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

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˝ ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING ˝ PARTICULARS OF WITNESSES REFERRED TO IN THE JUDGMENT ˝ AS B AND C.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA477/04

THE QUEEN

v

WIREMU TE URU KOWHAI NAPIA

Hearing: 7 March 2006

Court: Glazebrook, Wild and Venning JJ

Counsel: P V Paino for Appellant
D J Boldt for Crown

Judgment: 16 March 2006

JUDGMENT OF THE COURT

A The appeal, both against conviction and against sentence, is dismissed.

B Order prohibiting publication of names or identifying particulars of witnesses referred to in the judgment as B and C.

REASONS

(Given by Wild J)

Introduction

[1] By notice filed on 6 December 2004 the appellant appeals against both his conviction and sentence.

[2] Following a trial in the District Court at Palmerston North from 21 to 25 June the appellant was convicted of sexual violation and intentionally causing grievous bodily harm. At the start of his trial he had pleaded guilty to a third and lesser charge, of wounding with intent to injure. The trial Judge, Judge Clapham, declined sentencing jurisdiction. In the High Court at Palmerston North on 5 November 2004 MacKenzie J sentenced the appellant on all three charges to preventive detention and imposed a minimum period of imprisonment of 12 years.

Factual background

[3] The three charges arose out of events which occurred on 6 May 2003. The appellant and his de facto partner of some three years (A), had been at a party at a car wrecker's premises in Levin. A, who was getting drunk, was beginning to socialise intimately with other men at the party. The appellant became agitated about this and, when A went to leave the party with two men to buy some cigarettes, he followed her to their car, pushed the other two men aside, put A in the car and drove her home.

[4] In the early hours of the following morning, 7 May 2003, A arrived with the appellant at the Emergency Department at Palmerston North Hospital. She had a wound to her left eyebrow and was bleeding from her genital area. She refused to allow medical staff properly to examine her and told doctors she thought she might have miscarried. Following a test she was advised she was not pregnant. She discharged herself from the hospital later that day, having refused to allow the Police to become involved.

[5] Two days later, on the afternoon of 9 May, A came back to the Emergency Department at the Hospital. She complained of severe abdominal pain. Upon examination she was found to have a high temperature, low blood pressure and signs

of advanced, severe, intra-abdominal infection. Further examination revealed three stab wounds to her vagina, one of which had penetrated the vaginal wall into the abdominal cavity and gone through her pelvic muscles, perforating her bladder. The surgeon who attended these wounds estimated that they were two days old.

[6] A was admitted to Palmerston North Hospital and remained there for 15 days, most of it under intensive care. During the time she was in hospital A gave several accounts, some of them inconsistent, as to how she had sustained these injuries. The first of these accounts, given to a nurse, was that her partner Wiremu had sexually assaulted her and inflicted these injuries to her. Her initial account to the Police was that her injuries had been caused by gang members at the party in Levin. Later she told a Detective that the injuries had occurred at home and that it had to be the appellant who had caused them as he was the only person at home with her that night. She nonetheless refused to make a statement to the Police.

[7] The Crown called expert medical evidence as to the nature and likely cause of the injuries A had when she came to the Palmerston North Hospital. The surgeon expressed the view that the wound to her forehead, which had fractured a quite strong part of the skull, would have required force akin to that which would be exerted upon someone thrown forward into the dashboard of a car in a motor accident, or by the swing of a golf club. The surgeon's opinion was that the wounds to A's vagina were stabbing wounds, most likely inflicted with a screwdriver by a right-handed person. As with the wound to A's forehead, the surgeon's view was that the stabbing wounds were inflicted with considerable force.

[8] There was also evidence that a scene examination of the house in which the appellant and A had been living together showed large amounts of blood staining, including the blood of the appellant as well as A. There was a significant amount of A's blood in the bathroom area and on clothing of hers found in the bath, although that clothing had been rinsed. Amongst the clothing found in the bath was a pair of female underwear with three holes, said by the examining expert to be consistent with the screwdriver attack suggested by the medical evidence. When A first arrived at the hospital on 7 May, she was not wearing underwear.

The Crown case

[9] The Crown case was that the appellant had become jealous and very angry about A's behaviour at the Levin party and taken her home. Once home he had set upon her in a furious rage inflicting the blow that dented in her skull and stabbing her in the vagina with a screwdriver or similar instrument. Only when her profuse bleeding and pain brought home to him how seriously he had injured her did he take her to hospital, and he had been instrumental in her early discharge.

The defence case

[10] The appellant gave evidence at his trial. He said that it was A who was in a haste to leave the Levin party, and that he had taken her home. Once home, he and A had indulged in sexual foreplay. He said that A was sitting on a chair having taken her jeans off and he was kneeling in front of her stimulating her by touching her vagina with his fingers and mouth. He said that A suddenly lurched forward, striking and injuring him on the head, perhaps with her teeth, and that they had fallen back together on to the floor, he on top of her. He said that in the process of falling back on to the floor he dislocated his right shoulder and was in extreme pain as a result until he was able "pretty much instantaneously" to put his shoulder back in. He said that the wound to A's forehead was caused when he was unable to discard in time a cup that he was holding in his right hand which contained ice and a spoon which he had because A was drinking whiskey. He explained that that was why he had pleaded guilty to the charge of wounding A with intent to injure her. The appellant said he then managed to get off A who got up, "abusive because I was on top of her like that". His next recollection was that she was leaning against the kitchen bench either deliberately breaking things in the kitchen or knocking them off the kitchen bench on to the floor, and swearing and yelling. He said that Diane Wright, one of the people who had earlier been at the Levin party, then arrived outside in a car. He went outside and spoke to her and when he went back inside the house he found A in the bathroom, crouching down in the shower cabinet, bleeding. He said that that was when he first noticed the gash on her head. He said she was very faint and he went "into panic mode" and took her to the hospital.

[11] Under cross-examination, the appellant accepted that he had told the Police that he thought A had got the cut on her forehead when she fell on something, but he was not sure what. He accepted that he was not suggesting A's head injury had occurred at the party in Levin. He said that A was fine at the time his intimacy with her started. Asked about the wounds to A's vagina he said "possibly she done it to herself" and "I can only assume". He said he was not suggesting that it was somebody at the Levin party who had caused those vaginal injuries. He agreed that three Crown witnesses, including Diane Wright, had all said they did not notice anything wrong with A at the Levin party. Asked again to accept that those injuries clearly did not happen at the party he answered "I clearly can't tell you that. That it did or it didn't". The appellant agreed that he and A were the only two people in their home that night after arriving home from the Levin party. He was then asked whether he was suggesting that the consensual sexual activity he had described took place after the "excruciatingly painful" vaginal wounds were inflicted. He answered that he was just telling the events as they were. It was then put to him that he would not have had oral sex with A if she was bleeding from her genital area. He said, variously, that he did not know because he did not take notice of those sort of things, that she was not bleeding at the time and that, if she had been, possibly he would have been aware of it.

[12] Summing up to the jury, Judge Clapham said that the essence of the defence case was that, on the evidence, the jury must be left in doubt about the accused's guilt and should be acquitted. There was an absence of reliable evidence as to what happened at the party in Levin and the events at that venue may be critical. Given that gap in the evidence, the defence said the jury could not exclude the possibility of A's injuries having been inflicted at the party in Levin and, because of that, the jury should find him not guilty.

The conviction appeal

[13] Eight grounds of appeal were advanced. Although some were not pressed, none was formally abandoned. We therefore deal in turn with each of the grounds.

Ground 1: Lawyer previously acted

[14] This ground was that Mr Harvey ought not to have been permitted to prosecute in the appellant's trial, and that Mr Harvey's appearance affected the appellant's ability to give evidence properly.

[15] On this and some of the other grounds, we heard evidence from the appellant, from Mr Harvey and from both the appellant's trial "co-counsel", Messrs Winter and Cameron. Those witnesses all confirmed the contents of affidavits they had earlier sworn, gave further oral evidence, and were cross-examined.

[16] We think it unnecessary to summarise the evidence given by these witnesses. It suffices to record that, on the evidence we heard, we find that what occurred in relation to Mr Harvey was as follows:

(a) When the appellant first appeared in the Palmerston North District Court on 21 May 2003, Mr Harvey saw him in the cells as duty solicitor. Mr Harvey did three things that day for the appellant. First, he assisted the appellant to complete an application for criminal legal aid. The appellant was unsure who he wished to nominate to represent him. Either then, or in the course of a subsequent telephone call from the appellant, the appellant asked Mr Harvey whether Mr Harvey would act for the appellant. Mr Harvey declined. Mr Harvey's reason (as he explained it in evidence to us, but probably not to the appellant at the time) was a convention that a duty solicitor not accept assignment, coupled with some difficulties over certain assignments that had arisen in the Manawatu at the time. Second, Mr Harvey advised the appellant that it would be preferable to defer any application for bail until he could be represented by counsel assigned to him. Third, having obtained the appellant's agreement to that course, Mr Harvey appeared and consented to a remand in custody to 27 May 2003 to give time for legal representation for the appellant to be arranged.

