NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

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 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 7/2020
[2020] NZSC 51

BETWEEN R (SC 7/2020)
Applicant

AND THE QUEEN
Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: S J Gray for Applicant
J E L Carruthers for Respondent

Judgment: 19 May 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr R, seeks leave to appeal the dismissal by the Court of Appeal of his appeal against conviction.[1] At issue is the reliability of evidence obtained by the police digital forensics unit (DFU) from Mr R's phone. It is argued that the admission of the evidence at trial caused justice to miscarry, and that the application gives rise to a matter of public importance because it challenges the standards applied by the police to forensic examination of electronic devices.

Background and procedural history

[2] Following a retrial at the District Court in Manukau, Mr R was convicted of two charges of sexual offending against a 12 year old girl.[2] The Crown case was that Mr R called the complainant into his bedroom to massage his back. He then asked her if she wanted to earn some money. Using his mobile phone, he showed her a video of a woman holding and rubbing a man's penis. He then asked the complainant to perform that act on him. She complied. He then showed her a video of a woman performing oral sex on a man. He asked the complainant to perform that act on him. She did this briefly before becoming upset. She then left and went to her own bedroom.

[3] In the bedroom, the complainant used her own mobile phone to dial 111. The call connected but before the complainant was able to communicate her address, she heard Mr R coming to her room so she ended the call. The police were unable to respond. That call was made on 30 September 2015 at 11.57 am.

[4] The complainant told her mother and her teacher a few days later and the police were contacted. Mr R was arrested some five months later on 13 February 2016.

[5] Mr R gave evidence at trial. The defence case was that the complainant was lying and that she and her mother had conspired to level these false allegations against Mr R in order to secure his removal from the household.

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1 *R (CA89/2018) v R* [2019] NZCA 638 (Collins, Simon France and Lang JJ) [second appeal judgment].

2 *R v [R]* [2018] NZDC 2345 (Judge McNaughton). A jury had acquitted Mr R of one charge in the first trial but could not come to a verdict on the other three charges.

[6] The police obtained Mr R's phone and examined it several times between October 2015 and August 2017. The evidence the subject of this application was obtained from the phone on 17 August 2017. On that the date, Mr Son, a digital expert from the DFU, extracted data from the phone that the police had been unable to obtain earlier. The data contained a YouTube search for the term "maturbation". The search was timestamped 11.28 am on 30 September 2015, almost 30 minutes before the 111 call. The same examination also revealed data showing a Pornhub search had been undertaken. This search was timestamped 11.16 pm on the evening of the same date.

[7] Mr R's conviction appeal first came before the Court of Appeal in July 2018.[3] The Court dismissed the appeal. But the appeal was subsequently reopened after new evidence came to light suggesting that the manner in which the police had handled Mr R's mobile phone while it was in their custody gave rise to doubt about the reliability of the data extracted from it.[4] The Court reheard the appeal and dismissed it a second time.[5] Leave to appeal is sought in relation to that decision.

[8] At trial, the evidence of the police handling of Mr R's phone was as follows:

(a) On 9 October 2015 when first interviewed, Mr R agreed to hand his phone over to the police for a brief period (he needed it back because it was his business phone). The police held the phone for approximately five hours. They extracted some data but could not obtain the phone's internet history. Nor was there time to clone the phone's memory card.

(b) On 13 February 2016, the police executed a warrant to search the phone a second time. Mr R was arrested at the same time. The police seized the phone, removed its sim card, put the phone on flight mode and stored it at the police station.

(c) On or about 22 March 2016, a member of the DFU downloaded further data from the phone. However, data relating to the phone's internet history could still not be extracted.

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3 *R (CA89/2018) v R* [2018] NZCA 341 [first appeal judgment].
4 *R (CA89/2018) v R* [2019] NZCA 176 [reopening judgment].
5 Second appeal judgment, above n 1.

