

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203
OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF THE COMPLAINANT AND
ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED
AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE
ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA251/2019
[2019] NZCA 565**

BETWEEN ANDREW ROBERT MORGAN
Appellant

AND THE QUEEN
Respondent

Hearing: 9 October 2019

Court: Cooper, Lang and Mander JJ

Counsel: G A Walsh for Appellant
 J E Mildenhall for Respondent

Judgment: 18 November 2019 at 4 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Cooper J)

[1] The appellant, Andrew Robert Morgan, was found guilty on one representative charge of sexual violation by unlawful sexual connection, four charges (three of which

were representative) of sexual conduct with a child under 12 years of age and one charge of committing an indecent act with intent to offend. The trial Judge, Judge Spear, sentenced him to an effective total of seven years' imprisonment.¹

[2] Mr Morgan now appeals against conviction on the basis that new, credible and cogent evidence is available which impacts on the safety of the convictions. He also appeals against sentence on the basis that the sentence was manifestly excessive as a result of the Judge adopting a starting point that was too high, giving insufficient credit for previous good character and making no allowance for time spent on bail without any compliance issues.

Background

[3] During the period of the offending, the complainant lived with her parents and siblings in both Auckland and Hamilton.

[4] When the family was living in Auckland, Mr Morgan would regularly visit the family, having travelled up from Hamilton, and on occasions he stayed overnight. The complainant described the offending as occurring every time he visited. She said that when she was alone with him in her upstairs bedroom at the family home, he licked her genitalia, touched her genitalia, rubbed his penis on and around her genitalia and procured her to touch his penis. This offending occurred between 2010 and 2015 when the complainant was between five and nine years of age.

[5] The family subsequently moved to Hamilton. One day in July 2015, when the complainant was aged 11 years, Mr Morgan took her to the spa pools at Te Aroha, booking them in for a 45-minute session in a private pool. The complainant changed into her swimsuit and entered the pool. Mr Morgan had not brought any swimming gear with him and entered the pool with the complainant after taking off his clothes. While there, he procured the complainant to touch his penis.

[6] There was another incident after they had returned to Mr Morgan's home. He again exposed his penis to her. Her evidence was that she was by then sufficiently

¹ *R v Morgan* [2019] NZDC 9225.

mature to appreciate what he was doing to her and put a stop to it saying, “I’m 11 now and I don’t like it, I don’t want to do it”.

[7] It may be noted that none of the charges Mr Morgan faced required proof of an erection. The erectile dysfunction issue was raised as part of a credibility challenge to demonstrate the complainant was not telling the truth.

The conviction appeal

[8] The defence at the trial was that the appellant did not commit any of the acts alleged against him. He said that not only did the acts not happen, they could not have happened as he suffered from erectile dysfunction which prevented him getting an erection. The complainant had given evidence at trial that Mr Morgan’s penis was “kind of like a boner” and “usually up”. Under cross-examination she claimed that it was “sticking out from his body”, as opposed to being flaccid.

[9] The appellant gave evidence in which he described his various health issues including the fact that he had had a triple bypass, as well as referring to the erectile dysfunction, a ruptured shoulder and difficulties with his knee following an assault he had suffered whilst doing security work. In respect of the erectile dysfunction issue, he claimed that he had not been able to have an erection since 1990 or 1992. He said he could not recall getting an erection during the period of 2010 to 2015.

[10] In response to Mr Morgan’s evidence, the Crown was allowed to call rebuttal evidence.² A retired urologist was called to give general evidence about erectile dysfunction, but Mr Walsh, for the appellant, noted he had no professional interaction with or knowledge of the appellant. Mr Walsh submitted an expert should have been called to underpin Mr Morgan’s focus on health issues and erectile dysfunction and corroborate the defence theory that the appellant was physically incapable of committing the offences in question.

[11] The new evidence now said to be available would be given by Mr Morgan’s general practitioner, Dr Leong. Mr Walsh contended that Dr Leong was able to give

² *R v Morgan* [2019] NZDC 5134 at [5]–[6].

relevant expert evidence having regard to his first-hand knowledge of Mr Morgan's health issues. If he had been called at trial, the jury would have had each of the appellant's health issues explained to them and would have been told that for a man who was in his 70s at the time of the offending, the combination of his health issues rendered him less likely to be able to achieve an erection. Dr Leong could have confirmed that Mr Morgan had been prescribed medication to assist with erectile dysfunction.

