

**PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

CA334/04

THE QUEEN

v

JOSEPH WARREN LEPPER

Hearing: 13 October 2005
Court: Glazebrook, Wild and Doogue JJ
Counsel: C W J Stevenson for Appellant
J C Pike for Crown
Judgment: 1 November 2005

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Wild J)

Introduction

[1] This is an appeal against conviction. The appellant was convicted by Miller J of sexual violation by rape, and also by unlawful sexual connection, after a jury trial in the High Court at Palmerston North between 21 and 25 June 2004.

- [2] Five grounds of appeal are pursued, singly and in combination. They are:
- (a) Evidence from two experts about the import of DNA evidence went beyond the permissible.
 - (b) The evidence about a DNA match produced by LCN (low copy number) analysis was so unreliable that it should have been excluded by the Judge.
 - (c) References in the evidence to the appellant having previously been in prison and to the Police knowing where he lived and coming to his home were unfairly prejudicial.
 - (d) Evidence that the victim was unable to identify the appellant from a montage of 35 photographs, none of which were of the appellant was unfair to the accused and should have been excluded by the Judge.
 - (e) There were insufficient excisions from the videotaped interview of the appellant by the Police, with the result that the jury became aware of the appellant's criminal history and the fact that he had previously given a DNA sample.

The Crown and defence cases

[3] Early on the morning of 16 May 2002 the victim, a woman aged 54, was taking her customary morning walk near her home. The Crown case was that the accused, after following her and briefly speaking to her, seized the complainant and forced her into a secluded area near a little park in Palmerston North. The appellant held the complainant by the throat and repeatedly threatened to kill her if she cried out for help. Despite struggling, she finally submitted due to the intense pain of the appellant holding her. The appellant then inserted lubricant into the complainant's vagina. While still threatening to kill her, he then raped her wearing a condom. The complainant said that the appellant then scuffed the ground to cover any traces of what had been happening. He then told the complainant not to tell anybody and threatened to kill her if she did, adding that he would "do 10 years for this". After

the complainant pleaded with the appellant and said she would not tell anyone, the appellant fled. The complainant went for help to her son's house.

[4] The Crown case hinged on the analysis of DNA found in semen in soil collected from the crime scene, and in stains in the arch of the sole of one of the complainant's shoes and in the front of the waistband of her underpants. The New Zealand ESR could not obtain a sufficient DNA profile from the semen in the samples found on the complainant's shoe and underpants, and sent those two samples to a laboratory in Birmingham in the United Kingdom for analysis by the LCN technique. This produced a match between those two samples and enabled the ESR to establish that the DNA in those samples matched the profile of the DNA found on the ground, and that all those samples matched the profile of the DNA sample taken from the appellant. It did not match the DNA from the sample which had been obtained from another suspect, whom we will call Mr X.

[5] The accused's case at trial was that he had not long before these events had consensual sex with another woman at that very spot. This explanation differed from what he had said to the Police when first interviewed on 1 April 2003. He had on that occasion denied any knowledge of the little park where these crimes occurred. He told the Police that he regularly had sex with a variety of women in a variety of locations all over Palmerston North, including in the middle of the road, but never in that particular park. He made a point to the Police that this was unprotected sex: he had never used a condom. He also said he had never used lubricants.

[6] He denied raping the complainant. He said that he had plenty of consensual sex and had no need to rape a 50 year old woman.

First ground of appeal: Crown experts explaining effect of DNA evidence in impermissible terms

[7] The appellant challenged the way in which both DNA experts called by the Crown explained the results of their analysis to the Court. The first expert was Dr Whittaker, the English LCN DNA analysis expert called to give evidence of his analysis and comparison of the DNA found in the stains on the complainant's shoe and underpants. Dr Whittaker first explained that he had been able to obtain a full

DNA profile from the sample obtained from the underpants, but only a partial or incomplete profile from the DNA taken from the shoe. After explaining the way in which he had compared these two profiles, he explained the result of that comparison in the following way. (We have emphasised the passage challenged on this appeal):

Q. Again, referring to the table with 10 columns with 10 sites we are interested in, what results were you able to derive?

A. OK, where we did get a result we show that the numbers that we see are exactly the same as those numbers in the same columns as from the underpants. And this is what you would expect to find if these two profiles had originated from the same person, its just that one of the profiles isn't as complete as the other one.

Q. And because one of the profiles is obtained from a different site different location different fabric different item?

A. Different origin and therefore different amounts of DNA or different amounts of these chemical inhibitors.

Q. Your conclusion comparing the results in the two tables you have drawn from the LCN is what?

A. ***That those two profiles are what you would expect to find if they had both originated from the same person.***

[8] Dr Whittaker added that he had carried out his analysis “blind” – without having a DNA profile from the appellant.

[9] The other evidence challenged is that of the New Zealand DNA expert called, Dr Vintiner of the ESR laboratory at Mt Albert in Auckland. Dr Vintiner explained that she was sent for analysis samples which consisted of soil samples that contained semen, a semen stain from a pair of underpants and a semen stain from a shoe. She was also sent reference DNA samples from the complainant, and from the appellant and the other suspect, Mr X. She was asked to determine whether or not the semen in these samples could have originated from either of the two men.

[10] Dr Vintiner explained that her inability to obtain a satisfactory DNA profile from the DNA samples from the underpants and shoe were the reason that she dispatched those samples to Dr Whittaker in the United Kingdom, for analysis by the LCN method.

[11] Dr Vintiner confirmed the results as reported back to her by Dr Whittaker. She was then able to complete her analysis and comparison of the DNA profiles from the various samples. Dealing first with the sample from the soil, Dr Vintiner explained the results in the following way. We have highlighted the passage which the appellant challenges:

Q. And are you able to express in both numbers and words an assessment of the probability for the semen the origin of the semen and the soil sample?

A. Yes I can. In undertaking this assessment I have considered two alternatives. Either the DNA from the semen in the soil sample has originated from Mr Lepper or it has not, and its actually originated from another male. From this statistical assessment these results indicated that this DNA evidence was at least one million million which is the same as one thousand billion times more likely if the DNA and soil sample originated from Mr Lepper rather than if it originated from another unrelated male chosen at random from our general New Zealand population.

Q. Can you express that in words for us please?

A. This can be expressed in words to mean that ***this DNA evidence provides extremely strong scientific support that the DNA from the semen in the soil sample originated from Mr Lepper.***

[12] Turning to her analysis of the underpants, Dr Vintiner deposed thus:

The profile obtained from this sample contained a major male DNA component and a second minor component. Starting with the major male DNA component this DNA could also have originated from Mr Lepper or another male with the same profile as him at the DNA sites that were tested. The statistical assessment was also carried out on consideration of the two alternatives and from this assessment it was determined that the DNA evidence was at least 20 billion times more likely if the male DNA in the semen stain from the underpants originated from Mr Lepper, rather than if it had originated from another unrelated male chosen at random from our New Zealand population. This number expressed in words means that the DNA evidence provides extremely strong scientific support for the proposition that the male DNA and semen stain from the underpants originated from Mr Lepper.

Although Mr Stevenson did not expressly challenge the last sentence of this evidence, we presume the first ground of appeal is directed equally to it. The same presumably applies to the last sentence of Dr Vintiner's evidence quoted in the next paragraph.

[13] Dr Vintiner then stated that her analysis excluded Mr X because his DNA profile did not match the male profile from the semen stain. Next she explained that only a partial DNA profile had been obtained from the semen stain on the sole of the shoe, and explained the results of her analysis of that partial profile in this way:

... because there are fewer results of this profile, one would expect the strength of this DNA evidence would be less in comparison to what is obtained from the other samples and when the assessment was undertaken it was determined that the DNA results were at least 10,000 more likely if the DNA originated from Mr Lepper rather than from another unrelated male from the New Zealand population. Again expressed in words please... because this number is smaller than say for example a number in the billions the strength of the evidence is reduced and when expressed in words the DNA evidence provides very strong scientific support for the proposition that the DNA from the semen from the shoe originated from Mr Lepper.

[14] The appellant based his challenge to this evidence on the Privy Council's judgment in *Pringle v The Queen* [2003] UKPC 9. Delivering the Committee's decision, which allowed an appeal from the Court of Appeal of Jamaica, Lord Hope said this:

18. When he came to this point in his summing up the judge said that the readings on the D1S80 test and on the HLADQa test on the male fraction in the vaginal swab:

“would indicate that the spermatozoa in the vaginal cavity of the deceased woman came from the accused man, Pringle.”

After referring to the readings which (the analyst, Dr Cruickshank) had obtained on the HLADQa test from the female fraction he said:

“So, it is based upon these results that she comes to the conclusion that the spermatozoa there came from Pringle, that it, that Pringle had sexual intercourse with the deceased.”

19. This conclusion was fallacious, as Phillips LJ explained in *R v Doheny* [1997] 1 Cr Application R 369, 372 - 374. The fallacy is that which is known as “the prosecutor's fallacy”, although – as their Lordships have said – it was not a fallacy that was propounded in this case by the prosecutor. It can be explained in this way. Let it be assumed that the evidence about the random occurrence ratio is that one person in 50,000 has a DNA profile which matches that which was obtained from the crime scene. The fact that the defendant has that profile tells us that he is one of perhaps fifty thousand people who share that characteristic. One can then say, having regard to the population of the area, what the statistical probability is that he was the perpetrator. But that is all that can be said about it. The question whether the statistic points to the

defendant as the actual perpetrator will depend on what else is known about him. If it is plain from the other evidence that he could not have committed the crime because he was elsewhere at the time, the fact that the defendant's DNA profile matches that on the sample taken from the crime scene cannot be said to show that he did commit it. That proposition will have been negated by the other evidence. So the probative effect of the DNA evidence must depend on the question whether there is some other evidence which can demonstrate its significance. And it is for the jury, not the person who gives the DNA evidence, to assess its significance in the light of that other evidence.

20. It was, of course, open to Dr Cruickshank to identify the random occurrence ratio. It has not been suggested that the tests which she carried out, so far as they went, were defective in any way. The basic facts were there, and they have not been either challenged or criticised. It was within the province of her expertise to say what the statistical likelihood was of the same sections or bands of DNA being found in the male fraction of the vaginal swab as was found in the appellant's blood sample. But it was not for her to express an opinion as to the probability that was *his* spermatozoa that were found in the deceased's vagina. Her evidence that she could say that this was so "with a high degree of certainty" went beyond what was permissible. The risk of the jury being misled by this evidence was compounded by her reference in this context to a 99.999 per cent probability. It was made all the greater by the judge's statement in his summing up that she had come to the conclusion "that the spermatozoa there came from Pringle".

[15] In reliance on this, particularly the last paragraph, Mr Stevenson submitted that Drs Whittaker and Vintiner had gone beyond what is permissible, opining as to the probability, and in the case of Dr Whittaker, the apparent certainty, that the samples from the complainant were from the appellant.

[16] While he accepted that Miller J had correctly explained to the jury that a DNA "match" is not proof of guilt, Mr Stevenson submitted that there was no direction on the impermissible opinions of the two experts. The jury were left with two experts having given their opinions that, in effect, the samples from the complainant came from the appellant.

[17] The Court inquired of Mr Stevenson why he submitted that it was not for Drs Whittaker or Vintiner to express an opinion as to the probability of a match between the DNA in the samples and that from the appellant. Mr Stevenson suggested two reasons. The first was to concede that the concern about this originated from a time when DNA testing was far less sophisticated and reliable than

it is now. The second was that a witness ought not to comment on the ultimate issue. Mr Stevenson tempered this second point by accepting that, the stronger the random occurrence ratio, the less significance “the prosecutor’s fallacy” has.

[18] We see no fault in the way the two experts here expressed their opinions. There was no adoption by them of “the prosecutor’s fallacy”. Dr Vintiner gave the random occurrence ratio for each of the three samples she had analysed and compared with the sample from the appellant. Dr Whittaker did not, because his task was simply to express a view as to whether two DNA samples, one containing only a partial profile, matched. Contrary to Mr Stevenson’s submission, Dr Whittaker did not state that the DNA samples he had analysed almost certainly came from the appellant. He could not express a view about that, because he did not have the appellant’s DNA profile. Both experts explained the effect of their evidence in words, and it is that explanation which is challenged.

[19] Providing it is done in a scientifically disciplined and robust way, we can only regard such an explanation as helpful to a jury. It explains the random occurrence ratio in a readily understandable way, lessening the prospect of the jury speculating about its significance. Here, it was done in a scientifically disciplined way. ESR forensic scientists adhere to a manual which sets out the format in which they should present to a Court the results of DNA analysis. The relevant part of that manual first describes the way in which the scientist should give the random occurrence ratio. It then states:

This can be followed by a verbal statement of opinion as to the significance of the results.

The standard table of verbal equivalents used at ESR is:

Likelihood Ratio	Verbal equivalent
10-100	supports
100-1000	strongly supports
1000-1,000,000	very strongly supports
over 1,000,000	provides extremely strong support

The manual to which we refer is “Forensic Biology, Casework Sample Analysis by STRs, Version 5.0 June 2003”.

[20] A commentary by I W Evett and J S Buckleton “Some aspects of the Bayesian approach to evidence evaluation” published in the Journal of the Forensic Science Society 1989; 29(5): 317 - 324 touches on the reasons for, but at the same time the difficulties inherent in, verbal equivalents. The relevant passage and accompanying table read:

A verbal scale

It is unlikely that a numerical likelihood ratio will mean much to a court. Indeed, workers such as Kahneman and Tversky (Judgement under uncertainty: heuristics and biases. United Kingdom: Cambridge University Press, 1982) have shown that people may reason irrationally in the face of uncertainty. There are good arguments for presenting the evidence assessment in verbal terms, but this is also fraught with difficulty. Tanton (personal communication) has studied the phrases used by forensic scientists in statements and the interpretation which non-scientists – police, lawyers and jurymen – derive from them. He has shown that some stock phrases are particularly poor as communicators.

One of the problems with verbal indicators is that the meanings of words are, to one extent or another, context dependent. The word “frequent”, for example, might mean one thing when a person talks about how often he visits the theatre, something else when he talks about how often he drinks a cup of coffee. However, within the context of forensic science it is feasible to achieve a measure of consistency.

Statisticians have addressed this issue and the use of the word “support” has been proposed as a means of fitting a verbal convention to the likelihood ratio. This could be achieved in a manner such as in Table 1. Values of the likelihood ratio which are less than one would map into a similar convention in relation to the support for C. Of course, it may be argued that this convention is arbitrary. After all, there is nothing particularly significant about the numbers 10, 100, 1000 etc., apart from the appeal of being round numbers. But such a criticism may be levelled at any such convention and this one has the advantage of a logical basis which is the same in principle for all evidence types.

TABLE 1. Association of likelihood ratio with its verbal equivalent

<i>Likelihood Ratio</i>	<i>Verbal equivalent</i>
1 to 10	The evidence slightly supports C
10 to 100	The evidence supports C
100 to 1000	The evidence strongly supports C
1000 and above	The evidence very strongly supports C

[21] In *Pringle* the DNA expert did not give the random occurrence ratio. She expressed the likelihood that the semen had come from Mr Pringle as “a high degree

of certainty” and “99.999%”. In his summing up, the Judge who presided over Mr Pringle’s trial directed the jury that the DNA expert had come to the conclusion “that the spermatozoa there came from Pringle”.

[22] None of that occurred here. There was not here the reasoning which became known as “the prosecutor’s fallacy”. Dr Vintiner gave the random occurrence ratios, because she was able to. Both experts expressed their view as to the probability in scientific terms. As to the likelihood of a match between the DNA from the shoe and underpants samples their evidence was that:

... Those two profiles are what you would expect to find if they had both originated from the *same person*.

In relation to the DN from the soil and underpants samples:

... This DNA evidence provides extremely strong *scientific* support that the DNA from the semen in the soil sample originated from Mr Lepper.

And as to the DNA from the sole of the shoe, from which only a partial profile could be obtained:

... The DNA evidence provides very strong *scientific* support for the proposition that the DNA from the semen from the shoe originated from Mr Lepper.

In each case the emphasis is ours.

[23] All those expressions of opinion were in accordance with the protocol we have set out in [19].

[24] This first ground of appeal fails.

Second ground of appeal: low copy number (LCN) DNA analysis unreliable

[25] This appears to be the first time evidence of DNA profiling use the LCN technique has been given in evidence in a criminal proceeding in New Zealand.

[26] The samples of semen from the complainant's shoe and underpants were sent to Dr Whittaker in Britain, and he gave evidence in the appellant's trial. Dr Whittaker explained the LCN technique in the following way:

The actual steps are the same but there are subtle differences in some steps. We started off with extracting the DNA. If a sample had come in fresh to the lab we would be using slightly different chemicals from the ones used in a routine test. The next part of the process if you remember was the copying process, the copying, gives us enough DNA as we have spoken about to get a profile at the end of the day to see that profile in the lab and if you imagine a very small forensic stain you can appreciate in order to get enough DNA to see the profile you have got to copy it more times to get the required amount for the profiling to work. So a routine DNA profile test is generally applied to those samples which are relatively large in a forensic context and therefore need less copies to be generated to be able to see the final result, so a low copy actually copies the DNA more times.

[27] Given that this was novel science, at least in New Zealand, Mr Stevenson submitted that Miller J should have held a voir dire to determine the admissibility of Dr Whittaker's evidence. He submitted that the Judge should have done this of his own volition, as the Judge was "the gate keeper" of its admissibility.

[28] Mr Stevenson drew attention to Miller J's direction to the jury about the DNA profiling using the LCN technique. This is what the Judge said:

[65] It is over to you to assess whether DNA profiling by the LCN technique is reliable. You may ask yourselves, for example, about how well qualified Dr Whittaker is, how experienced he is, whether what he said about the DNA replication process used in the LCN technique made sense to you, whether you accept that the process is reliable in the presence of inhibitors such as soil, whether the technique is an established one that has been used elsewhere, whether there are strong safeguards to protect against error in what is clearly a highly sensitive process, and whether those safeguards were applied in this case.

[29] While not taking issue with this direction, Mr Stevenson submitted that the jury had no evidence – no means – to assess the reliability of the LCN technique. Mr Stevenson identified, as a particular concern, the possibility of contamination between the sample of DNA obtained from semen in the soil, and the two samples taken from the stains on the complainant's clothing, one from her underpants, the other from the arch of her left shoe.

[30] We do not accept any part of this argument. First, it is not part of the function of a Judge in a criminal trial in New Zealand to initiate a voir dire as contended for by Mr Stevenson. If the appellant wished to challenge Dr Whittaker's evidence, he could have indicated that to the Crown and the Crown would doubtless have made an application under s 344A of the Crimes Act in the usual way. There was no such application.

[31] Secondly, the appellant had a full opportunity to question Dr Whittaker about the reliability of profiling using the LCN technique, and about the extent to which evidence about DNA profiles obtained using the LCN had been admitted in criminal Courts in Britain. In evidence Dr Whittaker said that he had made about 60 Court appearances to give evidence about LCN results. In summing up to the jury Miller J said:

[64] ... So Dr Whittaker used the low copy number technique that has been developed in the UK to analyse very small amounts of DNA. It has been used in court there since 1999. You heard detailed evidence about it because it is my understanding that it has not been used previously in this country. ...

[32] Mr Stevenson referred to a discussion about LCN DNA analysis in *R v Bamber* [2002] EWCA Crim 2912. From our own researches we can add references to profiling using the LCN technique in *R v Shirley* [2003] EWCA Crim 1976; *R v King* [2001] EWCA Crim 1980 and *R v Mitchell* [2004] EWCA Crim 1928. These cases indicate that evidence of DNA profiling resulting from the LCN technique now has general acceptance in British criminal Courts.

[33] We can see no basis for Mr Stevenson's particular concern about possible contamination of the DNA samples, arising from the use of the LCN technique. The various DNA samples were collected and "bagged" by a Dr Cordiner, an experienced forensic scientist with the ESR. Miller J's summing up contains the following direction about the handling of the samples:

[56] You have the chain of custody evidence for the soil sample, the shoe and underpants, and the accused's blood sample. By that I mean the evidence about how samples were taken, bagged, labelled, and transferred from Palmerston North to the laboratories. The Crown has produced this evidence to show that the samples that were tested by the scientists are the same samples that were taken from the complainant or the scene, as the case

may be, and from the accused. I did not understand the defence to take issue with this evidence.

[34] Mr Stevenson made it clear that he was not suggesting that New Zealand does not follow rigorous procedures in respect of the gathering, packaging and transfer of DNA and other forensic samples.

[35] Miller J directed the jury in detail about the significance of the results of the DNA analysis, given the Crown and defence cases. He told the jury that the Crown case was that the appellant's semen had got on the ground, despite his use of a condom. And from the ground, it had got onto the complainant's underpants, which were only partly off, and also onto one of her shoes.

[36] He directed the jury that the defence case was an acceptance by the appellant that his semen had been found on the ground in the little park, because he had had unprotected, consensual sex with another woman there not long before the complainant was raped. His DNA had been transferred from the ground to the complainant's clothing and shoe during a rape by another man who was wearing a condom. Miller J also reminded the jury about the evidence as to rainfall in Palmerston North over the days preceding the rape, and the expert evidence as to the likelihood that the appellant's DNA could have remained on the ground in the park for a number of days.

[37] We can see no basis for criticism of any of Miller J's directions in relation to the DNA evidence called by the Crown, in particular its reliability.

[38] The second ground of appeal also fails.

Appeal ground three: references to the appellant being in prison

[39] During the trial there were several references in the evidence to the accused being in prison. The edited videotape of the appellant's initial interview with the Police on 1 April 2003 contained two references, both by the appellant and the one almost immediately following the other, to what the appellant had done after he got out of jail.

[40] There was also reference by defence witness Dr Barry-Walsh to reviewing the appellant's prison file. Miller J directed the jury immediately following Dr Barry-Walsh's evidence that the accused's prison history, whatever it might be, had no relevance whatsoever to the question of his guilt or innocence of the charges he faced. Then, when summing up, Miller J again explained that the appellant was in prison pending his trial, which was common for an accused facing 'serious' charges.

[41] Mr Stevenson said that these references were compounded by the prosecutor, when closing to the jury, criticising the appellant for exercising his right to speak to a lawyer when confronted with the DNA evidence. The prosecutor had told the jury that this indicated that the appellant was "forensically aware".

[42] Again, Miller J specifically directed the jury about this, reminding them that the appellant had done no more than exercise his rights to remain silent and to call for legal advice.

[43] In the context of the trial, we regard these references as minor, and coming nowhere near jeopardising the fairness of the appellant's trial. Whenever a reference such as that occurs, the trial Judge and counsel have to make an assessment as to whether something is said to correct the position, or whether it is best to let it pass, and not to say anything which might focus attention on what has been said. Both types of responses occurred in this trial.

[44] We are quite satisfied that these references, even when viewed in combination, did not lead to a miscarriage of justice. This third ground of appeal is dismissed.

Ground four on appeal: photomontage wrongly admitted

[45] Following her complaint to the Police, the complainant prepared an identikit likeness of the man who had raped her. She was then shown a montage comprising 35 photographs of men and asked if the rapist was one of them. The appellant was

not one of the 35 men in the montage and the complainant did not identify any of those men as the man who had raped her.

[46] The appellant was identified about a year later, when a DNA sample he had given in relation to earlier offending showed up as matching the samples obtained from the soil in the park.

[47] Mr Stevenson submitted that the photomontage ought not to have been admitted in evidence. He argued that it was highly prejudicial to the appellant since it would likely have given the jury the impression that the complainant had excluded all other suspects.

[48] Mr Pike explained to us that the Crown's purpose of putting it in evidence was to bolster the complainant's identikit picture of the man who had raped her. She had not identified him as one of the 35 men in the photomontage, who presumably resembled the 'identikit' man.

[49] Miller J's directions to the jury about the photomontage included the following:

[48] ... The montage did not include a photograph of the accused so it is of limited relevance. It does not tell you that the man who attacked her was the accused.

[49] It is relevant only to show that her recollection of the attacker at that time was sufficiently clear that she was able to exclude the photos that are in the montage. ...

...

[51] The defence also says the montage does not help you for the reasons that I have outlined. But it adds that the accused was not in the montage and it suggests Mrs Alve might well have eliminated Mr Lepper had he been included. Further, none of the other possible suspects that were named in this Court, were included in that montage.

[50] These directions conveyed to the jury the limited relevance of the photomontage to the issue of identification, and also put in a balanced way the points made by the defence about the montage.

[51] More importantly, we cannot see any prejudice to the appellant resulting from the montage being admitted in evidence. All it demonstrated is that the complainant did not identify any of the 35 men in the montage as the man who had raped her. But the rapist could have been any other man in New Zealand, or at least any other man who was in the Palmerston North area at the time.

[52] We regard Mr Stevenson's argument as imputing to the jury subtleties and inferences that they were most unlikely to have engaged in or drawn. The montage was about visual identification. In the end, the Crown case against the accused in terms of identification rested almost wholly on the DNA evidence.

[53] We dismiss this fourth ground of appeal.

Result

[54] None of the four grounds of appeal has succeeded. The appeal is dismissed.