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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 131/2019
[2020] NZSC 13**

BETWEEN ROBERT MATTI NEHO
 Applicant

AND THE QUEEN
 Respondent

Court: Winkelmann CJ, O'Regan and Ellen France JJ

Counsel: R M Lithgow QC for Applicant
 S K Barr for Respondent

Judgment: 4 March 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant faced trial on seven charges of physical violence, unlawful detention and sexual offending in relation to his partner. He was convicted after trial on one charge of sexual violation by rape and was acquitted on the other six charges.

[2] His appeal against conviction to the Court of Appeal on the basis of inconsistent verdicts was dismissed.¹ He seeks leave to appeal to this Court on the same basis.

Background

[3] The charges involved two sets of alleged offending. The first set related to alleged physical violence and unlawful detention which the complainant said occurred between July 2016 and January 2017 when the couple were living in the North Island. After the applicant breached a temporary protection order in May 2017, the complainant moved to the South Island. The applicant subsequently followed her there. The second set of offending was said to have occurred in the South Island.

[4] As the Court of Appeal said, this second set of offending:²

... comprised three incidents of alleged sexual offending following the complainant undergoing keyhole surgery The three incidents were as follows:

- (a) an allegation of non-consensual oral sex which the complainant said occurred on 13 July 2017 while she was still in hospital recovering from the operation;
- (b) an allegation of penile rape in the hospital shower area on 16 July 2017; and
- (c) an allegation of anal rape said to have occurred on 20 July 2017 in a hostel after the complainant had been discharged from hospital.

[5] The conviction related to the second of these alleged incidents, the penile rape in the hospital shower area.

[6] The defence case at trial was that none of the incidents described had occurred apart from the penile rape charge. On that charge it was accepted that the two had sexual intercourse in the hospital shower area but the applicant said this was consensual and initiated by the complainant. As the Court of Appeal noted:

[10] Significantly for present purposes, the complainant was also cross-examined on text messages she sent to [the applicant] on 16 July 2017

¹ *Neho v R* [2019] NZCA 537 (French, Lang and Mander JJ).

² At [6].

after he had left the hospital having allegedly raped her in the shower area. The text messages contained expressions of love and also an unsolicited reference that he must be feeling tired “after that quickie”.

[11] The complainant denied that she had initiated the sexual encounter in the shower area. Her explanation for the text messages was that they were designed to keep the peace and that she was worried about the safety of the staff and the other patients.

[7] In dismissing the appeal, the Court of Appeal did not accept the applicant’s submission that the jury must have concluded the complainant was a liar and rejected her evidence outright. Rather, the Court considered, it was possible that the jury simply could not be sure. In addition, the Court noted the jury was entitled to accept some aspects of the evidence and reject others. The Court said the shower incident was a stand-alone event so the jury had to consider the evidence relating to that event alone noting it took place on a different day and in different circumstances.

[8] The Court acknowledged that the fact the sexual conduct in the shower area was accepted as having taken place did not “of itself provide a rational explanation for the different verdict”.³ But, the Court considered, it did provide such an explanation when that difference was combined with a number of other factors identified by the Court.⁴ The Court concluded that:

[26] In light of this supporting evidence, we consider the jury would have been fully entitled to view the complainant’s explanations for the inconsistent text messaging as compelling and to treat the text messages differently from other inconsistencies identified by the defence as raising a doubt in relation to other charges.

The proposed appeal

[9] In essence, the applicant wishes to argue that the Court of Appeal paid lip service to the principles applicable to an appeal based on inconsistent verdicts set out in *B (SC12/13) v R* but did not actually apply those principles.⁵ In developing this submission, it is said that the Court dealt with the hospital rape as though it was a stand-alone event and did not consider the logic of that verdict in light of all of the

³ At [20].

⁴ Those factors included the more public nature of the venue; that the incident would have involved the complainant applying direct pressure to her surgical wounds; that she told a nurse the applicant had sexually abused her while she was in the hospital; and the evidence of nursing staff about the applicant’s behaviour: at [21]–[25].

⁵ *B (SC12/13) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

evidence. Further, it would be argued that the Court did not factor in the proposition that the jury did not believe the complainant in relation to the other six charges in a case where her credibility was central.

[10] There would be no challenge on the proposed appeal to the principles set out in *B (SC12/13) v R*. Rather, the focus would be on how those principles were applied to the particular facts of this case. No question of general or public importance arises.⁶ In terms of the factual inquiry envisaged by *B (SC12/13) v R*, the Court of Appeal considered the evidence given at trial and provided an explanation for the pattern of verdicts. None of the matters raised about that factual assessment give rise to an appearance of a miscarriage of justice.⁷ The criteria for leave to appeal are not met.

[11] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ Senior Courts Act 2016, s 74(2)(a).

⁷ Section 74(2)(b).