PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S.139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 245/02

THE QUEEN

v

S

Hearing: 14 July 2003

Coram: Keith J
Hammond J
Paterson J

Appearances: D J Orchard for Appellant
J C Pike for Crown

Judgment: 24 July 2003

JUDGMENT OF THE COURT DELIVERED BY HAMMOND J

Introduction

[1] On 12 June 2002, the appellant, S, was convicted in the High Court at Christchurch on 14 of 15 counts alleging sexual offending and assaults against three of his children. The charges related to historic offending, starting in 1968 and extending to 1984.

[2] On 28 June 2002 S was sentenced by the trial Judge, Panckhurst J, to four years imprisonment on three counts of sodomy; four years imprisonment on nine counts of indecent assault and indecencies, to be served cumulatively on the sodomy sentences; and one years imprisonment on two assault charges to be served concurrently. In all, this was an effective sentence of eight years imprisonment.

[3] The appellant now appeals solely against his convictions.

[4] There are eight grounds of appeal, but for convenience they can be grouped into five categories.

- Panckhurst J declined to direct a stay of these charges in December of 2001. It is said that judgment was in error, and that the charges should have been stayed, from the outset.

- Certain photographs are said to have been incorrectly allowed in evidence at the trial.

- Certain "opinions" made and recorded by a police detective in taking a statement are said to have been inappropriate but were not deleted from the statement that was led in evidence.

- The trial Judge is said to have failed to direct, or adequately direct, the jury on certain issues.

- Finally, there is a complaint the trial was not fully and appropriately conducted by trial counsel (not the counsel on appeal).

[5] These categories do not follow the order adopted by counsel, but do reflect the logical sequence in which they would have arisen, in court.

Background

[6] Given the breadth of the matters touched upon in the grounds of appeal it is appropriate first to set out the broad background to these counts.

[7] S is presently 64 years of age. He had no previous convictions. S had married X in 1963. There were four "children" of the marriage. We use the term "children" advisedly because X was pregnant with A at the time of the marriage. S was not the natural father of A. However, the couple treated A as their daughter. There were then three sons born to S and X: B (1966); C (1968); and D (1973).

[8] Shortly after B was born the family moved to a residential property in Christchurch. It lived there at all relevant times. The offences are alleged to have occurred in this family home in Christchurch over a period of some 16 years, between 1968 and 1984.

[9] The Crown case was that S indecently assaulted A, B and C over this period of years. The indecencies were of a serious character. They included manipulation of the vagina and genital areas of the victims; performing oral sex on them, and having the victims perform oral sex on S. There were allegations that the children were made to watch pornographic videos and simulate sex while S masturbated in front of them. It was claimed that S had on one occasion ejaculated on C's face, and that victim had had his foreskin damaged by being masturbated with too much force.

[10] As to the sodomy counts, the Crown case was that A and B were each sodomised once, and, on the evidence at trial, that C was sodomised regularly over several years.

[11] The assault counts went to incidents when S was alleged to have assaulted A and B.

[12] A was struck in the mouth by S following an altercation with her mother, when a tooth was knocked out.

[13] It was claimed B was punched in the mouth on another occasion with a closed fist. As a result he required treatment in the form of five stitches to the inside of his mouth.

[14] The Crown case was that the offending against all these three complainants finally stopped on the evening of 2 April 1984, after B told his mother what had been happening to him. X confronted S about this. She then went to the police. S left the family home two days later. He never returned.

[15] A was married in April of 1985. At that time there was a family gathering (which included S). There was a family counselling session of some character at which time much further detail relating to the complainants emerged. In particular, A learned for the first time about the abuse of her brothers.

[16] It was this which led A in June 1985, to approach the police. She made a complaint. Between that initial approach, and July of 1985, A, B, C, X and S were all interviewed. The accused strenuously denied the allegations which had been made by these children.

[17] In his oral judgment on 6 December 2001, Panckhurst J recorded that no police action was then taken because "the complainants were particularly fragile". A was pregnant; the other complainants "did not consider themselves able to confront the issues in a court situation". The detective sergeant conducting the investigation placed the file in the archives "with hesitation", on 20 August 1986.