(d) On 14 July 2016, Detective Sara, the officer in charge, accessed the phone's internet history via its Google Chrome web browser. The history able to be extracted related only to the period between 26 January 2016 and 13 February 2016. It showed that Mr R accessed the Pornhub site on a daily basis. Detective Sara took photographs of that history.

(e) On 8 March 2017, Detective Sara conducted a manual search of the phone's Google Chrome history. Nothing new was obtained. The search nonetheless generated three cookie files.

(f) On 17 August 2017, as already noted, Mr Son (from the DFU) conducted a final manual examination of the phone. He used a different technique to obtain greater data access. By downloading certain rooting software,[6] he obtained the YouTube and Pornhub historical searches timestamped 30 September 2015. Mr Son said the Pornhub entry was stored in the Google Chrome synchronisation database, while the YouTube entry was located on the phone's local storage. Mr Son also made a clone of the phone. Mr Son's search generated a cookie dated 17 August 2017. An unexpected synchronisation event also occurred as a result of the examination.[7]

[9] Mr R advanced two issues in the first appeal but only one of them was subsequently pursued in the second appeal and in this application.[8] That issue is whether the phone data evidence was inadmissible because it was unreliable. Initially, Mr R argued that police had not dealt with the phone in accordance with required best practice, for two reasons: first because a clone of the phone had not been created until August 2017 (nearly two years after the police first took possession of it); and second because the phone data had been modified during the course of police examination (as the cookies showed).

6 Rooting software allows a user to gain "root" access to the Android operating system code.

7 Generally speaking, synchronisation is where data on one device is replicated on another device through a link such as a common account. By this means, devices connected to a single web browser account will synchronise their internet history each time they are connected to the internet.

8 First appeal judgment, above n 3, at [20]; and second appeal judgment, above n 1, at [5].

[10] On the first appeal, the Court of Appeal rejected the unreliability argument and dismissed the appeal.[9] Relevantly, the Court found that the expert evidence at trial did not suggest that the timestamps for the "maturbation" and Pornhub searches were unreliable as a record of when they occurred.[10] The disagreement between the experts at trial related to whether the searches at those times had been carried out on Mr R's phone or some other connected device.[11] The Court noted that the possibility the searches took place on another device supported other evidence that the complainant may have undertaken the search on a separate device synchronised to Mr R's phone.[12] This was the alternative narrative advanced by Mr R at trial. In short, the search history evidence suited both sides in the case.

[11] Following dismissal of the appeal, evidence came to light that on 8 March 2017, Detective Sara had in fact tried to use a personal hotspot to connect Mr R's phone to the internet.[13] Experts agreed that the phone was set to synchronise automatically and that this made it highly likely the phone was synchronised with any connected devices on 8 March 2017.[14] This, the Court considered, raised further questions in relation to the reliability of the evidence obtained from the phone.[15]

[12] The Court of Appeal therefore reopened the appeal and it was heard by a differently constituted panel. Further expert evidence was received from Mr Son for the Crown and Mr Spence for Mr R. A third expert, a Mr Watt, was also called by Mr R.

[13] Mr R's experts took the view that the evidence from the phone could no longer be relied upon because the inevitable synchronisation event on 8 March 2017 probably changed the information on the phone, thereby compromising its utility as evidence of the state it was in on 30 September. Mr Spence in particular noted that there were two other YouTube searches recorded for that day. They were timestamped one second

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9 First appeal judgment, above n 3, at [63].
10 At [48].
11 At [50] and [56].
12 At [58] and [61]. When questioned by the Court at trial, the complainant accepted that she could have searched the word "masturbation" at some point but did not recall doing so.
13 Reopening judgment, above n 4, at [6].
14 At [7].
15 At [17].

apart.[16] Since, in Mr Spence's view, it is not possible to search two entries within one second of each other, the timestamps were likely synchronisation times rather than actual search times. This meant, he considered, the timestamp for "maturbation" could also have been a synchronisation time and not a search time.

