NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA758/2021
[2024] NZCA 3

BETWEEN	SHANE KEITH BULLOCK Appellant
AND	THE KING Respondent

Hearing: 8 November 2023

Court: Collins, Brewer and Muir JJ

Counsel: H G de Groot and M J McKillop for Appellant
S C Baker and W J Harvey for Respondent

Judgment: 1 February 2024 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Bullock appeals his convictions entered on 12 March 2021 following a jury trial.

[2] The convictions were for 15 charges of sexual violation (rape and unlawful sexual connection).[1] The victims were [BM] and [VT].[2] Mr Bullock was also convicted of a breach of a protection order in relation to [VT].[3] Three charges in relation to [VT] were dismissed during the trial, and the jury found Mr Bullock not guilty of a further five charges in relation to [VT].

[3] The grounds for Mr Bullock's appeal are:[4]

(a) He did not receive a fair trial because he became unwillingly self-represented shortly before the commencement of the trial. A decision by the Legal Services Commissioner to withdraw legal aid was substantively wrong and procedurally unfair. The Judge's appointment of standby counsel, Mr Hewson, did not remedy his position given a poor relationship based on earlier representation.

(b) Mr Hewson gave Mr Bullock inadequate advice around his election not to give evidence in the light of an absence of foundation for the defence case.

[4] We must allow Mr Bullock's appeal if we are satisfied that a miscarriage of justice has occurred. A miscarriage of justice is defined as: [5]

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

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1 Crimes Act 1961, ss 128 and 128B. Maximum penalty: 20 years' imprisonment.

2 The victims' names have been anonymised because they have automatic name suppression pursuant to s 203 of the Criminal Procedure Act 2011.

3 Domestic Violence Act 1995, ss 19(1)(d), 49(1)(b) and (3). Maximum penalty: three years' imprisonment. Mr Bullock is not appealing his conviction for this charge.

4 A third ground of appeal relating to the admissibility of Mr Bullock's police interviews was not pursued before us as a result of evidence given by Mr Bullock.

5 Criminal Procedure Act, s 232(4).

Background to the first ground of appeal

[5] Mr Bullock pleaded guilty in 2019 to five charges relating to [VT] involving domestic violence, of which three were for breaching a protection order. Mr Hewson represented Mr Bullock. Subsequently, Mr Bullock was charged with the offences which form the subject of this appeal.

[6] The Legal Services Agency (LSA) assigned, serially, six lawyers to represent Mr Bullock. The third was Mr Hewson, who was appointed by an email sent on 7 February 2020. However, Mr Bullock advised the LSA he did not want Mr Hewson to represent him (and left a voice message to that effect for Mr Hewson). On 20 February 2020, the file was reassigned to a fourth lawyer (approved by Mr Bullock). Mr Hewson had taken no substantive steps.

[7] Two of the six lawyers appointed to represent Mr Bullock surrendered their assignment. One felt insufficiently qualified and the other was too busy. Three engaged substantively with the trial issues and with Mr Bullock. All eventually concluded that they could not maintain a professional relationship with Mr Bullock. Two were granted leave to withdraw and a further assignment was made. The third in time, Mr Foster, was the subject of a request by Mr Bullock to the LSA on 3 November 2020 for a change of lawyer due to a "Big Breakdown in relationship". The LSA advised Mr Foster of this request on 9 November 2020. Mr Foster at once agreed that the professional relationship was broken such that he could not represent Mr Bullock any longer. The District Court formally granted him leave to withdraw as counsel on 10 December 2020.

[8] Thereafter, Mr Bullock was unrepresented by counsel. We will not go into detail because we do not consider it relevant. In short, the LSA was reluctant to assign yet another lawyer and Mr Bullock did not take up the opportunities offered to persuade the LSA to revise its position.

[9] The trial was scheduled to commence on 8 March 2021. The trial Judge, Judge Rowe, was understandably concerned that Mr Bullock did not have counsel. At a hearing on 21 January 2021, Judge Rowe discussed the situation with Mr Bullock.

