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

CA707/2021
[2022] NZCA 448

BETWEEN	THOMAS BARREN SMITH Appellant
AND	THE KING Respondent

Hearing: 23 August 2022

Court: Cooper P, Mallon and Wylie JJ

Counsel: E J Forster and L K McMaster for Appellant
S C Baker for Respondent

Judgment: 22 September 2022 at 11:00 am

JUDGMENT OF THE COURT

A The applications to adduce fresh evidence are granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] In July 2021, the appellant, Thomas Smith, was found guilty of two charges of sexual violation by unlawful sexual connection following a trial before

Judge W P Cathcart and a jury in the District Court at Gisborne.[1] Mr Smith was acquitted of a charge of strangulation and another charge of sexual violation by unlawful sexual connection. He was subsequently sentenced to six years and three months' imprisonment.[2]

[2] Mr Smith appeals against his convictions on two grounds. He argues that:

(a) The Crown unfairly and through the use of leading questions had the complainant repeat, in her evidence-in-chief, evidence that had already been put before the jury through the complainant's evidential video interview (EVI).

(b) Trial counsel gave Mr Smith inadequate advice on whether to give evidence at the trial.

[3] The Crown opposes the appeal.

Background facts

[4] Mr Smith and the complainant were in an intimate relationship at the time of the offending. They lived together at Mr Smith's home on the East Coast. The complainant tried to end the relationship and moved to Auckland. Mr Smith followed her. In mid-December 2019, they moved back to his home.

[5] Mr Smith was charged with four offences. Charges 1 and 2, both of sexual violation by unlawful sexual connection, related to events that were said to have happened in the bedroom in Mr Smith's home. The Crown alleged that about two days after returning from Auckland, the complainant was in Mr Smith's bedroom. Mr Smith walked into the bedroom and jammed the door shut by pushing a knife in between the door and the door frame. He then grabbed the complainant by her neck, ripped her clothes off and used another knife to cut her underwear away. He forced her onto her stomach onto the bed and penetrated her anus with his penis. She did not try to resist as she was fearful that if she did, he would seriously harm her. He then

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[1] Crimes Act 1961, s 128(1)(b).
[2] *Police v Smith* [2021] NZDC 22428.

made her sit in the corner of the bedroom. She was still naked. He said words to the effect that she was "fucken useless" and that she could "suck [his] cock now". He repeatedly pushed his penis into her face to try and force her to engage in oral sex. He eventually stopped and left the room, locking the door behind him from the outside.

[6] Charges 3 and 4 related to events that were said to have happened in the bathroom shortly after the offending that was the subject of charges 1 and 2. Charge 3 alleged strangulation and charge 4 alleged that Mr Smith sexually violated the complainant by inserting his penis into her anus. Mr Smith was acquitted of these charges.

[7] Mr Smith was spoken to by the police at his home in September 2020. When the allegations were put to him, he said they were not true. He said the complainant had made things up and that she had once sent a text to another person saying he had tried to run her over, which was also not true.

[8] After speaking with his lawyer, Mr Smith declined to be formally interviewed.

The appeal

[9] This appeal is brought pursuant to s 229 of the Criminal Procedure Act 2011. The Court must allow the appeal if there has been a miscarriage of justice for any reason.[3] A "miscarriage of justice" means any error, irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial or a trial that was a nullity.[4]

Submissions

[10] Mr Forster, on behalf of Mr Smith, submitted that:

(a) The Crown played the complainant's EVI to the jury and then followed this up by asking further questions about matters she had already covered in her EVI. These further questions were often leading.

[3] Criminal Procedure Act 2011, s 232(2).
[4] Section 232(4).

They were used primarily to get the complainant to repeat the narrative contained in her EVI. While it is acceptable to ask a complainant whether anything said in an EVI needs to be added to or changed, it is unfair to ask a complainant to repeat her EVI, especially if this is done by asking leading questions.

(b) Given the nature of the allegations against Mr Smith and that he did not give a formal interview to the police, the advice given to him as to whether he should have given evidence at trial had to include advice about the risks of leaving the jury with only the complainant's narrative of events. No specific advice was given on this issue and Mr Smith's decision not to give evidence was accordingly not fully informed.

Mr Forster submitted that there has been a miscarriage of justice due to either or both of these errors.

[11] Mr Baker, for the Crown, submitted that:

(a) The questions the complainant was asked after her EVI had been played to the jury were appropriate in context. She had earlier advised the police that parts of what she had said in the EVI were not true. As a result, it was necessary to clarify her evidence. The questions also sought to orient the complainant's narrative by reference to a photo booklet produced at the trial.

(b) Trial counsel, Mr Manaaki Terekia, fully prepared for the trial and prepared a brief of evidence for Mr Smith. Mr Terekia appropriately discussed with Mr Smith the potential risks and benefits of giving evidence. Mr Smith's decision not to give evidence was fully and properly informed. The complaint of trial counsel error was made belatedly and only because Mr Smith regrets his decision in light of the outcome and his incarceration.

Mr Baker argued that there has been no error and no miscarriage of justice.

Leading questions/unfair repetition

[12] We turn to the first ground of appeal, namely the use of leading questions and the repetition of parts of the complainant's EVI in her evidence-in-chief. It is helpful to first summarise the content of the complainant's EVI and then her subsequent written statement before noting the contested aspects of the evidence-in-chief.

The complainant's EVI

[13] The complainant's EVI was recorded on 25 May 2020. She explained to the interviewing officer, Detective Lucy Sievwright, that she and Mr Smith went into the bedroom in Mr Smith's house to have a cigarette, that Mr Smith put a butcher's knife in the bedroom door and that he would not let her out. She said that he had three knives with him in the bedroom. He grabbed another knife, pulled her clothes off and then started cutting away her underpants. He told her to roll onto her stomach so that he could get at her "backside". She was scared of him. Mr Smith penetrated her "behind" and would not stop. She was on all fours and he was on his knees behind her. She had a look down at her legs and there was blood dripping down. Mr Smith had hold of her shoulders and hair. He next made her sit in the corner of the room with no clothes on. Mr Smith said "ah see, look at you, you're fucken useless" and "fucken come and suck my cock now". He then shoved his penis into her mouth. She was still in the corner of the room. She did not want to do it. He was standing at first but he then got down on his knees. He grabbed her head and pushed her down onto his penis. The complainant said that Mr Smith then left and locked the bedroom from outside with a padlock.

[14] The complainant went on to recount the alleged offending in the bathroom — strangulation followed by further sexual violation by anal rape.

[15] The complainant said there was "a good hour" between the offending in the bedroom and the alleged offending in the bathroom. She said the incident was the first time "anal" had occurred between them. The complainant also said that she had been in Auckland for about a month to get away from Mr Smith but that she had come back with him on the bus. She stayed at his house. She left him about two or three weeks after the offending occurred. She had been with him for about three years

prior to that and had lived with him for two years. She explained that she said “no” to Mr Smith at the time but that he did not care what she was saying.

The complainant’s written statement

[16] On 11 May 2021, the complainant made a separate written statement to Detective Constable Nicholas Stark. She recorded that she had spoken to Detective Kim Johnson on 28 April 2021 when he called to talk to her about something else. She told Detective Johnson that she had lied in her EVI and that she had wanted to “hurt” Mr Smith. She was making the written statement “to speak about those lies and make sure the information is right”. She said that at the time she gave the EVI, she was still a “crack user”. However, she no longer smoked crack and that when she stopped she thought about what Mr Smith had done to her and “wanted to make changes to my statement so that it is all the truth”.

[17] The complainant said that the first thing she needed to change was why they went into Mr Smith’s bedroom at the start. She said it was not true that they had went in there for a cigarette. Rather, they had gone into the room for a “puff”. She said that was the only change to what she said had happened in the bedroom. She said that she had said “cigarette” in her EVI because she did not want to get into trouble for the “smoking meth thing”.

[18] The complainant went on to also change aspects of her EVI in relation to the alleged offending in the bathroom.

[19] By way of explanation for the changes, the complainant said:

> … I kept on thinking that no one would believe me because everyone would know that we were in a relationship and would question whether it happened or not. I didn’t think that anyone would believe that Tom [had] done these things to me because we would normally stay in the same room, in the same house and there was consensual sex before, just never anal. I just felt like if I didn’t make him look worse then no one would believe me.

And:

> When I told [Detective Johnson] that I wanted to hurt Thomas, I meant that. I wanted to hurt him through the court process because of what he [had] done to me but wanted it to be done with all the right information and not have those

> lies that I said to make him look bad. The stuff that I have talked about in this statement are the only things that are not right — everything else is what Tom did to me that evening.

The complainant's evidence-in-chief

[20] After her EVI had been played as part of her evidence-in-chief, the complainant was asked further questions by Crown counsel. Counsel started his questioning by referring to the complainant's 11 May 2021 written statement and to the various changes that the complainant had sought to make to her EVI. He sought to clarify some matters, for example that when the complainant said in her EVI that she and Mr Smith went into the bedroom to have a smoke or cigarette, they in fact went into the bedroom to smoke methamphetamine. The complainant was also asked questions about the photograph booklet produced at the trial to confirm where she said various things had happened. Mr Forster did not take issue with these questions. Rather, he took issue with the questions, many of which he submitted were leading, which led to the complainant repeating large parts of the narrative contained in her EVI.

[21] Crown counsel began this part of the examination-in-chief by asking:

> Q. I just want to move on now and ask you some questions just to clarify some of the things that we've heard in your video interview?
>
> A. Yes.

Counsel dealt first with the complainant's relationship with Mr Smith and her trip to Auckland. He then turned to what she said had happened in the bedroom. The following exchanges took place:

> Q. Now the next set of questions I want to ask you about is what happened in the bedroom on the occasion you have talked about?
>
> A. Yes.
>
> Q. In your video interview you say things are fine?
>
> A. Yes.
>
> Q. And then you go into the room together? Is that right?
>
> A. Yes, yes.

…

Q. You go into the room and I think your words are: "His mood changed"?

A. Yes.

Q. How did it change? Or what made you think his mood had changed?

A. Oh, straight away, the way he was started talking to me in the room.

…

Q. Did he put the knife in the door before or after he started saying the things you have just said?

A. After.

Q. Do you still have that photo booklet in front of you …?

A. Um, yes.

Q. With reference to — well sorry. If you look at photo 7 in that booklet?

A. Yes.

Q. Are you able to see in that photo where you say the knife went into the door?

A. Yes.

Q. If you just hold that photo booklet up and point out where you say the knife went into the door? A little bit higher please? Okay. So in that photo, there looks to be some markers on the door and a police officer has put an arrow on the door pointing at that marking? Is that what you're pointing at?

A. Yeah.

…

Q. You said in your video interview when you were talking about what happened in the room that he had you by the neck and he was ripping your clothes off. Do you remember saying that or watching that in your video interview?

A. Yes, yes.

…

Q. When he had you by the neck were you facing him or [were you] facing away from him?

A. I was facing … him.

Q. And when he had you by the neck as you've described what was happening in relation to your clothes?

A. He was trying to pull them off.

Q. Are [you] talking now about the top and the jeans … that [you] said you were wearing?

A. Yeah.

Q. You said earlier that you [ended up] on the bed?

A. Yes.

Q. How did you end up on the bed?

A. He threw me down there.

…

Q. You talk in your video interview about him putting his penis into your [anus]?

A. Yes.

Q. When he did that how were you positioned?

A. On my knees.

Q. And where was he?

A. Behind me.

Q. Do you remember whether he was doing anything with his hands?

A. He had, he had his hands on my shoulders and then he put — then he had my hair up like through it, he grabbed the back of my hair and pulled me back.

Q. When he had his penis in your [anus] as you've described it was he moving his body at all?

A. Yes.

Q How?

A. Backwards and forwards.

Q. And how long did that go on for?

A. Long enough.

…

Q. When that ended you talked in your interview about sitting in the corner with no clothes on?

A. Yes.

Q. You said in your video interview what he was saying to you, do you recall that?

A. Yes, yes.

Q. And then you go on to say, he shoved himself into my face?

A. Yes, he came over to me in the corner got on his knees and he grabbed my head and pushed me down there to suck his cock. That's what I said and that's what he, yeah.

Q. And when he pushed you down to suck his cock, is to use your words, what happened from there, is that what [ended up] happening?

A. Yeah. Yeah, yes it did.

[22] Counsel then questioned the complainant about the incidents she asserted had happened in the bathroom. The questions and answers followed a similar pattern.

Analysis

[23] Section 89(1) of the Evidence Act 2006 provides that a leading question must not be put to a witness in examination-in-chief (or re-examination) unless the question relates to introductory or undisputed matters, the question is put with the consent of all other parties, or the Judge, in exercising his or her discretion, allows the question. Further, s 85(1) of the Evidence Act provides that in any proceeding, the Judge can disallow or direct that the witness is not obliged to answer any question that inter alia the Judge considers improper, unfair or needlessly repetitive.

[24] Some of the questions asked by Crown counsel were leading questions. They were not in relation to undisputed matters and they should not have been asked without leave of the trial Judge. We also accept that as a result of counsel's questioning there was some repetition of matters already covered in the complainant's EVI.[5] Nevertheless, for the reasons that follow, we do not consider that a miscarriage of justice arose.

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5 For example, "[a]nd when he pushed you down to suck his cock … what happened from there, is that what ended up happening?" was a leading question involving unnecessary repetition.

[25] First, many of the leading questions used by Crown counsel were no more than signposts, intended to focus the complainant on specific parts of her EVI. The signposting of evidence already given in an EVI will often be regarded as permissible introductory questions in evidence-in-chief, provided it is not unnecessarily or unfairly repetitive and it is being used to orient the witness for the purpose of asking further questions which seek to clarify or elaborate on what is said in the EVI. In this case many of the leading questions were used in this way. They were followed with open questions inviting the complainant to clarify or elaborate on her account. While the Judge's permission should have been asked before such questions were asked, it is not uncommon for prosecutors (or defence counsel) to lead, particularly on routine and undisputed matters. Experienced counsel know the boundaries and do not venture over them. This practice is highly desirable in the interests of trial efficiency and, unless it is prejudicial to the defence, it is not generally considered to be objectionable.[6] We note that the Judge did not intervene. Nor did experienced defence counsel object.

[26] Secondly, while some of the questions asked arguably went further than they should have[7] and while they invited the complainant to repeat large parts of her EVI, in context, we are not persuaded that the questioning or the repetition was either inappropriate or unfair. The complainant had made a supplementary written statement to the police. In that statement she had sought to retract parts of her EVI. The Crown was entitled to give her the opportunity to explain the inconsistencies and to clarify her evidence. Repetition of parts of the EVI necessarily resulted.

[27] Mr Forster relied on this Court's decision in *R v E (CA 308/06)*.[8] The appellant in that case had been tried on two representative counts of sexual violation by rape of a young girl. At the time of trial the complainant was seven years old. After her EVI

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6 *Needham v R* [2012] NZCA 95 at [74].

7 The question "[y]ou said in your video interview when you were talking about what happened in the room that he had you by the neck and he was ripping your clothes off. Do you remember saying that or watching that in your video interview?" followed up by the questions "[w]hen he had you by the neck were you facing him or [were you] facing away from him?" and "[w]hen he had you by the neck as you've described what was happening in relation to your clothes?" were needlessly repetitive. They went further than was necessary to orient the witness to the further questions asked by way of elaboration and clarification.

8 *R v E (CA 308/06)* [2008] NZCA 404, [2008] 3 NZLR 145.

was played, the prosecutor asked a number of leading questions about the specific allegations made. This questioning was challenged on appeal. This Court said:[9]

> [66] Where a videotape of a child's interview is played, that becomes the child's evidence-in-chief. It is certainly acceptable to ask the child if he or she confirms what was said in the interview, if he or she has anything to add or change and to ask supplementary questions on topics not covered in the interview. It is not the occasion for a wholesale repetition of what was said in the interview and certainly not, as was done here, elicited by leading questions.
>
> [67] It is unacceptable to ask leading questions in examination-in-chief or re-examination, except by consent or on non-controversial matters … These questions went to the heart of the prosecution's case and, what is more, must be seen against the background of an evidential video interview where the complainant was unable to remember so many aspects of the alleged incidents. … The purpose of the questions asked by the prosecutor was simply to provide a repetition of the child's evidence.
>
> [68] This would have been sufficient in itself in the circumstances of this case for us to have allowed the appeal. The repetition was unnecessary and eliciting it through leading questions unacceptable, particularly in light of the obvious difficulties with the interview … Indeed, there may even be an issue as to whether the leading questions themselves must now be seen as having contaminated the child's evidence. This will be relevant to the retrial issue.