[18] On 18 November 2000, there was an incident involving B and S. In the result, B was charged with causing intentional damage, aggravated assault and burglary. He was ultimately sentenced to 18 months imprisonment, although the sentence was substantially served through home detention.

[19] On 12 March 2001, B approached another detective. He made a fresh complaint. The old police file was re-opened. New statements were obtained from the other two complainants, and from X, and the accused was re-interviewed on 18 May 2001. He continued to deny the allegations.

[20] It is convenient to record here that by this time the original statements of complaint made in 1985 were still available, but the officer concerned had left the police force. His notebook had not been retained. It was accepted that the accused had denied the charges but the terms of the denial were not therefore available. Certain other medical records, to which we will refer again later in this judgment, were also not available.

[21] The Crown ran the case on the basis of three independent, although related, sets of complaints by the children. That is, the Crown at no stage sought to treat the case as involving similar fact evidence. There was no application for severance by the defence prior to trial. The defence was a denial of the allegations, in their entirety.

Stay of Proceedings

[22] The appellant contends that Panckhurst J erred in declining to stay these charges by reason of delay, in his oral judgment of 6 December 2001.

[23] Broadly, the following matters were raised on S's behalf as giving rise to prejudice:

- An inability to locate material witnesses.

- These three children had suffered behavioural problems over the years and some physical injury. They had been seen by general practitioners, a paediatrician and a dentist. Those records were not now available.

- In the complaints which were made in 1985 there were allegations of indecent photographs having been taken of the children. It was said that had

the police obtained a search warrant and searched the family premises, the presence or otherwise of these photographs would have been confirmed.

- Notes of the denials of the accused which had been made to the police in 1985 had been lost.

[24] The Judge felt able to put aside two of these categories at once. He was not satisfied that any material witness was once likely available but could not now be found. No such witness had been identified. And as to the photographs, in fact no search had ever been made in 1985. Therefore the position had not altered over the passage of the years.

[25] Of the other two categories, Panckhurst J accepted that perhaps something of value to the accused might have been lost with the notebook entries, about his 1985 denials. Of much more significance, there was possible prejudice from the lack of medical and related records. But the Judge noted, we think correctly, that any prejudice, such as it was, could have flowed either way in that both the Crown and the defence could have been in a better position if medical records were available.

[26] The Judge concluded that such prejudice as could be identified did not displace the holding of a fair trial.

[27] The Judge was alert not only at the time of the initial application to the possibly prejudicial factors, but they plainly remained in the forefront of his consideration at trial also. To the extent that in his remarks on sentencing, Panckhurst J revisited his decision about delay and expressed the view that, on the evidence at trial, he had been satisfied that there was no trial prejudice from the delay in the allegations coming to trial. Not only was that a prudent course, but it confirms in a general way that given the way the defence ran the case the "missing" material would in fact have been of little (if any) assistance to it.

[28] That aside (as Mrs Orchard rightly recognised) the appellant is faced with the difficulty that this head of the appeal is an appeal against the exercise of a discretion. Her straightforward submission was that the trial Judge had "failed to give sufficient

weight to [the potentially prejudicial] factors". But she (rightly) accepted that it must be shown that the Judge was "wrong" with respect to the weight that he attached to these two identified factors (the medical notes and the notebook).

[29] Mrs Orchard is quite correct that the fundamental issue in cases involving alleged sexual abuse is the individual credibility of the complainants. The availability of records, as she said, is one of the few ways of objectively testing the evidence of complainants. Perhaps the most distinct example here was C's account of being struck on the head with a hammer. However given the way the trial developed and the respective cases were run, and that there has never been a suggestion that the defence was driven to the course it took by the actual unavailability of records, we are not disposed to interfere with the Judge's conclusions that the fact that certain relevant materials had been lost was not such as to compromise the trial process, and that a fair trial was still attainable; and on his post trial evaluation was in fact attained.

[30] This ground of appeal is dismissed.

Admission of Photos

[31] The complaint under this head is that the Judge should not have admitted nude photographs of A or the accused into evidence; and that having done so, he failed to give the jury proper direction on the relevance of these photographs.

