IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA588/2021
[2023] NZCA 655

BETWEEN	B (CA588/2021) Appellant
AND	THE KING Respondent

Hearing:	2 November 2023
Court:	Miller, Brewer and Osborne JJ
Counsel:	S J Gray and S C Shao for Appellant Z R Hamill for Respondent
Judgment:	18 December 2023 at 1.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B Leave to adduce further evidence is granted.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] The appellant was convicted after a jury trial on seven charges involving indecencies against his stepdaughter, who was aged between 13 and 18 when the offences were said to have happened, in the years 2009 to 2014.

[2] There were six charges of indecent assault, which took the form of kissing or touching her legs or bottom, and one of doing an indecent act (watching her in the

shower) with intention to insult or offend. Three of the indecent assault charges were representative.

[3] This conviction appeal is now brought on four grounds:[1]

(a) Evidence of changes in the complainant's behaviour was led and used by the Crown as evidence that the offending had happened.

(b) A secret recording of a family meeting, in which the appellant appeared to accept some of the allegations, was led in evidence.

(c) The complainant associated the first offence with the 2009 Bathurst 1000 car race being on TV and the appellant was able to show that he was elsewhere when the race was run that year. The Crown is said to have met this evidence by asserting without an adequate evidential foundation that the complainant must have been watching a replay of the race.

(d) The complainant was not cross-examined about her claim that she had a job at the time of the first offence.

The narrative

[4] The appellant married the complainant's mother in 2002 and their family comprised five children they had together and two of her previous relationship. The complainant, the eldest, had lived with him since she was aged six.

[5] The first incident (charge 1) is said to have occurred on a weekend in 2009 when the Bathurst 1000 was playing on television. The complainant said that the appellant went into the bathroom and watched her while she showered and then took her towel off the towel rail and refused to hand it to her unless she turned to face him.

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[1] Allegations of trial counsel error were made initially but have been abandoned.

[6] Thereafter the Crown alleged a continuing course of conduct with multiple instances of offending. Some specific charges were identified by reference to context or the features of the offending.

[7] In 2011 the complainant told her best friend at the time that her stepfather had been abusing her. In September 2016 she sent the appellant text messages in which she appeared to confront him. A few days later there was an unplanned family meeting which included the appellant, the complainant and her partner, and the complainant's parents. Her father secretly recorded the meeting. The appellant denied the offending but took a conciliatory approach, stating that if the complainant was saying these things happened, then they happened.

[8] In July 2018 the complainant went to the police. The appellant was interviewed in July 2019. He generally denied the offending and gave innocent explanations for some of the allegations.

The trial

[9] The trial was held before Judge PR Connell and a jury beginning on 22 February 2021. The Crown called the complainant, the school friend to whom she first disclosed what was happening, the complainant's father, and the officer in charge of the case. The appellant gave evidence, as did his brother (who deposed that they were together on the weekend when Bathurst was run in 2009), and the complainant's mother.

[10] The appellant's defence was that he is an affectionate and engaged parent to all his children, including the complainant. Some of the incidents had not happened, or had not happened in the way she claimed, and others had been misinterpreted. There was evidence about the Bathurst weekend and evidence to the effect that the incidents in the bathroom could not have happened as described because of the location of the towel rail. He and the complainant's mother sought to account for the allegations by explaining that in her teen years the complainant became depressed and there was conflict between the complainant and the appellant about her boyfriend's behaviour.

[11] We deal with aspects of the closing addresses and summing up when addressing the grounds of appeal.

[12] The jury found the appellant guilty on all charges.

The appeal

[13] We have mentioned the grounds of appeal. We note that originally the appellant alleged trial counsel error. A waiver of privilege was given and affidavits were filed. That ground of appeal was abandoned before the hearing, so neither the appellant nor trial counsel gave evidence. To the limited extent that the appellant continues to question the conduct of trial counsel, we proceed on the usual basis that it must be shown there was no reasonable basis for counsel to act as he did.[2]

[14] The appeal was filed 13 working days out of time.[3] This delay was explained by the appellant as being a result of having to organise changing his home detention address, difficulties he was experiencing generally with Ara Poutama Aotearoa | the Department of Corrections, and COVID-19 restrictions. The Crown has not objected to the extension of time being granted. The delay is not significant and has been explained by the appellant. The extension of time is granted.