The Judge raised the possible appointment of Mr Hewson as standby counsel. In his Minute of 21 January 2021 the Judge recorded:

> [4] Mr Bullock has review rights in relation to that decision [the LSA's refusal to assign another lawyer] and I have encouraged him to pursue those if he wishes to be represented by his own counsel at the trial.
>
> …
>
> [6] Section 95 of the Evidence Act 2006 applies in relation to several of the Crown witnesses. Mr Bullock is not permitted to cross examine those witnesses. If the matter cannot be regularised through legal aid by the review process or otherwise, Mr Bullock would have to represent himself but I would assign standby counsel to cross examine the witnesses as required.
>
> [7] I have asked a registrar to make enquiries. I am aware at least one senior lawyer, Simon Hewson, is available to be able to fulfil that role and will be at court on 28 January for trial callover for other matters.
>
> [8] I intend therefore, Mr Bullock, to remand you to appear in the callover on 28 January at 11.45am. Mr Hewson will be present. We will then discuss the position with him. You are of course free to pursue your review rights in relation to legal aid in the meantime, and if you wish to be assigned your own lawyer, I encourage you to do so.

[10] Mr Bullock again appeared before Judge Rowe on 28 January 2021. Mr Hewson was not present initially. The Judge asked Mr Bullock whether he had filed an application for a review of the LSA's decision not to assign him another lawyer. Mr Bullock said he did not have the necessary form.

[11] The Judge discussed with Mr Bullock the possibility of Mr Hewson being appointed as standby counsel. Mr Bullock made no objection. The discussion finished:

> Q. One way or another, I want to proceed with your trial on the 8th of March. And if you don't have counsel and Legal Aid won't assign you counsel, then I need to appoint standby counsel.
>
> A. Yes.
>
> Q. Because at the very least someone other than you has to be available to cross-examine the complainants, all right?
>
> A. Yeah, I understand that.
>
> Q. So I need to sort that issue today. So what I'm going to do is ask that you, we're going to call you again this afternoon sometime okay?
>
> A. Okay.

Q. And we're going to find out from Mr Hewson what his availability is. If necessary we'll get him in by VMR, by phone or whatever.

A. What about, it's, can we make it next week or something, or is there a vacancy tomorrow in the court to see you?

Q. Well no, I [need] to try and sort this today, all right?

A. Okay.

Q. We're only just over a month away from a proposed trial so we have to resolve this issue today if we can. Because if I'm appointing standby counsel I need to give them directions anyway as to what the scope of their role is.

A. Right.

Q. All right, I'll talk to you again this afternoon Mr Bullock okay?

A. Not a problem. Thank you very much for your help.

Q. That's okay. Thank you.

A. Thank you.

[12] Judge Rowe reconvened the case conference later in the same day. Mr Hewson and Mr Bullock were present. At the outset there was this exchange:

THE COURT:

Hello Mr Bullock. Mr Hewson, thank you so much for making yourself available.

MR HEWSON:

Yes. I'm happy with that, so long as Mr [Bullock's] happy with that.

[13] There followed a discussion on Mr Hewson's availability and what would be required of him as standby counsel, particularly the cross-examination of the complainants. There was this exchange:

A. Your Honour, I've acted for Mr Bullock historically on summary matters at a time when this enquiry was embryonic.

Q. Yes.

A. He had dealt with those matters and served a sentence before these charges were laid and (inaudible 15:01:27) there was a series of counsel (inaudible 15:01:30) that so I have some awareness of the detail of one of the complainants and the nature of the relationship between the two.

Q. Sure.

A. But I haven't read this file.

Q. No, and if we're to proceed down this path of having standby counsel I need to frame the assignment with what's required. We also need to get the information for standby counsel as fast as possible. They'd need to talk with Mr Bullock about what's needed to be able to cross-examine the complainants.

A. Well in terms of *Fahey* I would need to be talking to Mr Bullock at length about his potential defences and witnesses and so forth as well as preparing the case.

Q. Yes.

A. So I've got no problem with it. I don't know what the trial estimate is and I understand the Crown were put on notice last Thursday to start preparing a file for standby counsel?

Q. Yes.

[14] Later, agreement was reached between the Judge and Mr Hewson, with which Mr Bullock concurred:

A. Well if he's comfortable that I am standby counsel and the court can accommodate those issues, then I'm available. That's all I can say.

Q. In terms of framing your appointment then, did you want to meet with Mr Munro first and look at the information –

A. Mr Bullock.

Q. Mr Bullock, my apologies. Mr Bullock first and then?

A. Yes, I would meet with him and I'd meet with him –

Q. And have a look at the file?

A. I'd meet with him on the weekend.

Q. Because then – will the Crown file for standby counsel be available by the weekend?

MS WILKINSON:

Sir, I'm sure it can be available by the weekend.

THE COURT TO MR HEWSON:

Q. Yes. Because then you could come back to me with a memorandum, Mr Hewson, after talking with Mr Bullock. We'd settle the terms of your appointment and get on with it.

A. Okay. Insofar as my knowledge of the primary complainant who was Mr Bullock's wife at a relevant period of time, I wouldn't have thought there would be too many other witnesses that he would be calling. Might be the Crown would be calling other family members. But that's – I don't know about the other ma – but I'll certainly, I can book an appointment in Manawatū Prison for the weekend.

Q. Okay. Well in terms of *Fahey* we're not supposed to use standby counsel as a replacement for the Legal Aid regime.

A. No.

Q. Having said that, I would defer to your view of the interests of justice and the interests of a fair trial for Mr Bullock when framing your appointment.

A. Okay. Well I'd have a long chat with Mr Bullock. He's got the problem section 95 so he has to have someone.

Q. Absolutely, absolutely. And it's the court who would be appointing, so…

A. There's a lot of documents and delays in making that complaint that are in Mr Bullock's interest to develop as well.

THE COURT:

Mr Bullock, are you happy if we proceed on that basis?

MR BULLOCK:

I think that's a good move.

[15] The case conference continued with Mr Hewson identifying portions of Mr Bullock's electronic interviews which he thought should be redacted. Mr Bullock was involved in the discussion. He did not indicate any disagreement with the role of Mr Hewson as it was discussed.

[16] On 4 February 2021, Mr Hewson filed his memorandum recommending the ambit of his appointment as standby counsel. In his summary he stated:

> 27. In summary, and assuming that it is appropriate for counsel to retain an appointment as standby counsel, the duties required to protect the interests of the defendant will in effect be all embracing, requiring the usual commitments of defence counsel in the preparation of a trial for a defendant.

[17] On 22 February 2021, Judge Rowe directed:

> The ambit of Mr Hewson's appointment as stand-by counsel is that he is to represent Mr Bullock at his trial as if he was instructed as counsel to the full

> extent required, for the reasons outlined in Mr Hewson's 4 February memorandum.

[18] Mr Hewson prepared for the trial on this basis. He represented Mr Bullock at the trial in all respects as though he was assigned counsel. Mr Bullock did not in any way represent himself during the trial. He did not express any dissatisfaction with Mr Hewson to the Judge. Mr Hewson's evidence is that Mr Bullock did not express any dissatisfaction to him about his professional conduct either during trial preparation or over the course of the trial. We accept that evidence. It is consistent with the record we have just described and Mr Bullock's evidence does not materially contradict it.

[19] On 26 May 2021, Judge Rowe sentenced Mr Bullock on the charges on which he was convicted. Mr Hewson appeared as standby counsel but, again, represented Mr Bullock to the extent he would have had he been assigned counsel.

Discussion

[20] Mr de Groot has filed an affidavit by Mr Bullock as well as comprehensive submissions covering in detail the history of Mr Bullock's engagement with Mr Hewson, with the other lawyers assigned to him by the LSA and with the LSA itself. The Crown has responded in kind, including with affidavits from Mr Hewson and the three assigned lawyers whose professional relationship with Mr Bullock broke down. In the hearing before us Mr Bullock gave evidence, as did Mr Hewson.

[21] In our view, the events which preceded Mr Bullock's trial have limited relevance to his appeal. In our view, the focus of the appeal must be on what happened at the trial. That is because, although appointed as standby counsel, Mr Hewson acted indistinguishably from assigned counsel.[6]

[22] The first ground of appeal cannot succeed because even if Mr Bullock would have preferred different counsel to represent him at trial, and even if the Legal Services Commissioner was wrong to withdraw legal aid, this did not cause a miscarriage of justice.

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[6] Given Mr Hewson's role and Mr Bullock's acquiescence with the arrangements, the presumptive unfairness discussed in *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 and *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 does not arise.

[23] Judge Rowe, diligently and with Mr Bullock's (at least) acquiescence, worked through the appointment of Mr Hewson as standby counsel and prescribed the ambit of his duties as being those of assigned counsel. Mr Bullock accepted that and worked with Mr Hewson on that basis both in trial preparation and throughout the trial.

[24] Having heard the evidence of Mr Bullock and Mr Hewson, we find that Mr Hewson prepared diligently and properly for the trial, understood Mr Bullock's defence and communicated with him appropriately. There was no unfairness in the fact that it was Mr Hewson who represented Mr Bullock and not another lawyer who Mr Bullock might have preferred.

[25] Therefore, the appeal will turn on the second ground of appeal: whether Mr Hewson gave Mr Bullock inadequate advice around his election not to give evidence in the light of an absence of foundation for the defence case.

Background to the second ground of appeal

[26] The complainants were in domestic relationships with Mr Bullock when the alleged offending occurred. His relationship with [BM] preceded his relationship with [VT]. His defence to their allegations differed between complainants. In respect of [BM], Mr Bullock's instructions to Mr Hewson were that he never had any sexual connection with [BM] during the relevant period. In respect of [VT], Mr Bullock's instructions were that sexual connection between them was less frequent than [VT] said and when it took place it was consensual, or he believed on reasonable grounds that it was consensual.

[27] Mr Hewson gave evidence, which we accept, that the defence in respect of [BM] was problematic given the history of sexual activity between the couple prior to the alleged period of abuse and the fact that during that period the two were living together in a domestic relationship. Mr Hewson was more confident that he could challenge [VT's] reliability and credibility. His pre-trial preparation had identified significant areas of weakness in her evidence. We do not need to give detail because it is not relevant to our decision. It is the overall position at the end of the Crown case, and the interactions between Mr Bullock and Mr Hewson which are important.

[28] Mr Hewson was, of course, conscious during trial preparation that Mr Bullock would have to decide whether to give evidence himself. Mr Hewson, consistent with his oral evidence, deposed:

> 81. We also discussed whether the appellant would give or call evidence. It was agreed that that decision would be made at the end of the Crown case and that I would conduct cross-examination and proceedings generally on behalf of the appellant in a manner that did not force the position one way or the other, leaving open the possibility of the appellant giving evidence if instructed.

[29] Mr Hewson, consistent with his oral evidence, deposed as to what happened at the end of the Crown case:

> 98. The trial commenced as scheduled on Monday 8 March. The Crown had closed their case around one o'clock on Thursday 11 March 2019. We took the lunch break, and I used this time to finalise advice and receive instructions from the appellant as to whether he wanted to give evidence.
>
> 99. My advice was that that he shouldn't. At the conclusion of discussing this issue I received instructions from the appellant that he would not give evidence. I recorded those instructions in writing and the appellant signed those instructions. Refer annexure 33 of the appellants affidavit.
>
> 100. If the appellant had instructed that he was going to give evidence, I would have sought an adjournment until the afternoon break to ensure that I could take the appellant through his evidence and to be sure he understood my questions and what I was prompting from him.
>
> 101. In this regard at 2.3 iv, b) of the Updated Points on Appeal it is stated that I did not have a completed brief of evidence for the appellant. This criticism seems to be a reference specifically to the charges relating to BM. I will treat it as relating to both complainants. It is true that I did not have a formal signed brief for the appellant. I did have a detailed knowledge of the file. I had prepared a timeline covering the time frame of the charges, the various dates VT had engaged with members of the police and the purpose of that contact, where the appellant or complainant was residing at the relevant times, whether he could have been working, in jail or receiving any medical treatment and if so what treatment. I google searched the purchase of the Manukau property to confirm the time he and VT shifted to the property. I obtained instructions from the appellant as to each charge. I was also able to call on my knowledge of the 2018 proceedings involving the appellant and VT and this was helpful as this time period included the threatening behaviour charges and the course of the TPO granted 4 October 2018. The fact that the appellant had been provided with the disclosure by former counsel made discussing any aspect of the file easier as he had read it prior to my assignment. I had prepared my cross examination of all witnesses and had considered all evidence

given through the trial. As such the evidence of the two complainants was fresh and I therefore had the makings of a final brief of evidence in my various notes and the other material including the notes of evidence. The defences were straight forward and while differing as between complainants were internally consistent for each complainant.

102. We had been discussing the question of giving evidence from time to time during the trial. It was certainly on my mind throughout. I had to tailor my cross examination of complainants accordingly. In the end the decision whether the appellant gave evidence came down to two real points. Was he insistent on giving evidence, if so then that was the election. If he wasn't insistent and sought advice, then in my experience there is a recognised process of arriving at the decision. I ask myself what can the client say in evidence that assists his position, how can he better the case for the defence, I then ask the opposing question if he gives evidence, what is the risk that he can damage or undermine the case for the defence. In this case the appellant was not insistent on giving evidence. We therefore went over that second evaluative process.

103. My assessment of the trial was that we had made significant gains in relation to allegations involving VT. We had established a foundation to attack her reliability and credibility. We had clear examples whereby VT had lied to the police and to the appellants probation officer. The lies were significant and deliberate. There was also the history of her making then retracting or not wishing to proceed with the complaint. There was the CCTV footage taken in New World Otaki on two separate days depicting the appellant and VT going about normal domestic chores and there was opportunity for VT to have gone to the authorities at any time between 21 and 27 February 2019 if she felt threatened or was assaulted.

104. When reviewing the Crown case for BM, I was less certain. I was not sure what the jury made of her. She had given good evidence. I wasn't sure we had made compelling inroads in challenging her evidence. There was the failure to mention any sexual violation incidences when the police attended on her in June 2014. The alleged offending against her came to light when she was approached by the police enquiry team in 2019 due to the fact the appellant in his EVI of 28 February 2019 stated he had got a former partner to sign a statement consenting to sexual activity. The police attempted to locate and interview all former partners advising those interviewed of the reason for the interview. This could provide the basis for the submission that [an] angry or bitter ex-partner could take this opportunity for the making of a false complaint or distort or embellish the truth.

105. When considering whether the appellant could better the defence case by giving evidence, I considered firstly what damage could be done if he was exposed to cross examination. I assessed that there was a high risk of damage under cross examination. The appellants continued contact with VT while in custody or on release provided a number or platforms for potentially damaging cross examination

> 106. In respect of the case involving BM, the denial of any sexual connection after shifting into the Tawa address just seemed unrealistic. The couple apparently engaged in a healthy sexual relationship while in a hostel, however the moment they shifted into their own home the appellant instructs that sexual activity stopped and did not recommence. The appellant now says that was because she was having sex with others. That was not suggested to me during the preparation for trial and if it had been I would have had to bring a s44 Evidence Act application to raise such matters. No other former counsel had contemplated a s44 application either.

[30] Mr Hewson had serious concerns that if Mr Bullock gave evidence he would expose himself to cross-examination, particularly in respect of [VT], that would be damaging. We accept that there would have been scope for damaging cross-examination. Having seen Mr Bullock give evidence we also accept that Mr Hewson's concern that Mr Bullock would not acquit himself well as a witness was justified.

[31] Mr Hewson summarises his position:

> 114. … It would have been easy for me to simply advise the appellant to give evidence. It is far more difficult to try and create a reasonable doubt from the Crown case alone. It was my view that because of the way the appellant handled himself in his 28 February 2019 interview coupled with the material available for the Crown to use under cross examination he would have been unwise give evidence. He did not have to accept that advice. We could have proceeded later in the afternoon by opening the defence case and calling the appellant. There was no barrier related to my preparedness if that was what the appellant instructed me to do. He did accept that advice and I believe he did so after proper consideration of relevant matters.

[32] Mr Bullock's evidence is to the effect that he simply relied on Mr Hewson's advice. In his affidavit, referring to the pre-trial preparation period, he deposes:

> 7.5 He asked me what I thought about giving evidence. I said: "You're the lawyer, you tell me what to do".
>
> 7.6 He said I shouldn't give evidence. I told him I was leaning the other way. What they said was not true and I needed to explain. I'd been told to say no comment in my Police interviews, but that didn't look good.

[33] As to what happened at the close of the Court case, Mr Bullock deposed:

> 8.2 I do not understand what is "normal" or "good" in a trial but it seemed that some parts had gone pretty well. [Mr Hewson] asked [VT] some

good questions. However, I didn't understand most of what was going on.

8.3 I didn't feel like I could tell [Mr Hewson] what to do. I just had to go along with his way.

8.4 When the case was closed, [Mr Hewson] came to me and told me not to give evidence. He just said it could go wrong. He told me to sign a bit of paper saying that I wouldn't give evidence. This is annexed at **"33".**

8.5 He told me it was better this way. I said: "Better for who?" I didn't think it was right not to give evidence but I didn't feel like it was my choice and had to trust him. I regret this.

8.6 I was shocked when the jury read out guilty.

[34] During cross-examination on this point there was this exchange:

Q. The Crown case finished just after 1 o'clock on 11 March and Mr Hewson took your instructions about giving evidence, didn't he?

A. No, because it was over, wasn't it? You're saying it's finished?

Q. The Crown case had finished. So the prosecution case had finished and then it was up to you to decide, am I going to give evidence or not?

A. And then I asked him, what do you think I should do? I was still pushed into a corner.

Q. Why do you say you were pushed into a corner?

A. I was getting tired and it was going on for too long, and I was getting so frustrated.

Q. You had been discussing the question of giving evidence, though, from time to time during the trial, hadn't you, Mr Hewson and yourself?

A. I'd bring it up and at the time, this was well before we went to court, I said, what do we do, but there again I was leading for help, you know.

Q. And you weren't insistent on giving evidence, were you?

A. Nah. I was told not to.

Q. You wanted some advice?

A. Sorry?

Q. You wanted some advice about it?

A. Yeah.

Q. Isn't it correct that Mr Hewson gave you advice about it?

A. No. He had said – now what was he saying – it was very hard because we had two officers with me at the time. I said to him, well what do we do? Do we give evidence or what? Once the trial had finished then I knew I should have given evidence.

Q. Well, I understand hindsight is a wonderful thing, but can we talk about the advice. Pros and cons were discussed, weren't they?

A. Not really from [Mr] Hewson. All it was, was "do you want to plead guilty or not". "Give evidence or not".

Q. There was some discussion or are you saying there was just no discussion?

A. Nah, there was no discussion. I think I just said, whatever. That corner was gone now.

Q. Sorry but, it may be me not understanding, but why had it gone? This is really important. You're deciding whether you want to give evidence or not.

A. Right.

Q. But you're saying you were just too tired or what was the –

A. Well I thought I would have gone – I thought I didn't really have to give evidence, but I should have.

Q. And you say that because you'd been convicted?

A. Mmm.

Q. But, at the time, as to what was happening just after 1 o'clock on that day, Mr Hewson and yourself discussed the pros and cons of giving evidence, didn't you?

A. I can't remember that day. I can't remember him coming in and actually talking about it.

Q. Can you remember signing the document, saying you weren't going to give evidence?

A. He said sign this, and I said oh yeah.

[35] Later in the cross-examination of Mr Bullock there was this exchange:

Q. But you made a fully informed decision not to give evidence which is why you signed that note at 2 o'clock in the afternoon to not give evidence?

A. Yeah.

Q. That was your choice.

A. I, what will we do. Give it here then I'll have to sign it, so –

Q. You know you had a choice don't you?

A. Yes.

[36] Mr Bullock was asked about his answer during re-examination:

> Q. My learned friend also said to you that you'd made a fully informed decision about the election to give evidence, right? When Mr Hewson was talking to you at the end of the Crown case about you giving evidence, did he suggest to you what the advantages of you giving evidence would be?
>
> A. Nah. No. It was me and the two officers in the room talking about it, but no, Mr Hewson didn't say if you do this, you'll come out doing alright. Nothing like that.
>
> Q. Did he explain to you what the disadvantages of you giving evidence would be?
>
> A. Nah.
>
> Q. And how long do you think that this overall conversation about you giving evidence at the end of the Crown case lasted for?
>
> A. I mean, really quick, not very long.

Discussion

[37] We agree with the recitation of the applicable legal principles set out in the Crown's submissions:

> 104. In terms of defence counsel's duties around their client's election, the following principles can be distilled from the cases:
>
> 104.1 Counsel must ensure the defendant can make an informed decision as to whether to give evidence: counsel must "ensure that the client has the necessary information, conveyed in an appropriate and timely way, to make the decision."[7]
>
> 104.2 Any advice must take into account not only whether the defendant will be a good witness but whether the defendant's case can be effectively advanced without his or her testimony.[8]
>
> 104.3 While counsel may recommend a course of action, it must be made clear the defendant is free to reject that advice.[9]

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7 *Tarring v R* [2016] NZCA 452 at [26].
8 *Chambers v R* [2011] NZCA 218 at [15].
9 *Nightingale v R* [2010] NZCA 473 at [12].

104.4 Where there were reasonable grounds for the defendant's election not to give evidence, then ordinarily there will be no miscarriage.[10]

104.5 If the client acquiesced in counsel's advice not to go into the witness box it would be difficult to show that any miscarriage of justice resulted.[11] Indeed if it is asserted that counsel ought to have advised their client to give evidence (as is effectively the submission here), the test has been described as whether "the circumstances in their entirety [required] counsel to advise [the accused] that evidence should be given because otherwise conviction was inevitable".[12]

104.6 In practice, where there is an allegation that there is a miscarriage of justice relating to the election the appellant should state the substance of the evidence they would have given.[13] The absence of such evidence tells against the success of this type of appeal.[14]

104.7 Failure to prepare a brief is a departure from best practice only and does not lead inevitably to the conclusion that there has been a miscarriage of justice.[15] Relevant to this inquiry is whether trial counsel understood the defendant's version of events through other means whether by notes of attendances or statements to Police.[16]

[38] We find:

(a) Mr Hewson, with Mr Bullock's informed agreement, left open the decision whether Mr Bullock would give evidence until after the close of the Crown's case.

(b) During the course of the trial Mr Hewson reviewed the progress of the case with Mr Bullock during the adjournments.

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10 *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [16]; *Bushby v R* [2017] NZCA 192 at [50]; and *R v Pointon* [1985] 1 NZLR 109 (CA) at 114 per Cooke P ("A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial. … An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account.")

11 *W (CA702/2010) v R* [2011] NZCA 529 at [55] citing *R v Pointon*, above n 10, and *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.

12 *R v Timmins* CA250/02, 23 June 2003 at [19]; and *Z (CA589/2011) v R* [2013] NZCA 118 at [21].

13 *R v Pointon,* above n 10.

14 At 114.

15 *R v Wilkie* CA6/05, 27 April 2005 at [29].

16 At [16].

(c) Mr Hewson was prepared to lead Mr Bullock's evidence if he chose to give evidence. The absence of a brief of evidence was a departure from best practice, but Mr Bullock's defence positions were clear for each complainant. We have no doubt that the trial Judge, as Mr Hewson expected, would have given Mr Hewson whatever time he reasonably needed to go over with Mr Bullock the material he would cover in evidence-in-chief.

(d) There is force in Mr de Groot's submission that the general cross-examinations of the complainants carried out by Mr Hewson had not created a specific evidential basis for disputing each charge. His cross-examination of [BM] had not elicited concessions and so Mr Hewson was left with the way in which her complaints were elicited, [BM's] dislike of Mr Bullock and the passage of time to challenge her reliability. Mr Hewson had made significant attacks on [VT's] credibility. But there was no charge-specific evidence as to whether [VT] consented to the sexual contact, or whether Mr Bullock believed on reasonable grounds that [VT] did consent.

(e) In the hour or so after the Crown's evidence concluded, Mr Hewson discussed with Mr Bullock whether he should give evidence. Mr Bullock was not insistent on giving evidence and indeed he did not express a preference for giving evidence. Instead, he asked Mr Hewson for his advice. The advice Mr Hewson gave was that, for the reasons he explained, Mr Bullock should not give evidence. Mr Bullock accepted that advice and signed instructions accordingly.

(f) Mr Hewson did not explain to Mr Bullock that by not giving evidence there would be no charge-specific evidence going to, in [BM's] case, an absence of sexual contact nor, in [VT's] case, a charge-specific basis for submitting there was either consent or a belief on reasonable grounds that there was consent. Mr Hewson explained the risks of Mr Bullock giving evidence but he did not explain the possible benefits

because both Mr Hewson, from his knowledge of the case, and Mr Bullock, saw no real benefits and only likely disaster.

(g) Mr Hewson's assessment of the risks to Mr Bullock if he gave evidence — from cross-examination and adverse impression — was sound.

(h) Mr Bullock accepted Mr Hewson's advice and was happy with it until he was convicted on all of the charges relating to [BM] and a number of the charges relating to [VT].

[39] Mr de Groot submits that this was a case where Mr Bullock should have been advised that he needed to give evidence. That is because otherwise there would be no evidential foundation for Mr Bullock's defence that he had no sexual contact with [BM] during the relevant period, and no specific evidential foundation for his defence that with [VT] all sexual contact was consensual or otherwise he had reasonable grounds for his belief in consent. Without Mr Bullock's evidence, Mr de Groot submits, Mr Bullock had a hopeless defence.

[40] In *Weston v R*, this Court discussed the requirement for a defendant to be properly informed before deciding whether to give evidence:[17]

> [23] The approach to assertions of miscarriage based on trial counsel error was explained by the Supreme Court in *Sungsuwan v R*.[18] A two stage inquiry will generally be appropriate:
>
> (a) Was there in fact an error?
>
> (b) If there was, is there a real risk it affected the outcome of the trial: that is that the verdict was unsafe?
>
> [24] There are, however, a limited number of circumstances where error, without more, will evidence a real risk of miscarriage. In *Hall v R* this Court described those circumstances in the following way:[19]
>
> > [65] We agree with the Crown submission that it is helpful to identify the three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage. The fundamental decisions are those relating to plea, electing whether to give evidence and to advance a defence based on the accused person's version of events.

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17 *Weston v R* [2019] NZCA 541.

18 *R v Sungsuwan*, above n 11.

19 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.

> [25] It follows that the decision whether or not to give evidence is for the defendant to make him or herself, and that the obligation on counsel is to advise the defendant so that, in the relevant circumstances, that decision is a properly informed one. That is, one that considers in the particular circumstances of a defendant's trial the potential benefits and risks associated with the defendant giving evidence.[20]

[41] The Court will not, however, give weight to a defendant's post-conviction regret at their election decision. In *R v Pointon*, this Court observed:[21]

> This Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel. *An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account.*

[42] We do not accept Mr de Groot's submission that in the absence of Mr Bullock giving evidence his convictions were inevitable. We accept Mr Hewson's analysis that [BM] was a strong witness who had not made concessions, but there was scope for challenge to her reliability. This arose because [BM] had not previously made a complaint, despite the opportunity to do so, her complaint was recently elicited by police, her negative view of Mr Bullock and the passage of time. It must be remembered that the onus of proving guilt was on the Crown and that the standard of proof is beyond reasonable doubt. All Mr Hewson had to do was suggest a reasonable possibility that [BM] was not reliably reporting what happened.

[43] The defence position for [VT] was stronger. Her credibility had been significantly attacked.

[44] It is not unusual for a defendant to advance a general defence rather than address each charge. Particularly in a trial of multiple charges of sexual offending. Neither is it unusual for the defence to put the Crown to the proof, seeking by cross-examination and address to inject reasonable doubt into the minds of the jurors.

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[20] *Nightingale v R*, above n 9, at [12].

[21] *R v Pointon*, above n 10, at 114 (emphasis added). See also *Wright v R* [2018] NZCA 589 at [26].

[45] The real issue, in this case, is whether it was necessary for Mr Hewson to advise Mr Bullock that if he did not give evidence there would be no competing narratives on the specific charges, and this could raise the risk of convictions.

[46] Our conclusion is that Mr Hewson did not have to give that specific advice in the context of this case. Mr Bullock knew that it was his decision as to whether he gave evidence. He agreed with Mr Hewson to postpone making his decision until after the close of the Crown case. During the course of the trial he and Mr Hewson conferred regularly as to the strength of the Crown case.

[47] When it came time to make his election Mr Bullock was generally happy with the progress Mr Hewson had made in his cross-examinations. He knew [BM's] case was stronger than [VT's]. He asked Mr Hewson for his advice and Mr Hewson gave it. Mr Hewson appropriately assessed risk of harm to the defence case if Mr Bullock gave evidence. We agree that the Crown had ample material to cross-examine to undermine Mr Bullock's credibility. Further, as Mr Hewson recognised, we agree that there was a distinct risk that Mr Bullock would, by his own demeanour and answers, create a negative impression in the minds of the jurors. In our view, Mr Hewson gave sound advice. We do not consider this was a case where, no matter the risks of cross-examination and adverse impression on the jury, the defendant had to give evidence or face inevitable conviction.

[48] There was actually very little Mr Bullock could have said to assist his case. In respect of [BM] it would be that he did not have sexual contact with her during the relevant period. Mr Hewson was right to fear that this would not be helpful. Mr Bullock's evidence before us that he would have said that this was because [BM] had moved on to other sexual relationships was not something he had told Mr Hewson.

[49] In respect of [VT], all Mr Bullock could have said was that either [VT] consented or he believed on reasonable grounds that there was consent.

[50] For each complainant, there would be a credibility contest. We are satisfied that Mr Bullock knew that if he gave evidence, it would be to put his credibility up against the credibility of the complainants. Mr Bullock did not positively want to give

evidence. He knew the risks he faced if he did. He was happy not to. He remained happy with that decision up to the time that convictions were entered.

[51] We see no error on the part of Mr Hewson. We see no unfairness in the trial, presumptive or actual.

Result

[52] The appeal is dismissed.

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