(b) Because the appellant was unsure about legal representation, Mr Harvey retained the appellant's incomplete legal aid application. He either gave the appellant his card or gave him his telephone number, on the understanding that the appellant was to telephone Mr Harvey and tell him who he wished to represent him.

(c) A few days later, probably on either 25 or 26 March, the appellant rang Mr Harvey and advised him that he wished Mike Behrens (Mr M J Behrens QC) to represent him.

(d) Mr Harvey completed the legal aid application accordingly and sent it off to the Legal Services Agency. The application is date stamped as having been received by the Legal Services Agency at its Wellington office on 27 May 2003.

(e) Anticipating that legal aid funded representation for the appellant would not have been finalised by 27 May, Mr Harvey appeared for the appellant on 27 May. Although he did not do so strictly in a duty solicitor capacity, that was effectively again the capacity in which he appeared. The appellant was further remanded in custody to 6 June. Although the Court record does not record that that remand was by consent, that must have been the position because the remand was for longer than the seven day maximum remand period which otherwise would have applied. The Court record for 27 May records "RWOR 6.6.03 RIC". We understand this to mean "remanded without representation" and "remanded in custody (to 6.6.03)".

(f) On 6 June 2003 Mr Behrens QC, having accepted an assignment, appeared for the appellant and continued to do so until fresh counsel took over upon Mr Behrens' appointment to the District Court Bench on 12 February 2004.

(g) The appellant was not aware that Mr Harvey was prosecuting until his trial began before Judge Clapham on 21 June 2004. In particular, the appellant did not become aware of Mr Harvey's involvement at the

hearing of a s 344A Crimes Act 1961 application before Judge Rea on 11 May 2004. Although the appellant was in the courthouse during that hearing, he was in the cells and not in the courtroom. We do not need to decide whether it was the appellant's own choice to remain in the cells.

(h) Upon becoming aware at the start of his trial that Mr Harvey was prosecuting (he was appearing with Mr Holt), the appellant raised his concern with Mr Cameron. He did this on the first day of the trial, probably at the morning adjournment after the jury had been empanelled. The appellant explained to Mr Cameron the reason for his concern. The appellant did not express concern about Mr Harvey's appearance to Mr Winter during the trial. The first Mr Winter knew of that concern was on the morning the appellant was sentenced, when the appellant raised the matter with MacKenzie J, as outlined in [17] below.

(i) Mr Cameron did not take action in response to the appellant's concern, because he considered there was no basis for the appellant's concern and no proper ground to object to Mr Harvey appearing.

[17] When the appellant came before MacKenzie J in the High Court at Palmerston North on 5 November 2004 for sentence, he again raised the issue of Mr Harvey appearing for the Crown. MacKenzie J gave the following oral ruling:

> [1] In the course of submissions in relation to sentencing this morning, Mr Napia raised the issue that Mr Harvey, who appears for the Crown, had previously acted for him in relation to this matter and objected to his acting for the Crown.
>
> [2] In court from which the public was excluded but in the presence of the prisoner, I asked Mr Harvey to explain the position. He has explained that he saw the prisoner when he first appeared, as duty solicitor. He asked him whether he had counsel, and Mr Napia advised that at that stage he did not. Mr Harvey assisted with the completion of the legal aid application and subsequently received instructions that Mr Napia wished to instruct Mr Behrens, QC, as he then was, to act for him in the matter. That was the full extent of Mr Harvey's involvement at that stage. Mr Harvey also indicates that when he was instructed as junior counsel for the Crown in relation to the trial he took the precaution, which was a most commendable

> one, although it may in fact not have been strictly necessary, of raising the matter with Mr Behrens, to see whether there would be any objection to that course.
>
> [3] I am satisfied that Mr Harvey has acted properly throughout and that there is no basis on which it could be suggested that he is not able to fairly and impartially represent the Crown on this matter. So the objection to Mr Harvey's appearing for the Crown is disallowed.

[18] There was no dispute as to the legal position, which is well settled. Essentially, a legal practitioner may not act against a former client if there exists a real or appreciable risk of disclosure of information the client has imparted to the practitioner in confidence. In short, the practitioner must not act if there exists a real risk of a breach of the special fiduciary relationship which exists between a client and his lawyer: *Russell McVeagh McKenzie Bartleet v Tower Corporation* [1998] 3 NZLR 641 (CA); *Black v Taylor* [1993] 3 NZLR 403 (CA); r 1.05 of the New Zealand Law Society's Rules of Professional Conduct for Barristers and Solicitors.

[19] For two interrelated reasons we find ground 1 of the conviction appeal not to be made out. The first reason is that we are satisfied that the appellant did not impart any confidential information to Mr Harvey. Given that Mr Harvey, acting in a duty solicitor capacity, only assisted the appellant in the three ways we identify in [16](a) above, we cannot see what confidential disclosures the appellant might have made to Mr Harvey. When asked about this in evidence, the appellant was not able to suggest anything confidential he told Mr Harvey.

[20] Our second reason is that we are satisfied that no detriment to the appellant occurred as a result of Mr Harvey subsequently prosecuting, and that no reasonable objection could be taken by the appellant to Mr Harvey appearing. Those two aspects are the focus of r 1.05 in the Rules of Professional Conduct which bound Mr Harvey. In his evidence the appellant suggested that Mr Harvey's presence as a prosecutor, particularly in cross-examining the appellant, affected his performance and ability to give evidence. When asked about this, the appellant was unable to elaborate or to identify any particular respect(s) in which he had experienced difficulty or felt hampered or disadvantaged while giving his evidence. Our view is that the appellant's difficulties when giving evidence and answering the questions Mr Harvey put to him stemmed from the inherent improbability that his account of

events was truthful. The difficulties the appellant faced in trying to avert the inevitable conclusion that it was he who had inflicted the injuries on A will be apparent from [10] and [11] above.

[21] Mr Boldt initially took the point that the appellant had waived his right to object to Mr Harvey's appearance. This waiver point fell away, because it was based on an alleged failure by the appellant to object to Mr Harvey's appearance at the first opportunity, which Mr Boldt contended was the hearing before Judge Rea on 11 May 2004. We have held that the appellant was not in Court for that hearing and was not aware that Mr Harvey was appearing for the Crown.

[22] Ground 1 on appeal fails.

Ground 2: Similar fact evidence

[23] Although originally a challenge to the admission of all the similar fact evidence given by two previous partners of the appellant, whom we will call B and C, this ground was narrowed to challenge the extent of their evidence.

[24] In the face of the appellant's denial that it was he who inflicted the head and vaginal injuries on A, the Crown called at trial B and C to give evidence of the violence that the appellant had inflicted on them during their relationships with him.

[25] C gave evidence of an occasion in late 1988 or early 1989 when, having accused her of playing around, the appellant had poured a jug of boiling water over her and refused to allow her to go to hospital until much later. She gave evidence of a further occasion, in March 1989, when the appellant had again accused her of sleeping around, then punched her in the face, stabbed her twice with a knife and stood over her with a knife in each hand threatening to kill her. Her evidence was that this attack had continued the following day, with the appellant punching her repeatedly, stabbing her, this time in the side of the face, and hitting her with a wire cord and a towel rack.

[26] B's evidence was of an increasingly violent relationship with the appellant lasting, off and on, for some 11 years. She said that the appellant was eventually beating her every couple of weeks, and would accuse her of sleeping around. The violence culminated in an incident at Hastings when the appellant broke a mop in half and tried to stab her in the head with the broken handle. She described the numerous injuries that she sustained during the relationship, including numerous scars to her head and permanent partial loss of vision.

[27] As this Court acknowledged in *R v Taunoa* CA494/04 13 April 2005 this area of the law of evidence is probably overdue for definitive guidance to trial Judges from this Court or the Supreme Court. A factor relevant to the timing of such guidance is the Evidence Bill which, if enacted, will codify this and most other areas of the law of evidence. The provisions (cls 36 - 39) relating to similar fact evidence appear in the Bill under the heading "Evidence of Propensity". Meantime, the guiding principles remain those laid down in *R v M* [1999] 1 NZLR 315 (CA); *R v Mokaraka* [2002] 1 NZLR 793 (CA) and *R v Holtz* [2003] 1 NZLR 667 (CA). In *Taunoa* this Court said:

> [13] … We think the test aptly summarised by McLachlin J, writing for the five judge majority in *R v B (C.R.)* [1990] 1 SCR 717 at 732:
>
> > … evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

[28] Any requirement that may previously have existed for a "striking similarity" between the incident in question and the allegedly similar incident has given way to admissibility of evidence which is probative of facts in issue, and which is not illegitimately prejudicial to the accused. Evidence which does no more than establish a general or unrelated criminal propensity on the part of the accused falls squarely into the category of illegitimately prejudicial evidence. Determining admissibility requires a weighing, in the circumstances of the particular case, of the probative value of the evidence sought to be admitted against its potential prejudice. This exercise recognises that the probative value and the prejudice are two sides of the same coin.

[29] Ultimately, Mr Paino accepted that he could not pursue his objection to the evidence we have summarised in [25] and [26] above. The Crown case here was that the appellant thought A had acted flirtatiously at the party in Levin, that as a result he had become jealous and very angry and, once home, had used a weapon or weapons to inflict the head and vaginal injuries on A. That was the pattern of conduct disclosed by the evidence of B and C: a belief on the appellant's part that his partner was "sleeping around", resulting jealousy, anger, and the inflicting of injuries, often using weapons.

[30] Mr Paino limited his challenge under this second ground to evidence which he submitted was not of similar incidents. Three examples of the evidence he took exception to are:

(a) Evidence of B that the appellant had beaten her up after reacting badly to her saying that she wanted to stay at a friend's house as she had not met his mother before.

(b) Evidence by B that the appellant had struck her with a rear vision mirror in a fight in a motor vehicle which had no background of drinking, or argument or jealousy.

(c) C's evidence that the appellant had on one occasion hit her with a towel rack and a wire cord. She said that during this incident "he was accusing (me) of sleeping around".

[31] We hold firmly against this ground of appeal. We regard all the evidence given by B and C as well within the currently permissible bounds of similar fact evidence. The Crown case was that an incident which was really insignificant or petty, had caused the appellant to become very angry and then violent towards A, and that he had used weapons seriously to injure her. The appellant's alleged conduct could broadly be described as obsessively possessive and controlling. The appellant denied that. The evidence of B and C was of similar obsessively possessive conduct culminating in anger and violence, in the same sort of domestic context. It was therefore probative of facts in issue in the appellant's trial.

[32] Ground 2 on appeal fails.

Ground 3: Other prejudicial or irrelevant evidence

[33] This ground challenged evidence given by B and C, and by three Police Officers, on the basis that it was not at all similar fact evidence.

[34] For example, evidence by B that the appellant "was committing crimes" and that the appellant was on "a rehab after care plan … and never met any of those obligations" was challenged.

[35] Mr Paino took particular exception to the evidence of three Police Officers which was read to the jury by consent during a break in the cross-examination of B. The first two Police Officers, both Constables, described attending a domestic dispute in B's home in Flaxmere in the early hours of 5 October 2000 (this was the incident we have summarised in [26] above). The two Police Officers gave evidence of arresting the appellant for breach of a protection order, of his struggling and kicking out both before and after being handcuffed and of his being abusive and uncooperative with the Police after arriving at the Police Station. The third Police Officer, a Sergeant of Police and the Police Prosecutor at Napier, gave evidence of a guilty plea entered by the appellant in the Napier District Court on 24 November 2000 to a charge of male assaults female and breach of a protection order, and read out the Police summary of facts.

[36] We deprecate the calling of this evidence by the Crown. It invites the very sort of objection Mr Paino now raises, and imperils the convictions entered at the end of the appellant's trial. This evidence was not probative of facts in issue in the trial. It was therefore not admissible. It fell squarely within the category of illegitimately prejudicial evidence to which we have referred. As B had given a first hand account of the incident on 5 October 2000 to which the Police had been called, evidence from the Police prosecutor in the form of the Police summary of facts of that incident was both inadmissible and unnecessary. As Mr Paino pointed out, the appellant had pleaded guilty to the charge, not to the summary of facts, although he appears not to have contested it. We are surprised that the defence did not object to

the adducing of this evidence. Even in the absence of such objection by defence counsel, we think the trial Judge ought to have ruled this evidence out.

[37] Mr Paino's challenge to the admissibility of this evidence is wholly justified. But its admission at the appellant's trial undoubtedly did not result in a miscarriage of justice. In the face of what can only be described as an overwhelmingly strong case against the appellant, this evidence was peripheral and insignificant. Realistically, it cannot be suggested that this evidence resulted in a miscarriage of justice.

[38] Mr Paino drew attention to the lack of any warning or guidance by the Judge in summing up to the jury about how to treat this evidence. However, Mr Paino accepted that comment on this evidence by the Judge in summing up may have been counterproductive, serving only to remind the jury of evidence which ought never to have been led. As we have said, the Judge ought to have intervened and ruled out this evidence or, at the very least, have directed the jury, at the time the evidence was called, to disregard it altogether. Ultimately, we are satisfied that the lack of any warning or guidance by the Judge in summing up to the jury as to how to treat this evidence did not result in a miscarriage of justice.

[39] Ground 3 fails.

Ground 5: Evidence of the psychologist, Ms Anne Raethel

Ground 6: Conflicting recent complaint evidence

[40] These two grounds are related and need to be considered together.

[41] The Crown called evidence of the inconsistent accounts A gave as to how she had sustained her injuries. These are the accounts we have summarised in [6] above. Although his written submissions indicated a challenge to the admissibility of these complaints, save presumably the first, Mr Paino did not pursue this challenge. He accepted the Crown submission that this evidence was probably helpful to the appellant, and certainly did him no harm. Mr Paino did not take issue with the

Crown's submission that, if it had not placed before the jury a complete picture of these inconsistent accounts, then it was likely the defence would have done so.

[42] That left ground 5 which Mr Paino narrowed to a challenge to the highlighted portion of this part of Ms Raethel's evidence:

> Q. Now Mrs Raethel as I believe you are aware and as we have heard in evidence in Trial, we have had evidence that shortly after this event A gave a series of inconsistent accounts to both medical personnel and Police officers or a Police officer. Is that a phenomenon in terms of battered women syndrome that you can help us with?
>
> A. It's a phenomenon in terms of battered women syndrome and its also somewhat unique to A as well because ***she genuinely does have some periods of forgetfulness***, some areas that she can't remember.

[43] Mr Paino submitted that the highlighted words are an assessment by Ms Raethel of A's credibility which she should not have been permitted to give. Whether or not A's forgetfulness was genuine was for the jury to determine.

[44] We do not agree. Although Ms Raethel could better have expressed her answer, we think it was clearly an expression of her opinion based on her interview with A. Based on that interview, Ms Raethel was entitled to offer her view that there were periods or events that Ms Raethel could not recall, and to express an opinion that these "periods of forgetfulness" were genuine rather than contrived. The general tenor of the passage we have set out is unobjectionable: it describes A's inability to recall events and expresses the view that this inability is consistent with battered women syndrome ("BWS"): *R v Guthrie* (1997) 15 CRNZ 67 (CA) is authority that expert evidence about BWS is admissible, as is expert opinion that the complainant is suffering from the syndrome. When placed in its context in the passage of evidence we have set out, we regard the words objected to as not significantly prejudicial to the appellant. Certainly, we cannot regard their admission in evidence as resulting in a miscarriage of justice.

[45] Ground 6 was not pursued and ground 5 fails.

Ground 7: Failure to cross-examine on letters

[46] Following the events of May 2003, A wrote three letters. One is a sworn statement addressed "to whom it may concern", the second is similarly addressed, but is in the form of a letter, and the third is a personal letter to the appellant. Only the third is dated, "Monday 13th".

[47] We heard evidence from the appellant and his trial counsel, particularly Mr Winter, about these letters. On the basis of that evidence we find:

(a) The appellant gave these letters to Messrs Cameron and Winter for the purposes of his trial. They had previously been in Mr Behrens' hands for the same purpose.

(b) The appellant discussed these letters with Mr Winter, who was to cross-examine A. The appellant told Mr Winter that they would be useful in cross-examining A because they showed that she had changed her story: what she said in the letters was different from what she said in her evidence. The way in which the appellant put this to us in his evidence suggested more a personal need to know and understand why A had withdrawn her previous support of him, than any forensic gain from putting the letters to her. His relevant evidence was:

> Q. What does it mean to have them produced, in a Court case what does it mean to have letters produced?
>
> A. I expected them to be produced to Francine, to come to some sort of understanding as to why her present, her previous support of me had changed.
>
> Q. Do you understand when letters get produced in a Court case where there's a jury the jury gets to take the letters out with them when they deliberate? They would have those letters with them while deciding the verdict?
>
> A. I understand that now.
>
> Q. Did you understand that at the time?

> A. The sole purpose for those letters was to be produced as cross-examination to Francine. Because I needed to know.

(c) The appellant did not instruct Mr Winter that he wanted him to put the letters or their contents to A, or to have her produce them in evidence. The use which Mr Winter made of the letters in the course of cross-examining A was left by the appellant to Mr Winter's professional judgment. Mr Winter's evidence on this point was:

> … if Mr Napia had given me that express instruction (to have those letters produced) I would certainly have advised him in the strongest terms against having the letters produced and I would have either generated a file note myself or had Mr Cameron do so.

(d) Mr Winter's view was that little if anything was to be gained by introducing the letters or their contents in evidence. There had already been medical evidence suggesting that A's explanations in the letters as to how her injuries had occurred simply could not be correct. On the other hand, use of the letters Mr Winter considered was "at best … extremely dangerous to Mr Napia's case at that stage of the proceedings" (Mr Winter's words) and had the potential seriously to prejudice the appellant's defence.

(e) It was for those reasons that Mr Winter decided not to make use of the letters in defending the appellant at his trial.

[48] Faced with this evidence, Mr Paino very fairly conceded that he could not pursue this ground. He accepted that a judgment call was required of Mr Winter, and that Mr Winter had made that call and given an entirely reasonable explanation for his decision not to use the letters.

[49] We add that the point of putting the letters in could only have been to demonstrate inconsistencies in A's account of the critical events. But that point had largely been achieved because there was already considerable evidence of those inconsistencies: we refer to the accounts we have summarised in [6] above.

[50] Ground 7, which ultimately was all but abandoned, also fails.

Ground 8: Witness not located

[51] The witness in question is Darcy Peter Courtney, who was mentioned many times in the evidence at the appellant's trial. He was at the party in Levin. The appellant stated that he had at one stage sat in a car outside the party venue with Mr Courtney.

[52] Mr Courtney could not be located to give evidence at the trial. Mr Paino advised us that he still could not be located. Mr Paino was thus unable to take this ground any further. We add that it was not explained to us what relevant evidence Mr Courtney could give. He was not at the house at the relevant time, and could at best only have given background evidence. We accordingly dismiss this last ground.

Appeal against sentence

[53] Mr Paino accepted that there was little he could say in support of the sentence appeal. He submitted that a minimum term of imprisonment of ten years, rather than the 12 years imposed by MacKenzie J, would have provided adequate protection for society, in particular women who may come in contact with the appellant if he is eventually released from prison.

[54] That view was obviously not shared by MacKenzie J. The imposition of a minimum term of imprisonment where the sentence is preventive detention is a matter squarely within the discretion of the sentencing Judge. We cannot see any basis on which it could be contended that MacKenzie J exercised his discretion incorrectly, and Mr Paino did not point to any.

[55] There is at the end of MacKenzie J's sentencing remarks a careful consideration of the minimum period of imprisonment which s 89 of the Sentencing Act 2002 required him to impose. In summary, the Judge's views were:

(a) The minimum period of imprisonment required to reflect the gravity of the appellant's offences was 10 years: s 89(2)(a).

(b) The minimum period of imprisonment required for the purposes of the safety of the community in the light of the appellant's age and the risk he posed to that safety at the time of sentencing was 12 years: s 89(2)(b).

In terms of s 89(2), the Judge was thus required to impose the minimum period of 12 years which he did impose. MacKenzie J justified that minimum period on the following basis:

> [14] … The unanimity of professional view as to the risk of your re-offending as you have done on this occasion and in the past, coupled with your refusal to face up to the causes of your offending and to approach treatment and remedial measures in a state of mind which is conducive to rehabilitation, requires that a longer minimum period be imposed. I consider that a minimum period of 12 years is the minimum that I could impose as required for this purpose.

Having read the Judge's sentencing notes, and in particular his careful summary of the psychiatric and psychological assessment of the risks of the appellant committing similar offences, we are not in the slightest doubt that the 12 year minimum period imposed by the Judge was wholly justified.

[56] Accordingly, the appeal against sentence is also dismissed.

Result

[57] None of the five grounds of appeal against conviction that were pursued has been made out. The appeal against conviction accordingly fails and we dismiss it. The appeal against sentence also fails and we dismiss it also.

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