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 68/2020
[2020] NZSC 129

BETWEEN	SHJONEN BENJAMIN CRUMP Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: J D Munro and J N Olsen for Applicant
B F Fenton for Respondent

Judgment: 20 November 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr Crump, applies for leave to appeal against the Court of Appeal's dismissal of his appeal against conviction.[1]

[2] Mr Crump was tried by a jury for raping his then partner. At trial, the complainant's account had been that though she initially made advances on him, she

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1 *Crump v R* [2020] NZCA 287, (2020) 29 CRNZ 402 (Kós P, Venning and Mallon JJ) [CA judgment].

made it clear that she did not consent to sexual intercourse. Mr Crump's account was that the complainant was the one who initiated the intercourse, and that he did not immediately realise that she had withdrawn consent part way through. Following a combined majority and *Papadopoulos* direction given at 3.18 pm on the Friday of the trial, the jury found Mr Crump guilty.[2]

Appeal to the Court of Appeal

[3] In the Court of Appeal, Mr Crump appealed both conviction and sentence. The Court of Appeal allowed the sentence appeal.[3] Only his conviction for rape is at issue in this application.

[4] Mr Crump argued that the trial Judge erred by not giving an adequate direction on the issue of withdrawal of consent. He submitted that an important element of an adequate direction was that the accused must realise consent has been withdrawn and that this must be assessed in a "realistic way". The Judge did not give this direction either in summing up or in response to a jury question in which the jury sought his assistance on the definition of "rape".

[5] By a majority (comprising Kós P and Mallon J, Venning J dissenting), the Court of Appeal held that the trial Judge should have directed that a male must discontinue penetration where he appreciates or should reasonably have appreciated that consent has been withdrawn.[4] The majority was also critical of the trial Judge's decision to give a combined *Papadopoulos* and majority verdict direction when the jury advised it could not agree on the verdict in one charge.[5] Finally, the majority held that when the jury requested a "precise" definition of rape, the trial Judge erred when he refused to give more assistance beyond merely re-directing the jury to the previously circulated generic question trail. The majority considered that it was likely some jurors were having difficulty with the idea that rape could be established if the

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2 Mr Crump pleaded guilty to one charge of endangering transport and two of seven charges of physical assault. He was acquitted of the other five charges of physical assault and of a charge of threatening to kill.

3 CA judgment, above n 1, at [112].

4 At [37] per Mallon J and [77] per Kós P.

5 At [43]–[45] per Mallon J and [77] per Kós P.

complainant initially consented to sexual intercourse. The trial Judge should have given a tailored direction as to how to address withdrawal of consent.[6]

[6] Nevertheless, by a different majority (comprising Kós P and Venning J, Mallon J dissenting), the Court of Appeal held that there was no miscarriage of justice. The majority considered there was no reasonable possibility a properly-directed jury could have acquitted.[7]

Submissions

[7] Mr Crump raises three grounds in support of his application.

[8] First, he submits that a properly-directed jury could have acquitted him, with the result that a miscarriage of justice will arise if the conviction stands. It was clear from their request for a definition of rape that the jury was having trouble with that charge. Had the prosecution case been as overwhelming as suggested by Kós P and Venning J, Mr Crump submits, the jury would not have been in such difficulty. This was likely compounded by the premature *Papadopoulos* direction, which it is submitted pressured the jury into coming to a verdict before the weekend. Further, the jury had acquitted Mr Crump on the other charges, so they must have accepted that he was a credible witness to some extent.

[9] Second, Mr Crump submits that the trial Judge's failure to direct on withdrawal of consent resulted in an unfair trial, since Mr Crump's entire defence focussed on the issue of whether he understood consent had been withdrawn. He submits that this effectively meant that his case was not adequately put to the jury.

[10] Finally, Mr Crump submits that the Court of Appeal was wrong to hold that it was unnecessary to direct jurors to approach delay in ceasing intercourse "in a realistic way".[8] He submits that this effectively meant that *any* delay in discontinuing penetration would amount to rape, and that would result in overcriminalisation.

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6 At [47] per Mallon J and [77] per Kós P.
7 At [74] per Venning J and [87] per Kós P.
8 See *BC (CA44/2013) v R* [2013] NZCA 140.

Our assessment

[11] Taking the last ground first, as noted in the judgment of Mallon J (with Kós P in agreement), it was accepted by the defence that consent had been withdrawn. Against that background, the jury needed to be sure that Mr Crump continued with penetration no longer believing the complainant was consenting or that there was a period in which a reasonable person in the same situation would not have that belief.[9] In these circumstances, where Mr Crump's case was that he was confused about the position, the argument the Court of Appeal erred by rejecting a direction to the effect that the jury should approach the question of delay in a "realistic" way has insufficient prospects of success.

[12] On the first and second grounds raised by Mr Crump, the majority of the Court of Appeal agreed that the directions of the trial Judge were inadequate. Whether the Judge's directions complied with the correct legal analysis is not being challenged. No matter of general or public importance accordingly arises in respect of any of the three grounds.[10]

[13] Nor do we consider there is a risk of a miscarriage of justice on any of these grounds.[11] Whether there was a reasonable possibility that a jury, properly directed, would have entered a verdict of acquittal in the face of Mr Crump's evidence at trial was assessed by the Court of Appeal. The majority on this point said that Mr Crump's own evidence demonstrated that he heard the complainant say she did not want to continue, that he appreciated this warranted inquiry, that he heard her say no at least three more times, and that despite this he continued and "finished not long after".[12] The majority therefore considered that even on Mr Crump's own evidence, a properly-directed jury was bound to convict.[13] Whether that factual background is applied to assess Mr Crump's subjective belief about the complainant's consent or the reasonableness of that belief is immaterial. Either way, nothing raised by Mr Crump gives rise to the appearance of a miscarriage of justice in this assessment.[14]

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9 CA judgment, above n 1, at [32] per Mallon J and [77] per Kós P.
10 Senior Courts Act 2016, s 74(2)(a).
11 Section 74(2)(b).
12 CA judgment, above n 1, at [64]–[65] per Venning J and [86] per Kós P.
13 At [74] per Venning J, and [82] and [87] per Kós P.
14 Senior Courts Act, s 74(2)(b).

Result

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

Solicitors:
Tucker & Co, Auckland for Applicant
Crown Law Office, Wellington for Respondent