NOTE: ORDER MADE IN [2016] NZCA 180 PROHIBITING PUBLICATION OF APPLICANT'S NAME UNDER S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

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

CA270/2019
[2019] NZCA 447

BETWEEN	F (CA270/2019) Applicant
AND	THE QUEEN Respondent

Hearing:	20 August 2019
Court:	Brown, Simon France and Dunningham JJ
Counsel:	P E Dacre QC for Applicant A J Ewing for Respondent
Judgment:	23 September 2019 at 12.30 pm

JUDGMENT OF THE COURT

The application for leave to recall this Court's judgment *F (CA705/2015) v R* is declined.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Following a jury trial in August 2015 Mr F was convicted on one charge of rape and two charges of indecent assault of his former wife.[1] The applicant's primary defence to most, although not all, of the charges was that he suffered from the sleep disorder known as sexsomnia and had been asleep during the alleged offending. The Crown called Dr Antonio Fernando, a sleep expert, who deposed that sexsomnia generally does not involve talking.

[2] In May 2016 this Court dismissed Mr F's appeal against conviction finding that the jury's verdicts were reasonable.[2] The jury's verdicts were viewed as consistent with the complainant's evidence and Dr Fernando's evidence, in particular about the general absence of communication during a sexsomnia episode. In March 2017 Mr F's application for an extension of time to apply for leave to appeal to the Supreme Court on similar grounds was declined.[3]

[3] In June 2019 Mr F filed an application "to appeal a second time" to this Court against his conviction. That application is based on new evidence from Dr Fernando who, subsequent to the trial, appeal and further application to the Supreme Court, assessed Mr F in the capacity of a patient. Dr Fernando now states that Mr F is a sleep talker with the consequence that some form of simple communication can occur during or at the end of his experiencing a sexsomnia episode.

[4] The Crown opposes the application contending that it amounts to an application for recall of this Court's earlier decision which does not satisfy any of the prerequisites for the exercise of the inherent power to recall the Court's decision recognised in *R v Smith*.[4]

Jurisdiction

[5] The jurisdiction conferred on this Court by statute does not include the power to rehear appeals which have been finally disposed of. However the Court has an

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1 He was either found not guilty by the jury or discharged by the trial Judge on eight further charges.
2 *F (CA705/2015) v R* [2016] NZCA 180 [Court of Appeal decision].
3 *F (SC129/2016) v R* [2017] NZSC 34 [Supreme Court decision].
4 *R v Smith* [2003] 3 NZLR 617 (CA).

inherent power to revisit by way of recall earlier decisions in exceptional circumstances when required by the interests of justice to do so. In *R v Smith* the nature of that power was described in this way:[5]

> Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

[6] As this Court recently explained in *Lyon v R* three preconditions must be met for such a recall:[6]

(a) a "fundamental error in procedure";

(b) a substantial miscarriage of justice if the error is not corrected; and

(c) the absence of an alternative effective remedy.

[7] The Court emphasised that the power of recall is narrow, based on impeachment of the appellate decision, that being the decision sought to be recalled.[7] In the context of the third precondition, the point was made that, whereas a first appeal court which has determined an appeal finally is functus officio, that is not the case for a second appeal court whose jurisdiction depends on leave.[8] The Court explained:[9]

> Leave may be granted, *inter alia*, if that court is satisfied that a (substantial) miscarriage of justice may have occurred, or may occur unless the appeal is heard. That ground is particularly applicable to factual or evidence-based criminal appeals (or renewed appeals based on new evidence) which may not raise issues of general or public importance.
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> (Footnotes omitted.)

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5 At [36].
6 *Lyon v R* [2019] NZCA 311 at [27].
7 At [29].
8 At [30].
9 At [17].

The trial

[8] Throughout their marriage from 2007 to 2012, by the complainant's account there were many occasions when she would wake to find Mr F engaged in some form of sexual activity with her, sometimes penetrative, but usually some form of fondling or touching. The complainant did not like it and it became a point of contention in the marriage. When it first occurred Mr F claimed that he must have been suffering from sexsomnia.

[9] Initially the complainant believed him. However as time went by she began to doubt that Mr F was acting unconsciously, particularly after his acknowledgement that he had been awake during the incident which is the subject of charge 8 discussed below. The complainant also read that asking a question could prevent sexsomnia from occurring.

[10] Mr F had not had a professional diagnosis of sexsomnia. However at trial the Crown called Dr Fernando who gave general evidence on the condition confirming that it exists as a variation of parasomnia, a recognised sleep disorder. Dr Fernando had personally treated 10 to 15 patients who complained of the disorder and he was familiar with the specialist literature. He gave evidence that someone with this type of disorder could be asleep while performing sexual acts but based on his patients' reports there was generally no communication during sexsomnia.

[11] Mr F was found guilty on charges 4, 8 and 10. The charges are described in the Supreme Court's decision in this way:[10]

> [8] … Charge four alleged sexual violation by rape and was said to have occurred between 7 March 2007 and 31 December 2008. The complainant said that she woke up, face down in the bed with Mr F on top of her, having sexual intercourse. She said "no" and resisted but could not get away. Mr F did not desist. Just before ejaculation, he said "I'm going to come", a remark he would make during consensual intercourse. The next day, according to the evidence of the complainant, Mr F admitted to remembering having made the remark but said that he "wasn't awake enough to stop". In his police statement, which was before the jury, Mr F said he had a brief memory of only one event where he was at "that point knowing I'm about to ejaculate but not knowing how I got there" and that, even if he had wanted to stop, he would not have been able to.

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10 Supreme Court decision, above n 3.

> [9] Charge eight alleged indecent assault, said to have occurred between 1 November 2011 and 31 August 2012. According to the complainant the incident in question followed similar incidents on two preceding nights. She awoke to hear Mr F asking, "[a]re you awake?" She was, by this stage, suspicious of his claimed sleep disorder and feigned sleep. He moved her hand slowly towards his penis. When she confronted Mr F about this, he initially maintained that it was another incident of sexsomnia but later acknowledged that it was not.
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> [10] Charge 10 was a representative charge of indecent assault. The complainant said that on a number of occasions she woke up to find that Mr F rubbing his erect penis on her bottom. On one of these occasions, she asked him what the time was. He looked over at a clock near the bed and told her and, as she was falling asleep, he rolled over and resumed rubbing his penis against her bottom.
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> (Footnotes omitted.)

Subsequent judgments

This Court

[12] On appeal to this Court Mr F argued that the jury's verdicts were unreasonable or inconsistent. The Court considered there was sufficient evidence to raise the real possibility, even the probability, that Mr F had the sleep disorder, sexsomnia.

[13] Discussing charge 4 the Court observed:[11]

> [30] In our view, and looking at the evidence as a whole, the jury might well have decided to give Mr F the benefit of the doubt that most of the incidents charged against him could be excused by sexsomnia. However, for charge 4, the jury was entitled to accept the complainaint's evidence that Mr F acted normally and just as he would during conscious sex. The phrase "I'm going to come" was typical of his normal sexual practice. His admission that he had some memory of saying that and of the incident, coupled with Dr Fernando's evidence that generally there is no communication during an act occasioned by sexsomnia, could be relied on by the jury.

It held that the jury was entitled to find that such factors negated the reasonable doubt that might otherwise arise from the sexsomnia evidence.[12]

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11 Court of Appeal decision, above n 2.

12 At [31].

[14] With reference to charge 10 the Court noted that the complainant gave clear evidence of Mr F responding to her question about the time and then ceasing the conduct for a while before resuming it, concluding:

> [35] It is not inconsistent with other verdicts of acquittal that the jury took the evidence of the communication from Mr F to be a distinguishing feature sufficient to negate a reasonable doubt that might otherwise be raised by the evidence of sexsomnia.

[15] The Court noted that charge 8 did not involve sexsomnia and that Mr F admitted that he lied to the complainant about that.[13]

The Supreme Court

[16] The Supreme Court did not consider that the evidence at trial was such that, in the absence of a formal diagnosis, it was possible to conclude, as the Court of Appeal suggested, that there was a probability that Mr F suffered from sexsomnia (as against a possibility that he was so suffering).[14] In relation to the rape charge the Court concluded:

> [22] For completeness, we note that the jury had been told to acquit if they considered there to be a reasonable possibility that Mr F's actions were not deliberate because of sexsomnia. If the jury had accepted as a reasonable possibility that Mr F's account may have been true and therefore that he was not awake enough to stop, then it is axiomatic that his actions were not deliberate. It is clear by their verdict that the jury had rejected his account.

The application for recall

[17] After his release from prison Mr F was able to consult with Dr Fernando who diagnosed him as having the sexsomnia condition. Mr F applied for leave to call Dr Fernando as a witness on the following grounds:

- Dr Fernando is of the opinion that in his particular circumstances Mr F could have communicated during a sexsomnia episode and that the description given by the complainant in relation to the rape charge is consistent with Mr F experiencing an episode of sexsomnia.

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13 At [32].

14 Supreme Court decision, above n 3, at [7].

- This Court held that coupled with Dr Fernando's evidence that generally there was no communication during an act occasioned by sexsomnia, the jury was entitled to find that at the time of the incident, Mr F was not experiencing an episode of sexsomnia.

- If the fresh evidence now provided by Dr Fernando is accepted, then because of Mr F's particular combination of medical conditions, his behaviour would be consistent with an episode of sexsomnia.

- In these circumstances the jury verdict would have been inconsistent with the fresh evidence and a miscarriage of justice would have occurred.

Dr Fernando's evidence

[18] Dr Fernando gave the following evidence at trial concerning the occurrence of communication during a sexsomnia episode:

> Q In your experience is, from the partner's perspective, is there a difference between what might be called a normal sexual experience in the partnership or the marriage versus an incident where it's thought the person was actually asleep?
>
> A Yes sir. Partners most of the time will know that the event was sleep related, so a common, I remember a recent patient well the wife saying normally the patient during sex when he's awake is quite caring, is focussed on pleasuring the woman and however when he's in his sleep sex mode it's very selfish, aggressive and just doesn't factor in the needs of the other person. And I've heard something similar with a lot of the other stories, so patient or partners can (inaudible …) differentiate if it's sleep sex or normal sex.
>
> Q In terms of the, in your experience when someone's having, undergoing an incident of sleep sex so that the patient is asleep but is engaging in sexual activity. To what extent can there be or is there, in your experience, communication between the patient and the partner?
>
> A Again this is just based from my patients or partner's reports is that generally there's no communication. In fact the description is they're just in their own world, just totally just zoned out while in the process of sleep sex.
>
> Q So they're asleep?
>
> A Parts of their brain's asleep in terms of the communication connection aspect but the other part of the brain involved in mechanical sexual

> movement is engaged. And I think it's one of the reasons partners can differentiate if the behaviour is sleep related or normal sex, because of the communication if it occurs or doesn't occur.

[19] Dr Fernando swore an affidavit dated 15 December 2018 which confirmed this evidence as being his general experience of communication during a sexsomnia episode. The affidavit then noted that he was never invited to express an opinion as to whether the verbal communications from Mr F at the time of intercourse were consistent with him having sexsomnia.

[20] A report dated 10 December 2018 annexed to the affidavit recorded that Mr F asked Dr Fernando to review his case with a view to (1) providing a diagnosis of sexsomnia and (2) reviewing the general comments Dr Fernando made in evidence at the trial. In the report Dr Fernando provided a diagnosis of sexsomnia for Mr F. With reference to the issue of verbalisation, the summary at the end of the report stated:

> The report that [Mr F] has made verbalizations prior to ejaculation can still be part of a sexsomnia episode as [Mr F] is described as a light sleeper. It is possible that he came to superficial consciousness in the process of ejaculation, which is an intense physiological and psychological process. In addition, he is a known sleep talker, who comments occasionally on disturbances around him.
>
> Sleep talking could occur during or at the end of the sexsomnia episode, especially if the patient is also a sleep talker like [Mr F].
>
> In both above explanations, verbalization does not necessarily suggest full consciousness and awareness of events.

[21] Dr Fernando's affidavit referred to a literature review and specifically to a case study published by Dr Colin Shapiro which is said to describe four cases of sexsomnia where sleep talking also occurred. Dr Fernando then stated:

> 24 In general, coherent, verbal communication is not commonly reported by partners of patients with sexual parasomnias. In fact, intelligent verbal communication typically suggests that the person is awake, can process cognitive information and respond back to the other party. Generally, patients in a sleep walking or sexsomnia episode are unlikely to talk, and if spoken to, will speak gibberish.

[22] He then noted that the evidence suggested that Mr F is a superficial sleeper and easily responds to external stimuli. He stated:

> 26 It also suggests that [Mr F] can easily have conversations in the context of superficial sleep.
>
> 27 His parasomnia condition is not limited to sexual behaviours but according to the complainant, has components of easy sleep arousability and verbal communication. Because of his superficial sleep and ease of being momentarily partially aroused in response to an external or internal stimulus, it is possible that he will briefly talk about what's pertinent at the moment e.g. children getting up, movement of a bed partner, responding to a question, other events going on around or for him physically.

[23] Dr Fernando then proceeded, as requested, to comment on this Court's judgment relating to charges 4 and 10 in this fashion:

> 32 In respect of charge 4, [Mr F] apparently used the [phrase] "I'm going to come", which was typical of his normal sexual practice. There is also an admission that he had some memory of saying that.
>
> 33 In respect of charge 10, the complainant woke to find [Mr F] rubbing his erect penis against her bottom. She asked [Mr F] "what's the time". His response, she said, was to look over, check the clock and tell her the time. He then rolled away from her. But, after a little while, he rolled back to her and began to rub himself against her again. [Mr F] did not remember the incidents.
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> 34 I am recorded as expressing the view that in general there is no communication during an act occasioned by sexsomnia. As I explained earlier, that is my experience. Also, I was not commenting specifically about [Mr F's] case.
>
> 35 However, in [Mr F's] case, the incident described in the Court of Appeal decision can be consistent with being part of a sexsomnia episode.
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> 36 This would be consistent with [Mr F] being a sleep talker and at the point of climax becoming briefly conscious.
>
> 37 I have another patient who has behaved in this manner. In my other patient's experience, he wakes up just prior to or during the process of climax.
>
> 38 For both charge 4 & 10, sleep talking, or some form of simple communication can occur during or at the end of the sexsomnia episode especially if like [Mr F], the patient is also a known sleep talker. The complainant detailed accounts of [Mr F] also being easily roused briefly by external stimuli. In [Mr F's] case, short verbal communication does not necessarily indicate full consciousness or awareness of the situation.

[24] He concluded in this way:

> 41 Having reviewed all the material including [Mr F's] medical history, the court and disclosure records and the literature, I am of the opinion that the verbal communications occurring during or at the end of a sexual episode as described by the complainant can be consistent with [Mr F] experiencing an episode of sexsomnia.

Submissions of counsel

Applicant's submissions

[25] Addressing the three recall preconditions Mr Dacre QC identified as the fundamental error the fact that the Court of Appeal had relied on the general evidence of an expert witness to the effect that sexsomnia generally does not involve talking. However the new evidence of Dr Fernando provides clarification and demonstrates that the fact that Mr F made statements during the relevant incidents is not inconsistent with the defence of sexsomnia.

[26] With reference to the rape charge Mr Dacre submitted that there was some communication just before ejaculation but it did not follow that Mr F was conscious either prior to or after the making of the statement and in particular during the course of the incident. He argued that with the benefit of the new evidence the jury could not have been satisfied beyond reasonable doubt that Mr F was acting consciously during the incident. At the highest the jury could have concluded that he was conscious at the time of ejaculation and in the situation where it was too late to either desist or form an intention to continue.

[27] Mr Dacre contended that the same proposition applied to charge 10, namely that the reported communication occurred at the end of the incident and there was no evidence offered by the Crown that Mr F was conscious prior to this. He submitted:

> When the complainant asked [Mr F] a question, he then responded. It does not follow that he was awake prior to the question being asked. The noise and any body movement associated with the act of asking the question could have awoken [Mr F] enough to respond. This is consistent with her evidence that after a period, [Mr F's] behaviour continued. This could mean that he relaxed back into the sleep from which he was awoken.

[28] Mr Dacre acknowledged that the new evidence did not extend to charge 8 but submitted that it needed to be viewed in the context of charges 4 and 10. He argued that even though it did not involve a sexsomnia issue it was artificial to separate it

from the other two charges. If at the end of the day charge 8 was the only charge remaining, then that charge should be reconsidered as a matter of credibility.

[29] Mr Dacre submitted that a recall of this Court's judgment was the only reasonably available remedy. While acknowledging that he had given thought to a further application for leave to appeal to the Supreme Court, he considered this case turned on its own facts given the fact the same witness was involved and there was, in effect, unfinished business because the evidence at trial did not paint a complete picture.

Respondent's submissions

[30] Ms Ewing first submitted that the recall jurisdiction is available where something has gone seriously wrong with the appeal process, not the trial process.[15] Furthermore the recall jurisdiction is unavailable in fresh evidence cases which by contrast are paradigm cases for resort to s 406 of the Crimes Act 1961.[16]

[31] She submitted that Mr F's proposed appeal is based on new evidence, and that, as *Lyon v R* makes clear, this cannot found an application for recall of this Court's judgment on appeal.[17]

[32] Noting Mr F's argument that the s 406 procedure was "not a practical" remedy in this case, Ms Ewing observed that no reason was offered why that might be so. She contended that the application did not establish that a miscarriage of justice would occur unless the appeal was reopened, drawing attention to this Court's observation that charge 8 did not involve sexsomnia at all. Mr F had admitted that that assault occurred when he was awake.

[33] Finally Ms Ewing commented that Mr F had been represented by the same senior counsel throughout the trial, the appeal to this Court and this application. She submitted that absent a waiver of privilege, Mr F's explanation for the absence of

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15 Referring to the discussion in *Lyon v R*, above n 6, at [28]–[29]; and *McMaster v R* [2016] NZCA 612 at [58].

16 *A v R* [2011] NZSC 84 at [5]–[6].

17 *Lyon v R*, above n 6.

evidence both at trial or on an appeal could be given limited weight and without trial counsel's response it was impossible to undertake any meaningful assessment of the merits.

Discussion

[34] The application for recall was based squarely on the footing that fresh evidence has been obtained, which was not available either at trial or on appeal, which suggests that verbal communications by Mr F occurring during or at the end of a sexual episode as described by the complainant could be consistent with Mr F experiencing an episode of sexsomnia. In those circumstances Ms Ewing's submission is sound that *Lyon* makes clear that there is no basis for an application for recall, no qualifying error in the appellate process having been identified.[18]

[35] We do not consider that the fact that the source of the claimed fresh evidence is a witness who gave evidence at the trial provides a reason for departing from *Lyon*. At the trial Dr Fernando was a witness for the prosecution and gave evidence of a general nature as to the phenomenon of sexsomnia. Since the proceedings he has accepted Mr F as a patient. The evidence which it is proposed that he would give for the defence is based on his consultation with and diagnosis of Mr F. We do not consider that this scenario is different from the situation where it is sought to adduce evidence from a new witness not previously involved in the proceeding.

[36] We agree with Ms Ewing that the appropriate courses of action for Mr F in these circumstances are either a further application to the Supreme Court for leave to appeal or an application under s 406 of the Crimes Act.

[37] It is significant that Dr Fernando records in his affidavit that he was asked to comment only in relation to charges 4 and 10. We infer that the reason that he was not referred to charge 8 is because it is apparent that it did not involve sexsomnia given that Mr F admitted that the relevant assault occurred when he was awake. The practical difficulty for Mr F is that while he initially claimed he had no memory of the incident, as this Court's judgment records he acknowledged in his interview

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[18] At [34].

with the police that he initially lied to the complainant about the incident and he accepted that potentially he acted with a sexual motive.[19]

[38] Even if we considered it was appropriate to grant an order for recall notwithstanding our views above, we have significant reservations about the admissibility of the proposed evidence in any event.

[39] First evidence will only be received on appeal as fresh if it has become available since the trial or could not with reasonable diligence have been called.[20]

[40] Dr Fernando's opinion has been formed subsequent to the proceedings as a consequence of his interaction with Mr F as a patient. However his view is dependent to a very considerable extent upon the police interview with the complainant and the Shapiro case study which was published in the Canadian Journal of Psychiatry in 2003. We do not consider that the foundation proposition that Mr F may speak in his sleep is something which was not known at and could not have been pursued in cross-examination of Mr F at the trial.

[41] Secondly an expert's opinion is admissible if the jury is likely to obtain substantial help from the opinion either in understanding other evidence in the case or in ascertaining any fact that is of consequence to the determination of the proceeding.[21]

[42] Dr Fernando commenced the discussion of his opinion in his affidavit by noting that the Shapiro case study describes four cases of sexsomnia where sleep talking also occurred. In the first of those cases the wife of the patient described instances in which he "screamed and talked in his sleep". In the second the patient's wife stated that "there probably were times that he had spoken in his sleep ("mumbling")". In respect of the third it was stated that the patient's sleep history was "significant" for sleep talking and on one occasion sleep walking. In respect of the fourth it was said that the patient's sleep history was "notable" for sleep talking and sleep walking.

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19 Court of Appeal decision, above n 2, at [18].
20 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].
21 Evidence Act 2006, s 25(1).

[43] There was no further detail in the case study to suggest that the sleep talking was responsive to questions, nor that it was coherent. Nor was it expressly noted that the sleep talking occurred during an episode of sexsomnia, as opposed to the individual simply experiencing both sexsomnia and sleep talking in their sleep histories. The case study did not provide evidence different from Dr Fernando's statement in his affidavit that generally patients in a sleep walking or sexsomnia episode are unlikely to talk, and if spoken to, will speak gibberish.

[44] In the circumstances of this case where Dr Fernando gave unchallenged evidence of his general experience and Mr F had admitted in respect of one relevant event that he had lied, we do not consider that the proposed opinion evidence specific to Mr F would be likely to provide substantial help for the fact finder.

Result

[45] The application for leave to recall this Court's judgment *F (CA705/2015) v R* is declined.

Solicitors:
Crown Law Office, Wellington for Respondent