

**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 X PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA244/2017
[2018] NZCA 225**

BETWEEN A (CA244/2017)
 Appellant

AND THE QUEEN
 Respondent

Hearing: 18 April 2018

Court: Cooper, Dobson and Toogood JJ

Counsel: J W Watson for Appellant
 Z R Johnston and H G Max for Respondent

Judgment: 28 June 2018 at 3 pm

JUDGMENT OF THE COURT

- A The application for an extension of time 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 Criminal Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Toogood J)

[1] On 2 March 2017, in the District Court at Whangarei, A was found guilty by a jury of three charges of inducing a girl under 12 to do an indecent act upon him, two charges of doing an indecent act on a young person under 16 and two charges of sexual violation by unlawful sexual connection. The offending was repetitive and all but two of the charges were representative charges. A was convicted, and on 7 April 2017 he was sentenced by Judge D G Harvey to a total effective sentence of 14 years and six months' imprisonment, of which he was directed to serve a minimum period of eight years.¹

[2] The notice of appeal against the convictions and the sentence was filed one day late after A experienced difficulties with the prison mail system. A seeks leave to appeal out of time. There being no opposition and no prejudice to the Crown, we extend the time for filing the appeal.

Background facts

[3] A's offending was against a young relative X between January 2003 and January 2012. He began to take a sexual interest in the complainant when she was aged seven and, as Judge Harvey said, "targeted her and ... took every opportunity to initiate physical contact". On sentencing, the Judge summarised the offending in these terms:²

[3] When you could you took her down to the rugby field at Hikurangi, there you would make her touch your penis or wank you and as [X] said every time you went down there, and her estimate was somewhere between five and 10 times, you would also make her pull her pants down so that you could look at her.

[4] She said that this behaviour escalated. You began forcing her to give you blow jobs, you instructing her to lick it like a lollipop. [X] estimated that this occurred on about five occasions. At night you would go into rooms where she was sleeping and she would wake up to find that you had a finger or fingers in her vagina. Although she could not say how often that occurred she did say that it happened probably every time she stayed there.

¹ Sentencing Act 2002, s 86(1).

² *R v [A]* [2017] NZDC 7493.

[5] This offending was aggravated by the fact that on one occasion you said to her that if she ever told anyone you would hurt her or kill her.

[6] [X] told us about one occasion when she went with you in a Mr Whippy van. She said that you showed her a dirty magazine and you then made her give you a hand job which continued until you ejaculated.

[7] When she was in the kitchen she says that you would often brush past her quite deliberately touching her breasts or bottom and on one occasion while she was sleeping in the lounge she woke up to find you touching her breasts and sucking her nipples.

The trial

[4] The Crown's case at trial rested principally on X's evidence. The jury was required to decide whether they accepted her evidence as credible and reliable. Propensity evidence related to a conviction for indecent assault in 2000 was also admitted. A gave evidence in his defence, denying each of X's allegations of sexual contact. He admitted only that on one occasion he had whacked X on her bottom and told her she was putting on a bit of weight. He admitted indecently assaulting the propensity witness by touching her inappropriately.

[5] A's wife gave evidence on his behalf. She and A have 10 children. The thrust of her evidence, which related to matters such as the presence of other members of the household and the extended family; sleeping arrangements; the layout of their home; A's employment history and her not observing behaviour or events alleged by X, was intended to show the absence of opportunity and the unlikelihood of X's allegations being true.

[6] The jury was required to decide whether, taking the evidence of A and his wife into account, the Crown had proved its case beyond reasonable doubt. That meant considering, in respect of each of the alleged offences, whether there was a reasonable possibility that A's denials were true. In that event, a verdict of not guilty should have been entered, as was the case in respect of three of the charges.

[7] However, the jury rejected A's evidence on the remaining seven charges and was sure, on the basis of the complainant's evidence and the other Crown evidence, that he was guilty of those offences.

Approach to appeal against conviction

[8] On the conviction appeal, we are required to determine whether there was any error, irregularity, or occurrence in, or in relation to, or affecting the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.³

The grounds of appeal against conviction

[9] Mr Watson advanced three grounds for the appeal against conviction:

- (a) Despite being asked to do so, the Judge refused to give the jury a warning under s 122 of the Evidence Act 2006 about the need for caution in deciding whether to accept the complainant's evidence because the conduct of the defendant on which the charges were based was alleged to have occurred more than 10 years previously.
- (b) The Judge misdirected the jury on how they should treat the evidence of an expert witness who gave counter-intuitive evidence addressing misconceptions the jury might have held about the behaviour of complainants of sexual offending.
- (c) The Judge erred in admitting as propensity evidence under s 43 of the Evidence Act evidence of A's prior conviction for indecent assault on a female aged between 12 and 16.

Refusal to give delay warning

[10] Where a trial judge is of the opinion that any evidence given in the trial that is admissible may nevertheless be unreliable, the judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to the evidence.⁴ The material parts of the section provide:

³ Criminal Procedure Act 2011, ss 229(1), 232(2)(c) and 232(4).

⁴ Evidence Act 2006, s 122(1).

122 Judicial directions about evidence which may be unreliable

- (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge *may* warn the jury of the need for caution in deciding—
- (a) whether to accept the evidence:
 - (b) the weight to be given to the evidence.
- (2) In a criminal proceeding tried with a jury the Judge *must consider whether to give a warning* under subsection (1) whenever the following evidence is given:
- (a) hearsay evidence:
 - (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
 - (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
 - (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
 - (e) *evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.*
- (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but *the Judge need not comply with that request—*
- (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
 - (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

...

(Emphasis added.)

[11] In this case, some of the offending was alleged to have occurred more than 10 years earlier. Mr Watson, as trial counsel, requested the Judge to give a warning under s 122(1), as he was permitted to do by subs (3). As the section provides, the Judge was entitled to decline that request if he was of the opinion that to do so might unnecessarily emphasise evidence or that there was any other good reason not to do so.

[12] In a short mid-trial ruling, Judge Harvey said:

- [4] Mr Smith for the Crown is of the view that no such warning is required in this case and he made the point that it did not appear as if the Defendant or his wife had any difficulty in recalling, in quite some detail, what had occurred during the relevant period.
- [5] I have considered the evidence here and I do not believe that any warning is necessary. Certainly there are differences in the evidence as to which house, which bedroom and precisely when some of these incidents are said to have taken place but there is nothing unusual in that. Many cases involving more recent allegations contain those sort of difficulties.
- [6] I am very clear in this case that the sole issue for the jury to determine is whether or not what the complainant says the Defendant did to her in fact did occur. It is a classic she said/he said case and one ideally suited to a jury.
- [7] As a result of Counsel's addresses the jury are well aware of the disputes on peripheral matters but as the complainant said in one portion of her evidence ... [she] can remember what the Defendant did to her.

[13] The defence case focused on highlighting the lack of corroboration of X's account, which was said to result in a subconscious onus on A to prove his innocence. Mr Watson also pointed to inconsistencies between X's description of the houses, and the evidence of A and his wife. The jury was invited to consider the implausibility of X being alone with A in a family with so many children. While generally not challenging the counter-intuitive evidence given by a clinical psychologist, Dr Ahmad, defence counsel also submitted that the jury might conclude as a matter of common sense that if X's allegations about A's conduct were true she would not have waited 10 years to complain about it.

[14] Section 122(2)(e) is concerned with the reliability of evidence, not its credibility. As Mr Watson acknowledged, the lapse of time does not generally have any bearing on whether a witness is deliberately giving false evidence.⁵ He referred, however, to an observation by this Court in *T (CA561/2014) v R* that it may "have been best practice" for the trial judge in that case to have given a s 122 warning about the difficulty that arises with the passage of time when broad allegations must be refuted

⁵ *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [68]; *Prasad v R* [2016] NZCA 163 at [53]; and *Oquist v R* [2015] NZCA 310 at [59].

by the defence.⁶ But we do not read what was essentially a passing observation in that case as mandating that such a warning should be given in every case of a delayed complaint.

[15] It was open to Judge Harvey to refer to the effect of the passage of time on memory, but the jury did not need a particular warning about that and we are satisfied there was good reason for the Judge to decline to give a s 122 direction. Mr Watson has not identified any risk of a miscarriage of justice arising as a result of the Judge's refusal to do so in this case. This ground of appeal fails.

Counter-intuitive evidence of expert witness

[16] The counter-intuitive evidence given by Dr Ahmad was directed at correcting erroneous beliefs the jury might otherwise have held about the likely conduct of a complainant of sexual abuse. That type of evidence is regarded as being substantially helpful, and therefore admissible, provided that:⁷

- (a) the witness makes it clear that the witness is not commenting on the facts of the particular case;
- (b) the evidence is relevant to a live issue in the trial;
- (c) the witness makes it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which the evidence is being given; and
- (d) the judge instructs the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The Judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in

⁶ *T (CA561/2014) v R* [2016] NZCA 235, (2016) 28 CRNZ 17 at [41].

⁷ *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [29]–[30].

complaining) itself indicates that the complainant's allegation of sexual abuse is true.

[17] In summing up, Judge Harvey said, about Dr Ahmad's evidence:

The purpose of this evidence is to inform you as to the range of behaviour found among child complainants in this area. The aim is to counter any thought that you might have had along the lines of that it is to be expected that a child complainant would promptly complain to a parent or caregiver about sexual abuse or would complain about all instances of abuse at the first opportunity, or to continue with a seemingly ordinary relationship with the abuser.

It is important however for you to remember that Dr Ahmad told us that she has not interviewed any of the parties to this trial. None of her evidence is about the facts of this case. In particular, her evidence does not relate to the credibility of [X] and you cannot use it to bolster her evidence. In particular Dr Ahmad was not giving her opinion about what the complainant said in evidence or what your verdicts should be.

[18] Mr Watson criticised the Judge's remarks in that he failed to direct the jury that, as with other evidence, they may accept or reject the expert evidence or parts of it. Further, he said that the Judge failed to advise the jury that the purpose of the expert evidence was to enable them to form their own independent judgment by the application of the opinion advanced to the facts proved in evidence.

[19] We agree with counsel for the Crown, however, that no such direction was required in this case. Dr Ahmad's evidence was not challenged by contrary evidence from a defence witness, and it was not directly criticised by Mr Watson in his closing to the jury. He drew attention to the fact that Dr Ahmad had not done any research herself into delayed reporting and that she was relying on research done by others.

[20] This was not a case in which the expert witness was giving evidence directly linking A to the crime. There was no risk that the expert's views would supplant the task of the jury, which was to decide for themselves whether A was guilty of any of the alleged offending. The witness's evidence and the Judge's directions on it were in conventional terms and no prospect of a miscarriage of justice arises as a result. This ground of appeal fails also.

The admission of propensity evidence

[21] In a pre-trial ruling, Judge de Ridder held that A's conviction in 2000 on a charge of indecently assaulting a female aged between 12 and 16 (Y) was admissible as propensity evidence under s 43 of the Evidence Act.⁸ Because A did not agree to the fact and circumstances of that conviction being admitted by agreement under s 9 of the Evidence Act, Y was called to give evidence in person at the trial. A was entitled to challenge the admission of the evidence in the conviction appeal, despite not having appealed directly against Judge de Ridder's pre-trial ruling.⁹

[22] Section 43 of the Evidence Act provides:

43 Propensity evidence offered by prosecution about defendants

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
 - (a) the frequency with which the acts, omissions, events, or circumstances that are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (c) the extent of the similarity between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
 - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:

⁸ *R v [A]* [2016] NZDC 1855.

⁹ *Prasad v R*, above n 5, at [18].

- (f) the extent to which the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—
 - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
 - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

[23] Judge de Ridder held that A’s conviction showed he had a tendency to “have a sexual interest in young girls and to offend against them for his own sexual gratification”.¹⁰ The Judge held that, in combination, the evidence of the significant age difference between A and Y; that A was a mature male at the time of the offending; and that Y was a young girl, was sufficiently specific to enable him to categorise it as evidence of a propensity to act in a particular way against young girls.¹¹

[24] Judge de Ridder considered the matters which the Court may take into account under s 43(3) of the Evidence Act and observed that the propensity offending occurred in 1999, whereas X’s allegations related to events beginning in 2003.¹² He said that there was a distinct similarity between the circumstances involving the indecent assault in 1999 and the allegation made by X. Both involved young girls who had a family association with the defendant; in the 1999 case, Y was asleep and therefore vulnerable when A approached her, those circumstances being similar to what was alleged by X in some cases. The Judge observed there was no suggestion of collusion between X and Y and that it was well-established that it is unusual for an older male to have a sexual interest in young girls.¹³ In those circumstances, the Judge ruled that the probative value of the proposed propensity evidence was relatively strong.¹⁴

¹⁰ *R v [A]*, above n 8, at [22].

¹¹ At [22].

¹² At [25].

¹³ At [25].

¹⁴ At [26].

[25] We add that counsel for the Crown submitted on appeal that other similarities exist in that the alleged offending against both victims occurred when there were other people in the vicinity and that the victims were a similar age. X was aged between seven and 13 and Y was aged 14.

[26] Mr Watson criticised the admission of the evidence on the basis that there was an insufficient similarity between the propensity evidence and X's allegation to justify the conclusion that the evidence had probative value in relation to the credibility of X's evidence which outweighed the risk that the evidence might have an unfairly prejudicial effect on A.¹⁵

[27] Mr Watson argued that there were material differences between the circumstances of the propensity offending and the circumstances alleged by X:

- (a) There was only one allegation of indecency in the propensity evidence whereas X alleged frequent incidents over a lengthy period of time.
- (b) There was a limited connection in time in that there was a four-year gap between the 1999 offending and the first of the offences alleged by X, which was said to have occurred in 2003.
- (c) The age gap between Y and A was eight years, whereas the age gap between A and X was 20 years.
- (d) X and Y had different familial relationships with A.
- (e) The 1999 offending involved one offence at a given place, whereas X alleged a multiplicity of incidents at a variety of places over a substantial period of time.
- (f) The nature of the activity which took place in the 1999 offending was "very different, both as to mental state and actual occurrence".

¹⁵ Evidence Act, s 43(1).

- (g) The 1999 propensity evidence involved a single incident occurring on a single night, whereas X alleged a prolonged period of sexual activity.

[28] A number of the propositions thus advanced by Mr Watson amount to saying the same thing in a different way. The principal difference between Y's allegations and what X alleged to have occurred was that the propensity evidence related to a single incident, whereas A was on trial for repeated offending over a lengthy period. The fact that the alleged offending against X was repetitive does not alter the similarity between the character of what X alleged had occurred and the single incident which led to A's conviction in 2000.

[29] We agree with counsel for the Crown that the allegations are sufficiently similar to be of significant probative value. The propensity evidence demonstrates that A has an unusual interest in sexual acts with young girls for the purposes of his own gratification, making X's allegation more likely to be true. Any unfair prejudice arising from the admission of the propensity evidence was adequately addressed by the Judge's conventional directions on the issue, the adequacy of which was not challenged by Mr Watson.

[30] We are not persuaded that there was any risk of a miscarriage of justice arising from the admission of the propensity evidence. We reject this ground of appeal.

Conclusions on conviction appeal

[31] We have not been persuaded that any of the challenges made on the appeal against conviction, whether singly or in combination, created a real risk that the outcome of the trial was affected or resulted in an unfair trial.

[32] Accordingly, we dismiss the appeal against conviction.

Appeal against sentence

[33] An appeal against sentence must be allowed only if the Court is satisfied that there has been an error in the sentence imposed for any reason and that a different

sentence should be imposed.¹⁶ A material error requiring correction will be established if the sentence is manifestly excessive or wrong in principle, or if there are exceptional circumstances.¹⁷

[34] In a case such as this the real question is whether the effective end sentence was manifestly excessive. The appellate court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. Whether a sentence is manifestly excessive is to be examined in terms of the sentence given, rather than the process by which the sentence is reached.¹⁸

[35] Judge Harvey applied a conventional methodology to the assessment of the appropriate sentence by taking the conviction on charge four (which alleged oral penile sexual connection) as the lead offending and fixing a starting point, uplifting from that to recognise the offending overall.

[36] The Judge considered that the offending was aggravated to a high degree by planning and premeditation, the vulnerability of X (aged between seven and 13 at the time of the offending with a 20-year age gap between A and her), and the breach of trust involved in X being a relative and staying in A's home at the time of the offending. He also considered the scale of the offending and took into account that on one occasion A had threatened X with harm or death if she told anyone.

[37] Penile penetration of the mouth is properly considered to be on the same scale of seriousness as rape.¹⁹ Judge Harvey placed the offending on charge four in rape band three of the guideline judgment in *R v AM (CA27/2009)* where the sentence starting point is said to be between 12 and 18 years.²⁰ Mr Watson submitted that it would have been more appropriate for the Judge to place the offending in rape band two where the starting point ranges from seven to 13 years' imprisonment.

¹⁶ Criminal Procedure Act, s 250.

¹⁷ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[31].

¹⁸ *Ripia v R* [2011] NZCA 101 at [15].

¹⁹ *N (CA200/2016) v R* [2017] NZCA 165 at [38].

²⁰ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [105].

[38] As counsel for the Crown submitted, however, the distinction is largely academic given the cross-over between the two bands at the starting point of 12 years which the Judge adopted. Judge Harvey appropriately uplifted the sentence to one of 14 years' imprisonment to reflect the totality of the offending overall and added a further six months uplift to take account of A's previous convictions. There were no other aggravating or mitigating personal factors to be taken into account.

[39] We are satisfied that the end sentence of 14 years and six months' imprisonment for what was prolonged and serious offending was within the range available to the Judge. No challenge was made to the minimum period of imprisonment of eight years.

[40] There is no merit in the sentence appeal and we dismiss it accordingly.

Result

[41] The application for an extension of time is granted.

[42] The appeal against conviction is dismissed.

[43] The appeal against sentence is dismissed.

[44] In order to protect the identity of the complainant X, 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