[12] Mr Walsh conceded that the proposed evidence is not fresh, in that it could have been obtained prior to trial with reasonable diligence. However, he submitted the evidence was credible: it was plausible and capable of belief.³ It was plausible that Mr Morgan's ill health would mean he was less likely to achieve an erection and therefore less likely to have committed the offences of which he was convicted. The evidence now available rendered the convictions unsafe. Consequently, there had been a miscarriage of justice.

[13] As Mr Walsh recognised, the relevant law is in this Court's judgment in *R v Bain* and the Privy Council's judgment in *Lundy v R* (recently confirmed by the Privy Council in *Pora v R*).⁴ In the former, it was held that an appellant who wishes the court to consider evidence not called at the trial must demonstrate that the new evidence is sufficiently fresh and credible. If the evidence could with reasonable diligence have been called at the trial, it will not qualify as sufficiently fresh, although the overriding criterion is always what course will best serve the interests of justice.⁵

[14] In *Lundy v R*, the Privy Council emphasised that new evidence should be admitted if the interests of justice require it.⁶

[120] The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which

³ In assessing whether new evidence is credible, it is necessary to decide if it is plausible and capable of belief: *H (CA240/2015) v R* [2016] NZCA 57 at [25], applying *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [18].

⁴ *R v Bain* [2004] 1 NZLR 638 (CA) at [22]; *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; and *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

⁵ *R v Bain*, above n 4, at [22].

⁶ *Lundy v R*, above n 4.

could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[15] In this case it is appropriate also to bear in mind that for an appeal to succeed on the basis that relevant and credible evidence was not called the Court must be satisfied that there has been a miscarriage of justice. The question here is whether we can conclude that the evidence, if admitted, would not have affected the outcome of the trial.⁷

[16] For various reasons, we have not been persuaded that there was a miscarriage in this case. First, as Ms Mildenhall points out, this Court has not been provided with the proposed evidence for the purpose of assessing its cogency. Under r 12B of the Court of Appeal (Criminal) Rules 2001, the evidence should have been set out in affidavit form. All that we have is a brief letter from Dr Leong attached to Mr Walsh's submissions. The letter, dated 13 September 2019, was addressed to whom it may concern and said:

I was Andrews GP until March 2019.

I met with Melissa James (lawyer) to discuss aspects of Andrew's Medical history.

Andrew was prescribed Sildenafil by myself at Andrews request for erectile dysfunction.

This had been prescribed by his previous GP while in Auckland.

My recollection and my perusal of his notes is that I did not spend a lot of time discussing the issue as he had had it prescribed previously and wanted it to be continued.

I assumed that he wanted it as it worked and did not cause him significant side effects.

I discussed that there is no investigation nor is there an acceptable way of examining a patient to tell if the patient has erectile dysfunction. We are totally reliant on the history given by the patient.

⁷ Criminal Procedure Act 2011, s 232(4)(a); and *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [28].

It is fair to say the reports of erectile dysfunction are more likely to occur with increasing age diabetes and other conditions that will block other blood vessels ie Ischaemic heart disease. Andrew has diabetes Ischaemic heart disease and is currently 79 years old.

Kind regards

Dr Mike LEONG

[17] Despite the failure to provide an affidavit we have considered the letter. It confirms that, on the basis of his self-reported condition, Mr Morgan was first prescribed with Sildenafil to deal with erectile dysfunction when living in Auckland. Dr Leong explains why he was then prepared to write the prescription as Mr Morgan's Hamilton doctor: essentially, because Mr Morgan asked for it and it been prescribed in Auckland. Such evidence, if given, would not have countered in any direct or convincing way the evidence of the complainant about what she actually experienced when with Mr Morgan. Dr Leong's recorded assumption, that Mr Morgan wanted the drug because it worked; seems a reasonable one in the absence of any evidence to the contrary and if anything might justify a conclusion that supported the complainant's account rather than countering it. Based on the letter, which is all we have to go on, we do not consider the evidence Dr Leong could give is cogent.

