IN THE COURT OF APPEAL OF NEW ZEALAND CA 37/97

ORDER PROHIBITING PUBLICATION
AND IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY
S139, CRIMINAL JUSTICE ACT 1985

NOT
RECOMMENDED

THE QUEEN

v

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Coram:	Keith J Tompkins J Anderson J
Hearing:	29 May 1997
Counsel:	J A L Gibson Q C for the Appellant S P France and G Gowland for Crown
Judgment:	29 May 1997

JUDGMENT OF THE COURT DELIVERED BY KEITH J

The appellant was convicted on 14 January 1997 following a jury trial in the District Court in Napier of six sexual offences relating to one complainant. The complainant was 10 or 11 at the time of five of the offences (four of which were representative charges) and 17 or 18 at the time of the sixth. At the time the appellant was the partner of the complainant's mother and living with them.

The most serious of the offences was rape and for that the appellant was sentenced to seven years imprisonment. For the other offences the sentences were one or two years, to run concurrently with the seven year term. The appeal is against conviction.

The appellant had also appealed against the refusal to suppress his name. No submissions were made in support of that appeal. In accordance with the established law in this area and taking account of the facts in this case, particularly the opposition of the complainant to final name suppression, the appeal fails, ***R v Liddell*** [1995] 1 NZLR 538, 542-547. Accordingly the trial Judge's decision, the effect of which had been suspended pending the appeal, is now effective and the appellant's name is no longer suppressed.

The appeal against conviction challenged two passages in the direction to the jury, relating, first, to corroboration, and, second, to recent complaint. Mr Gibson, in most ably presenting the appellant's case, also emphasised the combination of the two matters.

Corroboration

The relevant part of the summing up is as follows:

> Mr Johnson [counsel for the appellant at the trial] also made another comment in his closing address to you. Having made it, he informed you that indeed I would take the opportunity to make a comment upon it and I do so. He said that in years gone by a Judge would be required to warn juries that it would be dangerous to act on the uncorroborated evidence of a complainant. That was so.
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> He said it with really two purposes in mind and the first is related to the fact that these allegations were made to the police, at least five of the counts relate to allegations made to the police some ten or eleven years ago.
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> The second reason that he made that comment was as part of a submission that really apart from her word, what other evidence can be found to support the claim. There is lack of medical evidence for example.

> Let me say this about whether to not you should be considering whether other evidence is required, whether corroborative evidence is required. It matters not that such evidence is available. The law does not require corroboration. Previously it may have done so, but our system, our justice system has determined that it was an unreasonable requirement and often led to injustice, and that crimes no longer need it because the myth that such complaints are easy to make and difficult to refute has been revealed for what it is, just a myth. Our law is that corroboration is not required and Mr Johnson's comment is met as simply as that.

The appellant contends that while it cannot be argued that every complaint is unfounded and should not have been advanced without corroboration, the Judge ought to have explained to the jury what corroboration was and why it was necessary. The short answer to this submission is that provided in the last sentence of the quote from the summing up - corroboration is simply not required in our law. There is no need to explain what the law used to be and why that law was thought necessary. That would unnecessarily have complicated the summing up. As this Court has said on an earlier occasion, it will often be preferable to avoid the word "corroborate" which has acquired somewhat technical associations and which may expose the summing up to an unmeritorious challenge in the event of conviction, ***R v Daniels*** [1986] 2 NZLR 106, 112.

The essential issue in the prosecution was whether the jury believed the complainant's evidence and other related prosecution evidence to the necessary standard as opposed to the evidence given by and for the appellant. The Judge mentioned that issue of credibility throughout his summing up and indeed he concluded with it:

> Whatever the position may be, you will I am sure adopt your collective views on those important questions of reliability and credibility. Both counsel have urged upon you this really is at the core of the decision that you are going to make in the case of each count.

No doubt the final addresses emphasised those issues as well. The old law relating to corroboration was properly put to one side. Accordingly the appeal on that ground is rejected.

The emphasis given in that passage to credibility and reliability is relevant as well to the second ground of appeal to which we now turn.

Recent complaint

A schoolfriend of the complainant gave evidence that when they were both about 10 or 11 she used to visit the complainant's house after school and after marching practice. The significant part of her evidence was as follows:

> As to [the complainant] ever discussing her stepfather with me - yes she did. There was something she said definitely that has stuck in my mind - and that is when she was a young girl he sexually abused her that's always stuck in my mind definitely.
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> As to the detail of that - as to the whereabouts we were when that subject was raised - we were in [the complainant's] bedroom at the time. As to how old we would have been at that stage - we were still at primary school [and] would have been 10 or 11 years old no older than that definitely no older than that. As to what it was that she actually said - I can't remember the exact wording it's obviously vague that many years ago being so young - um, I remember her gestures more than anything gesturing towards the bed which was there and speaking of stepfather Robin touching her and doing things he shouldn't be doing. And from this I always um in my mind it was sex not just actual molesting.
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> As a result of what she told me as to if I said anything to her - I never remember it being discussed in any great detail okay um, it's not something that was brought up on a regular basis and I remember saying that's not right why isn't something tell your mum, I remember saying tell your mum. I said my dad doesn't do things like that to me.
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> In response to my advice that she should tell her mum as to if she said anything to me about telling people - she said don't tell anybody.

The witness was cross-examined on that evidence and the Judge summed up as follows:

> [The witness] was a childhood friend of the complainant. She remembered a discussion in the complainant's bedroom. They were ten or eleven years old at the time she said. She cannot recall the exact words that were spoken. She remembers the complainant gesturing towards the bed and speaking of the stepfather Robin, touching her and doing things he shouldn't. She was cross-examined about the accuracy of her recollection of the words spoken on that occasion and you will recall again her being referred to what it had been she had previously said. She recalled being phoned by [the complainant's mother] and said she knew immediately why. Why else she said would she be contacted after such a long period of time during which there was no contact. She advised [the complainant's mother] of her recollections before being informed of the extent of the complainant's allegations. Again, with respect to [the witness's] evidence, it is for you to make the necessary assessments of credibility and reliability. But I want to say this also about her evidence, because it is evidence called by the Crown to indicate recent complaint. You will recall she said they were 10 or 11 years old at the time when they had the discussion and when there was that gesturing.
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> From the Crown's point of view, [the witness's] evidence serves two purposes. It is evidence against which you can make some assessment of the complainant's evidence and secondly, says the Crown, it counters any suggestion by the accused that the complaint was a fiction born or contrived out of jealousy by [the complainant's mother].
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> You must make your own assessment of [the witness's] evidence.
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> Mr Johnson suggests that you should be sceptical. He says her evidence is more detailed, and by inference perhaps more inventive, than those details she initially provided to the police.
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> Whatever your assessment of her evidence, this is what must be borne in mind when you consider what we term recent complaint evidence. It is this. The evidence that the complainant made a complaint soon after the alleged events and the terms of that complaint cannot, as a matter of law, be treated as evidence that the events happened or as to how they happened. The relevance of the complaint therefore, if you accept it was made, is that it may show that the complainant's conduct after the alleged occurrences was consistent with her evidence about it.
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> That may sound all a bit convoluted to you, but in brief this evidence of recent complaint does not amount to proof. Rather it is evidence by which you assess the reliability of the complainant's evidence.

Mr Gibson first made the point that the complainant did not give evidence about her complaint to the witness, that is about which she alleged occurred. But that was not necessary. The evidence of recent complaint is given to support the reliability of the complainant's evidence given at trial about the alleged offence. That recent complaint evidence can be given by the complainant or the person receiving the complaint or both, eg ***R v Breen*** (1976) 50 ALJR 534. It follows that it is not appropriate to speak of "inconsistency" in respect of the complainant not mentioning the recent complaint. The evidence of the recent complaint is, of course, not evidence of the offence itself. The Judge made that point sufficiently clearly in the final two sentences of the passage of the summing up which we have already quoted.

Mr Gibson also called attention to what he said were inconsistencies in the evidence about the complaint, pointing both to the cross-examination of the school friend and to the fact that the complainant did not say that she told her friend. We have already dealt with the second point. Any inconsistency in evidence relates to the weight to be given to the evidence, a matter for the final addresses; in any event it was not related in any particular way to the criticism of the summing up.

Next Mr Gibson submitted that there was no evidence of an independent nature supporting the allegations made by the complainant. Mr France referred to the evidence of opportunity given by the complainant's mother and brother. The fact that the case turned essentially on the complainant's evidence of the offences and the appellant's denial in his evidence was squarely before the jury, as was the appropriate direction on the standard of proof. The Judge had clearly directed the jury that the recent complaint (if they accepted the evidence of that) was not evidence of the offence. He had done that against his earlier statement that the law did not require corroboration. And, to repeat, he concluded by emphasising that the jury were to adopt their collective view on the important questions of reliability and credibility. This was very much a case which depended on what the jury made of the complainant and the appellant and the evidence each gave.

We conclude that each of the impugned parts of the summing up dealt appropriately with the two issues and that looking at the summing up as a whole there was no risk of the jury being misled about the law they were to apply.

Accordingly the appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Crown
McKay Hill Napier for Appellant