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S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA684/2015
[2016] NZCA 368**

BETWEEN SAREL PETRUS BOSHOFF
Appellant

AND THE QUEEN
Respondent

Hearing: 20 July 2016

Court: Randerson, Fogarty and Collins JJ

Counsel: R Vigor-Brown for Appellant
Z R Johnston for Respondent

Judgment: 1 August 2016 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 9 September 2015 Mr Boshoff was found guilty of one charge of sexual violation by digital penetration¹ and one charge of indecent assault² following a trial by a jury in the Rotorua District Court. The jury acquitted Mr Boshoff of a second charge of sexual violation, in which it was alleged he had placed his mouth on the complainant's genitalia.

[2] On 30 October 2015 Judge McGuire sentenced Mr Boshoff to two and a half years' imprisonment for the sexual violation conviction and a concurrent sentence of one year's imprisonment for the indecent assault conviction.³

[3] Mr Boshoff initially appealed against both conviction and sentence. However, no submissions were advanced in support of the sentence appeal and the Court has since been informed it is abandoned. There are two grounds for his appeal against conviction:⁴

- (a) His trial counsel had insufficient time to prepare for the trial and failed to properly put the defence case thereby causing a miscarriage of justice.
- (b) The complainant's mother gave inadmissible hearsay evidence about the complainant's physical condition and state of her emotional development thereby causing a miscarriage of justice.

[4] We are dismissing Mr Boshoff's appeals against conviction because his trial counsel properly put the defence case in accordance with his instructions and no error occurred when the complainant's mother gave the impugned evidence.

¹ Crimes Act 1961, ss 128(1)(b) and 128B. Maximum sentence of 20 years' imprisonment.

² Crimes Act 1961, s 135. Maximum sentence of 7 years' imprisonment.

³ *R v Boshoff* [2015] NZDC 21792.

⁴ Criminal Procedure Act 2011, s 232(2)(c).

Background

[5] The complainant was 20 years old at the time of the offending in September 2013. She was born blind. In her evidence the complainant's mother said the complainant had physical conditions associated with her blindness such as difficulties with spatial orientation and concepts of time. In response to a question from the jury the complainant's mother said that the complainant had been assessed as being "emotionally quite behind other children of her age".

[6] The complainant was a friend of Mr Boshoff's daughter. On 13 September 2013 the complainant was at Mr Boshoff's home waiting for his daughter to return home and take the complainant to a youth group meeting. Only Mr Boshoff and the complainant were in the house. The complainant was in the lounge and called out to Mr Boshoff. He went to the lounge and, according to the complainant, started to kiss her and touch her breasts. He then reached into her jeans and penetrated her genitalia with one of his fingers. The complainant also alleged that a short time later when she was in Mr Boshoff's study he entered that room, pulled her jeans part way down and licked her genitalia.

[7] The following day the complainant told her mother about a number of the things Mr Boshoff had done to her. The complainant was taken to the police on 23 September 2013 and gave an electronically recorded interview on 25 September 2013.

[8] When Mr Boshoff was interviewed on 1 October 2013 he admitted he had said to the police he had "done something ... that as a married man was not truthful" but declined to make a statement.

[9] Mr Boshoff gave evidence at his trial. He admitted going into the lounge and sitting next to the complainant. He said she was masturbating and he only touched her breasts after she had exposed them. He said that she then leaned back and pulled her jeans part way down. He admitted touching the complainant's genital area but said he did so with her consent. Mr Boshoff denied the allegation of oral sex.

[10] For almost two years Mr Boshoff was represented by a lawyer. He provided that lawyer with a statement that formed the basis of the evidence he gave at trial. We do not know exactly when that statement was prepared but we infer it was well before the trial.

[11] The week before the trial was due to commence, Mr Boshoff's previous lawyer was granted leave to withdraw. Mr Hine, an experienced Rotorua lawyer, agreed to act for Mr Boshoff on legal aid.

[12] Mr Hine was instructed on Friday 4 September 2015. He obtained Mr Boshoff's file from his previous lawyer and met with Mr Boshoff that day. Mr Hine said the Crown assisted by explaining to him what the trial issues were from the Crown's perspective.

[13] The trial was scheduled to start on Monday 7 September 2015. Mr Hine said in his evidence that he spoke to Mr Boshoff over the weekend and spent the weekend preparing. He also said he felt comfortable accepting the instructions at short notice because "it was not a particularly difficult trial from a fact base perspective".

[14] Judge McGuire also assisted Mr Hine by empanelling the jury at 11.00 am and deferring the start of the trial until 2.15 pm on 7 September 2015. This gave Mr Hine further time to take instructions from Mr Boshoff. Mr Hine had discussions with Mr Boshoff during the trial on 7 September 2015 and the morning of 8 September 2015 prior to cross-examining the complainant. Mr Hine tactfully cross-examined the complainant and put the essential elements of the defence case to her.

[15] During the course of his cross-examination of the complainant, Mr Hine questioned her about the jeans she was wearing. He asked her:

Q. ... Were they a tight fitting jean or a loose fitting jean?

A. Loose fitting.

In response to another question the complainant said the jeans were made from "stretch denim".

[16] The Crown case concluded after lunch on 8 September 2015.

[17] Mr Hine opened the defence case just before 3.00 pm on 8 September 2015 and Mr Boshoff gave evidence in accordance with the statement he had provided to his previous lawyer. During the course of his evidence-in-chief, Mr Boshoff said the complainant was wearing “skinny jeans really tight fitting”. This detail was not in Mr Boshoff’s pre-trial brief of evidence, and had not been mentioned to Mr Hine by Mr Boshoff. It was not consistent with the complainant’s evidence about the tightness of the jeans she was wearing.

[18] Closing addresses were given by counsel on the morning of 9 September 2015. Judge McGuire summed up later that morning and the jury returned with their verdicts at approximately 2.40 pm.

First ground of appeal

[19] Mr Vigor-Brown, counsel for Mr Boshoff in this Court, submitted Mr Hine had failed in three ways to properly put Mr Boshoff’s defence.

[20] First, it was submitted Mr Hine failed to properly put either in cross-examination or in his closing address that the complainant’s accounts of what had occurred had evolved from the time she spoke to her mother on 14 September 2013 through to when she gave her evidential interview. Mr Vigor-Brown submitted there were six additions to the complainant’s evidence from the time she complained to her mother to when she gave her evidence.

[21] Second, it was submitted the complainant had not been properly challenged when she said she was wearing loose fitting jeans.

[22] Third, it was submitted Mr Hine should have called “good character” evidence.

Analysis

Cross-examination

[23] Our reading of Mr Hine’s cross-examination of the complainant leads us to conclude he approached the difficult task of cross-examining a vulnerable witness in a tactful and professional manner. The argument cross-examination may have been more extensive and robust cannot in itself be a ground of appeal.⁵ Mr Boshoff’s defence was properly put to the complainant and in accordance with instructions he had given Mr Hine. In particular, Mr Hine challenged the complainant in relation to the key elements of her allegations.

Closing address

[24] Mr Hine gave a very detailed closing address, which he had prepared in written form and discussed with Mr Boshoff before it was delivered. In his closing address Mr Hine did point out to the jury that the complainant’s account of Mr Boshoff touching her genitalia had evolved and that the first time she mentioned Mr Boshoff’s finger had entered her vagina was towards the end of her evidential interview. Mr Hine spent some time explaining to the jury how the complainant’s accounts had changed over time, providing “a clear pointer that her evidence is unreliable”, and that this in itself was a reason for the jury to acquit Mr Boshoff.

[25] In our assessment, Mr Boshoff’s case was properly presented to the jury.

Tightness of complainant’s jeans

[26] Mr Boshoff sought leave to file affidavits from his wife and daughter. Mrs Boshoff has now filed an affidavit saying that the complainant was wearing tight jeans on the day in question. She has also tried to give evidence about how difficult it would have been for Mr Boshoff to have pulled down the complainant’s jeans.

[27] Mr Hine acknowledged that had he known the complainant was wearing tight skinny jeans then he would have questioned the complainant further about the tightness of her jeans. He did not do so because he had no instructions on that issue.

⁵ *Hall v R* [2015] NZCA 403 at [74]–[75].

Mr Hine did question the complainant about the jeans she was wearing and obtained the answers we have referred to in [15]. It was not Mr Hine's fault that Mr Boshoff omitted to tell him about the complainant wearing, according to him, "tight skinny jeans". It was not a matter covered in Mr Boshoff's pre-trial statement, which he had prepared for his previous lawyer. Nor was it something Mr Boshoff told Mr Hine about before Mr Boshoff gave evidence.

[28] This ground of appeal cannot succeed. It was available to be called at trial and was not. It is only admissible on appeal to the extent it demonstrates evidence that might have been called but for the complaint about trial counsel. We do not consider the evidence on this topic is as significant as Mr Boshoff now suggests. If it had been important, it would or should have been drawn to counsel's attention before trial. Given Mr Boshoff's admission of inappropriate touching of the complainant's breasts and genital area, the tightness or otherwise of her jeans is unlikely to have assisted Mr Boshoff. We see no material risk of a miscarriage arising.

Good character evidence

[29] Mr Vigor-Brown has filed a number of affidavits from female deponents who say that Mr Boshoff has not acted inappropriately towards them. In the hearing before us Mr Vigor-Brown relied on an affidavit from one woman in particular, who said that she met with Mr Boshoff when she was feeling vulnerable and that he did not act inappropriately towards her.

[30] This evidence might be classified as propensity evidence. In *Wi v R* the Supreme Court held that evidence of lack of previous convictions may be relevant propensity evidence if it tends to prove that the defendant is less likely to have committed the offence or offences with which he is charged.⁶ The Supreme Court also recognised the established common law practice that equates lack of previous convictions with good character.⁷

⁶ *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [19].

⁷ At [28].

[31] There is, however, a problem for Mr Boshoff in relation to this ground of appeal. The good character evidence could only be relevant to the issue of whether or not Mr Boshoff had a tendency to act inappropriately with vulnerable young women. The difficulty for Mr Boshoff is that he admitted that he had in fact acted inappropriately when he touched the complainant's breast and pubic area. In these circumstances, no miscarriage of justice arose through Mr Boshoff not calling the good character evidence which he now says should have been called at his trial, and which he did not instruct Mr Hine to call.

Second ground of appeal

[32] Mr Vigor-Brown did not abandon the second ground of appeal against conviction. He acknowledged however that it was difficult to see what prejudice was actually suffered by Mr Boshoff through the complainant's mother describing her physical condition and her level of emotional development. Mr Vigor-Brown acknowledged the complainant's mother was in an ideal position to answer the jury's question and that it would have been futile to have called expert evidence to explain to the jury the details of the complainant's physical condition and her level of emotional development. No one was better placed than the complainant's mother to give evidence of this nature. It was properly admissible.

[33] No miscarriage of justice arose through the complainant's mother giving evidence about her daughter's physical condition and the level of her emotional development.

Conclusion

[34] The appeal against conviction is dismissed.