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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA300/2008
[2009] NZCA 177

THE QUEEN

v

F (CA300/2008)

Hearing: 28 April 2009

Court: Robertson, Chisholm and Gendall JJ

Counsel: C J Tennet for Appellant
C E Clarke for Crown

Judgment: 11 May 2009 at 11.30 am

JUDGMENT OF THE COURT

A An extension of time for appealing is granted to 28 April 2009.

B Leave to adduce evidence in support of the appeal is declined.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Gendall J)

[1] The appellant was found guilty after a jury trial of two sexual crimes against his daughter W, a girl under the age of 12 years. They comprised indecent assault, being touching of her genitalia with his fingers, and unlawful sexual connection, being connection between his tongue and her genitalia. He was acquitted on counts of rape of the child, and unlawful sexual connection by penetrating her genitalia with an object made of soap. A fifth count in the indictment alleged digital penetration on a separate occasion, and the appellant was discharged under s 347 of the Crimes Act 1961.

[2] The appellant does not appeal against his sentence of five years' imprisonment imposed by Judge Bidois who had presided at trial.

[3] The application to extend time and to appeal against conviction is brought on the basis that there is a miscarriage of justice under s 385(1)(c) of the Crimes Act 1961. That miscarriage, it is said, arises because the complainant's evidence at the trial on 16 May 2005 is alleged to have been false and the appellant contends that she has recanted from her trial evidence. Leave is sought to adduce evidence in support of the appeal from three deponents, namely Ms TVM, Mr GWA and Mrs BAC. That evidence is contained in affidavits filed by counsel for the appellant.

[4] The appeal is well out of time and an extension of time is required. The appellant deposes that it was not until some time in 2007 that he was aware of evidence that had, he said, come to light to support his appeal and claim to innocence. He deposes that he endeavoured to obtain legal advice from a significant number of lawyers, and it was not until April 2008 that he was forwarded the required appeal documents by his present counsel, Mr Tennet.

The issues

[5] The issues requiring determination are:

- Should an extension of time for filing a notice of appeal be given?

- Should leave to adduce the evidence in support of the appeal be given?

- Has there been a recantation of the evidence of the complainant?

- Has there been a miscarriage of justice, or a risk of that?

Background

[6] W was born on 8 April 1992 and from age 3 was in the custody of the appellant. She was aged 13 when the trial took place in May 2005. The Crown case was that, between 1998 and 2002 when aged between 6 and 11, W was subjected to various forms of sexual abuse by her father. That included digital and oral contact with her genitalia.

[7] The complainant's evidence also alleged acts that she said occurred in the shower, namely digital penetration of her genitalia, and penetration of her with soap. She did not allege penile penetration. She further said in a videotaped evidential interview that:

> A. He would be drunk and um, I'd get scared so I'd just like go into his bed and um, he'd start using his penis, on my – thing between my legs.
>
> …
>
> And he'd use his hands and his tongue and stuff.
>
> Q. So how would he use his hands?
>
> A. Like, play with it.
>
> Q. Play with what?
>
> A. My vagina.

[8] She said she was aged seven or eight when this first happened and it ceased when she was aged about 10. She said it happened "heaps" of times. She said that the appellant did not manage to penetrate her vagina with his penis, or his fingers, but that he would move his finger just around the outside of her vagina. Her

evidence was that the appellant said that was how her mother and her boyfriend had sex. In cross-examination the girl said that the touching was on the "outside of the vagina" and "only the outside" beneath pyjamas. It was put to her:

> Q. Did someone ever tell you to say these things?
>
> A. No.

[9] When asked whether the appellant put his penis right inside her, she said "no". In relation to the soap incident, her evidence was that the appellant put "a corner" of the bar of soap inside her.

[10] The appellant, when interviewed by the Police, denied the allegations. He did not make a formal statement or give evidence at trial. Clearly, the jury was satisfied on the evidence of the complainant as to the oral and digital touching of the genitalia but, not altogether surprisingly, given what is apparent from the transcript, did not find the other sexual allegations involving penetration to be proven beyond reasonable doubt.

