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

CA729/2017
[2018] NZCA 538

BETWEEN	PAORA TAHAU Appellant
AND	THE QUEEN Respondent

Hearing: 5 November 2018

Court: Kós P, Lang and Moore JJ

Counsel: J S Jefferson for Appellant
P D Marshall for Respondent

Judgment: 30 November 2018 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Tahau and the complainant had sexual intercourse in a lavatory cubicle at a Napier bar. The complainant said that this occurred without her consent. Mr Tahau said she consented. A jury acquitted Mr Tahau on the first charge of three charges (sexual violation by digital penetration), convicted him on the second (rape) and

acquitted him on a third (also of rape). Judge Rea sentenced him to six years and six months' imprisonment.[1]

[2] Mr Tahau says the conviction verdict is unreasonable and the verdicts taken together are inconsistent and unsafe. He also says that a pre-trial ruling permitting the complainant to give evidence that Mr Tahau told her that he had just got out of prison for serious violence had a prejudicial effect at trial that outweighed its probative value and which could not be cured by judicial direction.[2] In either case, he says justice has miscarried.

Background

[3] The complainant and two female friends were drinking at the Thirsty Whale bar in Napier early in the morning of 19 February 2017. Sometime after 2.00 am Mr Tahau approached them. He introduced himself and began to talk to the complainant. Her evidence was that he said he had just got out of prison, and that he had received a five-year sentence for "bashing a nigger". Mr Tahau bought the complainant and her friends a drink. The friends went to the dance floor. Mr Tahau then kissed the complainant. Initially she reciprocated. Some this is captured on CCTV footage that was in evidence at trial.

[4] The complainant's evidence was that she began to become uncomfortable with Mr Tahau's attentions. After other methods of getting away from him failed, she decided to "ditch" him by going to the lavatory. When she entered the cubicle she found that Mr Tahau had followed her. He entered the cubicle and locked the door. It is common ground that sexual intercourse occurred between them. The complainant said that first he digitally penetrated her. She said "no" two or three times, but was too scared to resist him. She said that Mr Tahau was "scary" and the thought of his having been sent to prison "scared [her] more".

[5] The complainant's friends went looking for her in the lavatory. They banged on the doors. The complainant did not call out. She said she did not do so because

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1 *R v Tahau* [2017] NZDC 27448.
2 *R v Tahau* DC Napier CRI-2017-041-1129, 8 September 2017.

she was afraid something bad would happen to her friends. Mr Tahau left the lavatory. The complainant followed him out, found her friends and began crying. By the time they reached their car, she became hysterical and screamed that she had been raped. They took her to hospital and then a police complaint followed. She gave an evidential video interview the following day, 20 February 2017.

[6] Mr Tahau was interviewed the next day, 21 February 2017 and gave another shorter interview on 3 March. He said that he had been led by the hand into the lavatory cubicle by the complainant and that sexual intercourse was consensual. He denied digital penetration prior to sexual intercourse.

Evidence of Mr Tahau's claimed prior incarceration

[7] Judge Adeane's pre-trial ruling admitting evidence of the conversation between Mr Tahau and the complainant (as to his having recently been released from prison) was orthodox and not in its own terms criticised by the appellant.[3] Nor is the direction given in Judge Rea's summing-up on that evidence criticised.

[8] The ruling permitted the complainant to recount that on meeting her, Mr Tahau said that, to the effect, he had "just got out of prison" and that he had got "five years" for "bashing a nigger". It may be noted that the Crown accepted that parts of Mr Tahau's evidential interview to the same effect should be deleted. In consequence, Judge Rea pointed out in his summing-up that the jury did not know whether Mr Tahau had actually been to prison, or what for, and might instead have been "spinning a line". The jury was told not to speculate about his history.

[9] In terms of s 7 of the Evidence Act 2006, the evidence was probative in relation to the complainant's credibility. In particular, it was relevant to why:

(a) the complainant would have reason to be scared of Mr Tahau;

(b) she might acquiesce in unwanted sexual contact in the lavatory; and

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3 *R v Tahau*, above n 2.

(c) she did not call for help when her friends knocked on the lavatory door.

Mr Jefferson does not seriously contest that analysis.

[10] Rather, the concern here is with s 8, and the risk of unfair prejudice. Mr Jefferson points in particular to admission of the word "nigger". This, he submits, may have been construed by some jurors to indicate that Mr Tahau was affiliated with the Mongrel Mob. Mr Jefferson submits that Mr Tahau's fair trial rights were impugned by the inclusion of this evidence. That was reinforced by the fact the complainant in cross-examination and re-examination did not come up to brief in terms of being scared, and demonstrated significant memory loss due perhaps to alcohol consumption before the incident. All this diminished the probative value of the evidence, whereas its unfairly prejudicial effect increased.