[28] In our view, the decision in *R v E (CA 308/06)* has to be seen in context. The child complainant in that case had been unable to remember many aspects of the alleged incidents when she gave her EVI. The concerns expressed about repetitive evidence, induced by leading questions, were against that background. No similar issues arose with the complainant's EVI in this appeal. Further, there were a number of other issues with the trial process in *R v E (CA 308/06)* and the Crown had conceded that the appeal should be allowed. The leading questions asked in the child complainant's evidence-in-chief were compounded by further leading questions asked in re-examination. That did not occur here. Moreover, there were multiple leading questions asked in *R v E (CA 308/06)*, whereas in the present appeal there were occasional leading questions followed by open questions.

[29] The rationale for the prohibition on leading questions is that they can give a jury a false impression of a witness's knowledge, accuracy and veracity.[10] In our view,

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9 Citations omitted.

10 *Brunsell v R* [2018] NZCA 156, (2018) 28 CRNZ 543 at [31]; and *Singh v R* [2020] NZCA 487 at [23].

no false impression would have affected the jury in this case. The defence had opened with a challenge to the complainant's credibility. The complainant's EVI had already been played to the jury. Her 11 May 2021 written statement had been referred to and parts of it had been put to her. She had been questioned on those aspects of her account in the written statement that differed from the answers given in her EVI. Members of the jury would have been focused on her credibility (and reliability).

[30] Straight repetition of evidence given in an EVI will not generally be acceptable, particularly if it is elicited by leading questions and where it goes to the heart of the prosecution's case.[11] Nevertheless, we consider that, in the circumstances of this case, where the complainant had sought to retract some of the matters in her EVI and admitted that she had lied in her EVI in an attempt to set up Mr Smith, the use of a limited number of leading questions, primarily as signposts and followed by open questions, and the resulting repetition of parts of the complainant's EVI, are unlikely to have materially affected the jury's impression of the complainant or skewed the trial to such an extent that a miscarriage of justice has occurred.[12] Indeed some of the further questioning raised additional discrepancies in the complainant's evidence that the defence was able to exploit and which the Judge commented on in his summing up.[13]

[31] In our view, the first ground of appeal must fail.

Trial counsel error

[32] We turn now to the second ground of appeal — that Mr Smith was given inadequate advice by Mr Terekia as to whether he should give evidence.

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[11] *R v E (CA 308/06)*, above n 8, at [67]–[68]; and see *Henderson v R* [2007] NZCA 524 at [17]–[22].

[12] See *Paul v R* [2019] NZCA 390 at [36]–[40]; *Patel v R* [2009] NZCA 102 at [24]; and *M v R (CA259/2007)* [2008] NZCA 358 at [13]–[33].

[13] For example, the issues concerning when Mr Smith placed the knife in the door frame, whether another knife was involved, and how the complainant got onto the bed.

The evidence

[33] Both the Crown and Mr Smith sought to adduce fresh evidence on this issue.[14] Neither party was opposed to us receiving the evidence of the other and we grant the applications to adduce fresh evidence accordingly.

[34] The Crown filed an affidavit by Mr Terekia, who also gave oral evidence before us. In summary, Mr Terekia's evidence was as follows:

(a) He had represented Mr Smith at an earlier judge-alone trial in May 2020 in relation to separate offending against the same complainant. At the earlier trial, Mr Smith had elected to give evidence. Mr Smith did not do well when giving evidence, in particular during cross-examination. Mr Smith was convicted on the charges he then faced.

(b) The next time Mr Terekia heard from Mr Smith was when Mr Smith was arrested for the offending at issue in this proceeding. Mr Terekia was assigned to act for Mr Smith. He met with Mr Smith on several occasions in the lead up to trial. In Mr Terekia's view, they were well prepared for the trial.

(c) As part of their preparations, Mr Terekia and Mr Smith talked about whether Mr Smith would need to give evidence. Mr Terekia's preliminary view was that it was unlikely that Mr Smith would need to give evidence, although this would depend on the strength of the Crown case. It is probable that he conveyed this view to Mr Smith. Although Mr Smith did not need to decide whether to give evidence until after the Crown closed its case, Mr Terekia's practice was to advise his clients of the decision they would have to make in advance so that it was not sprung on them at the last minute.

14 Court of Appeal (Criminal) Rules 2001, r 12B.

(d) Mr Terekia prepared a brief of evidence for Mr Smith and Mr Smith signed it on the morning of the trial. His defence was essentially that the allegations were complete fabrications.

(e) The trial "went well" and Mr Terekia's cross-examination of the complainant was effective.

(f) Mr Terekia spoke with Mr Smith about his election to give and/or call evidence after the Crown closed its case. Mr Terekia's advice was that Mr Smith should not give or call evidence. Mr Terekia had reached that view for the following reasons:

   (i) Mr Smith had given a partial statement to the police which had been admitted into evidence through a Crown witness, Detective Constable Weeks. Mr Smith had denied the offending, saying the "allegations were not true", "that it is all untrue" and that "the complainant made things up". Mr Smith's case was essentially a denial and that denial was already in evidence through Detective Constable Weeks.

   (ii) The evidence as it then stood cast "serious doubt" on the reliability of the complainant. Mr Terekia thought that she "did not perform well under cross-examination".

   (iii) Mr Smith had not performed well during cross-examination in the earlier trial.

   (iv) Mr Smith could have "essentially only given evidence of his denial" and the risk of Mr Smith "opening himself up to cross-examination" by experienced Crown counsel outweighed any benefits that his evidence could have had.

(g) Having received and considered Mr Terekia's advice, Mr Smith elected not to give or call evidence. Mr Terekia obtained signed instructions from Mr Smith confirming his decision.

(h) Following Mr Terekia's closing address, but prior to the verdict being read, Mr Terekia spoke again to Mr Smith. Mr Smith confirmed that the way in which Mr Terekia had conducted the trial was in accordance with his instructions. Mr Smith signed an instruction sheet recording this.

[35] In answer to questions from the Court, Mr Terekia confirmed that he did discuss with Mr Smith the possible benefits of him giving evidence, in language that Mr Smith would have understood. He said that he gained the impression Mr Smith understood what he was saying and that there was nothing to suggest Mr Smith did not understand what they were talking about.

[36] Mr Smith filed an affidavit and a signed but unsworn statement. There were no significant differences between his and Mr Terekia's statements. Mr Smith also gave oral evidence before us.

[37] Mr Smith in both his affidavit and his unsworn statement accepted that he spent time with Mr Terekia preparing for trial and that they were well prepared. He also accepted that Mr Terekia did "a very good job on cross examination". Mr Smith acknowledged that a brief of evidence had been prepared for him and that he had signed it. He accepted that he also signed an instruction to Mr Terekia confirming that he did not want to give or call evidence. He asserted that "[t]his was a big mistake by me". In his unsworn statement Mr Smith said that he thought Mr Terekia's cross examination may have sufficed. He said that as a result of his decision, the jury never heard his side of the story and asserted that he was not given specific advice by Mr Terekia about the risk that the complainant's account would be left unanswered if he did not give evidence. He says that he was reliant on Mr Terekia to give him good tactical advice and that Mr Terekia failed to do so. He said that not giving evidence was a "silly position to take" and that he now regretted his decision. However, in his affidavit Mr Smith did not criticise Mr Terekia. Rather, he said that

not giving evidence "was a mistake of me not to consider how important it was that the jury hear[d] my side of the story".

[38] In cross-examination, Mr Smith accepted that he did not criticise Mr Terekia in his affidavit. He also accepted that it was the fact of his incarceration that had caused him to reconsider his position. As he said: "if I knew I was in here I would have given evidence, if I was gonna come in here". When it was put to him that he was not given bad advice and that he simply belatedly regretted his decision, he answered, "that's right, I regretted it". When he was asked whether Mr Terekia told him about the "pros and cons" of giving evidence, he confirmed that Mr Terekia did do so (albeit that he later, in re-examination, stated he did not know what "pros and cons" meant). Mr Smith accepted that he had decided not to give evidence but that if he could have changed his mind, he would have. When it was put to him that there was nothing Mr Terekia did wrong, and that it was simply that he (Mr Smith) had made a mistake he now regretted, he confirmed that was the case. Mr Smith said he would like a second chance. He accepted that Mr Terekia told him it was his view that he should not give evidence and that Mr Terekia explained his reasons for that view.