[14] The Court of Appeal rejected this opinion. During trial, when asked by the jury about the one-second interval, Mr Spence explained it by reference to minor processing delays. He dismissed it as of little consequence. The Court considered Mr Spence's new opinion was merely him "speculating on a different answer to essentially unchanged information".[17]

[15] The Court noted that it had always been understood that Mr R had continued to possess and use his phone for five months after the events of 30 September 2015, during which time he would have regularly connected to the internet, triggering multiple synchronisation events. It was also known at trial that Mr Son's actions on 17 August 2017 had triggered a synchronisation event.[18]

[16] The Court considered therefore that in substance, nothing had changed since the trial. The position remained that either Mr R had undertaken the "maturbation" search at 11.28 am on 30 September 2015, or someone else had on a different device.[19] Importantly, any failure to achieve best practice with respect to the handling of the phone had still to produce the reasonable possibility of a material error capable of giving rise to a miscarriage. The Court of Appeal was satisfied it could not be established that any departure from best practice made it reasonably possible that the timestamp for the "maturbation" search was unreliable to any greater extent than was argued at the trial.[20] The Crown only relied on the Pornhub entry later that evening to establish Mr R's state of mind at the relevant time. That fact was amply established by other reliable evidence (including that of Mr R himself).[21]

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16 They were timestamped 11.18.50 pm and 11.18.51 pm; 3 minutes or so after the Pornhub search timestamped 11.16 pm.
17 Second appeal judgment, above n 1, at [27].
18 At [28].
19 At [30].
20 At [31]–[32].
21 At [32].

Summary of applicant's submissions

[17] Mr R submits that the application meets the threshold for leave because:

(a) the YouTube entry was unreliable and so, being a "key plank" in the Crown case, its admission led to a miscarriage of justice; and

(b) the extent to which courts must uphold best practice in the handling of digital evidence is a matter of public importance that should be considered by this Court.

[18] Mr R argues that the phone evidence was not reliable because of the "circumstances in which the evidence was born":

(a) the evidence was "not located on the Phone" before Mr Son installed the rooting software;

(b) search results only returned four searches on 30 September 2015;

(c) it was accepted at the first trial that there was data missing from the phone;

(d) there are timestamps on the phone linking searches to 1970; and

(e) the fact that there were searches impossibly timestamped one second apart.

[19] Mr R also submits that the Court of Appeal was wrong to hold there were only two explanations for the "maturbation" search entry. There was a third explanation: that it was made from Mr R's phone but on a different date. Mr Watt's evidence in the Court of Appeal was that the timestamp could have been influenced by the rooting procedure, and Mr Spence's evidence was that the timestamp could have been a synchronisation time and date. Mr R complains that the Court ignored this evidence and, without proper basis, preferred Mr Son's evidence that the timestamps were accurate.

[20] Further, Mr R submits that Detective Sara and Mr Son did not follow best practice in maintaining an accurate record of their handling of the phone. This means there is insufficient information for the Court to be sure that the evidence extracted from the phone was reliable. He submits that the Court erred in not placing enough weight on this point and in failing to enquire further into the handling process to ensure the evidence from the phone was reliable.

[21] Mr R finally argues that the Court of Appeal was wrong to say it was necessary to link the procedural errors to evidence sought to be relied on at trial. This was because, it is submitted, reliability "is a threshold question", and evidence that is not reliable does not meet the admissibility threshold.

Analysis

[22] In substance, the arguments in support of miscarriage amount to a challenge to the Court of Appeal's factual findings. They do not raise any matter of general or public importance.[22] Further, the merits of the appeal were comprehensively addressed by differently constituted appeal panels, and as the Court of Appeal explained, the plausible alternative explanations for the timestamps were put to the jury at trial. Accordingly, none of the matters addressed in the application raises any real risk of a miscarriage of justice.[23]

[23] As to whether best practice with respect to the extraction of digital data from devices is a matter of public importance, there may be something in this point, but the issue is not material in this case for the reasons already canvassed.

[24] The application for leave to appeal is therefore dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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22 Senior Courts Act 2016, s 74(2)(a).
23 Section 74(2)(b).