NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA743/2017
[2018] NZCA 308

BETWEEN	ESTALL JHANA GLASSIE Appellant
AND	THE QUEEN Respondent

Hearing: 19 April 2018

Court: Williams, Wylie and Thomas JJ

Counsel: I M Brookie for Appellant
J C Pike QC for Respondent

Judgment: 14 August 2018 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] Mr Glassie faced nine charges involving violence and sexual violation in relation to his partner, C. They included four counts of male assaults female,[1] one of assault with intent to injure,[2] one of injuring with intent to injure,[3] and three counts of

1 Crimes Act 1961, s 194(b).
2 Section 193.
3 Section 189(2).

sexual violation by unlawful sexual connection.[4] The charges covered alleged offending over a two-day period in April 2016.

[2] Mr Glassie was tried before Judge M E Sharp and a jury in the District Court at Auckland. At the commencement of the trial, he pleaded guilty to three of the six violence charges (two counts of male assaults female and one count of injuring with intent to injure). The jury found him guilty on all other charges. Judge Sharp sentenced Mr Glassie to 12 years and eight months' imprisonment.

[3] Mr Glassie appeals against his convictions on those charges that he did not enter guilty pleas on.

Factual allegations

[4] Mr Glassie and C had been in an on-again, off-again relationship for five years. He had moved back to C's address shortly before the offending. The factual allegations in relation to the charges relevant to this appeal are as follows.

[5] On 27 April 2016, C returned home following a netball game. The pair engaged in consensual sex. During this, Mr Glassie became angry and accused C of having recently had sexual intercourse with someone else. He punched her repeatedly in the head, back and stomach. He went to the laundry to retrieve C's underwear, believing there would be evidence in them of recent sexual intercourse. When C followed him to the laundry, he slapped her causing her to fall back into the laundry wall.

[6] Later the following evening, when the pair were in bed, Mr Glassie raised the accusations of infidelity again. He began beating C. She admitted the allegation in the hope that would cause the violence to stop, but it did not. Mr Glassie then gave C "the biggest hiding" in her words. Mr Glassie strangled C and then beat her more. Following this Mr Glassie forced C to perform oral sex on him and he punched her until she agreed to his demand for anal sex. Mr Glassie then penetrated C's anus with his fingers and then his penis.

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4 Section 128(1)(b).

[7] C sustained a number of injuries: significant bruising to the left eye and the rear of the left ear, significant bruising to the right temple and behind that ear, a broken little finger and bruising to that hand, abdominal tenderness, bruising to the left shoulder and upper back, and a small abrasion at the anal entrance.

Mr Glassie's response

[8] Mr Glassie did not give or call evidence in his defence. But, through his counsel, he accepted the oral sex took place but maintained it was consensual. He argued that the two male assaults female charges and the one assault with intent to injure did not occur. Neither, it was argued, did the anal penetration (digital and penile) occur. C, it was argued, exaggerated the level of violence used against her, and lied about the sexual violations.

Grounds of appeal

[9] Mr Glassie advanced three grounds of appeal as follows:

(a) The verdict on the oral sex charge was unreasonable in light of C's inconsistent evidence.

(b) The Judge failed to give an appropriate reliability warning under s 122 of the Evidence Act 2006 in relation to medical evidence.

(c) The Judge failed to properly direct the jury in relation to comments by the prosecutor in closing address that the complainant had no motive to lie.

Unreasonable verdict

[10] The test for whether a jury's verdict is unreasonable is found in *R v Owen*:[5]

> [17] … a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

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5 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.

[11] Mr Glassie argued that C's evidence was inconsistent and contradictory. Mr Glassie argued that no reasonable jury could be satisfied beyond reasonable doubt that oral sex took place, and if it did, that C did not consent and Mr Glassie did not reasonably believe that she did.

[12] In her evidence in chief, C described the incident in these terms:

> … so he's forcing me to give him a blow job and, you know, lots of blow jobs because apparently that's what I'm good for um I wouldn't do it, I didn't want to do it so he'd slap me, he, a couple of times.

[13] Under cross-examination C acknowledged that she may have agreed to oral sex:

> Q: But what I am saying to you is that you did it because you wanted to. Do you agree with that?
>
> A: Maybe, yes.
>
> Q: Well it's a pretty simple question, [C].
>
> …
>
> Q: … maybe you did want to do it — have I got that right?
>
> A: Yep.