First ground of appeal: change in behaviour

[15] For the appellant, Ms Gray contended that the Crown relied on evidence from multiple witnesses of a dramatic change in the complainant's behaviour during her teenage years and invited the jury to find that the "obvious explanation" was that she had been abused by her stepfather. The change in behaviour took the form of her becoming depressed, not attending school, drinking and hanging out with the wrong crowd.

[16] It is said that this evidence ought not to have been led at all, and the error was exacerbated by the prosecutor's closing address, in which the complainant's behaviour was treated as evidence of the offending. The trial Judge gave no direction as to how

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2 *Lawson v R* [2012] NZCA 426 at [13].
3 Criminal Procedure Act 2011, s 231(2).

the evidence could be used and simply repeated the Crown's contentions when summarising the competing cases. Trial counsel did not object to the evidence being led. The Crown responds that the appellant put behavioural changes in issue in his police statement and in his case at trial. It does not accept that behavioural changes were used in a diagnostic way, and submits the issue was peripheral, and in the circumstances no direction was required.

[17] The Crown may have led evidence of behavioural changes because of what the appellant said in his statement to the police, but of course that evidence nonetheless formed part of the Crown case.

[18] There was not a great deal of evidence of behavioural changes. The complainant said in evidence in chief that the offending caused her to become "pretty depressed about life". Her friend said that sharing had lifted a weight off the complainant's shoulders but she continued to go off the rails a bit, hanging out with the wrong crowd, drinking and sneaking out. In his police interview the appellant explained some of his behaviour, such as telling her she was "sexy and beautiful" and saying they should "run away together", as attempts to boost her confidence because she was really down about herself and was having trouble at school. He gave similar explanations at the family meeting.

[19] As noted, the appellant sought to explain the allegations by referring to the complainant's troubles. He also emphasised that she had continued to seek him out, notably for driving lessons.

[20] It was put to him in cross-examination that he was the cause of the complainant's personality change. He denied it. At the end of his closing address the prosecutor suggested that:

> Members of the jury, I want to finish by pointing out that there's been evidence in this case from multiple sources that [the complainant's] performance at school and general demeanour changed over the course of her teenage years and the reason for that, the Crown says, is right in front of you. [The complainant] has very clearly said what happened to her during her teenage years. She did not put the blame on anybody else. She put it squarely what happened to her to one person. She was put in a situation that would have been unbelievably confusing and conflicting for a teenage girl. The man who played the role of father in a large part of her life had been doing some

> things to her that are clearly wrong but at the same time he was still fulfilling his role as her father providing for the family and undoubtedly doing some good things for everyone including [the complainant]. That is the obvious explanation the Crown says as to why [the complainant] changed during the course of her teenage years because she was having to deal with the conflict of a person in that position doing the things that she described to her.

[21] Defence counsel made no reference to the evidence in closing, nor did the Judge give any direction about it.

[22] Ms Gray relied on *R v G (CA414/03)*, in which an appeal succeeded in circumstances where the Crown had adduced extensive evidence from lay witnesses of a child's behaviour and invited the jury to infer that the behaviour was a "sharp indicator of sexual knowledge" which an adult must have imparted.[4] This Court doubted the admissibility of the evidence and observed that expert evidence might be necessary where the behaviour was outside the normal experience of a jury.[5]

[23] In *R v R* the Supreme Court surveyed the authorities and summarised the position: evidence of this kind may be admissible as part of the context, to respond to defence claims that the complainant's behaviour was inconsistent with offending, or to explain delayed complaint.[6] But care must be taken not to place too much reliance on evidence which has an element of self-boosting and may be explained by other causes. The trial judge should usually direct the jury not to jump from evidence of behavioural change to a conclusion that offending must explain it. This is particularly important where such evidence is front and centre in the trial.[7]

[24] The evidence of behavioural change was admissible in this case, as part of the context. It also responded to the appellant's case that the complainant had continued willingly to associate with him. But it did not assume prominence. Nor was it likely to lie beyond the jury's experience, so as to call for expert evidence. The alternative explanation — essentially, she was a teenager — was squarely before them.

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4 *R v G (CA414/03)*, 26 October 2004 at [25].

5 At [37]–[44].

6 *R v R* [2019] NZSC 87, [2019] 1 NZLR 693 at [45]–[46]. The admissibility of the evidence is governed by ss 7 and 8 of the Evidence Act 2006: it will be admissible if it is relevant and its probative value is not outweighed by its unfairly prejudicial effect.

7 At [47].

[25] We think a direction cautioning the jury that there might be other explanations for the complainant's behaviour was desirable but not essential in this case. The point was obvious. There is no real risk that the omission affected the outcome.

Second ground of appeal: the covert recording

[26] Ms Gray contended that the recorded conversation was unreliable and unfairly obtained and should have been ruled inadmissible. No objection was taken at trial, so there is no ruling from the trial Judge.

[27] The meeting followed texts from the complainant to the appellant stating that what he used to do to her at home was completely unacceptable and he was a creep. He disclosed the texts to the complainant's mother. A family meeting was organised by the complainant's father. Those who planned to attend were the complainant, her partner and her parents. Her father carried a hidden recording device which he intended to use to record the complainant's mother (with whom he has an acrimonious relationship). It was not intended that the appellant would attend. The complainant's mother called him into the meeting after it had begun.

[28] There was a confrontational tone initially, the complainant's father threatening to involve the police if they could not "sort this out", and promising that if they did sort it out "it goes nowhere else". The complainant put a number of accusations to the appellant but then had little more to say. The appellant denied indecencies but admitted that behaviour such as grabbing the complainant's bottom may have been inappropriate, in hindsight. He made apparent admissions and acknowledged she was a truthful person in what appeared to be an attempt to placate her:

> I, it's, I know and it's have to have happened ok, I agree with yah, I'm not calling you a liar it has to have happened.
>
> …
>
> … if I did it I did it okay? But I don't remember doing it.
>
> …
>
> I mean it, if I have done something I apologise profusely [complainant].
>
> …

> Put it this way [complainant], if you're saying it, it happened it happened okay?

[29] The appellant also offered a not very plausible explanation for his loss of memory; he is not a drug user himself but he may have been drugged by a friend who was a heavy user. As Ms Gray submitted, that account conveys the impression that he was clutching at straws.

[30] Counsel submitted that the appellant would have experienced pressure to participate in the meeting and he did so without preparation. He was confronted by four people. At trial he said he felt ambushed.

[31] We do not find substance in this ground of appeal. The appellant knew in advance of the meeting and the allegations. He went on the defence, telling the complainant's mother, who arranged the meeting. The appellant chose to participate. The evidence was offered by the Crown, so it engaged ss 28 and 30 of the Evidence Act 2006, but it is not suggested that the recording by the complainant's father, a non-state actor, was unlawful. Nor was the recording unfair; the appellant did not know of it, but he did know that the others were witnesses to what he was saying and knew at the outset that a complaint might be made to the police.

[32] Turning to reliability, we accept there was an element of threat and inducement at the outset and the appellant undoubtedly experienced pressure to account for himself. But there is no reason to think the pressure was so strong as to affect the reliability of what he said. At the outset he went on the front foot, expressing disappointment that others who had known of the complainant's allegations had not spoken to him earlier. As the meeting progressed he was not interrogated but rather gave a long account in which he sought to minimise his conduct and to explain his lack of memory. He said that if he did it then he apologised. We are satisfied that the circumstances were not likely to affect the reliability of what he said.[8]

[33] In our view the real question is one of substance: what weight ought to be attached to the appellant's statements given he was plainly trying both to deny doing

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[8] As is required by s 28(2) of the Evidence Act: *R v Nooroa* [2023] NZCA 96 at [24]–[27] and [32]–[37].

anything wrong and to placate the complainant? This was of course a question for the jury. The issue was squarely before them. Trial counsel contended that the appellant was rambling but never once admitted to any indecency. The Judge fairly summed up the defence case on the point.

Third ground of appeal: the Bathurst screening

[34] The complainant stated in her evidence in chief that the first incident happened in 2009, "which I remember because the Bathurst was on … the TV". That claim had also been made in her complaint to the police, the record of which had been disclosed to the defence. The prosecutor did not ask her whether the race was screening live or was a replay.

[35] The appellant offered an alibi in response, adducing evidence to show that he was not at home on the weekend of 10 and 11 October when the race was played in 2009. Defence counsel put this to the complainant, who simply responded that she remembered Bathurst being on.

[36] In the appellant's cross-examination the prosecutor established that Bathurst is a four-day event, including qualifying races on the Thursday and Friday. He suggested that the screening which the complainant spoke of might have been a replay. The appellant accepted it was possible that the race was replayed, in the following exchange:

> Q: So the 11th of October 2009 is not the only occasion you've watched, or you've said to have been watching V8s on TV. You've watched V8s on many occasions haven't you?
>
> A: Yes.
>
> Q: And into the evening?
>
> A: Ah, not sure, I think Bathurst is annual – it usually goes late into the evening from memory, but it could be on.
>
> Q: And replays?
>
> A: Pardon?
>
> Q: Replays?
>
> A: Replays.

Q: It's not only on live?

A: Oh, right.

Q: V8 events are replayed on TV?

A: Correct.

Q: Including Bathurst?

A: Possibly, I'm not 100% sure on that.

[37] Ms Gray contended that the questioning was unfair, because the prosecutor had no basis for suggesting the race might have been replayed. The Crown led no evidence about screenings of the race. She also contended that the prosecutor undermined the defence by suggesting in closing that what the complainant recalled may have been a replay.

[38] The Judge directed the jury that they must acquit on charge 1 if they were left with a reasonable doubt that the appellant was at home when the complainant was in the shower. He summarised the Crown case as being that the alibi was not watertight.

[39] After the trial, the appellant engaged a private investigator who deposed that the race was played live on 10 and 11 October 2009 on Channel Three. Those were the dates for which the appellant offered an alibi. Channel Three had not been able to locate any repeats. Ms Gray contended that had the jury known this, they must have entertained doubt as to the complainant's overall reliability and credibility. We admit this evidence.

[40] The Crown responded with an affidavit from a police officer showing that the race was replayed on free-to-air television at 4 pm on 18 October, the following weekend. We also admit this evidence. For the Crown, Ms Hamill pointed out that the complainant thought the incident happened when she returned from a weekend job where she washed dishes and she might have been showering after work.

[41] There was nothing unfair about the prosecutor's questions of the appellant. Counsel merely inquired whether the race might have been replayed. Had the appellant denied it the matter would have rested there. The Judge presumably would have directed the jury that counsel's question was not evidence. Having regard to the

evidence now adduced, we accept Ms Hamill's submission that the alibi evidence does not materially advance the appellant's case. There is no reason to think the jury verdict would have differed had they known the race was replayed on the following weekend.

Fourth ground of appeal: failure to cross-examine

[42] Ms Gray contended that trial counsel failed to cross-examine the complainant on a detail she provided about charge 1. She said, as noted above, that it occurred when she had started working at a restaurant, washing dishes. She was aged 13 in 2009. The appellant says that counsel was specifically instructed to put it to her that she did not commence employment until she was aged 16. Counsel did not do so, but he did lead the evidence from the complainant's mother on the point. That the complainant was not challenged on this was met with criticism from the prosecutor.

[43] We have noted that the appellant does not now allege counsel error, but he previously did so and affidavits were filed. Trial counsel says he was not instructed to put the question to the complainant. In the circumstances, we accept that evidence. However, the point clearly was part of the defence case and, that being so, it ought to have been put to the complainant, who had deposed that she knew the incident happened after she had started working.

[44] As Ms Gray acknowledged, the point is not enough in itself to amount to a miscarriage of justice. It concerns a collateral issue. The conflict of evidence between the complainant and her mother on the point was clearly there for the jury to assess. It is unlikely that cross-examination of the complainant would have elicited anything new. The Judge did not criticise defence counsel on this point or direct the jury to bear in mind that the complainant had not been challenged about her employment history.

Conclusions

[45] None of the grounds of appeal have been made out. We are not persuaded that the jury verdicts are unsafe. They were all available to a jury who, like the Judge (who remarked on it at sentencing), must have found the complainant a credible and reliable witness.

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

[47] Leave to adduce further evidence is granted.

[48] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent