

**NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF
COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE
ACT 1985.**

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF
WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE
CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA538/2022
[2023] NZCA 399**

BETWEEN EUGENE CHARLES PATRICK DOMINIC
MCCARTHY
Applicant

AND THE KING
Respondent

Hearing: 18 July 2023
Court: Gilbert, Lang and Woolford JJ
Counsel: G H Vear for Applicant
A J Ewing for Respondent
Judgment: 25 August 2023 at 3 pm

JUDGMENT OF THE COURT

**The application for an extension of time to appeal against conviction and sentence
is dismissed.**

REASONS OF THE COURT

(Given by Lang J)

[1] In December 2011, a District Court jury found Mr McCarthy guilty on six charges relating to the sexual abuse of three young females who were related to his then partner. The offending occurred between 1997 and 2009.

[2] On 29 February 2012, Judge T R Ingram sentenced Mr McCarthy to 18 years imprisonment.¹ On two of the charges, the Judge imposed a minimum term of imprisonment of nine years.²

[3] Mr McCarthy applies for an extension of time within which to appeal against both conviction and sentence.³ This judgment determines that application.

Background

[4] The offending against complainant A occurred between 1997 and 2002 when A was aged between eight and 13 years. She would stay overnight with Mr McCarthy's partner. Mr McCarthy would come into the bedroom at night and digitally penetrate A's vagina. A lost count of the number of times this happened. The offending occurred at two separate addresses.

[5] The bulk of the offending against complainant B occurred between 2003 and 2004, when B was aged between 10 and 12 years. At the time of this offending B was living with Mr McCarthy's partner. Mr McCarthy would come into B's bedroom at night and digitally penetrate her vagina. Mr McCarthy also engaged in anal intercourse with B on one occasion in 2005 when she was 13 years of age.

[6] When the family moved to another address, Mr McCarthy's offending against B escalated to rape. This occurred on a regular basis for a period of approximately 12 months between 2005 and 2006. During this period Mr McCarthy also made B perform oral sex on him on one occasion.

[7] The offending against complainant C occurred on one occasion in 2008, when C was 13 years of age. On this occasion, she was staying with Mr McCarthy's family

¹ *R v McCarthy* DC Whakatāne CRI-2009-087-1105, 29 February 2012.

² At [25].

³ Court of Appeal (Criminal) Rules 2001, r 11.

and shared a room with B. Mr McCarthy entered B's bedroom, touched C's breasts and vagina over her clothing and then left the room.

[8] All three complainants disclosed the offending to friends or persons associated with their family around the time that it occurred.

Procedural background

[9] Mr McCarthy stood trial on three occasions. The jury at the first trial acquitted him on several charges relating to all three complainants but could not reach agreement on the remaining charges. A second trial began in October 2011 but was aborted for reasons not relevant to the present application.

[10] The third trial commenced in November 2011. Mr McCarthy defended the charges on the basis that the evidence given by all three complainants was inconsistent, implausible and unreliable. He also contended there had been very limited opportunity for him to offend against them. The jury's verdicts confirm they rejected this defence.

[11] Because Mr McCarthy was tried on indictment in 2011 any appeal falls to be determined under ss 383(1) and 388 of the Crimes Act 1961.⁴ He was required to file any appeal within 28 days after the date of sentence.

Relevant principles

[12] The Court may grant an extension of time within which to appeal where it is in the interests of justice to do so.⁵ In determining where the interests of justice lie, several considerations may be relevant.⁶ These include:⁷

- (a) the length of the delay and whether it is adequately explained;
- (b) whether there is a compelling reason to extend time to appeal;

⁴ Criminal Procedure Act 2011, s 397(2).

⁵ *Ellis v R* [2019] NZSC 83 at [15], citing *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and *R v Lee* [2006] 3 NZLR 42 (CA) at [95]–[99]; and *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [50]–[53].

⁶ *R v Lee*, above n 5, at [106].

⁷ *Ellis v R*, above n 5, at [15]; and *R v Lee*, above n 5, at [99].

- (c) the need for finality in litigation;
- (d) where the liberty of the subject is involved;
- (e) prejudice to the Crown in conducting the appeal and any retrial;
- (f) the impact of granting leave to appeal on others, including victims; and
- (g) the strength of the proposed appeal.

Discussion

[13] There has been a delay of more than 10 years in bringing the present appeal. That is a very lengthy delay by any standard. Mr McCarthy has filed a brief affidavit in which he endeavours to explain the reasons for the delay. He says he spoke to his trial lawyer, Mr Roger Gowing, after he was sentenced on 29 February 2012. Mr Gowing told him he had no basis for an appeal.

[14] After Mr McCarthy was sentenced his sister contacted Mr Tony Rickard-Simms, a criminal barrister in Tauranga, and asked him to review Mr McCarthy's trial file with a view to lodging an appeal. Mr Rickard-Simms has provided an affidavit in which he confirms that he reviewed the file and advised Mr McCarthy that he could not see any grounds for appeal. Mr Rickard-Simms encouraged Mr McCarthy to provide him with any further fresh evidence that may come to light but never received a response to that request.

[15] Mr McCarthy deposes:

- 7 I didn't realise that I could have appealed anyway. I thought that being told by two lawyers that I had no grounds meant that I couldn't appeal. As far as I remember, neither lawyer told me that I could proceed with an appeal even if they didn't think it would succeed.
- 8 I didn't make any further enquiries about an appeal after that because of my belief that there was nothing further that could be done. I was also dealing with adjusting to being in prison, and coping with the violence aimed at me by other prisoners because of my convictions. I was diagnosed with depression while I was on bail and dealing with constant curfew checking by police. When I went into custody,

I continued to be treated for depression and was on medication for that for a while.

- 9 I have continued to deny the offending, even though this has meant that I can't do any programmes that would help me get parole.
- 10 In 2020 I heard about Te Kāhui Tātari Ture | Criminal Cases Review Commission being created. I made an application to them in November 2020. However they declined my application because I had never appealed my convictions. They suggested to me that I should appeal, and advised me that I could apply for Legal Aid to get an appeal lawyer. I did that in 2021.
- 11 My lawyer has told me there was great difficulty in tracking down copies of the documents from my file, from my old lawyer Roger Gowing, from the District Court and the Crown. All of them advised that the files (or most of them) were missing or destroyed. This has been very discouraging and delayed me receiving advice about an appeal. In 2022, after receiving advice from my lawyer, we were able to finalise what we wanted to argue in the appeal and file it.

[16] We do not regard the explanation Mr McCarthy has given as being satisfactory for the delay that has occurred in this case. Mr McCarthy asked Mr Gowing about lodging an appeal and his sister contacted Mr Rickard-Simms to investigate that issue. The fact that Mr McCarthy contacted two lawyers for separate advice regarding a potential appeal and chose not to pursue an appeal as a result of their advice, reflects a clear knowledge of his right of appeal.

[17] The length of the delay is another factor strongly militating against an extension of time within which to appeal. As counsel for Mr McCarthy acknowledge, any retrial would pose very real difficulty for the Crown and the three complainants. They were all entitled to conclude that the litigation had come to an end more than 10 years ago. The Crown and the complainants will also suffer significant practical prejudice if a retrial was to be ordered. By way of example, the evidential interviews given by one of the three complainants have now been destroyed. The impact of such a delay on the complainant's memories will also be significant. The desirability of finality in litigation has obvious application in this case.

[18] Given these factors, we would only consider that the interests of justice favour the grant an extension of time if we were satisfied that one or more of the grounds of appeal that Mr McCarthy wishes to advance has a realistic prospect of establishing the risk of a miscarriage of justice.

The proposed appeal against conviction

[19] On Mr McCarthy's behalf, Ms Vear advances several arguments on the proposed appeal against conviction. These relate to alleged deficiencies in the Judge's summing up, a complaint about the form of the indictment and challenges to the admission of unfairly prejudicial evidence. We briefly examine each of these in turn.

Alleged deficiencies in the Judge's summing up

Lack of balance

[20] With one exception, Ms Vear accepts that the Judge's summing up was balanced and could not be said to favour either side. The exception relates to a series of comments that the Judge made towards the end of his summing up that Ms Vear argues unfairly favoured the Crown case. The Judge began these with the following observation:

[203] I want now to provide you with such limited assistance as I can in relation to your consideration of these matters. I am well aware that jurors often look to the judge to assist them with their task with things that the judge might be able to point to which would help and there are a few things that I can assist you with.

[21] The Judge then referred to a variety of issues. These included the need to make allowances for the age of the complainants at the time of the alleged offending, as well as the dynamics and circumstances of the complainants' family at that time. In developing this theme, the Judge referred to the fear expressed by two of the complainants that they would not be believed if they disclosed the offending to close family members. The Judge then traversed in considerable detail the circumstances in which the complainants disclosed the offending to persons who were either not close family members or on the periphery of the family.

[22] In this context the Judge also referred to an attempt that B had made to commit suicide. This led the Judge to observe:

[212] Another aspect of the events that we have heard about that require some explanation is [B's] suicide attempt. There doesn't seem to be any argument but that she made an attempt at suicide. That might well be a strong pointer to stress in her life. She would surely have had to be highly stressed to take such a drastic step, and the question really is, what was causing that

stress on the evidence before you? What could have caused the level of stress that would cause a girl of that age to take that step? Was it because she was trapped in a cycle of sexual abuse as she herself has claimed? Or was it because she felt unsafe with her mother, because her mother was hitting her as we heard from the defence witnesses? Or indeed, was it a combination of the two? Those are at least possibilities for you to consider. But I suggest to you an explanation for her suicide attempt may well be able to be found somewhere in the evidence.

[23] Finally, the Judge stressed the value of independent evidence given by witnesses who had no connection with the complainants and their family and contemporaneous records. He suggested that a careful assessment of such evidence may well provide the jury with a basis for evaluating the conflicting evidence they had heard about who was living at the various addresses where the offending was alleged to have occurred.

[24] Ms Vear contends that the jury would have viewed the Judge's observations as constituting a series of reasons why they should accept the complainants' evidence. She therefore says they lacked balance and are likely to have contributed to a miscarriage of justice. Ms Vear takes particular issue with the manner in which the Judge dealt with the issue of B's suicide attempt. She points out that the Crown only referred to this issue in passing in closing and the defence did not mention it at all.

[25] We acknowledge that it was unorthodox for the Judge to provide the jury with observations of this type at the end of his summing up after having already summarised the cases for the Crown and the defence. However, we do not regard anything the Judge said as endorsing or suggesting to the jury that they should accept the complainants' evidence. Rather, he was drawing the jury's attention to issues they may wish to consider when assessing the weight they should give to the complainants' evidence.

[26] The manner in which the Judge dealt with B's suicide attempt provides a useful example of this. In the passage set out above the Judge pointed out that they might find there were different possible explanations for why B may have attempted suicide. He then gave examples from the perspective of both the Crown and the defence. We see nothing objectionable in this and do not consider it lacked balance.

[27] The Judge's observations also need to be viewed in context. They came at the end of a very lengthy summing up, the transcript of which extends to 224 paragraphs. Earlier in the summing up the Judge had summarised the respective cases for the Crown and the defence when he went through the question trail he had prepared for each charge. He then gave a lengthy and detailed summary of both the Crown and the defence cases before making his concluding remarks. As we have already observed, Ms Vear takes no issue with these aspects of the summing up. We do not consider the Judge's closing remarks detracted from or affected the earlier summaries he had given of the Crown and defence cases.

The acquittal propensity evidence

[28] The second aspect of the challenge to the Judge's summing up relates to evidence given at the trial regarding the events that formed the basis of the charges on which Mr McCarthy had already been acquitted. The Crown relied on these as propensity evidence at the third and final trial. We do not know whether the evidence was admitted without objection or following pre-trial argument.

[29] A factual summary relating to three of the charges on which Mr McCarthy had been acquitted (Counts 2,7 and 11) was placed before the jury in an agreed statement of facts. Evidence relating to Count 11 also remained in complainant C's evidential interview that was played to the jury. The Judge referred briefly in his summing up to the events giving rise to a further charge (Count 10) that was not in the agreed statement of facts.⁸

[30] As a preliminary argument Ms Vear contends that the evidence relating to Count 11 should have been excluded because it did not comprise admissible propensity evidence. This evidence related to an incident in which Mr McCarthy allegedly touched C's buttocks when she sat next to him on a couch during the day. Ms Vear points out that this was different to the other offending, in which Mr McCarthy allegedly offended against the complainants at night after entering their bedrooms.

⁸ This is to be found in the final sentence of paragraph [79] of the summing up set out below at [32].

[31] We consider it is now too late to challenge the Crown's decision to adduce the evidence underpinning Count 11. In any event, we do not consider the evidence to be so dissimilar to the other alleged offending that it should have been excluded. Nor do we consider it could have caused unfair prejudice to Mr McCarthy in the overall context of the trial given the very minor role that it played. There is no risk that the evidence may have caused a miscarriage of justice.

[32] The Judge gave the jury the following direction about the acquittal propensity evidence in his summing up:

[79] Now obviously, ladies and gentlemen, we have heard in evidence some of the allegations that were made at the earlier trials including evidence relating to charges which resulted in verdicts of not guilty. One of those was an allegation of rape made by [B] and the accused was found not guilty. There was another allegation of sexual violation by digital penetration which resulted in a verdict of not guilty. Evidence was not given in this trial about that latter matter.

[80] It is very important that you understand, you are not being asked to retry those allegations. The accused has been acquitted on those charges and they are at an end. Your task is to decide the charges now before the Court on the evidence that you have before you.

[81] The allegations made in respect of all of those matters, including those on which the accused was acquitted, have been put before you for one purpose and one purpose only. That is to assist you in assessing the accuracy, the reliability, [and] the credibility, of the witnesses in this trial. That is because the Crown alleges that there is a pattern of behaviour in the evidence as a whole, which may help you to decide on the credibility of witnesses ...

[33] Ms Vear contends these directions were insufficient and that they created unfair prejudice to Mr McCarthy. However, this submission overlooks the fact that the Judge immediately went on to provide the jury with orthodox directions regarding the use they could make of all the propensity evidence that the Crown relied upon. Ms Vear does not take issue with these. We therefore do not consider there is any merit in this proposed ground of appeal.

The form of the indictment

[34] This ground of appeal arises out of the fact that Count 1 in the indictment was a representative charge alleging sexual violation by unlawful sexual connection against complainant A between 28 June 1997 and 31 December 2002 at Whakatāne.

[35] The Crown alleged that the offending giving rise to this charge occurred at three separate addresses, two in Whakatāne and one in Poroporo. Ms Vear says the charge should have been divided into three separate charges, each of which alleged offending at a particular address. She says the inclusion within a single charge of alleged offending at three different addresses created a risk that the jury were not unanimous that offending had occurred at any of the three addresses. She says the Judge ought to have dealt with this issue in his summing up and he failed to do so.

[36] We accept that the Crown should have divided Count 1 into three separate charges for the reason Ms Vear has advanced. This would have had the advantage at sentencing of allowing the Judge to discern the precise basis of the jury's verdict. We also agree that the Judge ought to have made it clear to the jury that they needed to be unanimous that Mr McCarthy had committed an offence at least one of the three addresses before they could find him guilty on Count 1.

[37] On the Crown's behalf Ms Ewing points out, however, that the prosecutor made it clear that the jury needed to be unanimous that offending had occurred at one of the addresses in the following passage of his closing address:

So in respect of count 1, which is [complainant A], it covers [the Whakatāne address] and Poroporo and it included one occasion at [A]'s mother's. It is a representative charge which means that you have to be satisfied that this happened at least once in order to find guilt and you could decide it just happened at [the Whakatāne address]. Because the charge just says "at Whakatāne". So you could decide, yes, it happened at [the Whakatāne address], we are not sure about Poroporo, we are not sure about [A]'s mother's but the fact that you found it happened at [the Whakatāne address] means it is guilty. You could decide it happened at two you could decide it happened at three, guilty. So if you decide you are not sure that it happened at all the answer is not guilty.

[38] Given the manner in which the Crown addressed the jury on this charge we think it unlikely that any miscarriage of justice has occurred as a result of the manner in which Count 1 was framed. Further, A gave evidence that the digital penetration occurred in the same way at each of the three addresses. We think it likely that the jury accepted her evidence on this point. There is no discernible logical basis for an argument that offending occurred at one address but not at the others.

Prejudicial evidence wrongly admitted

[39] Ms Vear contends that the Judge erred by permitting the Crown to adduce evidence that was irrelevant and unfairly prejudicial to Mr McCarthy.

Evidence given by Mr McCarthy's former partner

[40] Ms Vear contends that Mr McCarthy's former partner made several comments in her evidence that were both irrelevant and unfairly prejudicial. The most serious of these related to an incident that occurred one night in 2005 when they were living at Poroporo. She said she woke up when she heard the roller door to the children's bedroom being opened. She thought this was unusual and went into the bedroom to investigate a few minutes later. She found Mr McCarthy naked in the bedroom. He was holding a cushion over his private parts. When she asked him what he was doing there he told her he was getting a cushion. She said that she and Mr McCarthy normally slept with no clothes on.

[41] We accept that this evidence was not directly relevant to any charge that Mr McCarthy faced. However, it was relevant to the extent that it showed Mr McCarthy had a tendency to enter the children's bedroom at night, and the Crown alleged that offending occurred when he did so. We therefore consider it had probative value that outweighed any unfairly prejudicial effect. In any event the evidence formed a miniscule proportion of the overall evidence. It occupied less than a page of the lengthy trial transcript.

[42] Ms Vear contends that Mr McCarthy's former partner was also permitted to give evidence about other irrelevant and unfairly prejudicial matters. These included allegations that Mr McCarthy had rammed her car, that he had been unfaithful to her and had used drugs. She also said that he had driven the vehicle whilst intoxicated on several occasions whilst the children were in it. Ms Vear argues that the Judge did not intervene on any of these occasions to prevent this evidence being given.

[43] It is difficult to see the direct relevance to the charges of the evidence about which Ms Vear complains. However, Mr Gowing is a very experienced criminal advocate and would have been well aware of the key issues the jury were required to

consider. We have no doubt he would have objected to evidence being given if he had believed it would unfairly prejudice Mr McCarthy. The incidents that form the basis of this proposed ground of appeal may also be regarded as peripheral to the central issues the jury was required to consider at trial. We see nothing in them to suggest a miscarriage of justice may have occurred.

Incremental disclosure of opinion evidence

[44] Ms Vear points out that one of the central aspects of Mr McCarthy's defence was that B's evidence was undermined by the fact that she denied in her evidential interview that anal intercourse had occurred. She did not disclose that form of offending until she subsequently provided the police with a further written statement. The detective who arrested Mr McCarthy told the jury that incremental disclosure was not uncommon with complainants in sexual cases. He said in re-examination that he would be told all relevant information during the initial interview in "[v]ery, very few" cases. When asked to expand on this he said this would occur in just 30 to 40 per cent of cases. Ms Vear contends that opinion evidence led from a witness who was not an expert was clearly inadmissible. It also created the risk that the jury would use it to support B's credibility.

[45] We do not accept this submission. First, we do not accept that the detective was giving opinion evidence. Rather, he was telling the jury about his own experience in dealing with complainants. Secondly, the detective gave the evidence during re-examination. Mr Gowing had suggested during cross-examination that in the three and a half years the detective had been working in the area of sexual abuse he had never previously encountered a case in which incremental disclosure had occurred. The detective denied this and told Mr Gowing it had happened on multiple occasions. The prosecutor was clearly entitled to explore the issue further in re-examination. We see no merit in this proposed ground of appeal.

Evidence about B's suicide attempt

[46] As will already be apparent, B gave evidence that she had attempted to take her own life. This was also referred to by another Crown witness. The Judge then referred to the issue on two occasions in his summing up, one of which we have

already set out.⁹ Ms Vear contends that this was highly emotive evidence with marginal probative value. She therefore argues the Judge should have ruled the evidence inadmissible because of its unfairly prejudicial effect.

[47] This submission needs to be considered in light of the reason the evidence was led. B said that whilst she was in year 9 or 10 at school, while living with her grandmother, she nearly committed suicide because of what was happening. An older relative had visited her to find out why she had attempted to take her life. B told this person that she had tried to commit suicide because of Mr McCarthy raping and sodomising her. Ms Ewing submits it would have been artificial for the relative to have told the jury about B's disclosure without also setting out the context in which it occurred. We accept this submission.

[48] It follows that we are satisfied none of the proposed grounds of appeal against conviction establishes a risk that a miscarriage of justice may have occurred.

The proposed appeal against sentence

[49] As we have already observed, the Judge sentenced Mr McCarthy to 18 years' imprisonment and, on two of the charges, imposed a minimum term of imprisonment of nine years. The Judge reached the sentence by taking a starting point of 17 years' imprisonment for the offending against B. He added an uplift of one year to reflect the balance of the offending, noting that the uplift would have been 18 months but for restrictive bail conditions to which Mr McCarthy had been subject prior to trial and his good employment record.¹⁰ In selecting the starting point the Judge noted that offending involving the features of that against B would normally fall within rape band 4 identified in *R v AM (CA27/2009)*.¹¹ This calls for a starting point of 16 to 20 years' imprisonment.¹²

[50] Ms Vear contends that Mr McCarthy's offending was less serious than that generally found in cases falling within band 4 in *R v AM*. She points out that only one

⁹ See above at [22].

¹⁰ *R v McCarthy*, above n 1, at [18].

¹¹ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹² At [108]–[109].

of the complainants allege that Mr McCarthy had raped her and the offending occurred over a matter of months rather than years. Ms Vear contends that the overall offending warranted a starting point of around 15 to 16 years.

[51] The Judge was clearly correct to take the offending against B as the lead, or most serious, offending. The aggravating features of that offending included the fact that it involved numerous instances of digital penetration and one instance of anal intercourse over a two-year period. The offending then escalated to regular instances of rape and one involving oral sex over a period of approximately one year. B was aged between 10 and 13 years at the time of the offending and was living with Mr McCarthy when it occurred. The regularity of the offending meant there must have been a degree of premeditation on Mr McCarthy's part. It also involved vulnerability on B's part given her age and the fact that she was living with Mr McCarthy at the time. This fact meant that the offending involved a considerable breach of trust on the part of Mr McCarthy. It also meant that B found it difficult to disclose the offending to members of her family. Finally, the offending resulted in B suffering considerable emotional and psychological harm.

[52] We consider these factors placed the offending towards the bottom of rape band 4 identified in *R v AM*.¹³ As this Court noted in that case, the paradigm case of offending at the lower end of band 4 will involve repeated rapes of one or more family members over a period of years.¹⁴ It follows that a starting point of 17 years' imprisonment was not outside the available range. The uplift of 12 months to reflect the offending against the other two complainants is likewise well within range having regard to totality principles.

[53] We therefore see no merit in the proposed appeal against sentence.

Result

[54] The application for an extension of time within which to appeal against conviction and sentence is dismissed.

¹³ At [108].

¹⁴ At [109].

Solicitors:

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