[14] Later during cross-examination, C provided her explanation:

> Q: But I think even on your story you agree that on the Thursday night he tried to initiate oral sex with you, he tried —
>
> A: Well, there were times when I just let him do it because I was over the hitting.
>
> Q: And —
>
> A: It was either that, take it or get a hiding, get hit more.

[15] In re-examination the prosecutor asked as follows:

> And then you said maybe you did it because you wanted to, okay? I'm just trying to work out whether you're clear about whether your video's right or whether you can't remember or whether you think maybe you did want to give him a blow job?

[16] C answered as follows:

> So I didn't get hit. I mean, it's hard to say, like, I may not have wanted to give it so he'd slap me and then I'd give it for the fact that he would stop slapping me.

[17] At the conclusion of the Crown case, Mr Glassie sought a s 147 discharge in respect of this charge. Judge Sharp dismissed the application finding that the variations in C's account went to credibility which was a matter for the jury.

[18] We accept there were apparent inconsistencies between C's evidence in chief and her responses to questions in cross-examination, but those inconsistencies were cleared up later in cross-examination and then again on re-examination. C said she acquiesced to oral sex because she would be beaten if she did not.[6] It was entirely open to the jury to accept this explanation in light of the evidence of violence the day before (which Mr Glassie admitted) and C's extensive evidence of violence during the course of the second evening. It is difficult to see how any intimate or sexual activity that evening could have been consensual given the violent context in which it all took place, if the jury accepted that evidence.

[19] We see no merit in this ground.

Reliability warning

[20] A Doctors for Sexual Assault Care (DSAC) doctor, Dr Sarah Aly, examined C. She took two anal swabs, one of which identified that male DNA was present in the anal passage which was 30 times more likely to be that of Mr Glassie or a male to which he was paternally related, than any New Zealand male paternally unrelated to him. The evidence provided moderate support for C's allegations. It then emerged that a third rectal swab, which was marked as having been taken by Dr Aly on the relevant form, was never received by ESR. The doctor could not explain the absence of the swab. A second problem was that, contrary to DSAC "best practice", Dr Aly did not change her gloves between taking vaginal and anal swabs. Dr Aly said it was

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[6] According to s 128A(2)(a)–(c) of the Crimes Act, a person does not consent to sexual activity if he or she allows the activity because of force applied or threatened to be applied to him or her or some other person, or if they are fearful of the application of force to him or her or some other person.

never her practice to change her gloves in such circumstances. She had been a DSAC doctor for many years.

[21] Section 122 of the Evidence Act relevantly provides as follows:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> …
>
> (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
>
> (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
>
> (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
>
> (4) It is not necessary for a Judge to use a particular form of words in giving the warning.
>
> …

[22] Section 122(1) makes clear that the relevant opinion as to whether admissible evidence "may nevertheless be unreliable", is that of the judge. Discretion is involved.[7] In *Ross v R,* this Court considered that: [8]

> [53] If a judge considers a warning is needed, what is required is a warning of the need for caution, an explanation as to why such caution is necessary and identification of the risks. There can, however, be a concern that in certain cases (for example where reliability issues are already obvious to the jury) the judicial imprimatur can artificially tip the scales against witnesses. …
>
> (footnotes omitted.)

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7 *R v Taylor* [2010] NZCA 69.
8 *Ross v R* [2017] NZCA 587.

[23] In this case, the Judge directed the jury in relation to the medical evidence as follows:

> [71] It's entirely a matter for you to decide what you think about this evidence; whether you accept it or whether you consider it to be reliable evidence. If you decide that it is unreliable evidence, then of course you should not accept it. If you are not sure how reliable it is and whether you can place much weight on it, then you should just disregard it altogether.
>
> [72] On the other hand, all things considered, if you consider that Dr Aly who after all was an extremely experienced DSAC doctor, was a good reliable witness of integrity and that the processes that she followed were scientifically unchallengeable, then it will be for you to determine whether you accept her evidence. If you don't accept her evidence, then you shouldn't go on to even look at the ESR evidence, because one follows from the other. But if you accept her evidence and you are satisfied beyond reasonable doubt of that and that you should give it appropriate weight, then you'll want to go on to consider the ESR evidence.
>
> [73] So it's right that I discuss this with you and that I say to you that you should be cautious about all of this evidence and make a decision, first off, about whether you accept what Dr Aly said and that what she did was an appropriate scientific process and that you are satisfied beyond reasonable doubt that there was not contamination so that the samples which ESR analysed were samples that did give the results in question. I don't think that there is any suggestion that the ESR process itself was in any way flawed; merely that you couldn't rely on their results unless you were satisfied of Dr Aly's processes first.
>
> [74] But the Crown does say to you that the analysis of the DNA in the anal swab put the DNA strength at the low end of the second lowest of all of the categories. And Mr Brookie says to you that that's just not good enough. Whereas of course you have extremely strong support for the DNA of some of the semen which was evaluated and analysed from the vaginal swab, as coming from a DNA profile of somebody like Mr Glassie. And there's a mighty difference between the strength of the two categories.
>
> [75] So I ask you to give serious thought and consideration to Dr Aly's evidence and to what impact it should or does have for you on the ESR evidence. But it is for you and if you consider that she was reliable and that her processes were not flawed, then you can place such weight on it as you wish.

