here.[4] The essential background is that the context in which the offending is said to have occurred was that the complainant was providing massage services to the applicant. It was the third time she had done this. The offending was said to have occurred at the end of the third session, after the complainant had agreed to extend the session.

Prosecutor's closing address

[5] The applicant says that the prosecutor made unfounded, inappropriate and speculative factual submissions concerning his truthfulness and character in the course of the prosecutor's closing address. These criticisms were considered in some detail by the Court of Appeal.[5] The Court rejected some of the criticisms, but accepted that

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3 Senior Courts Act 2016, s 74(2)(b).
4 CA judgment, above n 2, at [3]–[12].
5 At [15]–[39].

some of the submissions made by the prosecutor were flawed. Similarly, the Court considered that some of the "adversarial flourishes" made in the closing address would have been better avoided.[6] But the Court said the case was not one of prosecutorial error and that the flaws identified in the closing address had not occasioned a miscarriage of justice.[7]

[6] There is no appearance of error in the way the Court of Appeal addressed the criticisms of the prosecutor's closing address. Nor do we consider there is any risk of a miscarriage if leave is not granted on this ground.

Unreasonable verdicts

[7] The applicant made detailed submissions on this ground in support of his application for leave. He pointed out aspects of the evidence which he argued demonstrate a lack of credibility on the part of the complainant. He pointed to what he said are inconsistencies in the complainant's evidence and between the complainant's evidence and the scientific evidence.

[8] This ground of appeal was raised in the written submissions to the Court of Appeal, but not pursued by the applicant's counsel in his oral argument. The Court of Appeal did, however, consider the submission that the verdicts were unreasonable and rejected it.

[9] The Court considered that the complainant's evidence provided material that, if accepted, satisfied all the elements of the charges and her credibility was not obviously undermined such as to make the acceptance of her evidence unreasonable. It considered that the scientific evidence provided an obvious source of the reasonable doubt the jury must have had concerning the charge on which the applicant was acquitted.[8]

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6 At [38].
7 At [38]–[39].
8 At [40].

[10] The applicant did not give evidence at the trial, but denied the offending both in his evidential video interview and also in a phone call with the complainant set up and recorded by the police.

[11] We do not see any appearance of miscarriage in relation to this ground. In essence, the applicant is seeking to pursue on appeal to this Court a ground that was not advanced in oral submissions to the Court of Appeal. Nothing raised by the applicant in his submissions to this Court suggests the conclusion of the Court of Appeal was wrong. We do not, therefore, consider there is a sufficient basis to justify a second appeal on this ground, particularly as it was not advanced with any vigour in the Court of Appeal. This means we do not have the benefit of a detailed analysis by that Court of the points the applicant now wishes to raise.

Evidence that was not led

[12] The final ground concerns evidence of traces of an unknown male's DNA in the complainant's underwear that was not led at the trial. This evidence was considered at a voir dire with the scientist who gave evidence at the trial. The Court of Appeal observed that, at the voir dire, it became clear that there was no probative value to the evidence and that its admission could raise issues under s 44 of the Evidence Act 2006.[9] The Court of Appeal recorded that the applicant's counsel in that Court "responsibly and correctly advised the Court he did not consider he was able to advance that ground".[10] There is nothing in the material provided to us by the applicant that calls into question that assessment.

Result

[13] We do not consider that the criteria for the grant of leave to appeal are satisfied in this case. We therefore dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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9 Section 44(1) of the Evidence Act 2006 provides that evidence relating directly or indirectly to the prior sexual experience of the complainant with any person other than the defendant cannot be offered without the permission of the judge.

10 CA judgment, above n 2, at [41].