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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 84/2024
[2024] NZSC 157**

BETWEEN	BENJOVI CHANNI TOA Applicant
AND	THE KING Respondent

Court:	Glazebrook, Ellen France and Miller JJ
Counsel:	J D Lucas for Applicant M J Lillico and A J Ewing for Respondent
Judgment:	14 November 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal his convictions for sexual violation of a woman with whom he had sexual connection at a party when she was heavily intoxicated. She spoke of a big gap in her memory about behaviour that others

witnessed. There was evidence that she texted her ex-partner seeking help. The Crown contended that she did not consent and she was so intoxicated that she incapable of doing so. The Crown also submitted that her behaviour could not have provided Mr Toa reasonable grounds to believe she consented.

[2] Mr Toa's primary defence was that she did consent. He contended that she was not so intoxicated that she could not give consent and was lying about whether she did or not. But if she was intoxicated, her evidence was unreliable. He contended that her complaint was the product of subsequent regret and embarrassment. He also denied some of the alleged sexual activity.

[3] The trial Judge gave the jury an intoxication direction about a number of witnesses, including the complainant.¹ They were told that intoxication might be relevant to the memory and reliability or accuracy of witness accounts.

[4] After the jury had been sent out, defence counsel invited the trial Judge to go further and give the jury a reliability warning under s 122 of the Evidence Act 2006, to the effect that if the jury found the complainant was intoxicated they ought to exercise caution before accepting her evidence. The Judge declined to do so, stating that he had already made it abundantly clear that the jury needed to consider the complainant's intoxication and it was not necessary to further warn them to exercise caution. The Judge was also concerned that the jury might interpret such further direction as an indication as to how they ought to decide the case.

[5] The Court of Appeal dismissed Mr Toa's appeal on the basis that the potential unreliability of the complainant was squarely before the jury, not only through the witnesses and counsel but also the Judge, so a warning would not have materially assisted them.² The Court considered that a s 122 direction, in addition to what the Judge had already said, could have sent a signal that the complainant was lying.³ The Judge accordingly had good reason not to comply with counsel's request for a s 122

¹ See *Toa v R* [2024] NZCA 295 (Mallon, Lang and Moore JJ) at [25].

² At [35]–[37].

³ At [43].

direction.⁴ The Court also pointed out that in respect of some of the central events the defence case was not that the complainant was unreliable but that she was lying.⁵

[6] Mr Toa contends that the proposed appeal raises a question of general or public importance about the approach to reliability directions, and further that the Court of Appeal erred by discounting the need for a reliability warning in circumstances where the defence contended that the complainant was lying.⁶ He invites us to hear it with *Tamati v R*, in which leave has been given in what he contends is a similar case.⁷

[7] We are not persuaded that the proposed appeal has sufficient prospects of success to justify giving leave.⁸ The potential unreliability of the complainant's evidence was squarely before the jury and they had been told to take it into account when considering the reliability or accuracy of her account.⁹ That amounted to a direction to exercise caution if they found she was intoxicated.¹⁰ It is not readily apparent that something more was required in the circumstances. The omission of an express warning to exercise caution accordingly raises no appearance of a miscarriage of justice. *Tamati v R*, in which leave has been given, is not on all fours. It raises a number of issues, notably trial counsel error, and those issues are likely to inform the Court's approach to the issue of a s 122 direction in that case.

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

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

⁴ At [44].

⁵ At [41].

⁶ See Senior Courts Act 2016, s 74(2)(a)–(b); and *R v R* [2023] NZSC 132, [2023] 1 NZLR 507 at [49(c)] and [67] per Winkelmann CJ, O'Regan and Williams JJ.

⁷ *Tamati v R* [2024] NZSC 91.

⁸ See Senior Courts Act, s 74(1).

⁹ The Judge addressed this in the context of the intoxication direction.

¹⁰ See Evidence Act 2006, s 122(4).