[24] Mr Glassie contended that these directions failed to acknowledge specific shortcomings in the scientific evidence and that this failure was fatal.

[25] We accept as a general proposition that when applying s 122, a judge should point out specifically why evidence may be unreliable. This is to assist the jury to decide whether to accept it, and if they do, to assist in evaluating the weight to attribute to it. But in this case, what was the risk of unreliability?

[26] Dr Aly acknowledged she did not change her surgical gloves between the taking of vaginal and anal swabs. She accepted that this was inconsistent with the DSAC guidelines contained in the handbook. Her evidence was:

> That is my clinical practice, that's the way I was taught to do an examination and I do note that in the DSAC handbook it talks about changing gloves but that's not something that I've routinely been taught or routinely done.

[27] But the issue at trial was not compliance with the DSAC handbook. It was whether there was a reasonable possibility of false results through the transference of genetic material from one site to another. The doctor was acutely conscious of the need to avoid cross-contamination:

> Q: Because, of course, contamination across swabs effectively undermines any results that might be obtained?
>
> A: Yes, but at no point do I touch the swabs with my gloved hands.

[28] We do not consider the risk that the doctor's evidence was unreliable in this respect was such that the Judge needed to go further than she did in advising the jury to be cautious.

[29] The second complaint related to the third of the three anal swabs Dr Aly recorded on the examination form as having been taken during the examination of C. The samples were then forwarded to ESR for analysis. ESR records showed that it received only two of the three samples. ESR received a perianal sample (from a swab taken from around the external area of the anal sphincter) and an anal sample (from a swab taken two to three cm inside the anal entrance). But there was no record of ESR receiving a rectal sample (from a swab taken from the rectal cavity beyond the anal canal) despite the fact that Dr Aly recorded on the examination form that she had taken one. The doctor acknowledged that she may have filled out the form incorrectly. She then accepted the possibility that she may also have mislabelled the two samples that it seems were sent on to ESR. But, she said, while the latter was a theoretical possibility, it was "extremely unlikely".

[30] Thus the evidence went no further than that a rectal sample had somehow been lost either as a result of Dr Aly's or ESR's error. While perhaps of general interest in the case, such evidence said nothing about the specific reliability of the samples that

were analysed by ESR. It could not be said that the doctor's evidence had been so undermined that there was a genuine risk the samples examined by ESR were unreliable due to cross-contamination.

[31] On analysis, the two anal samples returned negative results for the presence of semen. This led to ESR undertaking the more sensitive male DNA focussed Y-STR test on the anal sample. The perianal sample was not further tested and, of course, the rectal sample was lost.

[32] It was the Y-STR test on the anal sample that produced male DNA that was 30 times more likely to be that of Mr Glassie or someone paternally related to him than to any other unrelated male in New Zealand. This was considered to be "moderate scientific support" for the proposition that the DNA originated from Mr Glassie.

[33] For Mr Glassie, it was argued that it was possible his DNA was deposited around the perianal area during consensual sex (or transferred there when C showered after the events in question). Mr Glassie then sought to rely on Dr Aly's apparent error with the samples and her failure to follow DSAC guidelines in relation to the changing of gloves, to suggest it was also possible that she had botched the anal swab process and introduced Mr Glassie's DNA into C's anus with the swab. The theory was Mr Glassie's DNA could have been innocently deposited in or around the perianal area during consensual sex and then swept up by an ineptly executed anal swab. It was in the context of the argument for that possibility that the reliability of Dr Aly's evidence was put in issue.

[34] There are two problems with this thesis.