[11] We do not think the ruling can be criticised. In *Milligan v R* a complainant gave evidence that she had been "too scared" to call for help because the appellant was a member of the Mongrel Mob.[4] This Court held that the complainant was entitled to explain why she had been afraid of the appellant:

> [40] There must be integrity in every trial, but an environment cannot be created in which that integrity can be contaminated to the advantage of an accused person. While it is essential that a hearing is managed to guard against prejudice to the accused, it is also critical that the Crown is not precluded from presenting its case by an unreasonably stringent standard of trial hygiene. In a case like this, where an accused is a gang member and his conduct has materially frightened a complainant, there can be no objection to those facts being before the jury once the complainant's credibility is challenged. When defence counsel put questions to complainants in cross-examination, honest (and full) answers to those questions are to be expected and permitted. That is especially so when, as in this case, a complainant is repeatedly pressed on a matter.

[12] For the same reasons, the ruling here was correct. The evidence was probative on a point that would be (and was) put seriously in issue: the complainant's credibility. The absence of that part of the narrative would have given the jury an inaccurate picture of the dynamic between the complainant and Mr Tahau immediately before the alleged offending. Any prejudice could be dealt with by a firm direction. And, as we have noted, the parts of Mr Tahau's interview where he confirmed his recent release

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4 *Milligan v R* [2009] NZCA 344.

from prison were excised. The evidence from the complainant was properly led at trial.

[13] It is true that under cross-examination (and also re-examination) the complainant was vaguer than in her evidential interview as to the real effect of Mr Tahau's history on her attitude to his sexual attentions. She did not resile altogether, however, asserting that although initially she dismissed it, when she was in the cubicle with Mr Tahau it started to run through her mind. It made her "frightened" and "scared … a little". The fundamental contest concerned consent (and to a lesser extent, exactly what physical acts occurred in the lavatory). The complainant's attitude to, and apprehension of, Mr Tahau were tested thoroughly in evidence. The jury were well aware of the nature of the core contest. It was the subject of extensive submission by defence counsel. The potential significance of the word "nigger" was not adverted to expressly. Mr Jefferson accepted that the trial did not otherwise feature any gang overtones.

[14] The arguably reduced significance of fear (because the complainant did not come up to brief on that) did not mean the ruling was wrong. It did not mean the evidence could not be led. It did not mean that the leading of the evidence in that context necessarily would cause a miscarriage of justice. What it did mean was that the balance between probative value and prejudicial effect altered. The real question was whether the Judge's direction was adequate in the light of that change. But no issue is taken with the direction, which was notably robust:

> [66] Now, I want to deal with the elephant in the room and that is this issue about him telling her that he had been to prison for bashing somebody and that he had been there for five years or something. Now normally unless there are exceptionally good reasons for it juries do not get to hear about anybody's past history. The reason is you have to make a determination based on the facts in the particular case without having your views polluted by the fact that the person has been in trouble before. The only reason that you heard about his claim that he had been in prison before, was because the Crown put it to you that that was an explanation for the behaviour of the complainant. That she had this information and that led her to being frightened and to acquiescing in what happened, not consenting to what happened but simply going along with it because she was confronted with somebody who had told her that he had [been] violent to a degree that he had spent a considerable period of time in jail and that played on her mind. That is why it was before you.

> [67] Now deliberately there has been no information before you as to whether that comment that he made was true or not and the reason there is no information before you about that is it is entirely irrelevant. You have it only for one reason and that is so you can assess the affect it may have had on the complainant. Whether it is true or not, has no bearing in the case at all so do not go there and say ... "My word what a violent fellow, we have got to sort this out." That is not what it is about because we do not know actually whether it is true or not. That is why I particularly asked the complainant whether she believed him or not. Whether she thought he was just spinning a yarn or whether she accepted it, and you will recall she thought that he was showing off at least at the stage we were examining at that point. Whether she continued to think that or not, that is a matter that you are going to have to take into account in assessing it. But I want to put it very clearly to you that you do not draw the conclusion because there is some comment in this case about him having been to prison that somehow that is working adversely to him. It is there for that single purpose that I have outlined for you and for nothing else.

[15] We think this direction was sufficient in the circumstances to guard against the drawing of an illegitimately prejudicial inference. We do not therefore accept this ground of appeal.