Analysis

[39] Trial counsel error is not itself a ground of appeal.[15] It is however trite law that a defendant is entitled to a fair trial.[16] A defendant has the right to present a defence at trial.[17] A key aspect of the right to a fair trial is the right to be represented by competent counsel who meets relevant standards and complies with relevant statutory, regulatory and common law obligations.[18]

[40] The leading authority on the issue of trial counsel error is the decision of the Supreme Court in *R v Sungsuwan*.[19] The Court there emphasised the need for an appellate court, considering any appeal based on trial counsel error, to focus on the question of whether or not a miscarriage of justice has occurred, rather than on whether there were shortcomings in counsel's performance and how those shortcomings might

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15 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [7] per Elias CJ.
16 New Zealand Bill of Rights Act 1990, s 25(a).
17 Section 25(e).
18 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [3].
19 *R v Sungsuwan*, above n 15.

be characterised.[20] Gault J, delivering the majority judgment (for himself and for Keith and Blanchard JJ), noted as follows:

> [70] … while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

Tipping J said as follows:[21]

> [115] … when counsel's conduct is said to have given rise to a miscarriage of justice, the Court must ask itself first, whether something can fairly be said to have gone wrong with the process of justice in the way the appellant was represented at the trial. If that is so, the Court must then ask itself whether what has gone wrong has deprived the appellant of the reasonable possibility of a not guilty or more favourable verdict. If the answer is no, there will be no real risk of an unsafe verdict and thus no miscarriage of justice. If the answer is yes, there will have been a miscarriage of justice, irrespective of whether what has gone wrong amounts to negligence on counsel's part. …

[41] There are three types of fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage of justice. The types of fundamental decisions are those relating to plea, electing whether to give evidence, and to advance a defence based on the defendant's version of events.[22]

[42] We are satisfied there was no error by Mr Terekia. It is clear that he properly prepared for Mr Smith's trial. He met with Mr Smith on several occasions in the lead up to trial. He prepared a brief of evidence for Mr Smith. Mr Smith signed this brief of evidence on the morning of the trial. His defence was that the "allegations [were] complete fabrications". This was the tenor of Mr Terekia's opening address. Mr Terekia put it to the jury that "all allegations against Mr Smith are blatant lies". His cross-examination of the complainant proceeded along the same lines. Mr Terekia's questions to her included "you've made this all up haven't you?"; "Mr Smith did not sexually violate you, did he?"; "[h]e did not strangle you and this

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[20] At [63]–[70] per Gault, Keith and Blanchard JJ.
[21] See also *Scurrah v R* CA159/06, 12 September 2006 at [17].
[22] *Hall v R*, above n 18, at [65].

is all a complete fabrication, isn't it?" Mr Smith confirmed that Mr Terekia "did a very good job on cross-examination" and that he was "really impressed" by Mr Terekia's questioning of the complainant. Mr Smith's denials and assertion that the complainant was fabricating her assertions were put to Crown witnesses, especially Detective Constable Weeks.

[43] Once the Crown closed its case, Mr Terekia met with Mr Smith to discuss whether Mr Smith should give or call evidence. Mr Terekia had a view. He explained the basis for his view. The matters to which Mr Terekia referred in his evidence and which led him to his view were all reasonable in the context of the trial. We are satisfied on the evidence given before us that the "pros and cons" of Mr Smith giving evidence were properly explained to Mr Smith by Mr Terekia. There was no failure by Mr Terekia to follow instructions and the defence advanced by him was in accordance with Mr Smith's instructions.

[44] Mr Forster submitted that the jury was left with only one narrative of the offending. This assertion is unfounded. Mr Smith's defence was that the allegations were "complete fabrications", something that was already in evidence through the testimony given by Detective Constable Weeks. The issues which Mr Smith said he could have given evidence on — for example, whether the damage to the bedroom door was prior damage or damage caused by the knife — were largely peripheral. There could have been no doubt in the jury's mind about Mr Smith's position on the charges, given Mr Terekia's opening address, his cross-examination of the complainant and his closing address.

[45] In our clear view, there was no error or failure to give appropriate and adequate advice by Mr Terekia. On the evidence, Mr Smith was fully informed of the benefits and risks of giving or not giving evidence. He chose not to do so, as was his right. He confirmed that decision in writing. He subsequently confirmed that the case had been conducted in accordance with his instructions. There was no error let alone an error affecting the outcome and the safety of the convictions.

[46] Accordingly this ground of appeal must also fail.

Result

[47] The applications to adduce fresh evidence are granted.

[48] For the reasons we have set out, the appeal is dismissed.

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