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

CA403/2022
[2023] NZCA 445

BETWEEN	KEN MARION SANTIAGO ANG Appellant
AND	THE KING Respondent

Court: Miller, Ellis and van Bohemen JJ

Counsel: S J Gray for Appellant
S C Baker for Respondent

Judgment: (On the papers) 13 September 2023 at 12.30 pm

JUDGMENT OF THE COURT

A The evidence of Dr Menkes is not admissible at the hearing of Mr Ang's appeal. We decline the application to adduce it as further evidence.

B We decline to order that blood and urine samples be released for analysis.

C We order that the introital, vaginal and cervical samples from the complainant, which are held by the Institute of Environmental Science and Research, be released for testing for purposes of the appeal.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Ang has brought an appeal against his conviction on one charge of sexual violation by rape,[1] one of sexual violation by unlawful sexual connection (introduction of his finger into the complainant's genitalia)[2] and one of indecent assault (sucking her breasts).[3] It is said that the offences happened during a camping trip when the complainant was very intoxicated.[4]

The applications

[2] Mr Ang intends to appeal on the grounds that the jury could not exclude the reasonable possibility that the complainant confabulated her allegations due to her alcohol consumption. He also wants to have swabs taken from the complainant's introital, vaginal and cervical areas tested in the hope that they will exclude epithelial cells from his penis or finger.[5]

[3] This judgment addresses Mr Ang's applications:

(a) to advance new evidence about memory. He has tendered an affidavit of Dr David Menkes, an associate professor and consultant psychiatrist, about alcohol consumption and confabulation; and

(b) to have the swabs, and blood and urine samples, released for analysis.[6] Mr Ang has tendered an affidavit of Paige McElhinney, a forensic science consultant, in relation to the swabs. In relation to the blood and urine samples, it is contended that the evidence could assist Dr Mendes in refining his evidence about confabulation.

[4] There is no allegation of counsel error, but a waiver of privilege has been given and we have an affidavit from trial counsel, Nicola Hansen.

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1 Crimes Act 1961, ss 128(1)(a) and 128B.
2 Sections 128(1)(b) and 128B.
3 Section 135.
4 *R v Ang* [2022] NZDC 8192 at [5]–[11].
5 Because it is seized of the proceeding this Court has power to order that the swabs, which are in the custody of the Institute of Environmental Science and Research, be released for analysis: *Milner v R* [2019] NZCA 619 at [30]–[32]; Criminal Procedure Act 2011, ss 334 and 335; and Court of Appeal (Criminal) Rules 2005, r 45.
6 Criminal Procedure Act, s 335(2)(e).

[5] The course adopted here is unusual. In the ordinary way new evidence would be assessed at the hearing of the appeal, the court determining its admissibility partly by reference to its materiality to the jury's verdict. That involves an assessment of the entire trial record. However, an interlocutory order is needed to have the swabs and samples tested and the application to offer memory evidence was set down for hearing at the same time. Consistent with the interlocutory nature of the applications, they have been referred to a divisional panel for a decision on the papers.[7]

The trial

[6] The complainant's account of the offending was that it occurred after they had been drinking at a campsite alongside Mr Ang's campervan. She had drunk to excess and her memory was patchy. She recalled that her tracksuit bottoms had been pulled down with her underwear. She recalled Mr Ang having his penis between her legs and it felt as though he was trying to insert it but she had no recollection of his penis actually entering her vagina. She did recall that it was parting the "lips" to her vagina. She recalled him running his finger to the entrance of her vagina but she could not recall him putting his fingers inside it. She remembered him sucking her breasts. Mr Ang later told her that it might be worth her getting the morning after pill to be on the safe side.

[7] The complainant was examined by a doctor and swabs were taken. Sperm was observed on perianal, anal and rectal slides. Swabs were taken from her breasts. DNA was extracted from these samples. It is not in dispute that the DNA originated from Mr Ang.

[8] No semen was detected on introital, vaginal and cervical slides and those slides were not tested further. Mr Ang was advised by his counsel that the samples could be tested for epithelial cells, but he would have to live with the results of the testing. He made a tactical decision not to ask that the samples be tested for epithelial cells. Ms Hansen has explained that:

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[7] We make this point because there are indications in the papers that Katz J, who ordered this hearing, was given to understand that the appeal is entirely dependent on the new evidence. Appellant counsel has confirmed in submissions that that is not the case.

> 30. The risk was that if we had the swabs tested for epithelial cells they might in fact be present – whether by transference from some other item, or otherwise. And then we would be stuck with those results. On the state of the existing evidence we were able to put the Crown to proof on the issue of whether or not Mr Ang had penetrated (either digitally or with his penis) [the complainant]. The present of epithelial cells would significantly weaken our position.
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> 31. I explained this to Mr Ang. I made it clear that if his fingers or penis had touched [the complainant's] vagina in the areas where the swabs were taken then there was a significant risk that epithelial cells would be found. If he thought that his epithelial cells could be found then it would be safer to not test the swabs. He instructed that he did not want the swabs tested for epithelial cells.
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> 32. His instructions on this were consistent with his instructions to me that he was uncertain as to whether or not he had penetrated [the complainant's] vagina with his penis. As it turned out, it was also consistent with his evidence at trial that he had touched [her] clitoris. In his brief of evidence, Mr Ang had stated that he only touched the outside of her genitalia with his fingers.

[9] Accordingly, the defence put the Crown to proof on the actus reus of the offences.[8] During her cross-examination of Crown witnesses counsel was able to use the fact that the vaginal swabs had not undergone DNA analysis to strengthen Mr Ang's case.

[10] Mr Ang gave evidence, maintaining that the sexual contact was consensual. He denied that the complainant was so intoxicated so as to be incapable of consent. He admitted kissing her breast and touching her clitoris with his finger. He denied penile penetration of the genitalia, maintaining he could not get an erection. He explained the presence of semen on the anal swabs by saying that it was pre-ejaculate in the vicinity of the anus.

[11] A charge of sexual violation by introduction of his penis into her anus was dismissed under s 147 of the Criminal Procedure Act 2011 at the end of the Crown case on the basis that the expert evidence left the reasonable possibility that sperm found its way into the anus by secondary transfer when the area was being swabbed.[9]

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8 The actus reus of rape is penile penetration of the genitalia: s 128(2) Crimes Act 1961. The actus reus of sexual connection is (relevantly) introduction of a finger into the genitalia or anus: ss 2 and 128 Crimes Act 1961. The witnesses used the term "penetration" to describe both offences.

9 *R v Ang* [2022] NZDC 1575 at [22].

[12] With respect to memory, Ms Hansen took instructions about having blood and/or urine samples tested to determine the complainant's level of intoxication. Mr Ang instructed her not to do so because of the risk that the results might disclose that the complainant was grossly intoxicated or affected by drugs.

[13] Counsel was able to use a video taken by the complainant on the evening, suggesting that it showed she was not grossly intoxicated. The complainant reported no memory of having taken the video.

[14] Ms Hansen did not seek a report from a memory expert, taking the view that it was not necessary given the evidence she had to work with and ultimately such evidence was unlikely to substantially assist the jury, who would have their own experience and understanding of trying to make sense of what had happened after an alcohol-fuelled night. That was the approach taken in the closing address, counsel distinguishing between loss of consciousness and loss of memory. Counsel does not recall whether she discussed the possibility of calling an expert with Mr Ang.

The memory evidence

[15] Dr Menkes is an academic psychiatrist and experienced expert witness with a research interest in drugs and their mechanisms of action. His proposed evidence outlines the general process of memory and explains how alcohol can impair it. He explains that drug-induced blackouts can lead to the unconscious filling in of memory gaps, which is known as confabulation of false memories. Confabulation compensates for the memory-impairing effects of alcohol or other drugs.

[16] Dr Menkes does not, and could not, offer an opinion that the complainant's account involves confabulation. The most that he could say is that a person who reports gaps in memory, as the complainant did here, may unconsciously use confabulation to fill the gaps. There is no reason to think that this is a dimension of memory with which jurors would be unfamiliar or which they need expert assistance

to understand. That being so, it would not have been admissible at trial.[10] It cannot be said that an omission to lead it there may have occasioned a miscarriage of justice.

[17] It follows that there is no reason to release the blood and urine samples for further testing for purposes of the appeal. The application to have the samples tested is based on speculation that Dr Menkes would be able to use the results to say something about confabulation. As the Crown observes, he does not make that claim himself. The application also confronts the major difficulty that Mr Ang decided not to have the samples tested at trial, fearing they would bear out the Crown's contention that the complainant was incapable of consent. We record that had we found the evidence in principle admissible we would have declined the application on this last ground.

Testing slides for the absence of epithelial cells

[18] Ms McElhinney was briefed by Ms Hansen before trial. She advised at that time that that the vaginal samples could have been tested for epithelial cells. In her affidavit sworn for the appeal, she explained that a large proportion of the samples would likely be cellular material from the complainant and they would be tested for male DNA. She stated that there are no scientific findings that assist in conclusively determining whether or not vaginal penetration occurred. If none of Mr Ang's DNA was detected, it would not automatically follow that there was no vaginal penetration. Further, cellular material from him could have been lost below a detectable level prior to sampling. And if his DNA was detected, it would be necessary to consider whether it might have been transferred to the internal area.

[19] The Crown contends that a negative result now would not assist Mr Ang. We are not able to say that with confidence. There is no expert evidence as to the likelihood that introital, vaginal and cervical swabs would contain male epithelial cells had Mr Ang's finger or penis been introduced into the complainant's genitalia. The most we have is Ms Hansen's observation that in her experience as trial counsel epithelial cells have been readily found on swabs. In the circumstances we cannot

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[10] The authorities were surveyed in *R v M* [2020] NZCA 663 at [14]–[19]. See also *P (CA470/2017) v R* [2020] NZCA 304 at [44]–[49] citing *M (CA68/2015) v R* [2017] NZCA 333.

exclude the possibility that the absence of epithelial cells in swabs from the three locations may have probative value.

[20] That being so, we consider that the introital, vaginal and cervical samples should be released for testing.

[21] We emphasise that it does not follow that the results of the testing will be found admissible at the hearing of the appeal, for three reasons. First, it is not in the interests of justice to allow a defendant to revisit tactical decisions made at trial. Mr Ang's decision not to have the samples tested there precisely because he feared epithelial cells would be found may prove an insuperable barrier to admission even if the results favour his case. Second, as the prosecutor noted in closing Mr Ang appeared to admit the actus reus of the offence of sexual violation by unlawful sexual connection because he acknowledged that he had touched the complainant's clitoris with his finger.[11] Third, the presence or absence of epithelial cells may not be probative in all the circumstances. But these are issues for another day.

Disposition

[22] The evidence of Dr Menkes is not admissible at the hearing of Mr Ang's appeal. We decline the application to adduce it as further evidence.

[23] We decline to order that blood and urine samples be released for analysis.

[24] We order that the introital, vaginal and cervical samples from the complainant, which are held by the Institute of Environmental Science and Research, be released for analysis which the appellant or the Crown may wish to undertake for purposes of the appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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[11] For purposes of these offences the female genitalia comprise the area within the labia: *R v Karotu* (1994) 11 CRNZ 691 at 694 citing *R v Lines* (1844) 1 Car & K 393, 174 ER 861. See also *R v PH (CA582/2020)* [2021] NZCA 584 at [19]; and *E (CA522/2021) v R* [2022] NZCA 368 at [27]. Any degree of introduction is sufficient.