[32] Some additional background is necessary. The officer in charge of the case asked X to see if there were old photographs of A's teeth that might be relevant in the proceedings. On the eve of trial X turned up a box of old photographs from the family home (which she said had been unopened for many years). On sifting through it, she found compromising photographs of A when she was a young girl. In his trial ruling the Judge said "in each photograph she is naked and posing for the camera in a provocative or at least suggestive manner". The accused conceded in evidence these were "suggestive" photos. Certain photographs of the accused, also naked, were found, and the Judge said in one of them "he has an erection". The photograph of the accused was thought by the Judge to be amateurish (by

comparison with that of A) "as if taken by a child or at least someone unversed in the use of a camera".

[33] Given that these photos were turned up only on the eve of trial, trial counsel opposed their admission. First, he said on the ground of "lateness". And secondly, that this evidence should not be admitted on a prejudice/probative value basis.

[34] On the lateness point, the Judge had held a voir dire; and leave was given for A to be recalled (this being the second day of the trial) if application was made. In the event it was not.

[35] It is not entirely clear to us whether the "lateness" point was still being maintained on the appeal (Mrs Orchard said the defence had been "taken by surprise"). But in any event the Judge was satisfied with the explanation as to the way in which the photographs had come to light, and the reason for their late introduction.

[36] That was a trial decision which we are not disposed to interfere with. It was within the Judge's discretion. And in any event the Judge put in place appropriate procedures to minimise any impact for the defence, which had every opportunity to respond to the photographs.

[37] On the prejudice/probative value point, the argument was that the photographs had "an impact out of proportion to their evidential value". It had to be the case, as the Judge held, that given their character the photographs had some evidential value in a trial in which the allegations were of systematic sexual abuse of a young girl. Whether the prejudicial value distinctly outweighed the probative value, is a matter of judicial judgment. The Judge was of the view that they should not be excluded. Again, we are not disposed to interfere with that exercise of his trial discretion. It has not been shown that he was plainly wrong, and the parties had a full opportunity to urge on the jury such significance as it thought ought to be accorded to these photographs.

[38] As to the photographs of the accused, the argument was that they were not of direct relevance and should not even have been entertained at all in evidence. The real point with this photograph of the accused was, who took the photograph – A or her mother in a moment of playfulness with the accused? It is correct that the Judge himself, right at the end of the case, put some questions to the accused as to whether X would have taken photographs which were apparently as badly taken as those photographs were. The photograph might or might not have been relevant, depending on who took it. If the jury was of the view that the photograph was taken by A, then it would have had some (perhaps slight) evidential value. But the question, "who took the photograph?" was before the jury, and it was simply a question of fact for it in the usual way.

[39] Then it is said that the photographs having come in, the Judge should have given some specific warning to the jury as to the way in which (if at all) it could utilise these photographs.

[40] The Judge gave no directions of this kind, beyond repeating (in summarising the Crown case) that the Crown had asserted that "[the photographs] really told the story and really totally confirmed everything A had said about this had begun". And that indeed was the position in this trial – the photographs were introduced by the Crown simply as confirming evidence of A's account that there had been incidents of photography of this kind.

[41] In our view no special direction was required. The provenance and circumstances of the photographs (which was contested) was before the jury as a matter of fact. Indeed it might even be said that the failure to refer further to these photographs by the Judge in his summing up was in the defence's favour, rather than that of the prosecution, because the Judge could have said (but did not) that in addition to the oral testimony of the complainant A, there were these items of confirmatory evidence.

The Detective's Statement

[42] Mrs Orchard did not place great weight on this ground of appeal, but we did not understand her to abandon it.

[43] Detective Reed took a statement from the accused (which was put in evidence) on 18 May 2001. At one point in the course of a 15 page interview, the Detective said "I put it to you that after speaking with all of your children and seeing how they have been traumatised I have no doubt that they all have offences committed against them, I still have to put allegations to you, but at this point *I just do not accept what you are saying*. Do you have any comment on that?". And at another point at the end of the interview, the detective said "I have spoken to all three of the people (your children) who have made complaints against you, *I believe them* … [comment sought]". (Italics added)

[44] The appeal point is that these comments should have been excised from the statement. Mrs Orchard cited *R v W* [1995] 1 NZLR 548 at 556-557 (CA). In that case this Court was confronted with a situation where a police officer had offered his opinion as to *W's* guilt a number of times whilst interviewing him. This Court held (on other grounds) that the appeal should be allowed and a retrial ordered. But the then Chief Justice, Sir Thomas Eichelbaum, said that such expressions of opinion "appear to infringe the principles in Halligan's case [*R v Halligan* [1973] 2 NZLR 158]. No doubt the interviews will be scrutinised before the submission to a jury at a further trial". Hence this Court in *R v W* did not have to consider this issue fully.

[45] In *Halligan,* which is still the leading authority, this Court noted (per Turner P at page 162) that:

> This Court has said before, and it now repeats it, that police officers cannot be allowed to introduce evidence for the Crown by making accusations to a suspect, and, when they receive no damaging admission in reply, relaying to the jury what they said as if it were relevant evidence. Where this is the effect of what was done, and it is the effect of what was done here, this Court will not allow a conviction obtained upon such evidence to stand, unless it is clearly demonstrable that without that evidence the jury must have convicted.

[46] This case is a long way away from true *Halligan* type concerns. There the real concern is that something asserted by a police officer and not responded to cannot fairly and appropriately be relied upon as evidence.

[47] In this case, S made a quite assertive response. He said:

> Allegations of this nature cannot be disproved so I have been railroaded into a very tight corner.

[48] S utterly rejected the suggestion the detective had made. The whole defence was a denial. The jury was abundantly aware of that, on the facts.

[49] It would have been preferable if these statements had been appropriately excised – they were gratuitous comments by a police officer – but that said, they were rejected and we can see no material harm to the appellant.

[50] This appeal point too must fail.

Misdirection

[51] For the appellant it is submitted that the trial Judge then failed to direct, or inadequately directed, the jury on three specific issues:

- That the jury must consider each count separately;

- That if the jury was satisfied that the appellant had committed a particular offence, it was improper to conclude that the appellant must be guilty of the other offences;

- That the complainants may have colluded.

[52] It is convenient to dispose of the third point first. In appropriate circumstances it may be necessary for a trial Judge to direct a jury as to the possibility of collusion. No such circumstances arose here. There was no suggestion raised at the trial that there had been collusion. No questions of that character at all were put to the complainants in cross-examination, and there was nothing in the circumstances of the trial which might have made it necessary for the Judge, of his own motion, to raise any concern of that character. For instance, the members of this family were not close.

[53] The other two points are related. We begin with some general observations. It is trite that each count in an indictment must be considered separately. For convenience the counts are heard together, but the evidence against an accused on each charge must be considered separately. It would also be quite wrong to bolster up the case on one charge, by evidence which relates to another count, or to reason that if an accused is guilty of one charge then he must be guilty of another.

[54] In cases where similar fact evidence is (appropriately) led, then in accordance with the decision of this Court in *R v Sanders* [2001] 1 NZLR 257, particular care, and directions, are required. However it must be said at the outset that this case was not run as a similar fact case. It was an orthodox case of multiple complainants with numerous counts. Nevertheless, there must still be careful directions where there are multiple complainants because some of the same dangers still obtain.

[55] In his summing up the Judge began, in an unusual opening paragraph, by saying:

> Where does the truth lie is really what this case is all about. Was there systemic sexual abuse over that period of years or wasn't there? More relevantly, has it been proved by the Crown beyond reasonable doubt that there was? Those are the real issues in this case, as I see it anyway.

[56] At paragraph 4 of his summing up (after explaining the respective functions of Judge and jury) the Judge said:

> In reaching a view about what did and did not happen you will be involved centrally in the process of assessing the truthfulness and the reliability of the witnesses, what the lawyers have referred to as their credibility. You are entitled to accept everything that a witness says, accept part, reject part, if there is a sensible basis for doing that. There may be in a case where we are dealing with the recollections of complainants who are talking about what they can recall from very early childhood and what they can recall of all those years ago. In assessing their truthfulness, their reliability, the worth of witnesses including the accused, it is essential to have regard to what they said, how they said it and how it fits in with the other evidence in the case, whether it adds up, what makes sense when you put it in the context of the evidence as a whole.

[57] At paragraph 13 the Judge said:

> So your task is to consider and weigh the whole of the evidence. To bear in mind the submissions, the arguments of counsel. That was not evidence but

> rather as I say argument and then ultimately *reach verdicts on all of the individual charges* applying the directions as to the law which I am giving you. (Italics added)

[58] At paragraphs 15 and 16 the Judge said:

> The standard of proof as you would expect in relation to serious crimes is a high one. The law is that the Crown must prove each ingredient of each of the charges beyond reasonable doubt. To be satisfied beyond reasonable doubt means that you must feel sure, individually and collectively feel sure of guilt. So it is not good enough to think that it's likely it happened or it's probable it happened. You must feel sure that it happened. If at the end of your considerations of any particular count you hold a doubt, a doubt that is based on reason, then the Crown has not proved its case. It does not have to prove its case to a mathematical certainty. It must prove it to the point that you feel sure. If at the end of your consideration of an individual count you do feel sure, then as unpleasant as it may be it would be your duty to find the accused guilty and you apply that test to each separate charge in the indictment.
>
> Because again, as has been correctly explained to you already, *this is in effect fifteen separate trials heard together* as one for the obvious reason that the charges all concern the same accused and arise out of a similar background. But *that does not mean that you can view the evidence in any global fashion*. *You must do as the lawyers have done, focus on each charge as an individual entity and consider the evidence that relates to it*. (Italics added)

[59] Finally, in paragraph 18 of the summing up (in the context of discussing the effect of the accused giving evidence) the Judge said:

> The third possibility is that you do not accept his evidence. If that is the case it does not automatically mean that he is guilty. What you would then be required to do, of course, is to consider the case against a rejection of his evidence *and find on a charge by charge consideration whether each individual charge was established on the basis of the Crown evidence.* (Italics added)

[60] Mrs Orchard did not suggest that the jury had not been instructed to consider each charge separately. But she said that what the Judge should have done (perhaps by amplification of paragraph 16), was to have said something like:

> It would be wrong to bolster up the case on one charge by evidence which relates to another or to reason that if an accused is guilty of one charge, then he must be guilty of another, [perhaps with the addition of an observation that it is not a case of "all counts in or all out"].

[61] It must be said that it would have been preferable if the trial Judge had there used something like this fuller traditional formula, simply because it would have put

this matter beyond doubt. Having said that, we are not persuaded that this jury was inadequately directed as to its task.

[62] First, there can be no question that the jury was instructed – several times – to treat each of the charges individually. And it was specifically told that it must find on a charge by charge consideration whether each "individual charge" was established on the basis of the Crown evidence "that relates to it". Further, it was told not to treat the evidence "in any global fashion", which is a commonly understood, if colloquial, way of saying that it should discriminate between charges. All that it was not told, in terms, is that if an accused is guilty of one charge it did not follow that the accused was guilty of another.

[63] That said, the summing up has to be read as a whole. We are not persuaded that when the particular passages to which we have referred, in the context of the summing up as a whole, and in the manner in which the Judge subsequently proceeded, could have left this jury in any doubt as to the course to be taken by it.

[64] The literal directions given by the Judge would have been strongly reinforced by the manner in which the Judge himself proceeded thereafter in his summing up. The summing up had been organised by marshalling the respective cases under the individual counts, which is by far the preferable manner of proceeding. That is, the way in which the Judge himself proceeded in his summing up was entirely consistent with appropriate directions and would have been a practical reinforcement to the jury of what the Judge had already said.

[65] Thirdly, it is appropriate – so far as it is possible – to see how the jury in fact behaved. After retirement the jury asked certain questions which were directed to two specific counts of a factual character and one "legal" question as to the definition in law of "genitalia". This tends to support the proposition that the jury was proceeding, evidence-wise, count by count. The jury acquitted on one count (admittedly not entirely of the same character as most of the other counts). The short point here is that, on what is known publicly of the jury's deliberations, it discriminated.

[66] We therefore take the view that there was no material misdirection by the trial Judge.

Incompetent Counsel

[67] The legal principles to be applied when allegations of incompetence by trial counsel are made, are now well settled. The matter was put shortly by this Court in *R v Jones* (CA 426/00, 30 March 2001) and was confirmed by this Court in *R v Grant* (CA 326/01, 16 April 2002).

[68] In *Jones* this Court said:

> The well settled test is whether the conduct of the defence can be said to have led to a miscarriage of justice, or at least to "a real risk of a miscarriage of justice": *R v Quinn* [1991] 3 NZLR 146. In order to reach that threshold, the appellant must demonstrate "radical" or "fundamental" mistakes or blunders, not merely decisions that could have yielded better results: *R v Pointon* [1985] 1 NZLR 109; *R v Coster* (CA538/95, judgment 19 March 1996); *Byford v R* (CA74/93, judgment 25 June 1992). If it is established that trial counsel failed to follow his or her client's instructions, the appellant must also show that the failure led to a miscarriage of justice: *R v Reti* (CA296/91, judgment 22 November 1991); *R v S* [1998] 2 NZLR 392.

[69] It follows that in relation to an allegation that trial counsel has failed to present the case adequately, a mere mistake in tactics will not suffice. Nor is it enough that other counsel might have acted differently, or indeed more competently. And what has to be shown is that the "radical" mistake or failure pointed to, could well have had a significant prejudicial effect on the outcome of the trial.

[70] In this case Mrs Orchard submitted that trial counsel made six "radical errors" in the conduct of the defence case. These errors can be summarised as follows:

- A failure to cross-examine the complainants and their mother on three specific matters which might have undermined those witness's evidence.

- A failure to establish the background against which the complaints were made.

- The advancing of a case theory that was inconsistent with S's instructions.

- A failure to put to X that it was her who had taken the nude photograph of the appellant.

- A failure to cross-examine the complainants in relation to successful ACC claims they had made.

- A failure to seek leave to cross-examine the complainants about their sexual activity with one Y and his daughter, and certain matters flowing from that association.

[71] The usual procedures attendant on allegations of this character have been followed, and trial counsel has made an affidavit. In that affidavit trial counsel explains why he conducted each aspect of the defence case, and about which the appellant now complains, in the way that he did.

[72] In essence, trial counsel's position is that this was not an easy trial to conduct. Indeed the shaping of the defence raised its own distinct problems, on which different forensic views could be taken. And secondly (and we think of distinct significance) counsel kept S fully and fairly informed and S accepted the advice offered to him as to how the defence case should be conducted.

[73] There are some matters which can be got out of the way at the outset. The concerns relating to the photograph, ACC, and the general background to the case, in the context of a *Pointon* type application are all *de minimis* and come nowhere near a radical error.

[74] The heart of the complaint here really is that if these complainants were to be shaken, their credibility was going to have to be attacked, but this was not (or so it is said) done.

[75] There were really only three areas in which effective attacks could have been mounted.

[76] The first was the question of a possible vendetta against the accused by the children, particularly after the altercation between S and B led to B's conviction and incarceration. On that, trial counsel had carefully and prudently written to S about the problems associated with tackling this area at trial, in a letter of 15 January 2002. He said:

> If evidence is introduced to the jury that B attacked you last year, the jury will want to know the reasons for the attack. The complainants will undoubtedly say that B attacked you because you sexually abused him when he was a child and that the attack was as a result of pent up rage. We consider that such evidence will be fatal to your case. The jury must not be left with the impression that there is "no smoke without fire". The whole issue of Bs attack is a double edged sword.

[77] Counsel then distinctly advised "that the issue of [B's] attack on you last year should not be put before the jury, but if the Crown decides to make it an issue, we will have to address it at the trial. As you know, no evidence of B's attack was given at the previous depositions hearing".

[78] S was asked to consider this matter. Counsel said they would discuss it further with him before the trial. That there were further discussions which were confirmed inter alia by a file note of 30 April 2002. Plainly S was asked to consider this problem himself, and did so, and he went along with counsel's advice.

[79] The second broad area was that of the 1985 complaints and whether to attack these complainants on what was (inconsistently) said in them. Counsel's view on that was that it would be wise not to draw further attention to the "core complaints", but rather to leave things on the footing that the complainants had made statements to the police in the mid 80's "but that they had not pursued their complaints at that time". Forensically, that was defensible. It left things open to a submission (in fact made in closing) that if the complainants had not advanced things promptly, did this not tell against their accounts?

[80] As to Y, counsel's concern was that S had advised him that Y was a convicted paedophile. Trial counsel was understandably anxious not to draw attention to any association with a person of that character as between S and Y.

[81] Mrs Orchard's primary concern appeared to be with the failure to tackle the prior statements. Her concerns were that (as is undoubtedly the case) there are some bizarre observations in those statements; and over she described as some "gross inconsistencies".

[82] In the first category, by way of illustrations, there is an allegation at the end of A's 11 June 1985 statement that at A's wedding in Nelson (when S and B stayed in the same room), S's father had openly masturbated in the room in front of B, and made it known "that his body was available to B if he wanted it". Then there were matters said to have been remembered by A when she was only two. And there is what would have to be described as "oddities": that A said that at one point S was a "magician" (which apparently explained his "sly" fingers!) and that he had hypnotised her "which explains a lot of the methods he used on me".

[83] On the question of inconsistencies, easily the most graphic illustration is that, at trial, C claimed that he had been sodomised "lots of times", whereas in his early complaint he said it had only occurred "once".

[84] We have thought it appropriate to review the entire record in this case. Any competent trial counsel (which clearly counsel in the court below was) would have recognised the forensic potential of items of this kind. But the fact of the matter was that a difficult decision had to be made as to whether to traverse the earlier allegations (even with the inconsistencies) before the jury. The practical problem is always whether there is more to be gained than lost from such an exercise, and trial counsel elected not to pursue those matters. There is nothing in the nature of a "king hit" in any of the inconsistencies. Probably the most jarring is the frequency of sodomy with respect to C, but the usual Crown rejoinder would have been forthcoming: whilst some particulars might not be correct (and understandably so over the years) the "essence" of the counts as alleged still stood. The downside for S of retraversing these earlier statements was that much further undesirable material could have been retraversed. Indeed, depending on the depth to which matters were gone into, it would have been open to the trial Judge to require the entire statements to be put before the jury, and that would certainly not have been to S's advantage. (See s.11(2) Evidence Act 1908).

[85] Whether to take an "aggressive" or more soft stance in cross-examination is a difficult trial issue, and one which every trial counsel has to struggle with. S had a respectable background. He had no convictions, and he had been a civil servant. Aggressive attacks on children do not sit comfortably with juries and the decision to have S give evidence – so that it was a straight out contest between how he presented, and how the children presented in Court – was simply a matter of trial strategy. And again as has to be emphasised, it was one which S knowingly adopted.

[86] There is one final point under this head. S appears to have been anxious – he maintained it was "the truth"– not to be portrayed as a violent man. Trial counsel had little scope to work with in this case. He was clearly minded that for there to be any forensic chance of success there needed to be some explanation for why the children would have reacted towards their father as they had, if S's account was to be preferred. Each of the children gave evidence that S had disciplined them using physical force (such as a belt). Trial counsel therefore cross-examined all of the three complainants on the footing that the accused was a strong, domineering and even repressive sort of father – obviously as a basis for a submission (which was in fact made) that this explained why the children had taken the attitude they had to S. There is nothing in the record to show this was contrary to S's instructions. It was nothing more nor less than counsel making the best that he could of the difficult hand he had been dealt.

[87] It is not open to an appellant to in effect revisit trial tactics after an unsuccessful defence and to say (of course with the benefit of hindsight) that course M might have been better than course N. The matters here complained of were jointly considered, and considered trial decisions were taken upon them. Nor is it anything like apparent to us that the suggested course would have produced a different result. In the result, this ground of appeal is also dismissed.

Conclusion

[88] The appeals against the convictions are all dismissed.

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