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ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA693/2011
[2014] NZCA 378**

BETWEEN T (CA693/2011)
 Appellant

AND THE QUEEN
 Respondent

Hearing: 7 May 2014

Court: O'Regan P, Courtney and Clifford JJ

Counsel: Appellant in person
 K A L Bicknell for respondent

Judgment: 7 August 2014 at 3 pm

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is dismissed.**
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REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Following a jury trial before Judge Kelly, the appellant (whom we will call T to protect the complainant from identification) was convicted on eight out of nine representative counts of historic sexual offending against his daughter, A. T was

subsequently sentenced to 10 years' imprisonment on four representative charges of sexual violation by unlawful sexual connection, and to lesser concurrent sentences on the balance of those charges.

[2] T now appeals against conviction and sentence.

[3] T represented himself, having earlier terminated the appointment of the counsel appointed by the Court to assist him in the conduct of the appeal, Ms Gould.

The allegations

[4] A was born in November 1991. When she was six months old she moved, with her mother and three siblings but not her father, to the South Island. In July 1998 they moved back to the greater Wellington region, where T lived with the family again. A and her family lived at three addresses during the relevant period, first R Drive from July 1998 until November 1999, when A was aged from six and a half to eight. The family then moved to B Street, from 1999 until June 2003, by which time A was aged 11 and a half, and then W Road, from June 2003 onwards. A's evidence was that the offending stopped in March 2006, when she was 14.

[5] In October 2009 A, in circumstances to which we return, discussed with a school guidance counsellor the sexual abuse she had suffered. The guidance counsellor spoke to A's mother at the time. A made a DVD interview in April 2010, and she and her mother provided formal written statements in May. In August, T was arrested and charged.

[6] Count one related to offending at R Drive. It alleged indecent assault by T touching A's genitalia over her clothing. This was said to occur most mornings before school.

[7] Counts two, three and four related to offending at B Street. Count two alleged indecent assault by touching A's genitalia, both over and under her clothing, most mornings before school. Counts three and four respectively alleged that T induced A to do an indecent act upon him by touching his penis, and that T sexually violated A by unlawful sexual connection between his mouth and her genitalia. A's

evidence was that this offending generally occurred twice a week, normally Monday and Friday afternoons when T picked her up from school.

[8] Counts five to eight related to offending at W Road. They respectively alleged sexual violation by digital penetration of A's genitalia, connection between T's mouth and A's genitalia, digital penetration of A's anus by T and indecent assault by T touching A's genitalia with his penis at W Road. A said that T would tell her to lie on the bed with her feet dangling over the end and he would get down on his knees and digitally penetrate and lick her before masturbating himself. T would sometimes tell A to hold herself open with her hands so he could have easier access. The offending continued until 2006, when A was aged 14, and A told T that she wanted it to stop.

[9] T was found not guilty on the ninth charge he faced, a representative charge involving an allegation of indecent assault by placing A's hand on his penis at W Road.

The evidence

[10] A was the principal witness. A's evidence-in-chief took up the afternoon of the first day of T's three day trial. Mr Crowley, T's defence counsel, cross-examined A throughout the morning of the second day.

[11] While A acknowledged some inconsistencies between previous statements and her evidence-in-chief, and that her memory of at least one of the alleged incidents may have been flawed, she remained firm that the alleged abuse had – in general terms – occurred as she had said. It was not, as Mr Crowley put to her, a fabrication.

[12] A's mother gave evidence that when she confronted T, he denied sexual abuse, but did admit to inappropriate touching.

[13] A friend of A's gave evidence of A telling her in 2005 that her father had been sexually abusing her.

[14] In his police statement T denied the allegations. T did not give or call evidence.

The conviction appeal

[15] T challenges his convictions on the basis that there has been a miscarriage of justice in his case. The verdicts, T submitted, were unreasonable and unsafe. The case against him had not been proven beyond reasonable doubt. A was not a truthful witness: her inconsistent accounts of the alleged abuse demonstrated that.

[16] A theme of T's written and oral submissions was to draw an analogy with what he described as "leaven". This image, as we understood it, was T's way of portraying the potential significance of various aspects of what he said had gone wrong at trial. We understand the submission to be akin to the well-known proposition that while matters of particular complaint may not, by themselves, give rise to a miscarriage of justice, when taken together that can be the case. We consider T's submissions accordingly.

[17] At one point in his written submissions, T summarised the themes of his appeal by reference to the case against him being:

... [a] case of invention and make-believe by the complainant, subterfuge by the police, misdirecting the jury by the trial Judge, misconduct by the Crown prosecutor and serious inadequate defence behaviour by [T's] lawyers.

[18] That is a reasonably accurate summary of T's wide-ranging written and oral submissions. We consider those submissions under the following headings:

- (a) police misconduct;
- (b) A's evidence;
- (c) counsel incompetence; and
- (d) misdirection of the jury by the trial Judge.

[19] It is not necessary to separately discuss the question of prosecutorial misconduct. This would appear to have arisen because Ms Bicknell, in her summary of the facts, recorded erroneously that T was said to have licked his daughter's anus. Ms Bicknell immediately drew this error to our attention, and the issues T advanced on the basis of that simple error were unwarranted, and require no further response from us.

Police misconduct

[20] A central element of T's case was his allegation that he had, in effect, been unlawfully arrested when first spoken to by the police. T was, he said, unfairly pressured into accompanying the officer in question, a Detective Constable Johnson, to the police station, where he made his initial police statement. He also complained about the legal advice he received when he was in police custody.

[21] We accept T has complaints about the events of 19 August 2010 when he accompanied Detective Constable Johnson to the police station. We also acknowledge T has a deep sense of grievance arising from events that day.

[22] On that day T was spoken to by the Detective Constable on a local roadside at about 2.30 pm. T says that he was ambushed by the police and forced against his will to go with them in the police car to the police station. The Crown acknowledges that, although not under arrest, T was handcuffed for the duration of the drive to the police station. T says that the Detective Constable told him that was "normal procedure" when driving. We make no comment on that suggestion, but acknowledge that the events as T describes them could give rise to concerns as to the way in which T was dealt with by the police that day.

[23] But T did not make any incriminatory admissions during his subsequent formal police interview. As advised by the lawyer he spoke to, T declined to make a video statement and refused to answer questions relating to the sexual conduct of which he was accused. In those circumstances, issues about the circumstances in which he accompanied the Detective Constable to the police station and made that statement could not have impacted on his trial.

[24] Moreover, in those circumstances, there would have been little point in Mr Crowley cross-examining the police officer, as T, in this appeal, said he should have.

[25] T also complained about police misconduct in connection with A's DVD interview. The DVD interview itself was not played at T's trial. It would appear that, at one point during the interview, the DVD recorder broke down. T's complaint was that over half an hour of key evidence was lost and was not available to the jury or to T to use in his defence.

[26] As the DVD interview was not played in Court, the fact that the DVD recorder broke down is not of itself an issue in terms of compliance with the Evidence Regulations 2007. There is no suggestion that the failure to record that part of the DVD interview gave rise to any non-disclosure of relevant evidence to T. In fact Mr Crowley was able to cross-examine A, on the general theme of inconsistency between her various statements to the police and her evidence in Court, by reference to the police notes from the interview.

[27] Therefore, these matters do not provide a basis for calling into question T's convictions.

A's evidence

[28] A second important theme of T's appeal was his assertion that A's evidence was inconsistent and unreliable. He said this was established by Mr Crowley during cross-examination by reference to the differences between her account at trial and those in her video interview and police statement. At the same time, T submitted that Mr Crowley had failed to cross-examine A sufficiently robustly to place those matters clearly before the jury.

[29] In his summary opening, Mr Crowley put the defence case clearly: the defence case was that the alleged abuse did not happen – A was making it up. In cross-examination, Mr Crowley advanced a number of themes designed to support that proposition.

[30] Mr Crowley cross-examined A extensively on inconsistencies between her initial DVD interview, her subsequent written statement and her evidence-in-chief. A admitted that her recollection of various incidents was not completely accurate, and that she had said different things at different times. A number of particular inconsistencies were also identified by Mr Crowley. For example, it was A's evidence that the abuse had, over time, generally happened on Mondays and Fridays when T would pick her up after school and take her home. But, as Mr Crowley pointed out, by the time A was at secondary school, she was playing hockey on Friday evenings: this caused A to clarify her evidence.

[31] Mr Crowley also cross-examined A on the circumstances in which she told her friend about the alleged abuse. A acknowledged that she had not told her friend outright that her father had abused her. Rather, during a text message "conversation" (where both A and her friend were using the same phone), A asked her friend to guess why she hated her father. The friend guessed that A hated her father because he had abused her. On the basis of that acknowledgement, Mr Crowley put the proposition to A that she had gone along with that proposition because it was easier to do that than to tell the truth. A denied that.

[32] Mr Crowley's underlying thesis, which he put to A, was that A had never liked having to help her father put cream on his back for his psoriasis and that, as she went through her adolescent years, her dislike for her father deepened as she sought to assert her independence. Against that background of dislike, A used the false allegation that her father had sexually abused her to, in effect, get back at her father.

[33] Another important theme of Mr Crowley's cross-examination was to build on A's statements, at various times, that when she had asked her father to stop the abuse, he had done so. If that was a fact then, Mr Crowley asked, why had A simply not told her father to stop or avoided the opportunities for abuse by, for example, staying later at school. That those options were so obviously available to A were, Mr Crowley put to her, an indicator that she was making up these allegations of abuse.

[34] Mr Crowley built on those themes of his cross-examination in his closing to support the proposition that, given A's inconsistent and therefore unreliable evidence, she was not to be believed and, in particular, the jury could not be satisfied beyond reasonable doubt of T's guilt.

[35] We note, further, that in his submissions T, on occasions, exaggerated the significance of A's evidence in terms of undermining the Crown case. A was, it would appear, to some extent tricked by her friend when she spoke with the guidance counsellor. A had thought she was meeting with the guidance counsellor to discuss her friend's problems. When A spoke with the guidance counsellor, she was asked about the sexual abuse she had discussed with that friend. But, in her subsequent DVD interview, her formal statement and in her evidence-in-chief and cross-examination, A was, as we have said, firm as to the core narrative of the allegations against T.

[36] Nor did A, as T submitted, accept that the offending covered by the first three representative charges had not happened at all. That was not the overall outcome of that part of Mr Crowley's cross-examination. In her evidence-in-chief, A suggested that she had been sexually abused by T when showering with T at R Drive. As Mr Crowley was able to establish, A had previously indicated in her DVD interview and formal written statement that, although she had showered with her father, she was not at all sure that he had sexually abused her. That alleged sexual abuse was not the subject of a specific charge. But Mr Crowley did obtain an acknowledgement from A that her recollection on that matter could be flawed. That was, by our assessment, a relatively limited admission, and did not affect A's central and consistent narrative of T's offending against her as reflected in the charges he faced.

[37] We consider that Mr Crowley cross-examined A effectively, and used that cross-examination as best he could in closing to put the defence case. However, it was open to the jury to accept A's account. We do not think there is anything in these matters that call into question T's conviction.

Counsel incompetence

[38] T raised a number of other specific issues relating to the way in which Mr Crowley conducted the trial.

[39] In his written submissions, T said he was told by Mr Crowley not to give evidence, and that Mr Crowley would speak on his behalf. In arguing his appeal before us, T acknowledged that he had, on Mr Crowley's advice, made a decision not to give evidence. T may now have second thoughts about that decision, but that does not found an allegation of counsel incompetence. Moreover, given T's acknowledgement to his wife of improper touching of his daughter, and the progress Mr Crowley had made in cross-examining A, we do not think Mr Crowley can be criticised for the advice T acknowledges he gave to him.

[40] T also complained at the way Mr Crowley handled the Crown's late application to replace one "previous statement" Crown witness with another. The Crown originally proposed to call evidence from an acquaintance of A's about a statement by A that her father had sexually abused her. In her Ruling No 2, the Judge noted that Mr Crowley had pointed out that A had consistently stated she first complained of the sexual abuse by her father to another person sometime in 2008.¹ The Crown then decided to call that person, rather than the one originally intended. Mr Crowley opposed the application to call the evidence of the previous complaint on the basis that T did not challenge the fact that A had made such a prior consistent statement. The Judge overruled that challenge, correctly in our view, pointing to the Supreme Court decisions of *Hart v R* and *Rongonui v R* as to the purpose of evidence of a prior consistent statement being to respond to a challenge to A's veracity, which challenge was at the core of T's defence.² His objection having been overruled, Mr Crowley had the statement of the new witness in sufficient time to consider it appropriately, and to address any prejudice to T that might otherwise have arisen from the Crown's decision to change witnesses.

¹ *R v [T]* DC Wellington CRI-2010-032-3076, 22 August 2011 at [3].

² *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [8] and [50]–[51]; *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [4] and [31].

[41] T complained that Mr Crowley had failed to call the counsellor at A's secondary school, with whom A had discussed these allegations in November 2009. There was no suggestion as to what the school counsellor's evidence would have been. Mr Crowley had the formal statements by A and her mother, in which they refer to those discussions. In evidence, A's mother set out the essence of what she had been told by the counsellor. Mr Crowley would appear to have formed the view that evidence from the counsellor would have added little to the trial, except to repeat A's allegations.

[42] T complained that Mr Crowley did not cross-examine A's mother on her evidence-in-chief that, when they were living at R Drive, she had got the children up and taken them to school. T, who was not a morning person, would not have been the one to get the children ready for school. A's evidence-in-chief, as regards count one, was that her siblings would get her ready to go to school once her mother had left and that T would then tell her to get into bed with him, when the touching over the clothes occurred. That narrative would appear to be inconsistent with A's mother's evidence, that she had in fact taken the children, including A, to school, during the relevant period. This aspect of A's mother's evidence, which Mr Crowley highlighted in his closing, should, T said, have been subject to extensive cross-examination. Our assessment is that, A's mother having given that evidence-in-chief, Mr Crowley tactically decided to take it as it was, and not risk the mother withdrawing or clarifying that evidence, unhelpfully, in cross-examination. That enabled Mr Crowley to submit in closing that A's mother had, quite inadvertently, contradicted A's evidence and that was a "most important" thing for the jury to bear in mind.

[43] Similarly, Mr Crowley pointed out that A's mother had confirmed that T did not ever sleep upstairs: this contradicted, as Mr Crowley pointed out, A's evidence that her father would sleep upstairs at B Street and that he would call her upstairs where abuse happened in the mornings.

[44] Finally, T complained that Mr Crowley had failed to cross-examine A sufficiently on her evidence that T had threatened her with violence, were she to tell others of his alleged sexual offending against her.

[45] A had said that her father would give her “the bash”. Mr Crowley put it to her that her father’s violence was limited to him pushing her and slapping her, but never so as to leave any marks. He put to A that she had used the words “the bash” to make the threat to her sound more plausible, when it could not really be described as “the bash” at all. In response, A explained that she had used the phrase “the bash” to describe being physically hit. Again, in our view, Mr Crowley’s cross-examination on this question cannot be criticised in any material way.

[46] Taken overall, we do not think T has sustained any material challenge to the way Mr Crowley conducted the defence on his behalf. On the contrary, we think Mr Crowley discharged his duties to T fairly and well.

Misdirection by the Judge

[47] T’s complaint, in essence, was that the Judge failed to point out the extent to which Mr Crowley had identified inconsistencies and contradictions in A’s evidence. We do not accept that complaint. As we have noted, Mr Crowley focused his closing on that topic. In her direction to the jury, the Judge very clearly identified the topic of prior inconsistent statements and that, when assessing A’s credibility, that was something the jury should take into account, as well as any explanation A may have given for the identified differences between her various statements. There can be no quarrel with that direction.

Result

[48] For all those reasons, we therefore dismiss T’s appeal against his conviction.

The sentence appeal

[49] T originally filed an appeal against his sentence, as well as his conviction. Before us, T did not advance any submissions in support of that sentence appeal. It was not clear, however, whether T intended to abandon that appeal formally. In those circumstances, we will briefly consider the sentence imposed on T.

[50] At sentencing, both counsel agreed that the case fell within the lower end of the third band for sexual violation by unlawful sexual connection in *R v AM*.³ The Judge adopted a starting point of ten and a half years having regard to the breach of trust, the victim being his daughter and the offending having occurred in the home; a particular vulnerability; the scale of the offending; the extent of harm resulting from the offending; and the planning and premeditation involved in the offending.

[51] The Judge identified no aggravating factors personal to the appellant. The only mitigating factor was the absence of previous convictions, for which a discount of six months was made. The Judge considered that the sentence of ten years was appropriate for the totality of the offending.

[52] As the Crown submitted, the sentence of ten years' imprisonment imposed by the District Court Judge on T is not, by our assessment, manifestly excessive or otherwise wrong in principle. The Judge's sentencing notes reflect that she properly understood the factual basis upon which the jury found T guilty, and assessed his culpability accordingly. She considered the relevant sentencing principles, this Court's guideline decision in *R v AM* and the need to impose a sentence consistent with those for similar offending.

[53] This was serious sexual offending against a young and vulnerable victim over an extended period of time. In our view, notwithstanding the fact that T did not advance any submissions in support of his sentence appeal, an appeal against that sentence could not succeed.

Result

[54] Accordingly that appeal, to the extent it formally remained before us, is also dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

³ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [105].