Should the extension of time to appeal be granted?

[11] The appeal was received on 23 May 2008, nearly three years after the time for appealing had lapsed. The appellant said that he did not file an appeal earlier because he had legal advice to the effect that if he appealed against sentence that would make matters worse. He said he was visited by Ms TVM and Mr GWA, and then he was made aware of what they said concerning the alleged recanting by the complainant. He deposed that he had been passed around between lawyers and the further delay arose because he knew that affidavit evidence had to be obtained.

[12] We have some reservations about accepting his explanation for the length of delay, given that Ms TVM and Mr GWA visited the appellant at least as early as March 2007, five months after the alleged recantation, and 14 months before the appeal was lodged.

[13] The power to extend time for filing an appeal is contained in s 388(2) of the Crimes Act 1961. The test is set out in *R v Knight* [1998] 1 NZLR 583 at 587 (CA), which was recently affirmed in *R v Lee* [2006] 3 NZLR 42 (CA). The Court must exercise a discretion in a way which meets the overall interests of justice in the particular case, which will call for balancing the wider interests of society and finality of decisions against the interests of an individual applicant in having a conviction reviewed.

[14] Some relevant factors are set out in *Knight* at 588-589 and repeated in *Lee* at [97] which include the strength of a proposed appeal, whether the liberty of the subject is involved, the practical utility of any remedy sought, the extent of the impact on others affected and on the administration of justice, prejudice to the Crown, and in the end the balancing exercise must serve the overall interests of justice. Where it is claimed that there is new, relevant and cogent evidence (and recantation by a crucial witness of evidence crucial to conviction may naturally occur after the time for filing an appeal has elapsed) the interests of justice would usually require an extension of time.

[15] We are prepared to grant an extension of time in this case, notwithstanding the delay, and reservations as to the reasons why nothing was done in early 2007. There is no prejudice to the Crown, which has been able to actively resist the appeal on its merits, and adduce affidavit evidence from the complainant, and others to counter the claims of the appellant. The Crown accepts the evidence is "fresh" in the sense that it was not available at trial, and that in other cases appeals such as this have proceeded on their merits.

[16] The proposed appeal raises matters which warrant consideration, and accordingly we grant the extension as to the date of hearing.

The new evidence sought to be adduced on behalf of the appellant

[17] Mr Tennet submitted affidavits from the three witnesses which he says are compelling, relevant and go to the heart of the convictions. He says they contain fresh evidence not available at trial and essential to the appellant's appeal. The

evidence is to the effect that since the appellant was convicted and sentenced the complainant has recanted from her trial evidence.

[18] Ms TVM had sworn two affidavits. She is now aged 20 and deposes to having known the appellant and W for about seven years, since the latter was ten years of age. Contact was lost in about 2005. She says that W visited her during Labour Weekend in October 2006, when Mr GWA was at her address in Bell Block. In the course of that weekend the girl said she missed her father and:

> … I put my father in prison and it was a setup.

[19] She deposed that the child said to her the set-up was between herself, her mother and a younger sister to make up lies about the appellant because the child's mother wanted ACC and she had obtained $10,000. She deposed that W wanted to know which prison her father was in and had said she wanted to keep in touch. Ms TVM says that she and Mr GWA wrote a letter on a computer, (as did W separately) and three copies of each were sent to different prisons where they thought the appellant might be. She deposed that later in the weekend the child said:

> Mum got me to say that Dad had sex with me and put his fingers inside me.

And also that her mother had "got her sister to make up lies as well".

[20] The second deponent, Mr GWA, is a friend (described as a partner) of Ms TVM. He is aged 58 and shared accommodation with her in Bell Block at the relevant time. Both say that there was no intimate relationship. His affidavit evidence was to the effect that in October 2006 he was present when W visited the home in Bell Block and said that her father had gone to prison for molesting her; that she missed him and loved him, and he deposed that she said that:

> Dad done nothing to me, he was set up by my mother and her friend, Mrs BAC.

[21] Mrs BAC is in fact the mother of Ms TVM.

[22] Mr GWA deposed that the child said her mother had received $10,000 from ACC. He said that the three letters written to the appellant by W and by Ms TVM

were posted to three different prisons by him. He deposed that some days later he took the child in his truck, as he was a driver, on an overnight trip to Auckland. He said he asked her at least twice about her father, and she repeated her recantation, stating that she "hated her mother for sending Dad away". He said that some time later, after he had made contact with the appellant, he and Ms TVM met at a BP Service Station in New Plymouth to read to W a letter that the appellant, it is said, had written. Her reaction was that she was sorry, her father shouldn't be there, and "she wanted him out". She also said she "hated her mother".

[23] The third deponent on behalf of the appellant is Mrs BAC, the mother of Ms TVM. She deposed that she knew the appellant and W for about nine or ten years. She had not spoken to the child's mother for about nine years, and was told in 2006 by W when visiting Ms TVM at her home that:

> Her father had been sent to prison for raping her. [W] said it was a game between her and her mum, and that they did it so they could claim $10,000 from ACC. W admitted to me that her father had not raped her. She admitted that she had lied about it, and that she felt bad about what she had done. She kept repeating that her mother had got her to do it.

[24] She expressed her opinion that W "is a compulsive liar". She said that at about the same time she read a letter that W had written on the computer to the appellant, in which had explained that she had lied. She says that Ms TVM helped W post the letter. She deposed that in computer communications with W, W has said frequently that what her father was supposed to have done was not true.

[25] All these deponents, apart from the appellant, were cross-examined before this Court.

Affidavits filed by the Crown

[26] To counter the contentions in the affidavits of the deponents supporting the appellant, the Crown has filed affidavits made by W, her half-sister Ms D, and her mother Ms M.

[27] W denies that she recanted at all. In cross-examination, she maintained, vehemently, that what she said at trial was the truth. She maintained that she did not tell any of the proposed deponents that she lied; that she did not receive money from ACC, and had not talked about the appellant in any of the ways that the other deponents allege. She said that in October 2006 Ms TVM and Mr GWA presented her with a typed letter about her father and asked her to sign it, but she refused to do so. She recollected going for a ride in Mr GWA's truck to Auckland, but denied talking to him about her father in the way that he asserts. She said that she did not trust him. She denied meeting Mr GWA or Ms TVM at the BP Service Station, although they came to her home. She contended that both Ms TVM and her mother Mrs BAC, are friends of the appellant, and are not telling the truth.

[28] W's sister, Ms D, is now aged 18. She deposed that in about October 2007 she was approached by both Ms TVM and Mr GWA, who said to her words to the effect that they did not like seeing an innocent man in prison and he should not be there. She says that they presented to her a statement that had been written by the appellant, which they requested her to sign. She said she was aware of the statement because her mother had a copy of it also. She says she was asked to complete a statement to the effect that W and her mother were lying. She did not wish to do this. She said that Ms TVM and Mr GWA told her that they would:

> … set me up for life financially if I wrote a statement. [G] said his mother had died and they were selling her farm for $4 million.

[29] She said that she did not believe they would give her the money and she did not do what was asked of her, despite being telephoned thereafter on a daily basis. She says she was approached at her work by Ms TVM and told that the appellant wanted to see her, they had a good lawyer and the appellant was "going to get out of prison if I wrote a statement". She said she did not continue to communicate with them but:

> I was thinking what [W] had said [at trial] was true because I had seen [the appellant] do some things when I stayed with him.

[30] The third affidavit filed by the Crown was from Ms M, the mother of W. She said that in September 2002 her daughter made a disclosure to her about sexual

abuse by the appellant. She said that she had no part to play in the allegations made by her daughter; she did not tell her to make them up; and at that time contacted a lawyer and Child Youth & Family about the allegations. She deposed that there has been no ACC payment to W, it being dependent on the outcome of her counselling and any claim after that, if it eventuates, would belong to W. She denies that she "set up [the appellant]".

[31] These three deponents were present and cross-examined before this Court.

Is the evidence new so as to be admitted in support of the appeal?

[32] Evidence as to statements made post-trial purporting to recant from evidence given at trial must qualify as "fresh". But the alleged recanting occurred in October 2006, and letters to the appellant's then Wanganui counsel were not written until September 2007 and affidavits sworn on 26 November 2007. These were not filed until after the leave application was filed on 29 September 2008. So in one sense it had become stale.

[33] Admissibility of evidence and whether a miscarriage of justice occurred are interwoven, and the test is that the evidence must be sufficiently fresh and credible so as to justify admission. Nevertheless, the discretion to admit it has to be exercised in whatever manner would further the interests of justice, both to the appellant and the Crown – see *R v Bain* [2004] 1 NZLR 638 at [22]-[23] (CA). Once the evidence is admitted the Court considers its cogency. This requires assessment alongside the evidence given at trial, and whether such might reasonably have led the jury to return a verdict of not guilty. There can be no doubt that if the evidence of a recantation was all that was admitted at trial there would be no direct evidence of a crime and then verdicts of not guilty must have arisen. Indeed, there is likely to have been no trial. However, as discussed below, given W's denial that the recantation occurred, the Court must first consider the credibility of the allegations of recantation, before going on to consider the credibility of the recantation itself. If, of course, the evidence of recantation is not cogent or accepted then that must be the end of the matter.

[34] Legal principles concerning recantation by a crucial witness after trial is set out in *R v M* CA135/05 4 July 2006:

> [12] … An appeal against conviction in situations where a crucial witness recants after trial can only be on the basis that there was a miscarriage of justice, or a risk of that, in terms of s 385(1)(c). Recantation may reflect human family pressures in a situation and a Court may reject new evidence where it differs from evidence at trial, in declining to treat a retraction as warranting disturbance of the jury's verdict.
>
> …
>
> The Court has to be alive to the allowing of the criminal justice system to be manipulated because a key or critical witness has regretted the consequence of giving crucial evidence.
>
> [13] The position in New Zealand is encapsulated in *R v Barr (Alistair)* [1973] 2 NZLR 95, 98 (CA), where the approach of the English Court of Criminal Appeal in *R v Flower* [1966] 1 QB 146 was adopted. In *Flower* it was said (at 150):
>
> > If the witness's new version of the case is disbelieved this may very well show he is now unreliable, but it is a fallacy to assume from this that he was also unreliable at trial. Witnesses may have second thoughts for a variety of different reasons. Some may become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at the time….So much depends in every case upon the reason, if any, given by the witness for having changed his or her testimony.
>
> [14] This Court also adopted a further passage from *Flower* (at 98):
>
> > Having heard the fresh evidence and considered the reliability of the witness, this Court may take one of three views with regard to it. First, if satisfied that the fresh evidence is true and that it is conclusive of the appeal, the Court can, and no doubt ordinarily would, quash the conviction. Alternatively, if not satisfied that the evidence is conclusive, the Court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial. The second possibility is that the Court is not satisfied that the fresh evidence is true but nevertheless thinks that it might be acceptable to, and believed by, a jury, in which case as a general proposition the Court would no doubt be inclined to order a new trial so that that evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course. Then there is a third possibility, namely, that this Court having heard the evidence, positively disbelieves it and is satisfied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless, and the Court will then proceed to deal with the appeal as

> though the fresh evidence had not been tendered ([1966] 1 QB 146, 149-150).

[35] The situation on this appeal is different to many cases involving the recanting of a crucial Crown witness, because here W denies that she has recanted. There were assertions on oath by witnesses that they did not give truthful evidence at trial in *R v Barr (Alistair)* [1973] 2 NZLR 95, 98 (CA), *R v Flower* [1966] 1 QB 146 and *In re O'Connor and Aitken (No. 2)* NZLR [1953] 776 (CA). But here the appellant denies that she recanted and denies what others have said she did. It falls into the type of situation that arose in *R v Blomfield* CA119/93 9 July 1993 and *R v L* CA153/06 31 October 2006, where complainants swore on oath that the original accounts were true.

[36] If W made the alleged statements to the deponents they would comprise prior inconsistent statements if a new trial was later to be held. But that will always be the case where a witness is said to later recant from evidence given at an earlier trial. It cannot mean that an appeal would always be allowed and a retrial granted on the basis that someone said she had recanted. The first step therefore is to consider whether in fact W recanted. If there is credible evidence so as to establish that she did in fact make the statements alleged, this places W's credibility in some doubt, but it may not necessarily follow that her evidence before the jury was false. If the evidence that recantation occurred is plausible and there is nothing to show fabrication, the crucial issue then becomes whether or not that recantation was true and genuine.

[37] Apart from having the affidavit evidence the Court had the advantage of hearing the evidence in considering the reliability of W, as well as the reliability and credibility of those who assert that she recanted.

[38] From the various affidavits and evidence that emerged in cross-examination we are able to make factual and credibility findings. These include the following:

(a) We are satisfied the impetus for approaches to W was likely to have been provided by the appellant. Ms TVM said in cross-examination that she had a telephone call from the appellant, which was out of the

blue, whilst he was in prison. Although she said she did not know why he was there, he did say, to the effect that "W put him there", asserting that lies had been told at W's mother's instigation. Mr GWA said that he had been told by Ms TVM *before* Labour Weekend in October 2006, of her "friend" W. He had not met her before and it is apparent from some answers that he gave in cross-examination that Ms TVM was endeavouring to locate W after having received the telephone call from the appellant. He said that he was under the impression that Ms TVM had not seen W for a very long time. The following exchange occurred in his cross-examination:

> Q. Well, wasn't it the case that [T] had often spoken to you about a friend of hers, a female named [W]?
>
> A. Not really, no.
>
> Q. Whom she had known for quite a while and that her father had been sent to prison for a sexual offence concerning her.
>
> A. I did after she had initially or found where [W] was, through her cellphone or texting I recall her saying to me one night that she had finally got hold of [W].
>
> Q. And she also talked to you often about [W] and the fact that her father was in prison for sexual abuse.
>
> A. After she had made contact with [W], yes, she had mentioned to me a few times.
>
> Q. And that was before [W] turned up at your place in Bell Block wasn't it?
>
> A. Yes.
>
> Q. So both you and [T] knew well before [W] turned up that [the appellant] was in prison for sexual abuse?
>
> A. Yep.
>
> Q. Now, it was [T] that got [W] to come over that weekend, wasn't it?
>
> A. Yes.

(b) At Labour Weekend the deponents assert, two letters, one created by W and one by Ms TVM, were then sent to the appellant. Whilst those

were sent to three different prisons, it is clear that the appellant had earlier telephoned Ms TVM. Further, according to Ms TVM, he also telephoned her during the Labour Weekend in October 2006.

(c) Ms TVM's evidence was that about two weeks after Labour Weekend (or perhaps the trip to Auckland with Mr GWA), the appellant himself wrote back to Ms TVM saying that he was in Wanganui Prison, and she contacted W to advise her that she had received a letter. It must follow that the appellant received, within a very short time, the communications said to have been created at Labour Weekend 2006. One would have expected that if W had signed a letter, created by her and intended for her father, and it comprised three copies, such might have been tendered to the Court. The appellant contends that he in fact never received W's letter because of prison authorities' intervention, but what is clear is that in about November 2006, if there had been the recantation as alleged, that was squarely known to the appellant because of Ms TVM's letter.

(d) Despite Ms TVM and Mr GWA visiting the appellant in prison at Wanganui apparently on two occasions in March 2007, it was not until September 2007 that Ms TVM wrote to the then Wanganui counsel of the appellant. Neither the appellant nor Ms TVM or Mr GWA reported any recantation to the police and there was evidence that they were not adverse to turning to authorities if the need arose, (indeed, Mr GWA was a former traffic officer).

[39] W's sister, Ms D, presented as a reasonable, reliable and truthful witness and less emotionally charged than any of the other witnesses and we believe her evidence that she was offered money to falsely say that W had recanted. The Court does not accept the denials of Ms TVM that money was offered to Ms D to state that W had recanted. Indeed, Ms D referred to the fact that funds were said to have come from the estate of Mr GWA's mother. It was acknowledged in cross-examination that that person had died, which suggests that what Ms D asserts was said to her occurred. The affidavits of both Ms TVM and Mr GWA do not disclose the fact that the

appellant was in contact with Ms TVM before Labour Weekend 2006 and there are significant contradictions in the evidence of the appellant's witnesses both internally and as between each other.

[40] It may be that Mr GWA overheard some discussion between W and Ms TVM, and questioned the child himself, but we do not think it plausible that he would have taken W on an overnight trip knowing that she was a young girl who, she said, had falsely alleged sexual offending against her father.

[41] Some matters claimed to have been said by W to Ms TVM, even if said, could not be correct. For example, we accept the evidence of W's mother that she had never received nor claimed $10,000; also W never claimed or gave evidence at the trial in Court that her father had raped her. It was clearly incorrect that W's mother had conspired with Ms TVM's mother to concoct evidence, as they had not spoken for about nine years. Those matters go to the credibility of any recantation if it had been made in the terms alleged.

[42] W vehemently maintained on oath that she did not recant from her evidence given at trial and despite vigorous cross-examination she could not be shifted.

[43] It is not a case of a witness saying she recanted, but one who positively denies that. It is clearly not a case which falls into the first category as described in *Flower* because we are not satisfied the fresh evidence, which is denied, is true. The second possibility envisages an order for a new trial if the Court is not satisfied the evidence was true but thinks it might nevertheless be acceptable or believed by a jury. That has to be viewed against the danger that new trials could frequently be ordered simply because a convicted person is able to obtain evidence from some supporter, or more than one, to say that a crucial witness recanted. Any claim to recantation must have some foundation based upon a credible narrative. In *Flower* a crucial witness recanted but gave no acceptable explanation for her reasons for changing her story and the Court disbelieved her evidence saying that just because she made the assertion it did not follow that the evidence should be reconsidered by a jury in light of the fact that she was unreliable. The Court concluded that whilst every case depends on its own facts there was:

> … no general requirement for a new trial merely because a witness' account in this court differs from that given in the court below.

[44] Here, the evidence given by the witness W does not differ at all from that given at trial. She positively denies what others say. We are not satisfied the evidence as sought to be adduced is true in the sense there has been genuine recantation. We do not accept the evidence of the (denied) recantation is sufficiently cogent to lead a jury to return a verdict of not guilty. If evidence of the alleged conversations were to be given (and it could only be given at a later trial, as proof of denied inconsistent statements), it would then lead to the Crown being able to adduce prior consistent statements. Those exist in the form of complaints which, it now emerges, were made to W's sister, Ms D. It would lead possibly to other prejudicial evidence from Ms D.

[45] We think this case falls squarely into the situation described in *Blomfield* as:

> To deploy language from *In re O'Connor and Aitken (No. 2)* [1953] NZLR 776, 785 the fresh evidence does not raise such a case of doubt that it would be a denial of justice if the question of guilt or innocence were not submitted to another jury. The appellant's case fell short of satisfying us that the refusal of a new trial would cause a miscarriage of justice.

[46] The narrative as variously described by the deponents on behalf of the appellant, contains obvious falsehoods, is not in our view credible so as to provide sufficient or any weight to disturb the persistent denials of W that she recanted. The case falls into the third, not the second possibility from *Flower*, namely the fresh evidence is not worthwhile as a truthful withdrawal from W's evidence at trial.

[47] We do not accept that the proposed evidence is worthy of belief or of sufficient cogency. For that reason we do not admit it as "fresh" evidence. If it had sufficient force or impact it would have been tendered at the very least by March 2007, and the evidence of Ms TVM and other deponents did not carry sufficient or any force to satisfy us that W might possibly have made a truthful recantation.

Result

[48] An extension of time for appealing is granted to 28 April 2009.

[49] Leave to adduce evidence in support of the appeal is declined and the appeal is dismissed.

Solicitors:
Crown Law Office, Wellington