

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,  
OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT  
PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.**

**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**

**CA157/2016  
[2016] NZCA 615**

BETWEEN                      W (CA157/2016)  
   Appellant

AND                              THE QUEEN  
   Respondent

Hearing:                      8 September 2016 (further submissions received  
   17 October 2016)

Court:                         Asher, Mallon and Whata JJ

Counsel:                      N Levy for Appellant  
   K S Grau for Respondent

Judgment:                    16 December 2016 at 3.00 pm

---

**JUDGMENT OF THE COURT**

---

- A        The application to extend the time to appeal is granted.**
- B        The appeal against conviction is dismissed.**
- C        The appeal against sentence is dismissed.**
- D        Order prohibiting publication of name, address, occupation or identifying  
          particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.**
-

## REASONS OF THE COURT

(Given by Mallon J)

### Introduction

[1] The appellant was convicted, following trial in the Napier District Court before Judge Mackintosh and a jury, on charges of sexual offending against his stepdaughter, J, when she was aged between 12 and 16. He was sentenced to 13 and a half years imprisonment with a 50 per cent minimum period of imprisonment (MPI).<sup>1</sup> He appeals against conviction. He also appeals against the MPI. His appeal is out of time and he therefore seeks an extension of time for his appeal.

### Background

[2] The appellant faced three representative charges of sexual violation by unlawful sexual connection,<sup>2</sup> two representative charges of sexual violation by rape<sup>3</sup> and four representative charges of sexual conduct with a person under 16 years.<sup>4</sup> He was convicted on all charges.

[3] J gave evidence at trial about this offending. The appellant began a relationship with J's mother in 2007 when she was 11. The appellant began acting inappropriately towards her when they were alone, initially by touching her breasts, buttocks and genital area. The offending progressed to digital penetration of J's vagina and having J masturbate him to ejaculation. J alleged the appellant began to have sexual intercourse with her around July 2009 when she was 13. This happened regularly, as did other forms of sexual activity. She was about 15 when the appellant began to have oral sex with her.

---

<sup>1</sup> *R v [W]* DC Napier CRI-2014-020-2034, 20 November 2015.

<sup>2</sup> Crimes Act 1961, ss 128(1)(b) and 128B (maximum penalty 20 years imprisonment).

<sup>3</sup> Sections 128(1)(a) and 128B (maximum penalty 20 years imprisonment).

<sup>4</sup> Section 134(3) (maximum penalty seven years imprisonment). He also faced three further representative charges of sexual conduct with a person under 16 years but these were alternatives to three of the charges on which he was convicted and no verdicts on the alternative charges were therefore necessary. These were brought under s 134(1) rather than s 134(3). Section 134(1) has a higher maximum penalty of 10 years imprisonment as opposed to seven years imprisonment.

[4] J said she told her mother about a month or two after the touching first began that the appellant had put his hand down her pants. J thought there were angry words exchanged between her mother and the appellant but it was never spoken of again. She said the situation was confusing because she was not sure whether to see the appellant as a father, a boyfriend or a lover. He acted like a father when everyone else was around, but when they were alone she would have to kiss him like he was her boyfriend.

[5] After the first time she told her mother about the abuse, she did not think there was much point telling her mother again. However her mother did find out later on. The appellant had sexual intercourse with her and then she had taken a shower. She was standing in her towel in her room, the appellant was in her doorway and they were arguing. Her mother came home and saw them. Her mother stormed out yelling and crying. The appellant followed J's mother and tried to tell her they were arguing because J had a long shower.

[6] In 2012, when J was 16, she left home and lived with her grandmother for around six months. Later that same year J moved to Australia with the appellant, her mother and siblings. J wanted to go to Australia because she wanted to be with her mother and she would miss her siblings. However the sexual relationship with the appellant recommenced in Australia.

[7] In 2014 J finished school and left home. In April 2014 J returned to New Zealand to visit her godmother. She did not return to Australia. While in New Zealand she visited a doctor, attended counselling and then disclosed the abuse to her godmother. Her godmother took her to the police. This led to the charges against the appellant. The police spoke to the appellant when he and J's mother returned to New Zealand in August 2014. He gave a DVD interview in which he denied the offending. J's mother told the police that she did not believe her daughter.

[8] The appellant's defence at trial was that the offending had not occurred. J was said to have been a different and difficult child who was mentally unstable at

the time she returned to New Zealand and made the allegations. The appellant and J's mother both gave evidence at trial.

[9] The appellant denied having any sexual activity with J. He said he may have had accidental contact with J's private parts. He remembered an occasion when they were watching a movie and J was on his lap. He went to tickle her but his hand accidentally went inside J's t-shirt and touched her breast. There was another occasion when he went to say goodnight to her in her bedroom. The room was very dark. He found her leg and ran his hand up. She was wearing very baggy pyjama boxer pants and his hand got caught in them. He discussed this with J's mother and they agreed that from then on he would stand in the doorway with the lights on to say goodnight to her. The appellant was asked in cross-examination about the incident when J was wearing only a towel. He said J's mother was uncomfortable with the way J flirted with him and at times felt like she was competing with her daughter.

[10] J's mother said she had been sexually abused by her own father and as a result did not trust males easily. She never saw anything happen between J and the appellant which caused her concern. J's mother said the first time J had said anything was when J told her that the appellant had put his hands down her pants. J's mother confronted the appellant about this. He said his hand got caught in J's boxer shorts accidentally when he was saying goodnight to her. She also recalled the occasion when the appellant was talking to J and she was wearing only a towel. She agreed she was upset about this. This was because J was always flirting with the appellant, touching him on the shoulder or upper arm, getting his phone for him if it rang, and giving him juice at dinner.

[11] The appellant and J's mother denied there being any opportunity for the offending to have taken place as J had described. Essentially they said J's mother would have been present, or close by, when the offending at their family property was alleged to have occurred. In relation to offending alleged to have taken place in a tent on a family holiday, it was said the tent was the hub of activity for the families they holidayed with. A third defence witness, a friend of the appellants who holidayed with the family, gave evidence that there was no privacy in the tent at all.

## **Conviction appeal**

[12] The conviction appeal concerns both alleged prosecutorial misconduct and trial counsel error. The misconduct or errors relate to evidence of pressure from J's mother to J to drop the case in messages sent to J prior to the trial; emotive and prejudicial evidence adduced from J's grandmother; a suggestion put to the appellant that he had "so much to lose"; a suggestion put to the appellant that he was making up on the spot that J's mother believed J flirted with him; and cross-examination of J about her disclosing the offending to her mother.

### *Messages from J's mother to J*

#### *a) Submission*

[13] The appellant contends there was improper conduct by the Crown and errors by his trial counsel arising out of evidence of Facebook and text messages between J and her mother prior to trial. The appellant says the Crown wrongly failed to disclose these messages to the defence. The appellant also says his trial counsel (Mr Krebs) erred in his cross-examination of J and in calling J's mother to give evidence in light of these messages.

#### *b) How the issue arose at trial*

[14] This issue arose in this way. In evidence-in-chief J said it was difficult deciding not to return to Australia because she knew she would not get to see her mother and siblings and she had not seen them since. She was asked about how she felt about that lack of contact. She said she hated this. She was asked if she had much contact with her mother. She replied "I've talked to her over Facebook a few times, but most of the time she has tried to convince me to drop the case, because it's hurting her." Following an intervention from the Judge, the prosecutor told J not to say what her mother had said only whether J had much communication with her. J said she had a "slight bit" of contact with her.

[15] In cross-examination of J the following exchange took place on this topic:

Q Well your mum will give evidence to say that that has never, ever occurred, that she's never told you to drop the case and that you're not telling the truth about that.

A Well she hasn't said it directly but she has definitely tried to guilt trip me into not proceeding.

Q So she's never told you not to proceed has she?

A Not in those words but she has implied it very heavily in a few messages that she sent me. In fact one message I got from her was so guilt ridden I actually cried and I asked [a friend] if he could stop mum from talking to me.

Q Well I put it to you there's been no such messages and no such attempts to guilt trip you into dropping the case?

A. Well there are three that I remember very well.

[16] After giving her evidence J showed the police officer in charge of the case the Facebook and text messages which were retained on her cell phone. These were not disclosed to defence counsel at this time. These included the following messages from J's mother to J:

(a) 1 September 2014

I cant support you in what you are doing, there will be no winners no matter the outcome, it will only get worse for you and everyone else before it gets better – if at all ...– [the children] and I will lose the most either way. ... It is never too late to change your mind. I love you.

(b) 23 September 2014

I have to question why? Here is my dilemma, at the moment the kids are still upset in regards to you ... [because you] ... "promised to come back" ... the little ones asked every day – "when is daddy coming home"... So whilst they love you, I can't begin to imagine how they would feel if they knew you were actively campaigning to remove their precious daddy from their lives. ... it would devastate them to lose you and/or their dad. ... nothing good will come of it for you or anyone and I have to agree sorry.

(c) 14 July 2015

I'm not moving back. I tried so many times to help you ... I love you but I cant cope with you. You may be out to destroy [the appellant] but in the process you are destroying me and [the children] and I will not be part of it. You may hate [the appellant] but [the children] love him so much. We all have choices to make to in our lives. You are making me choose and at the

same time putting me through hell bringing up every awful thing ... I will always love you [J] but I choose me.

(d) 1 September 2015

It has now been well over 12 months since we have been able to talk, are you still happy continuing down the path you have chosen. My dad died last month and I was lucky to be able to spend some time with him before he passed away. It was lovely meeting all my family again, pity it was under sad circumstances. Love you [J].

[17] The appellant was not asked about these messages in his evidence-in-chief. However, in cross-examination the prosecutor asked the appellant if he was aware of contact between J and her mother over the last year. The appellant said he was aware they had communicated over Facebook and that J had called her mother once or twice. He was asked if J's mother had intentionally put emotional pressure on J to change her mind about the case. The appellant said he was not aware of any intentional pressure. He said the police had told them they were not to have contact with J and that if they tried to persuade her to drop the case they could go to jail.

[18] When J's mother gave evidence, Mr Krebs asked her whether she had much contact with J after J went back to New Zealand. J's mother said they had the odd Facebook communication but not very much, because if J's mother said anything J did not like then J would not reply. The following exchange then took place:

Q [J] suggested in her evidence that you had been in touch with her and tried to get her to withdraw her allegations. Is that something you have done?

A No.

Q When she was questioned a bit more, it was suggested that it was more a guilt tripping type approach by you to her. Have you tried to guilt trip into withdrawing her allegations?

A No 'cos we were told right from the start, that if we were to put any pressure on [J] to change her mind or anything, that I would face, what is it, contempt of Court and face possible jail time for it, so no. I did voice that I didn't support her in it, she did send me a message saying that I should leave [the appellant] to deal with his own shit and that I should take the babies and come back to New Zealand because I should be the one here helping her with boyfriends and rents and finding places to live and stuff.

[19] In cross-examination the prosecutor put to the mother her messages to J. J's mother said J was often not aware of the outcome of things she does. She was just saying it was going to get worse for everybody before it got better and that has in fact been the case. She said she had not deliberately tried to persuade J to change her mind. The mother accepted she had made it plain to J what the cost to her would be if she carried on with the case.

[20] In re-examination J's mother confirmed she had not intended to emotionally blackmail J. She was worried about J, and there were a lot of things J would not want brought up and she wanted J to be aware of that. She was also thinking of herself and her other children. She and J had other unrelated communications about chocolate cake, Christmas and J's father.

[21] Mr Krebs says he was unaware of the messages between J and her mother until they emerged in cross-examination of J's mother. He confronted the prosecutor about the failure to disclose this material. Mr Krebs was told the police had received it only 24 hours or so before J's mother gave evidence.

[22] In closing, the Crown submitted to the jury that J's mother had put her under considerable pressure to "guilt trip" her out of continuing with the case, and yet J had forged on with courage knowing that it was going to cost her dearly. The Judge directed the jury that the communications were relevant to how they assessed J's mother's credibility.

*c) Disclosure obligations*

[23] The first question is whether the Crown was obliged to disclose the messages once J provided them to the police officer. The Crown submits it was not required to disclose information that was relevant to the credibility of a defence witness.<sup>5</sup> Once the messages became relevant to J's mother's credibility they were admissible for all purposes.<sup>6</sup> The Crown was entitled to rely on them as bolstering J's credibility, both to show she had been telling the truth when she was cross-examined about the contact with her mother, and more generally to show she was prepared to continue

---

<sup>5</sup> Criminal Disclosure Act 2008, s 16(1)(o).

<sup>6</sup> *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].



with her complaint despite the damage it was causing to her relationship with her mother and siblings.

[24] The appellant says the Crown was required to disclose the messages to the defence as soon as reasonably practicable.<sup>7</sup> This should have occurred as soon as the police officer obtained possession of them. The Crown was not entitled to withhold the messages until cross-examination of J's mother because they were not only relevant to the mother's credibility. They were also relevant to J's credibility, as was apparent from the reliance placed on them in the prosecutor's closing address.

[25] The requirement on the prosecutor is to disclose "any relevant information".<sup>8</sup> Relevant information is any information "that tends to support or rebut, or has a material bearing on, the case against the defendant".<sup>9</sup> The obligation continues until the trial is completed.<sup>10</sup> Where information comes into the prosecutor's possession during the trial, it must be disclosed as soon as reasonably practicable.<sup>11</sup> The prosecutor is, however, entitled to withhold information that:<sup>12</sup>

- (i) reflects on the credibility of a witness who is not to be called by the prosecutor to give evidence but who may be called by the defendant to give evidence; and
- (ii) is not for any other reason relevant.

[26] We consider the messages were relevant in a number of ways:

- (a) First, Mr Krebs cross-examined J on the basis that J's mother would be called, she would say she had never told J to drop the case nor attempted to guilt trip J into doing so, and J was not telling the truth about this. The messages were relevant to show J was in fact telling the truth about this.
- (b) Secondly, the messages were relevant to J's mother credibility if, as had been foreshadowed in the cross-examination of J, J's mother was

---

<sup>7</sup> Criminal Disclosure Act, s 13(5).

<sup>8</sup> Sections 13(1) and (2).

<sup>9</sup> Section 8.

<sup>10</sup> Section 13(5) and (6).

<sup>11</sup> Section 13(5).

<sup>12</sup> Section 16(1)(o).

called and gave evidence denying she had tried to guilt trip her daughter out of proceeding with the case.

- (c) Thirdly, the messages were relevant to show J's courage in proceeding with her allegations despite the personal cost to her in being cut off from her mother and siblings who she loved.

[27] The first and second of these purposes were very much peripheral to the third purpose. The prosecutor made much of these messages in his closing address. However, he did not rely on them for the first two purposes. Rather he submitted the mother's conduct in emotionally blackmailing her daughter had been disgraceful. That submission was available simply because the messages had been sent (and did not depend on whether the mother accepted the messages showed she had guilt tripped J). The prosecutor went on to say:

So how is this relevant to your assessment of [J's] honesty in relation to these allegations? And it's this; if she really was lying then surely after that amount of pressure and those consequences being pointed out to her, surely then she would've stopped but no, she didn't. [Instead she said] "I love you mum but none of this is my fault." ... I am going to suggest to you members of the jury that what you have witnessed in this trial is an act of courage and absolute guts. Guts to step forward and stand up to this man knowing what it would cost her. ...

[28] We therefore consider the prosecutor was required to disclose the messages to the defence as soon as he became aware of them, rather than waiting until cross-examination of J's mother.<sup>13</sup> The messages were not solely relevant to the credibility of a defence witness. They were also relevant to J's credibility.

d) *Trial counsel error*

[29] The second question is whether there was trial counsel error. This error is said to arise because, prior to trial, Mr Krebs had been provided with some of the relevant messages from J's mother but had either not read or not remembered them. Nor, the appellant says, did he make sufficient enquiries of J's mother about the messages following J's evidence about those messages.

---

<sup>13</sup> We note it is a little unclear when the prosecutor learned of the messages. There is no evidence from the prosecutor or the police officer about this. Mr Krebs says he was told the police had received the information only 24 hours or so before J's mother gave evidence.

[30] The background to this issue is as follows. On 18 December 2014, around 11 months prior to the trial, Mr Krebs had received from the appellant a large number of documents. This included the 23 September 2014 message set out above. Mr Krebs does not now recall whether he saw this message, but considers it likely that the documents were printed for him and he would have read the printed material. His recollection is that the focus at this time was the large range of photographs included in the material. This was because the appellant and J's mother wished to discredit J by reference to her behaviour.

[31] J's mother says that on 2 September 2015 she sent a further email to Mr Krebs. This email also contained a number of attachments, one of which was her Facebook messages with J between December 2014 and July 2015. This included the July 2015 message set out above.

[32] Mr Krebs is certain he would have raised with J's mother whether she had guilt tripped her daughter after J gave her evidence-in-chief and before he cross-examined J on this topic. He said he had many conversations with J's mother and the appellant's father "who were at Court throughout and were anxious to be kept up to date with what was occurring".

[33] J's mother says she was told she was not allowed to be in Court until she gave her evidence. Therefore she was not at Court on the first two days of the trial and was looking after her children. She cannot recall having a conversation with Mr Krebs about the messages or anything else. She acknowledges there may have been a conversation that she has forgotten. She says, if Mr Krebs had asked her about the messages, she would have said "yes, there was contact, we have sent you some of the messages". She says she did not believe she was trying to get J to drop the case, so she would have denied this if Mr Krebs had asked her about this.

[34] In light of what J's mother says, it appears Mr Krebs is mistaken about the presence of J's mother at Court when J gave evidence. However we accept Mr Krebs' evidence that he asked J's mother about whether she had asked J to drop the case and she had denied this. The question he put to J was emphatic: her mother would say she had never told J to drop the case and J was not telling the truth about

this. Experienced trial counsel, as Mr Krebs is, would not put this to a witness unless they had instructions from the mother about what she would say. Mr Krebs says he is acutely aware of his obligations to correctly put to a Crown witness, evidence that is to be given by a defence witness. He is certain he would have asked J's mother about this before cross-examining J on this topic. Moreover he is clear that he would not have asked J's mother questions to which he did not know the answer.

[35] Whether he made enquiries with J's mother on this topic before trial or after J had given her evidence-in-chief does not matter. The questions he put to J in cross-examination, and to J's mother in her evidence in chief, are consistent with J's mother having told him she had not tried to get J to drop the case. That was and remains J's mother's view, even though objectively the messages can be viewed as emotional pressure put on J to drop the case.

[36] Against that background, we consider the appellant's submissions on this ground seek to place too onerous a standard on trial counsel. One of the messages was provided to Mr Krebs nearly a year before the trial. The messages were included with a number of other attachments. The appellant's instructions focussed on J's behavioural issues. Neither the appellant nor J's mother say they drew Mr Krebs' attention to the messages at that time, nor at any time during the trial.

[37] Nor was there trial counsel error in calling J's mother to give evidence. The defence strategy from the outset was to call evidence from the appellant and J's mother. Mr Krebs regarded the appellant's DVD interview as extremely unhelpful to him. He regarded the appellant's demeanour and his lack of comment or explanation as likely to create a negative impression with the jury. J's mother was to give evidence of family dynamics and the difficulties with her behaviour. It was also felt that it would assist the defence for the jury to know that J's mother did not believe J.

[38] With the benefit of hindsight, Mr Krebs might have asked J's mother or the appellant if they knew of the message J referred to as being so guilt ridden that she cried, or the three messages which J said she remembered. Mr Krebs did, however, ask J's mother if she had tried to get J to drop the case or to guilt trip her. She told

him she had not. It was not counsel error to fail to investigate the matter further by asking to see any messages J's mother might still have.<sup>14</sup>

*e) Our conclusion on this ground*

[39] We conclude there was prosecutorial error in not disclosing the messages as soon as reasonably practicable once J provided them to the police officer in charge of the case. We consider there was no trial counsel error in relying on the advice of J's mother that she had not tried to guilt trip her daughter out of pursuing the charges, nor in failing to recall there were messages in the documents provided by the appellant and J's mother which showed the mother's position to be incorrect.

[40] We do not, however, regard the prosecutor's error as giving rise to any risk of a miscarriage of justice. As the prosecutor's closing address showed, the probative force of the messages lay in their existence, not whether J's mother viewed her messages as having put emotional pressure on J to drop the case. They showed J as a credible witness, courageously proceeding with her allegations despite the personal cost to her. Had the messages been disclosed to Mr Krebs prior to calling J's mother, Mr Krebs may have been able to bring home to J's mother how they would be seen by a jury. Possibly J's mother might not have been called although, as Mr Krebs says, the importance of her evidence in other respects was such that this step would not have been taken lightly. Regardless, there was nothing to be done about the fact that J was courageous in the face of pressure, as the pressure was always provable given the existence of the messages.

[41] This ground of appeal is not made out.

*Prejudicial evidence*

[42] The appellant contends the Crown elicited irrelevant, emotive and prejudicial evidence from J's grandmother. J's grandmother, who had supported her, said she had been denied an ongoing relationship with other grandchildren. After the

---

<sup>14</sup> See *R v Scurrah* CA159/06, 12 September 2006 at [18]: "where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial".

appellant's arrest she had tried to maintain contact, but Christmas and birthday presents she sent were thrown out or were returned to her.

[43] The evidence was relevant as illustrative of the partisanship of J's mother in her support of the appellant. It was also prejudicial because it showed the hurtful way J's grandmother was treated. If the evidence was to be excluded, the basis for its exclusion would be that it was more prejudicial than probative.<sup>15</sup> We are doubtful that any such objection to the evidence would have succeeded. The fact that there was no objection from the appellant's experienced trial counsel suggests it did not assume any significance in the trial. After the evidence was given it was never mentioned again by either party or the trial Judge. We are satisfied the evidence could not have affected the result. This ground of appeal is not made out.

#### *Motive to lie*

[44] The Crown twice suggested to the appellant in cross-examination that he had a motive to lie because he had "so much to lose". The appellant contends this was improper. The Judge did not explain when this was put to the appellant, nor in summing-up, that it would be wrong and unfair to consider the appellant's evidence against the suggestion he had the most to lose. The appellant submits this was unfair and it is impossible to know what the jury made of the suggestion that was put to him.

[45] The respondent accepts the suggestion that the appellant had "so much to lose" should not have been put. It was put to him in the context of putting to him that J was telling the truth and he was lying. We consider that this suggestion could not have given rise to any risk of miscarriage nor did it make the trial unfair. This was a case where either J or the appellant had to be lying. The Crown firmly emphasised that it had the burden of proof. The Judge directed the jury that the appellant was not required to prove his innocence and the burden was on the Crown. The Judge also gave the jury the usual tripartite direction and thereby reinforced how the burden of proof worked in relation to the appellant's evidence. This ground of appeal is not made out.

---

<sup>15</sup> Evidence Act 2006, s 8.

## *Flirting*

### *a) Submission*

[46] The appellant contends the Crown's cross-examination of him was improper. This was because it included a suggestion that the reason J had not been asked about whether she had flirted with him, was because he had made up that allegation on the spot. This is said to have improperly suggested the appellant was involved in the cross-examination strategy of J and required an answer that infringed his privilege for communications with his trial counsel. The appellant's trial counsel is also said to have erred by not correcting the impression created by the Crown that the appellant had invented the flirting allegation at trial.

### *b) The trial*

[47] In evidence-in-chief the appellant accepted that J's mother had returned home when J was wearing a towel and J's mother was upset. He said they had a discussion about it but it was not suggested by anybody that he had behaved inappropriately in any way. The issue arose in cross-examination of the appellant as follows:

Q Now you've introduced a whole new "fact" into the case Mr [W] and that's flirting.

A Mhm.

Q We had [J] here for a day and a half being asked questions didn't we?

A Yes.

Q And you've been giving your lawyer instructions about all sorts of things haven't you?

A Yes.

Q Did you hear her asked any questions about the fact she was apparently flirting with you?

A No.

Q No, because you just made that up on the spot didn't you?

A No.

Q You're suggesting your stepdaughter was flirting with you?

A Yes.

Q Mhm how did you feel about that?

A When I was aware of it, very uncomfortable.

Q Right. ... is it the situation that what you are doing here where you can is to say whatever negative thing you can think of about [J]?

A I'm telling the truth.

[48] When J's mother gave evidence, Mr Krebs asked her what it was about the towel incident that upset her. J's mother said J was "always flirting" with the appellant. She described J as being the first to get his phone for him if it rang or to give him juice at dinner time, and said she would touch him on the upper arm. This led to an objection from the prosecutor that this had not been put to J.

[49] Neither the closing addresses nor the summing-up addressed the improper nature of the prosecutor's questions concerning the appellant's instructions to his lawyer. Nor did counsel or the Judge specifically correct the possible impression that the appellant had made up the allegation on the spot. The Judge did, however, direct the jury that J was not asked about the allegation of her flirting with the appellant and therefore they had only one side of the story about that.

*c) The prosecutor's conduct*

[50] The respondent accepts the prosecutor should not have asked questions which implied the appellant had not told his lawyer that J had flirted with him. We agree. The appellant's instructions to his lawyer were privileged. The prosecutor's question wrongly invited the appellant to disclose his instructions to his trial counsel.<sup>16</sup> However this was a small lapse in the context of the trial. The Crown did not enquire into the contents of any specific instructions, and the issue was never raised by the Crown again. It became apparent to the jury that the appellant had not made up the allegation on the spot when Mr Krebs led evidence from J's mother about the flirting.

---

<sup>16</sup> *R v Cox* CA204/05, 7 December 2005.



*d) Trial counsel error*

[51] Nor do we agree with the appellant that his trial counsel erred in how he dealt with this line of questioning. Mr Krebs engaged a private investigator to assist him with the preparation of the defence briefs of evidence. The appellant said, in his brief of evidence, that J “always flirted with me, according to [J’s mother]”. He said J seemed a bit confused as to whether she saw him as a father figure or something else. This made him uncomfortable at times. It also made J’s mother uncomfortable and she had asked him what was going on between J and him.

[52] Mr Krebs says the appellant thought J’s flirting with him was relevant to his defence and should be advanced in his evidence. Mr Krebs considered this evidence might have had some relevance if the defence was that J had consented. However, because the defence was that the incidents simply did not happen, he considered the evidence was irrelevant. He considered the appellant would be seen as interpreting affectionate behaviour for a stepparent as having a sexual overtone. His very firm view was that this evidence would be harmful to the defence. He is certain he told the appellant his view during the trial and in the course of his cross-examination of J.

[53] The appellant does not recall being advised not to mention that J flirted with him. He considered it was a necessary part of his answer to the prosecutor’s question about why J’s mother was angry with him over the towel incident.

[54] Mr Krebs may not have specifically instructed the appellant not to mention this evidence. The appellant was required to tell the truth if the matter came up. We do not read Mr Krebs as saying that he gave any such instruction. Rather he says he told the appellant this evidence was harmful to his defence and we accept his evidence about this. His assessment of the evidence was sensible. It explains why it was not put to J, nor led from the appellant in evidence-in-chief. Mr Krebs had expertly asked the appellant about this without the need for the appellant to explain J’s mother’s concern that J was flirting.

[55] However once the appellant had raised the topic in cross-examination, it was open to trial counsel to respond to the suggestion that the allegation had been made up on the spot through leading evidence from J’s mother about the flirting. Any

further evidence (such as from the private investigator) or reference to the evidence in the defence closing address risked highlighting an unhelpful aspect of the case. The defence closing instead focussed on J's behavioural issues. We agree this was not trial counsel error. Rather it was counsel exercising their best judgment in the circumstances as they existed at the time.<sup>17</sup>

[56] This ground of appeal is not made out.

*J's disclosure to her mother*

[57] The appellant contends his trial counsel erred in cross-examining J about her disclosure to her mother. The appellant says Mr Krebs had a statement from J's mother that J had told her the appellant had put his hands down her pants. He says Mr Krebs cross-examined J on the basis that her mother would deny that any disclosure was made. The evidence of the disclosure was then elicited by the prosecutor in cross-examination of the mother. This was said to have caused unnecessary prejudice to the defence.

[58] In her evidence-in-chief J was asked if she had told her mother the appellant had touched her. J said she told her mother the appellant had put his hands down her pants, her mother talked to the appellant about it, somehow the appellant got around this, and it was never spoken of again. J said this occurred at the first address they lived at and it was not long after the touching began.

[59] In cross-examination of J, the following exchange occurred:

Q      You should know that your mother's going to come to Court and give evidence too and she'll tell the Court that you never, ever told her any of these things, that you never told her at [the first address] that [the appellant] touched you, do you want to comment about that?

A      I did tell her.

[60] Prior to trial Mr Krebs had a statement from J's mother. In this statement she said J had told her the appellant had put his hand in her pants. She asked the appellant about this and he said it happened when he went to say goodnight to J and

---

<sup>17</sup> *R v Scurrah*, above n 14, at [18].

his hand got stuck in her boxers. This related to a later incident at the second address.

[61] Mr Krebs did not lead this evidence from J's mother. It was elicited from J's mother in cross-examination. It is clear from that cross-examination, that J's mother was referring to a later incident at a second address consistent with her pre-trial statement which Mr Krebs had. Mr Krebs says he did not lead this evidence because at that stage there was no evidence that J had disclosed this particular incident to her mother. The appellant had mentioned the discussion with J's mother about the incident but did not say J had told her mother about it. He regarded the appellant's explanation of the incident as unconvincing and reflecting badly on the appellant and J's mother.

[62] We consider the question which Mr Krebs put to J about this did not amount to trial counsel error. The wording in the first part of the question reads as a slip of the tongue. The question was clarified when Mr Krebs said "you never told her at [the first address] that [the appellant] touched you". J's mother was clear that J had told her about the appellant putting his hand in her boxers at a much later time.

[63] We also consider there was no trial counsel error in not leading this evidence from J's mother. Mr Krebs' assessment that it was better not to raise the matter, when it was not before the jury at that point that J had disclosed this to her mother, was a reasonable one in the context of the trial. It would not have improved matters if defence counsel had led this evidence, when the appellant had already given evidence that his hands had been inside his stepdaughter's boxer pants and that he had told his wife about it.

[64] This ground of appeal is not made out.

#### *Conclusion on conviction appeal*

[65] This was a strong Crown case. J gave clear and firm evidence of the offending. Her account was unshaken by cross-examination. There was some corroboration of her account from the appellant's acknowledgement of touching her under her boxers when she was in bed. The appellant's explanation of that lacked

credibility. There was further corroboration in the form of J's mother being upset when she returned home to find J dressed only in towel and the appellant standing nearby. The appellant's explanation that he was remonstrating with J for having a long shower was of doubtful plausibility, especially when the reason J's mother was said to be upset was because she regarded J as flirting with the appellant and J had earlier disclosed offending by the appellant to her mother.

[66] We consider that there was no risk of miscarriage arising from the prosecutor's error in not disclosing the messages as soon as reasonably practicable upon becoming aware of them. It is not always easy to fully apprehend the relevance of something mid-trial and for that reason we can understand how the prosecutor's error arose. Similarly, defence counsel must make difficult tactical calls as a trial progresses and the decisions that are made may turn out to be successful or they may not. An appeal does not succeed because it turns out some other tactic would have been better. It is our overall impression that the case against the appellant was competently defended.

[67] The conviction appeal is not made out.

### **The sentence appeal**

[68] The Judge adopted a starting point of 15 years imprisonment for the offending. She discounted it to 13 and a half years because of the appellant's previous good character. She regarded a 50 per cent MPI as necessary for accountability, denunciation, deterrence and community protection purposes.<sup>18</sup>

[69] There is no challenge to the overall sentence. The sentence appeal is advanced solely on the basis that the imposition of an MPI was manifestly excessive. It is said that an MPI of nearly seven years goes beyond what society demands of a person who has admitted offending and sought help to ensure that his risk of re-offending is low. The appellant did not admit the offending and nor had he sought help to ensure his risk of re-offending was low. Nevertheless it is submitted the appellant should be "given the opportunity to be that person." We understand

---

<sup>18</sup> *R v [W]*, above n 1, at [15].

this submission to be that, over time, the appellant may be able to show his risk of re-offending is in fact low and that a release earlier than the MPI would be appropriate.

[70] We consider it was open to the Judge to impose an MPI of 50 per cent. After his conviction the appellant continued to deny his offending. Because of this his risk of reoffending was regarded by the pre-sentence report writer to be high. This was sustained and serious sexual offending by an adult against a vulnerable young person in his care. Totality considerations that apply when setting the end sentence are “not necessarily so cogent in terms of the proportion of the sentence which must be served”.<sup>19</sup> As this Court has previously said the “imposition of a minimum period of 50 per cent of the finite sentence is almost standard in offending for serious sexual offending against a young child”.<sup>20</sup> The Judge relied on this authority when imposing the MPI on the appellant.<sup>21</sup> Nothing has been advanced to show that the Judge erred in her assessment that the MPI was necessary to meet the relevant purposes in the appellant’s case.

### **Privilege**

[71] For completeness we note that counsel for the appellant was critical of Mr Krebs’ affidavit which he provided for the purposes of the appeal. She submits the affidavit went beyond the scope of the privilege waiver provided by the appellant. However, in our view, most of the affidavit was entirely proper. It was necessary for Mr Krebs to explain why he made the decisions he did by providing a broader context of his assessment of the defence case and the trial. We do, however, agree with the appellant that Mr Krebs ought not to have included reference to allegations from another complainant which did not proceed. This was irrelevant to the appeal and we disregarded it.

### **Result**

[72] The application to extend the time to appeal is granted. The appeals against conviction and sentence are dismissed.

---

<sup>19</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [156].

<sup>20</sup> *W (CA702/2010) v R* [2011] NZCA 529 at [120].

<sup>21</sup> *R v [W]*, above n 1, at [13].

[73] To avoid identifying the complainant, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:  
Crown Law Office, Wellington for Respondent