Unreasonable or inconsistent verdicts

[16] Mr Jefferson submits that the conviction verdict was unreasonable because there was contemporaneous evidence contradicting the complainant's evidence. In particular, he points to CCTV footage which shows the complainant and Mr Tahau walking together to the lavatory (Mr Tahau being very close behind the complainant), that he waited for her to come out after and that they walked together back into the bar in close proximity. The complainant's memory was poor, affected by alcohol consumption. She accepted that she may have taken a more active part in the process of intercourse than suggested in her evidential interview.

[17] Mr Jefferson also submits that the verdicts were factually inconsistent, "strongly suggestive of a compromise" which may have been influenced by the jury having heard of the fact Mr Tahau had been in prison. He submitted it was an affront to logic and common sense, given the complainant's narrative, that the jury would not accept the complainant's evidence on charges 1 and 3 but would on charge 2. The jury must have rejected the complainant's narrative.

Inconsistent verdicts?

[18] It is convenient to deal with the latter point first, as any force it has contributes to the unreasonableness argument. We do not however think the verdicts can be described as inconsistent.

[19] The essential principle is that a guilty verdict on one charge will be unsafe if logically irreconcilable with a verdict of acquittal on another. The Supreme Court said in *B (SC12/2013) v R*:[5]

> [67] … Where they deliver multiple verdicts which are not capable of logical reconciliation, juries give some insight into their thought processes. Logically irreconcilable verdicts may indicate that the jury's thinking has gone awry in some fundamental way: in particular, the jury may have acted on a misunderstanding of the law or reached an illegitimate compromise. In such circumstances, a court may feel it necessary to intervene in order to ensure that justice is done, despite its respect for the jury's function in the criminal justice process.

The test is one of "logic and reasonableness". This Court put the point this way in *R v Irvine*:[6]

> The question which we must ask ourselves is whether the acquittal on count one, in all the circumstances of this particular case, renders the verdict of guilty in respect of count two unsafe, in the sense that no reasonable jury could have arrived at different verdicts on the two different counts.

[20] In this case the differing verdicts are explicable on two bases:

(a) Mr Tahau admitted sexual intercourse (in a single act), thus offering some corroboration for the second charge (on which he was convicted). But he denied the physical acts constituting charges 1 and 3. It is understandable that the jury might therefore have been more sure of culpability on charge 2 than the others. The jury may have thought Mr Tahau harboured some reasonable belief in consent at the time of the first charge (which then evoked, on the complainant's evidence, a repeated protest of "no"). Further, the jury may have reasoned that

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5 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 per Arnold J (footnote omitted).

6 *R v Irvine* [1976] 1 NZLR 96 (CA) at 99 (in a passage approved in *B (SC12/2013) v R*, above n 5, at [68]).

the sexual intercourse could not be divided into two parts on the basis of Mr Tahau's account of events (hence explaining the dismissal of the third charge).

(b) A significant margin of appreciation must be allowed to a jury. If acquittal verdicts are explicable on what the Supreme Court called in *B (SC12/2013)* the exercise of "an innate sense of justice" — that is, that conviction for one charge of rape is sufficient to reflect Mr Tahau's culpability — an appellate court will not interfere.[7] The Court's concern is far greater where there is reason to believe a jury may have acted erratically in convicting, than where it has acted logically but leniently in acquitting.

Unreasonable verdict?

[21] We turn to the question of unreasonableness of the conviction verdict. A verdict may be set aside as unreasonable only if the court is "satisfied that no jury applying the criminal standard of proof could reasonably have reached a guilty verdict on the evidence".[8] Appellate courts here perform a review function; in doing so they must give appropriate weight to advantages possessed by the jury.[9] An assessment of witness credibility and reliability is quintessentially a jury function. The jury is the delegated fact-finder; courts should not lightly trespass on their jurisdiction.

[22] We have noted already that the two acquittals are logically explicable on the basis that the jury were looking for some measure of corroboration on charge one, and harboured doubt as to whether the physical aspects of charges two and three could be split. Available consistency between the verdicts weakens Mr Tahau's argument that the verdict on charge 2 was unreasonable. The cross-examination of the complainant was exacting and counsel's closing address probed thoroughly the uncertainties arising on the evidence and the basis on which consensual sexual activity might instead be inferred. There is no criticism made of the Judge's summing-up and the jury, duly directed, rejected that inference. The verdicts

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7 *B (SC12/2013) v R*, above n 5, at [105]–[106].
8 *Wylie v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [10(c)].
9 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13] and [17].

demonstrate discrimination by the jury. It deliberated for some time, during which it reviewed the CCTV footage. Given weaknesses in the complainant's evidence exposed in cross-examination, the conviction verdict might perhaps have surprised. But surprise is insufficient to constitute unreasonableness, or to avoid the verdict. The threshold for the finding of unreasonable verdict in this instance simply has not been met.

Result

[23] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent