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

CA443/2017
[2018] NZCA 84

BETWEEN	GREGORY DAVID WATERS Appellant
AND	THE QUEEN Respondent

Hearing:	8 March 2018
Court:	Asher, Brewer and Collins JJ
Counsel:	W C Pyke for Appellant J E L Carruthers for Respondent
Judgment:	10 April 2018 at 11 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant, Gregory Waters, has been convicted of five charges of indecent assault and sentenced to a community-based sentence.[1] He appeals against his conviction on two grounds:[2]

(a) Judge Dawson erred in not summarising the defence case when summing up to the jury; and

(b) incorrect and prejudicial evidence given by the complainant, namely that Mr Waters refused to show the police his thighs when asked to do so, went uncorrected.

Background

[2] The facts are straightforward. The complainant, an adult woman, contacted Mr Waters because she wanted to learn techniques to defend herself from an abusive ex-husband. At the time, Mr Waters was a member of the New Zealand Police and an Aikido instructor. He agreed to give her lessons on a one-on-one basis at her home. There were two lessons. The offending occurred at the second lesson and the complainant alleged that it involved Mr Waters, in the course of apparently teaching her self-defence techniques, doing the following:

(a) brushing his fingers over her genitalia;

(b) pressing his finger on her breast and nipple;

(c) resting his hand on her breast;

(d) resting his hand between her anus and genitalia;

(e) pressing his thumb into her groin;

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1 *R v Waters* [2017] NZDC 18170. He was also ordered to pay reparation of $1,000.

2 Mr Waters initially also appealed against sentence. However, the sentence appeal was not pursued and we received no submissions on it.

(f) simulating sexual intercourse with her as she was bent over a couch; and

(g) instructing her to put her hand on the base of his penis.

[3] The trial took place over four days. A significant portion of that time was taken up by the playing of Mr Waters' lengthy interview with police.

The summing-up

[4] When summing up, Judge Dawson did not summarise either the Crown or the defence case. His exact comments on the factual cases for the Crown and the defence were short. We quote them from the transcript:

> Now this trial is sometimes referred to … as a he says, she says case. [The complainant] says the offending alleged in the six charges happened. Mr Waters says it did not. Counsel for the Crown and the defendant have outlined their arguments about who you should believe and why. Those arguments will still be fresh in your memory.

[5] Mr Pyke for Mr Waters argued that this summary was entirely inadequate, contrary to usual practice and left the jury with no guidance on the facts.

[6] The Judge had provided question trails for each charge. Those question trails detailed each charge, referring to the specific alleged act. For instance, in Charge 1 the first question he asked the jury to address was whether Mr Waters had "intentionally brushed his fingers over the genitalia of [the complainant]?" There was a statement in all question trails requiring the jury to be sure that there was a specified indecent act and that Mr Waters knew that the act was indecent.

[7] As the Crown accepted, the Judge should have summarised the defence case and indeed that of the Crown. It is a judge's duty to do so; a judge is required to clearly

and fairly put the contentions of either side.[3] The remarks of Lord Goddard CJ in *R v Clayton-Wright* are often quoted in New Zealand cases:[4]

> The duty of the Judge in any criminal trial, or, for the matter of that, in any civil trial, is adequately and properly performed if he gives the jury an adequate direction on the law, an adequate direction upon the regard they are to have to particular evidence on such matters as accomplices … and if he puts before the jury clearly and fairly the contentions on either side, *omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based*. He must give to the jury a fair picture of the defence, but *that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else.*

[8] As the passage indicates, there are limits on a judge's duty to put the defence case to the jury. The judge must be satisfied that the defence case is fully understood by the jury. The extent of the detail that the judge must traverse will depend on the case. In a complex case, the judge will generally need to go through the key factual allegations for both sides, to give them order and coherence for the jury, and make it easier for them to carry out their assessment. In a simple case this is not as important, because the issues will be obvious and the facts to be determined will not require particular organisation to assist in deliberations, or particular elucidation to ensure a clear understanding of the respective positions. A judge is not required to repeat all defence counsel's arguments or assist the defence case by setting out inconsistencies or other matters already referred to by counsel.[5]

[9] But the Crown and defence case should be summarised at least as to their broad form in a balanced and clear way by the judge. It is a judge's duty to assist a jury in its difficult task, and such a summary will help them. In his summing-up in this case, the Judge should have briefly outlined what the complainant said and what Mr Waters said. It did not need to be exhaustive or deal with the facts of each particular charge. A few paragraphs could have set out the essence of the two conflicting accounts. But this was not done. Good practice was not observed.

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3 *R v Foss* (1996) 14 CRNZ 1 (CA) at 4–5; *R v Shipton* [2007] 2 NZLR 218 (CA) at [33] and [35]; and *Piwari v R* [2010] NZCA 19 at [18].

4 *R v Clayton-Wright* (1948) 33 Cr App R 22 (CA) at 29 (emphasis added), referred to in *R v Ryan* [1973] 2 NZLR 611 (CA) at 614; and *R v Shipton*, above n 3, at 224.

5 *R v Shipton*, above n 3, at [37].

[10] However, we have reached the view that this error has not resulted in any miscarriage of justice.[6] As we have said, any summary could have been short. This was because of the innate simplicity of the case. It was of a number of indecent assaults over a single teaching session when the complainant and Mr Waters were alone, when he allegedly assaulted her while purporting to teach her defensive techniques. She said the indecent assaults happened. Mr Waters said they did not. He said that all bodily contact was a natural and accepted part of the teaching process. There were no other witnesses. There is little corroborative evidence. It was the complainant's word against Mr Waters', dominated by the onus on the Crown to prove its case beyond reasonable doubt.

[11] Fortunately, the failure to put each case was also ameliorated by the presence of various factors. The closings and summing-up were all in one day, so they would have been fresh in the minds of the jury. It is of relevance that the defence case had been heard both through Mr Waters, in his detailed statement to the police and in his evidence, and then for the third time through his experienced counsel who spoke clearly and forcefully to the jury during closing. Further, as we have said, there were detailed question trails, setting out each particular alleged indecent assault, and the jury would have to go through each one. As part of doing so it would have been required in relation to each allegation to consider the evidence of both the complainant and Mr Waters on that act, and the submissions that had been made clearly and forcefully to them by counsel on both sides. The finding of not guilty on one charge is an indication that the jury properly considered all the evidence.

[12] Therefore, we are satisfied that the defence case would have been fully understood by the jury, despite the absence of a summary by the Judge.

[13] This ground of appeal does not succeed.

The incorrect evidence given by the complainant

[14] The complainant said that Mr Waters removed his trousers before engaging in the offending in two of the charges. To support her contention she described

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6 Criminal Procedure Act 2011, s 232(4). See also *Edmonds v R* [2015] NZCA 152 at [24].

Mr Waters' underwear and pubic hair and said that she noticed bruises on his thighs. When asked about the bruises in his police interview Mr Waters had said that he had no such bruises.

[15] When cross-examining the complainant, Mr Waters' trial counsel, Mr Morgan QC, suggested to her that her account of Mr Waters' bruises, pubic hair and underwear was a fabrication as Mr Waters had never removed his pants when he was with her. The complainant responded in this way:

> No, he did take his trousers off and it was disappointing to hear when the detective told me that he refused to take his trousers off and prove there were no bruises there. I was appalled that he said he was exercising his human rights …

[16] At that point before she went any further the Judge stepped in and asked the complainant to "just answer the question". There was no further cross-examination.

[17] The complainant's evidence on this point was incorrect. The police never alleged that Mr Waters was asked to take his trousers off and refused to do so. Mr Pyke submitted that this evidence was left uncorrected for the remainder of the trial, and left the jury with the misconception of his alleged refusal. He submitted that there was trial counsel error in that Mr Morgan should have required a direction from the Judge, which was required to fix the error. The absence of any direction left the prejudice uncured.

[18] Witnesses will on occasions make unsolicited and erroneous or inadmissible comments in the course of their evidence. The consequences will turn on the content of a statement, the general context, and steps taken to remediate it.

[19] In this case Mr Waters' police interview was played at trial. It would have been clear to the jury on hearing the interview that the police had not in that interview asked Mr Waters to remove his trousers and he had not refused to do so. Indeed, no such claims were made by the officer who dealt with and interviewed Mr Waters. Mr Waters was called and gave evidence. In the course of that evidence Mr Morgan specifically asked a question about this issue:

Q. When you met with [the investigating police officer] or indeed later after the 31st of July did he ever ask to see the insides of your thighs or your pubic hair?

A. Never.

[20] The prosecutor did not challenge Mr Waters on this evidence. Mr Waters therefore had the last word on whether he was asked. Neither counsel sought to rely on this aspect of the complainant's evidence when closing for the jury. It was not mentioned by them or the Judge.

[21] Trial counsel was very experienced. Mr Waters did not waive privilege. Mr Morgan's views on the significance of the evidence in question and what, if any, discussions took place between him and Mr Waters, are therefore unknown. Mr Morgan clearly did not overlook the complainant's evidence about Mr Waters not showing the insides of his thighs to the police, because he asked the specific question we have referred to above. Mr Waters' lengthy account of events from his perspective, given in his interview and in evidence, was before the jury. We must assume that Mr Morgan made a tactical decision not to take the matter any further, and in particular not to seek a direction. There is always a potential downside in seeking a direction, in that it will serve to remind the jury of the matter corrected with the unwelcome result that it may assume greater importance than it should. Given the absence of any waiver of privilege by Mr Waters we assume that Mr Morgan made a considered decision that was open to him.

[22] The ultimate issue is whether the giving of this evidence has given rise to a miscarriage of justice. We can see no injustice arising from the erroneous remark of the complainant. It was corrected both in Mr Waters' interview and in his evidence. The jury clearly applied independent judgment when considering every charge, given that the jury found Mr Waters not guilty of one charge. It is also to be noted that the Judge directed the jury in firm terms on the onus of proof and that Mr Waters did not need to prove anything.

[23] Mr Pyke argued that s 32 of the Evidence Act 2006 was engaged. Section 32(1) and (2) provide:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
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> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
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> (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
>
> (b) to disclose a defence before trial.
>
> (2) If subsection (1) applies,—
>
> (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
>
> (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.

[24] The section applies when "it appears" that a defendant has failed to answer a question, respond to a statement or disclose a defence. These factors did not arise, given the informal nature of the complainant's aside, the Judge's intervention, and the fact that it was clearly unsupported by the Crown, and unsupportable on the evidence. Given Mr Waters' unchallenged evidence denying being asked, it would not "appear" to the jury that he had failed to do anything. Section 32 was not engaged.

[25] We cannot see that the jury would have been in the end influenced in any material way by the erroneous aside made by the complainant. This ground of appeal fails.

Result

[26] The appeal is dismissed.

Solicitors:
Gavin Boot Law, Hamilton for Appellant
Crown Law Office, Wellington for Respondent