[35] First, Dr Aly said she knew well that the anal swab must not touch the perianal area. She said, "care is taken to only place that swab in the area we're trying to sample, for example, not touching the perianal area when we're trying to take an anal swab". The evidence of potential mistake and failure to follow guidelines did not therefore go to the point Mr Glassie was advancing. The only evidence on the question was that cross-contamination was carefully avoided.

[36] Second, there was no evidence that Mr Glassie had deposited DNA in or around C's perianal area during consensual sex anyway. Nor was there evidence that, if such material had been deposited, it could be picked up by a swab carefully placed (according to the doctor's evidence) in the anal canal itself. Evidence was needed to establish these possibilities, for example through cross-examination of C and by calling a defence expert. We therefore agree with the Crown that such argument was no more than speculation without evidential foundation. The fact that it then relied for its efficacy upon an unrelated mistake (if indeed it was a mistake) and an equally unrelated failure to follow DSAC guidelines, cannot have corrected the problem.

[37] This was not the sort of situation where a carefully calibrated reliability warning was required, in which unrelated problems with the doctor's evidence needed to be specified. We are satisfied the Judge's directions were sufficient to meet the needs of the case.

Motive to lie

[38] In closing address, the Crown identified three "key factors" for why the jury should accept C's evidence. The third of these factors was "a complete lack of motive to lie".

[39] This was later expanded:

> So the final thing I want to touch on in respect of [C's] evidence is the lack of motive to lie, okay. She went to the police station the same day. She's clearly got these injuries that you can see, and clearly on its own that is serious, she's got a little broken finger, she's got bruising to her face, she's got bruising behind her ears, she's got bruising on her shoulder. That alone is serious there's no need to fabricate or lie or elaborate or make it all up, and whilst, of course, there is no onus on a defendant to prove motive as to why she may have exaggerated or made it up, if you accept there is no plausible motive to fabricate then it can in fact support the proposition that [C] is telling the truth.

[40] In re-direction, following further submissions from defence counsel, the Judge agreed to direct the jury on motive to lie. She said:

> [93] Next issue. In her closing address, the prosecutor Ms Lummis referred to [C] having an absence of motive to lie. Now you need to be clear that regardless of the absence of evidence of motive to lie, the onus of proof remains on the Crown throughout. There is no onus on the defence to prove

> a motive to lie and I also remind you that absence of evidence of motive to lie is not the same thing as an absence of motive.

Submission

[41] Mr Glassie argued that a stronger direction was required. He submitted that the Judge should have directed the jury to set the Crown's motive to lie submission to one side entirely. She should have explained to the jury that:

(a) There is no logical connection between C's physical injuries and the absence of motive to lie.

(b) The absence of evidence of motive does not add to the Crown case, C's motives may have only been known to her.

(c) There is no requirement on the defendant to suggest a motive.

Analysis

[42] It is well settled in New Zealand that it is permissible for prosecutors to question defendants (should they choose to give evidence) on a complainant's motive to lie and to close on the subject.[9] But prosecutors must be moderate in their treatment of the subject.[10] The risk that must be guarded against is the prospect that raising the absence of evidence of a complainant's motive to lie will subtly shift the onus of proof in the minds of the jury and lead them to convict unless the defendant can offer a plausible reason for why the complainant must be lying.

[43] In the present case, defence counsel closed very firmly on the proposition that, except for the charges where a guilty plea had been entered, C had greatly exaggerated and/or lied throughout. The defence's closing address is replete with references to reasons for why C's evidence in respect of the sexual violation and strangulation charges were utterly discredited through internal inconsistency, narrative shifts and implausibility. This is the kind of case where, even in the absence of evidence from the defendant himself, a careful reference by the prosecutor to the complainant's lack

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9 *R v T* [1998] 2 NZLR 257 (CA) at 265; and *Parker v R* [2008] NZSC 25.
10 *R v E* [2007] NZCA 404, [2008] 3 NZLR 145 at [55] and [57].

of a motive to lie cannot be criticised. We do not read the comments of the prosecutor as going too far. She was careful to remind the jury that the submission she made did not shift the onus of proof, but lack of motive was an appropriate matter to be taken into account.

[44] Following that submission, it was then for the Judge, utilising her judicial imprimatur, to ensure that the jury did not lose sight of which side carried the onus. We are satisfied that her direction was adequate in this respect. She reminded the jury explicitly that the defence was not required to prove C had a motive to lie and she further reminded them that even if there was no evidence of a motive to lie that did not mean that there was no such motive. The Judge was not required to direct the jury to set the submission to one side.

Result

[45] The appeal is therefore dismissed.

Solicitors:
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