[18] Secondly, there is force in another submission made by Ms Mildenhall. She pointed out that on 15 October 2018 the original trial date of 23 October 2018 had been vacated for the specific purpose of enabling the defence to obtain expert evidence but no such evidence was called at the trial.⁸ Judge Connell was plainly reluctant to grant the adjournment, given the complainant's young age, the fact she had complained to police over a year earlier, and the December trial date had been fixed in March, when the Court was notified the trial ready to proceed.⁹ The Judge registered surprise at the fact that Mr Morgan had not previously mentioned the dysfunction issue to counsel, but considered it necessary to grant the adjournment to enable Mr Morgan to consult an urologist.¹⁰ Despite this, no expert evidence was called for the defence.

⁸ *R v Morgan* DC Hamilton CRI-2017-019-6588, 15 October 2018.

⁹ At [4]–[5].

¹⁰ At [9]–[10].

[19] Mr Morgan nevertheless gave evidence about his inability to have an erection at the trial. He said since 1990 or 1992 he had been unable to get an erection. His doctor prescribed first Viagra, then Cialis but about 1995 or 1996 he decided not to use it, because of concerns about his heart problems. He claimed that since then, although he had discussed the issue with his doctor “many times”, he had been told he could not take the relevant medication because of his heart condition. The last time he could remember getting “a decent erection” was around 2000. The expert called by the Crown in rebuttal was a recently retired consultant urological surgeon of many years’ experience, Mr Cresswell.

[20] Mr Cresswell confirmed in evidence-in-chief that erectile dysfunction is of its nature largely self-reported and could be caused by various medical issues such as low testosterone and also “general health issues such as high blood pressure.” He explained that drugs such as Viagra or Sildenafil work by boosting the transmitters of arousal stimuli from the nervous system to the arterial system. He explained that pelvic surgery, and operations on the rectum or the prostate could cause impotence. He said Viagra was about 80 per cent successful as a treatment for erectile dysfunction but age was a significant factor, with dysfunction being much more common in men over 70. It could also happen (and was not rare) that men in their 70s and 80s and impotent with one partner of long standing may be stimulated to erection by contact with another partner; impotence could fluctuate in the same person including as a result of confidence issues. He confirmed that Viagra should not be used in conjunction with angina drugs.

[21] In cross-examination, Mr Cresswell confirmed that Viagra and Cialis have varying degrees of success, and that depends on the individual concerned. The combination of those drugs with “nitrolingual spray”, which Mr Morgan said he used, would have a negative effect and should be avoided. He agreed he was unaware whether Mr Morgan could obtain an erection through different stimuli. These were all responses to questions obviously designed to give an expert underpinning for parts of Mr Morgan’s evidence. It has not been explained how Dr Leong could have given different or more comprehensive evidence. Perhaps more importantly there is nothing in his letter of 13 September 2019 that takes the matter any further than what Mr Cresswell was able to confirm.

[22] We agree with Ms Mildenhall that Dr Leong could not give direct evidence about Mr Morgan's claimed erectile dysfunction. Other evidence about his health condition was not contested. Overall, we consider there is no realistic possibility that Dr Leong could provide expert evidence that might be useful to a jury if called.

[23] There is another problem with Mr Morgan attempting to rely on Dr Leong's evidence. His evidence was that he had not taken Viagra or Cialis since around the late 1990s. Mr Morgan returned to Hamilton from Auckland in late 2006. Yet according to Dr Leong, Mr Morgan asked him to prescribe Sildenafil when he was in Hamilton.¹¹ Far from helping the defence this would contradict Mr Morgan's own evidence.

[24] Mr Walsh was not counsel in the District Court, but the appeal is not advanced on the basis of counsel error. We do not see how it could be. In all the circumstances we do not accept that calling Dr Leong would have materially assisted the defence. Nor do we consider the fact he was not called affected the outcome of the trial or led to a miscarriage of justice.

[25] The conviction appeal is accordingly dismissed.

Sentence appeal

[26] The Judge applied this Court's judgment in *R v AM*.¹² He considered a starting point of 10 years' imprisonment was appropriate in respect of the offending that occurred in Auckland.¹³ He identified the relevant aggravating features as the complainant being young and vulnerable, abuse of trust, age disparity, the fact the offending occurred over a period of five years and harm to the complainant.¹⁴ He added an uplift of one year in respect of the offending linked to the visit to the Te Aroha spa pools.¹⁵

¹¹ Mr Cresswell gave evidence that Viagra was the original trade name of the drug now called Sildenafil. He explained that Cialis is a different drug, but in "the same group of drugs."

¹² *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹³ *R v Morgan*, above n 1, at [12].

¹⁴ At [13].

¹⁵ At [15].

[27] There was no expressed remorse and a concession that Mr Morgan made about having been unwise to go into the Te Aroha pool naked was an attempt to minimise the significance of the event, not remorse.¹⁶ The Judge allowed a reduction of one year on account of Mr Morgan's life as a good and contributing member of the community.¹⁷ Age and health problems likely to make prison a harder sentence than for a younger person led to a further reduction in the sentence of three years.¹⁸ The result was a seven-year term of imprisonment, imposed on the lead offence of sexual violation.¹⁹ Concurrent terms of two years were imposed on the four charges of sexual conduct with a child under 12, and one year's imprisonment on the charge of committing an indecent act with intent to offend.

[28] Mr Walsh argued the starting point was too high, claiming that eight to nine years' imprisonment would have been more appropriate for the totality of the offending. He then pointed to the pre-sentence report which recognised Mr Morgan's heavy involvement in the community, particularly in relation to sport in both coaching and administrative roles. He emphasised the lack of any previous convictions and submitted that Mr Morgan's history and record justified a higher discount for previous good character than that which had been allowed. He submitted that for this factor alone a discount of two years should have been given. He accepted that the discount given by the Judge in respect of age and ill health was appropriate.

[29] Mr Walsh next noted that Mr Morgan had been admitted to bail on 10 October 2017 and remained on bail until the verdicts were delivered in March 2019. The 17 months on bail did not give rise to any issue. Mr Walsh suggested that some recognition could have been given to that factor by way of a further discount on sentencing. The lower starting point, and additional discounts would result in an end sentence of between three to four years.

[30] We have not been persuaded that the sentence to an effective term of seven years imposed by the Judge was excessive.

¹⁶ At [16].

¹⁷ At [17].

¹⁸ At [18].

¹⁹ At [19].

[31] It is clear from the Judge's sentencing remarks that he regarded the case as suitably placed at the lower end of band three of the bands identified for unlawful sexual connection in *R v AM (CA27/2009)*.²⁰ This Court said that band was appropriate for the most serious offending involving unlawful sexual connection. It was designed to encompass cases involving two or more of the factors increasing culpability to a high degree, the examples given of being offending in relation to young complainants or over an extensive period. It was also said that the band would be appropriate where more than three of the relevant factors were present to a moderate degree.²¹

[32] Here, there was a serious breach of trust, a vulnerable complainant having regard to her age and a pronounced disparity in age between her and Mr Morgan. There was extended abuse over a prolonged period and, obviously, significant harm. As to that, the victim impact statement, made when the complainant was 13 years of age, referred to ongoing health issues caused by stress, missing school and falling behind because of the need to attend counselling sessions and difficulty staying focused, problems interacting with male authority figures and distrust of others, even old friends. A counsellor described the impact on the complainant as having been "devastating".

[33] It was open to the Judge to deal separately with the Te Aroha offending by adding a further year to the starting point he arrived at with respect to the Auckland based offending. Equally, he could have adopted a starting point of 11 years for the totality of the offending. Either way, we do not regard the effective overall starting point of 11 years as being excessive. There was here a combination of the factors identified as increasing culpability in *R v AM (CA27/2009)*. Breach of trust and vulnerability were present to a high degree and other aggravating features present to a moderate degree. We reject the argument that the starting point was too high.

[34] We are also satisfied that there can be no proper criticism of the discounts which the Judge allowed for mitigating factors. In a case such as this involving offending over a long period against a young child, it is difficult to sustain an argument

²⁰ *R v AM (CA27/2009)*, above n 12, at [120].

²¹ At [120].

for a greater discount for good character than the one year which the Judge allowed. In any event, the further allowance of three years about which Mr Morgan does not complain was fulsome. The total allowance for mitigating considerations of four years was in our view more than adequate.

[35] The appeal against sentence must also fail.

Result

[36] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent