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

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT AND ANY PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 15/2020
[2020] NZSC 48

BETWEEN	EDWARD RAWIRI HERBERT Applicant
AND	THE QUEEN Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	A J Holland and K J Simonsen for Applicant J E Mildenhall for Respondent
Judgment:	18 May 2020

JUDGMENT OF THE COURT

A The application for an extension of time to file the application for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr Herbert, was convicted after trial on one charge of sexual violation by rape. His appeal against conviction to the Court of Appeal was dismissed.[1] He now seeks leave to appeal to this Court on the basis that the jury's verdict was unreasonable.

Background

[2] The incident giving rise to the charge arose in this way. On 15 July 2017, the complainant, aged 16, became intoxicated at a party held in a house in Auckland. She was carried to a bed in a spare room at the house by her friends to sleep it off. Mr Herbert, aged 34, was later found in the same room. The two did not know each other. When found in the room the complainant was on a mattress on the floor. Both the complainant and Mr Herbert were without their underwear and the complainant was in a distressed state. She did not have much recollection as to what happened in the bedroom. Police were called and arrived shortly after midnight. A medical examination was undertaken in the early hours of the following morning. Subsequent forensic testing of swabs taken as part of that examination identified Mr Herbert's semen on vaginal swabs from the complainant and his DNA on a swab taken from a bruise on her neck.

[3] At trial, the complainant's evidence-in-chief was given by way of video interview. In the interview she said she remembered getting held down and trying to get away and feeling Mr Herbert "like rubbing up" against her. She told police a scratch on her arm had resulted from a struggle with Mr Herbert. In cross-examination the complainant said she could not recall any penetration or being in the bedroom with Mr Herbert and that she had "guessed a few things" when she had spoken to the police. She also accepted that she had made an assumption about how she got the scratch on her arm.

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1 *Herbert v R* [2019] NZCA 640 (Collins, Brewer and Gendall JJ) [CA judgment].

[4] Susan Vintiner, a forensic scientist, from the Institute of Environmental Science and Research Ltd (ESR) gave evidence at trial as part of the Crown case about the analysis of the vaginal swabs. The effect of this evidence was, relevantly, that it was possible that the sperm found in the sample was from pre-ejaculate rather than ejaculate. It was also accepted that, given the reasonably short time frame between the alleged act and the medical examination, it was possible that the semen was introduced into the vagina by some other means such as liquid semen on a finger or through some other body part.[2]

[5] In his evidence at trial, Mr Herbert described going into the spare room and lying on a mattress on the floor to go to sleep. He said he woke up and the complainant was on the other side of him and had her leg and arm draped over him. He said they started kissing and she put her hand down his pants and was "sort of … rubbing" him. They removed their underwear and he touched her vagina before they were interrupted by someone trying to come into the room. He denied there was any contact between his penis and her genitalia.

[6] The appeal to the Court of Appeal was brought on the basis that the jury's verdict was unreasonable because there was insufficient evidence to support proof of the element of penile penetration required to establish the charge.

[7] In dismissing the appeal, the Court accepted that the complainant did not give direct evidence of penile penetration and that the presence of Mr Herbert's semen on the vaginal swabs was not on its own able to found an inference of penile penetration. The Court said that "[n]onetheless" the scientific evidence was "a powerful piece of circumstantial evidence when considered in conjunction" with other evidence at trial.[3] The Court considered that Ms Vintiner's evidence was "entirely consistent with penile penetration which ended without Mr Herbert ejaculating but after he had deposited his DNA through pre-ejaculate fluid".[4] Whether penile penetration could be proved was a matter "squarely" before the jury and the jury was entitled to find this element

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2 She accepted another possibility was that the semen was introduced through a flawed swabbing process.

3 CA judgment, above n 1, at [10].

4 At [12].

proven.[5] In particular, it was open to the jury to decide that introduction of Mr Herbert's semen into the complainant's vagina "by, say, transfer from his fingers was not a real possibility in the circumstances".[6]

The proposed appeal

[8] Mr Herbert submits that leave should be granted, first, because the approach to scientific evidence, particularly as it affects the assessment of reasonableness of verdicts, gives rise to a question of more general importance.[7] Second, Mr Herbert says that the Court of Appeal erred in its approach to the evidence at trial and that this has given rise to a miscarriage of justice.[8] If the evidence had been properly construed, the Court would have concluded that the verdict was unreasonable.

[9] In developing the submissions on the second, and primary, point it would be argued on appeal that the jury could not conclude the introduction of the semen into the complainant's vagina by digital transfer was not a real possibility. In this respect, Mr Herbert would emphasise a number of factors. These factors include the following: the Court of Appeal's acknowledgement of the equivocal nature of the scientific evidence; the inability of the complainant to give reliable evidence of what happened in the bedroom; and the lack of any explanation as to how she ended up on the mattress in a manner consistent with Mr Herbert's account of events.

[10] In opposing leave, the respondent submits the proposed appeal does not raise any question of general or public importance where the scientific evidence was simply part of the analysis for the jury to undertake. The respondent also submits no miscarriage arises where there was a range of evidence to support the conclusion that penile penetration occurred and a contrasting lack of detail in the narrative to support digital penetration as the explanation for the presence of the semen on the vaginal swabs. In this latter respect, the respondent refers to Mr Herbert's inability to describe the level of touching on the complainant's vagina. Reference is also made to the fact

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5 At [13]. The issue was addressed by Crown and defence counsel and by the trial Judge in summing up.
6 At [14].
7 Senior Courts Act 2016, s 74(2)(a).
8 Section 74(2)(b).

that the complainant did not resile from her earlier statements about what happened in the bedroom and denied fabricating her evidence.

Our assessment

[11] There is no challenge to the principles applicable to unreasonable verdicts.[9] Rather, the proposed appeal would turn on the application of those principles to the particular facts. Nor do we see issues such as the place of scientific evidence as determinative in this case where there is no dispute the evidence was relevant to the question of whether the jury could be satisfied on the issue of penile penetration. No question of general or public importance accordingly arises.

[12] The proposed appeal would revisit the arguments in the Court of Appeal. Nothing raised by Mr Herbert gives rise to an appearance of a miscarriage of justice arising out of the Court's assessment this was a question for the jury and that the jury "was entitled to find proved the physical element of penile penetration having regard to all the evidence".[10]

[13] Mr Herbert's application for leave is filed out of time but the delay is explained. In these circumstances, an extension of time to file the application for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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9 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

10 CA judgment, above n 1, at [14].