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 116/2019
[2020] NZSC 12

BETWEEN	SIDDHARTH SHARMA Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, Glazebrook and Ellen France JJ
Counsel:	N Levy QC for Applicant Z R Johnston for Respondent
Judgment:	20 February 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant seeks leave to appeal on the basis his conviction on a count of sexual violation by rape is inconsistent with the not guilty verdicts in the same trial on two charges of sexual violation by unlawful sexual connection. His appeal against conviction on this ground was dismissed by the Court of Appeal.[1]

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1 *Sharma v R* [2019] NZCA 462 (Kós P, Woolford and Dunningham JJ) [CA judgment].

Background

[2] The charges arose in this way.[2] The applicant and complainant were acquaintances. After an evening out together they returned to the applicant's flat. Whilst they were watching a movie there with the applicant's flatmate and another woman, the applicant fell asleep. The complainant was going to go home but the flatmate suggested she sleep in an empty bedroom. She went to the bedroom and began reading. Not long afterwards there was a text exchange between the applicant and the complainant. He came into the room.

[3] The complainant then described two episodes of sexual activity which she said took place in the bedroom. The first of these episodes led to the two charges of sexual violation by unlawful sexual connection on which the applicant was acquitted. The complainant said the applicant then passed out. After about half an hour she tried to get up. This woke the applicant. She said he grabbed her, pulled her back, grabbed her throat and had sexual intercourse with her.[3] This incident led to the charge of rape on which the applicant was convicted. The complainant said that the applicant then went back to sleep. She said that she left the flat after about another hour.

[4] The applicant gave evidence at trial in line with his statement to police. He too described two episodes of sexual activity but he said this was consensual. His account was that, after a break, there was further mutual sexual activity in the course of which the complainant asked him to choke her. He was reluctant to do that but eventually did. He left the room after she asked him to choke her again and then to slap her. The applicant accepted in cross-examination there was a break, "like half an hour or something", in the sexual activity.

[5] In dismissing the appeal against conviction, the Court of Appeal considered on the facts that there was a "real distinction" between the two episodes.[4] The Court went on to reject the applicant's argument the jury must have had reasonable doubt about the complainant's evidence, in particular of her firm evidence of saying "No" and

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2 The facts are set out in more detail in the Court of Appeal judgment: CA judgment, above n 1, at [2]–[10].

3 There was medical evidence of two small bruises and of tenderness on her neck, jaw and shoulder.

4 CA judgment, above n 1, at [17].

"Stop". The Court considered the jury could have accepted the complainant said "No" and "Stop" during the first episode, while still finding there was reasonable belief in consent at this point.[5]

The proposed appeal

[6] The applicant wishes to argue that the Court of Appeal erred in logic in concluding that a jury acting rationally could have reached different verdicts. In developing this submission, the applicant says the notion reasonable belief in consent in the first episode can co-exist with "no" and "stop" is a rape myth. The submission is that in relation to the first episode, the jury must have either not believed the complainant or believed her but not beyond reasonable doubt, and there was no independent evidence to make any difference in relation to the second episode.

Assessment

[7] We do not consider the criteria for leave are met.[6] The Court of Appeal applied the principles in *B (SC12/2013) v R* and the proposed appeal would be particular to the specific facts.[7] No question of general or public importance arises.

[8] Nor do any of the matters raised by the applicant give rise to the appearance of a miscarriage of justice. The Court of Appeal reviewed the evidence at trial and provided an explanation for the pattern of verdicts. To use language endorsed in *B (SC12/2013) v R*, the Court essentially concluded that the evidence on the first two counts was not "so wound up with the evidence on the [third] that it is not logically separable".[8] The evidence was of two distinct episodes with some clear differences between them.

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5 At [19]. The flatmate gave evidence of hearing "pleasurable noises" coming from the bedroom during the first episode.
6 Senior Courts Act 2016, s 74(2).
7 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68(c)]–[68(f)].
8 At [68(e)], citing *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [8].

[9] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent