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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA134/2009
[2009] NZCA 432

THE QUEEN

v

MICHAEL BRADLEY

Hearing:	19 August 2009
Court:	Arnold, Panckhurst and Miller JJ
Counsel:	H D M Lawry for Appellant K Raftery for Crown
Judgment:	23 September 2009 at 3.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] The appellant was charged with five counts of sexual offending against two sisters, complainant A and complainant B. He was convicted on four of the five counts over three trials:

(a) The first trial commenced on 16 April 2007 in the District Court at Auckland before Judge Treston. The Judge declared a mistrial later that day.

(b) The second trial commenced on 18 April 2007, again before Judge Treston. The appellant, who did not give evidence but relied on a statement which he had made to the police, was:

- Convicted on one count of indecent assault on a girl under 12 years, namely complainant B: s 133 of the Crimes Act 1961 (now repealed).

- Acquitted on one count of indecent assault on a girl aged between 12 and 16 years in relation to complainant B: s 134 of the Crimes Act (now amended).

The jury was unable to reach agreement on the remaining charges.

(c) The third trial commenced on 10 November 2008 before Judge Perkins. The appellant gave evidence on this occasion. He was convicted on the remaining three charges, namely:

- Sexual violation by rape against complainant A: s 128B.

- Attempted sexual violation by rape and indecent assault in respect of complainant B: ss 129 and 134 respectively.

[2] The appellant appeals against all convictions. Mr Lawry, who did not appear at trial, argues in relation to the second trial that:

(a) The guilty verdict on the s 133 count is not consistent with the acquittal on the s 134 count.

(b) Recent complaint evidence was wrongly admitted.

In relation to the third trial, he argues that:

(c) Prior consistent statements were admitted contrary to s 35 of the Evidence Act 2006. Further, the Judge failed to direct the jury on what use could be made of the evidence.

(d) The Judge failed to give an adequate explanation of the defence case in his summing up.

Factual background

[3] The appellant and his wife were friends of the complainants' family. The Crown alleged that on the first weekend in December 2000 when the appellant was babysitting at the complainants' house, he raped complainant A on her parents' bed. It said that the appellant had told complainant A not to tell her parents as it would destroy his relationship with them. At this stage complainant A was aged nine. The appellant was convicted on this charge at the third trial.

[4] The Crown also alleged that the appellant tried to touch complainant B on her vagina and breasts during that same weekend. The complainant said that this had occurred in the bathroom where she had gone to wash her hands. The appellant had come up to her and attempted to touch her and she had "whacked" his hand away. The appellant was convicted on this charge at the second trial.

[5] The charge on which the appellant was acquitted at the second trial related to an incident alleged to have occurred in March 2002. Complainant B said in her

evidence at the second trial that she was at the appellant's house doing some chores for pocket money. She said that while she was in the garage cutting up boxes, the appellant came in and tried to touch her vagina and breasts and that she had "whacked his hand away".

[6] Complainant B also said that on another occasion when she was at the appellant's house he appeared having removed his trousers and underpants. He put a pornographic DVD on, removed the clothing from her lower body and attempted to have sexual intercourse with her, unsuccessfully. This gave rise to the attempted sexual violation charge of which the appellant was convicted at the third trial. There was also a further incident in which complainant B said that the appellant had indecently assaulted her.

[7] The offending came to light when, in June 2005, complainant A wrote two letters to her parents setting out what she claimed had happened. She said she wrote the letters when she realised, after a conversation with a school friend, that what the appellant had done to her was wrong.

[8] Complainant B wrote a letter following an enquiry from her mother. Her mother told complainant B that something had happened to complainant A in relation to the appellant and asked if anything had happened to her. Complainant B said that it had and wrote a brief letter in which she said the appellant had touched her inappropriately and raped her.

[9] The police executed a search warrant at the appellant's home and seized several items of pornography. Having been advised that he was under investigation in relation to sexual offending against the complainants and appropriately cautioned, the appellant said:

> One thing I can tell you is, I've never had sexual intercourse with either of the girls ever. I've never had sexual intercourse with them. There was touching involved with the older girl [complainant B], but that was consensual. There are practical reasons why one doesn't have sex with younger girls, pregnancy is one massive reason, that's why I think I should speak to a lawyer.

[10] The appellant made no further statement and was ultimately arrested and charged.

Discussion

[11] We deal with each ground of appeal in turn.

Inconsistent verdicts

[12] Mr Lawry argued that complainant B's evidence about the two incidents was almost identical. She testified that on each occasion the appellant had approached her and attempted to touch her vagina and breasts, and that she had "whacked" his hand away. The appellant denied that anything had occurred on either occasion. Accordingly, Mr Lawry submitted, the two verdicts could only be reconciled as either guesswork or a compromise.

[13] We reject that submission. As Mr Raftery said, the Crown alleged that the two incidents occurred on different occasions, one in the bathroom of the complainant's house in December 2000, and the other sometime later, in March 2002, in the garage of the appellant's house. As a result, there is no necessary inconsistency in the jury being satisfied beyond reasonable doubt that the former occurred, but entertaining a reasonable doubt about the latter even though the evidence as to the incidents was similar.

[14] Further, in relation to the bathroom incident, there was no innocent explanation for the appellant being in the bathroom while the complainant was washing her hands (assuming the jury believed that he was there). In relation to the garage, however, there was an innocent explanation for his presence, which was that he was showing complainant B how to cut up the boxes. Certainly defence counsel put this to complainant B in cross-examination. So (and notwithstanding that counsel's questions are not evidence), the jury may have thought that complainant B misinterpreted what happened in the garage, or at least that there was a reasonable possibility that she had done so.

[15] Finally, at the third trial, Judge Perkins made the following observations about the way in which complainant B gave her evidence:

> I know that [prosecuting counsel] may express some disgust at what I am going to say to you now, but nevertheless, I am going to talk about [complainant B's] speech impediment. I want to mention the way that she gave her evidence. What I am saying is nothing to do with a young girl having to come to a frightening environment like this. In my view she gave her evidence in a number of respects in a very confident manner and while she may have been in some trepidation, she certainly gained in confidence as the trial proceeded. But, she was an interesting witness. She was firm when she appeared to be sure of her evidence, but she changed her language and became quite incoherent when she was not confident. That was something that was also confirmed by her mother, when I asked her mother about that. So it is not a matter of her going into that phase as a result of perhaps the overall environment of this Court, but in fact when something was put to her, which may have undermined what she had said and she became unconfident about her position.
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> Now you may decide that that may have made her unconvincing in some important aspects of her evidence. For instance, remember her reaction when confronted with the change in her evidence demonstrated by those portions of the letter to her mother read to you, when compared with those portions of her statement to the police. Now I do mention that, because it is a matter, which goes to demeanour. It is a matter for you to decide it is not for me to direct you on that, but it may be something that you wish to consider. It is entirely a matter for you to take into account.

[16] Judge Treston did not make a similar comment when summing up to the jury in the second trial. Nevertheless, it is likely that complainant B gave evidence in the same way at that trial. If she did, this may explain why the jury believed her in relation to the bathroom incident but was left with a reasonable doubt in relation to the garage incident. The jury may also have had some doubt (rightly or wrongly) about whether complainant B would have put herself in a vulnerable position with the appellant having been assaulted by him on an earlier occasion. Finally, it is relevant to note that complainant B's credibility must have been boosted to some extent in the minds of the jury by the fact that the appellant accepted when talking to the police that he had touched her.

[17] Accordingly, we reject this ground of appeal.

Recent complaint evidence wrongly admitted at second trial

[18] This ground of appeal relates to the letters written by the complainants, two by complainant A and one by complainant B. They were admitted at the second trial, which was held prior to the coming into force of the Evidence Act 2006, and were referred to (although not admitted) at the third trial, after the Act came into force.

[19] As to the second trial, Mr Lawry submitted that the letters were not admissible as recent complaint evidence as they were not proximate in time to the alleged offending and complainant B's letter was elicited only after an enquiry by her mother. He submitted that the presence of the letters might have persuaded the jury that they should convict the appellant of something. He noted that the jury deliberated for ten hours before giving its verdict.

[20] As Mr Raftery submitted, in the "recent complaint" context courts addressed the question whether a complaint had been made at the earliest possible opportunity by considering the age, nature and personality of the victim and the reasons for the delay in making the complaint: see, for example, *R v Nazif* [1987] 2 NZLR 122 at 125 (CA). Where young persons were involved, quite lengthy delays were accepted: see, for example, *R v Accused (CA132/97)* (1997) 15 CRNZ 26 at 29 – 30 (CA). In the present case we consider that the complaints were made at the earliest possible opportunity, taking into account the age of the complainants and the relationship of the appellant with their parents. Furthermore, we do not agree that the complaint from complainant B was improperly prompted, in the sense that there was a real risk that the substance of the complaint resulted from suggestive questioning: see *R v Duncan* [1992] 1 NZLR 528 (CA) and *R v Accused (CA132/97)* at 30 – 31. While the evidence is not entirely clear, it seems that the complainants' mother simply asked complainant B a general question, in response to which complainant B wrote the letter.

[21] But even if the letters did not qualify as recent complaint evidence, there was, in our view, no material risk that they might have influenced the jury in the way suggested by Mr Lawry.

[22] As we have said, at the second trial the appellant was convicted of one count of s 133 indecent assault, and acquitted of one count of s 134 indecent assault, in respect of complainant B. The jury was unable to reach verdicts on three counts, including the sexual violation by rape count in respect of complainant A. It seems clear from this that the jury went through the various charges with some care, adopting a discriminating approach. Knowledge of the two letters written by complainant A clearly did not influence the jury to reach a guilty verdict in relation to the charge involving her. The letter from complainant B was brief and non-specific. It related more to the charges on which the jury was unable to reach agreement than to the one on which they convicted. Against that background we do not accept that the admission of the letters created the risk of an improper compromise verdict in relation to the charge on which the jury convicted.

[23] Accordingly, we reject this ground of appeal.

Prior consistent statements at the third trial

[24] Mr Lawry submitted that the letters were prior consistent statements for the purpose of s 35 of the Evidence Act and that they were not admissible under that provision. Further, if they were admissible, the Judge should have given an appropriate direction to the jury.

[25] However, the letters were not produced at the third trial. When complainant A gave evidence describing the sequence of events, she said that after having a discussion with her friend about what had happened, she wrote two letters to her parents. This was four and a half years after the event. In cross-examination, defence counsel put parts of the letters to complainant A, asking her if it was possible she was "just making it up as [she] went along". After complainant A denied this, counsel put to her various inconsistencies between what was in the letters and what she had said in Court. Prosecuting counsel asked some questions about this in re-examination.

[26] A similar situation occurred in relation to complainant B. She referred briefly to her letter in examination-in-chief as part of the factual narrative. Defence

counsel put the letter to her in cross-examination, but it was not produced. Counsel cross-examined on aspects of the letter in an effort to undermine complainant B's credibility. Counsel focussed on the fact that in the letter complainant B had said that the appellant had raped her, whereas at trial she said only that he attempted to rape her. In re-examination, counsel for the Crown also referred to parts of the letter. During this re-examination, the Judge advised the jury that they could take account of the portions of the letter read into the record, but should not speculate about the contents of the remainder of the letter, a warning which he repeated in his summing-up.

[27] The complainants' mother also referred to the letters as part of the narrative. In cross-examination she was asked about the circumstances in which complainant B came to write her letter, but that was as far as matters went.

[28] Although the letters were not in fact admitted in evidence, we consider that the requirements of s 35(2) were met. Counsel did challenge the veracity of both complainants on the ground of recent invention and the letters could have been introduced in an effort to meet that challenge. Once admitted, the letters would have been admissible to prove the truth of their contents: see *R v Barlien* [2009] 1 NZLR 170 at [20] (CA).

[29] In the result, we see nothing in this ground of appeal.

Failure to summarise defence case sufficiently

[30] Mr Lawry submitted that Judge Perkins did not adequately sum up the appellant's case to the jury. In this context, the details of the trial are important. The third trial commenced on Monday 10 November 2008. As there were some preliminary evidentiary issues to be dealt with, the Crown did not call its first witness until after the luncheon adjournment. The evidence continued through until the afternoon of Thursday 13 November, when the defence closed its case. Counsel delivered their closing addresses on the morning of Friday 14 November, following which the Judge gave his summing up. The jury retired at 12.52 pm that day. In

other words, counsel's closing addresses and the Judge's summing up were delivered before lunch on the same day.

[31] Early in his summing up, having dealt with some of the usual preliminary matters, the Judge dealt with evidentiary issues, including the drawing of inferences and the approach to expert evidence. He then dealt with the fact that the appellant had given evidence. He said:

> In this case the [appellant] has explained his version of events to you. Quite simply, he denies the allegations of the young complainants, who are daughters of former friends. If you accept what he says, then obviously the proper verdict is acquittal, because he will not then have done what the Crown says he did. If what he says and what his witness says, leaves you unsure, then again the proper verdict is acquittal, because you will have then been left with a reasonable doubt. If what the accused says seems a reasonable possibility, the Crown will not have discharged its task and you must acquit.
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> If however, you disbelieve the [appellant's] evidence in denying the allegations, then do not automatically leap from that to an assessment of guilt, because to do that, would be to forget what I have told you, as to who has to prove the case. Rather, you must assess all the evidence that you accept as reliable. You then decide whether that evidence satisfies you of the [appellant's] guilt to the required standard. Please remember also what I told you about considering each of the charges separately.

[32] Later, when dealing with the ingredients of the offence of sexual violation by rape (the charge in relation to complainant A) the Judge noted the requirement for penetration and said: "[n]ow that is hotly in dispute in this case". He went on to say:

> [The appellant] denies having sexual intercourse with [complainant A] and as I have said, that is the primary issue for you to decide. If you are sure that he did not, then that is the end of the matter. Or, if you have a reasonable doubt that he did, then again that is the end of the matter, because if you are sure that he did not penetrate her vagina, or have a reasonable doubt about that, then the first element has not been proved and you do not need to go on and consider. But, if you are sure that he did commit the act that [complainant A] says, then you must go on and consider this matter of consent and I need to ask you do to that.

[33] When dealing with the ingredients of the charge of attempted sexual violation of complainant B, the Judge again reminded the jury that the appellant denied that he had made any such attempt.

[34] After having discussed the ingredients of the offences charged, the Judge said:

> I am not going to spend too much time on the facts beyond what I have already discussed in dealing with the legal issues. You have had the facts analysed by counsel at some length from their respective positions. Clearly in this case, the primary issue is whether the acts complained of by [complainant A and complainant B] occurred. Therefore, you need to decide whether you are sure you believe them, or whether you believe Mr Bradley when he says they did not occur at all.
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> While I have asked you to consider the issue of consent in respect of the alleged rape and the alleged attempted rape, that issue in the circumstances you have heard will not trouble you greatly if you do get to that point in your deliberations. But, before getting to that point, you must determine the primary issues. Did Mr Bradley have sexual intercourse with [complainant A]? Did Mr Bradley attempt to have sexual intercourse with [complainant B]? Did Mr Bradley attempt to touch [complainant B's] genital area and did contact occur between them when she brushed his hand away in the kitchen at her home?
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> Now it is a matter of who you believe and you will judge the matter by taking account of the manner the primary witnesses gave their evidence and the surrounding circumstances described by the witnesses called in support. You will decide what you make of the statement [the appellant] made to Detective Wheelan. You may regard his explanation as acceptable, or you may not. It is a matter for you, as I said.

The Judge then discussed aspects of the evidence and made the observations concerning complainant B which we have quoted at [15] above before saying:

> Now do keep in mind one thing. It is very important. If you are not sure whom you believe, if you have a reasonable doubt, then you must give the benefit of that doubt to Mr Bradley. That is the requirement of our criminal law. It is an important principle and you must apply it if you are not sure he has committed these charges. Remember also, what I said, because it is also very important, to deal with each charge separately and apply these legal principles separately to them in each. Do not decide that because you have determined guilt or innocence on one of the charges, that that must be so in respect of the other two. You must consider all three charges separately.

[35] Following the conclusion of the summing up, Judge Perkins asked counsel whether there were any matters arising. Both counsel indicated that there were none.

[36] Mr Lawry said that the Judge was obliged to go further in summarising the defence case than he had done. He relied in particular on the decision of this Court in *R v Shipton* [2007] 2 NZLR 218. There the Court discussed the obligations of a Judge in summing up to a jury: see [33] – [39]. The Court said:

> [38] One subset of this general problem which we think bears particular emphasis is that this fundamental duty falls on the trial Judge who cannot, in general, rely on counsel's closing speeches. There are statements in the appellate judgments, and in the treatises (see, for example, *R v Hiha* (Court of Appeal, CA 4/04, 1 June 2004) and Paul Taylor, *Taylor on Appeals* (2000), para [8-055] respectively), which suggest that in a short and simple trial it may not be necessary for the trial Judge to recite in detail the defence case. However, in our view, even in a straightforward criminal jury trial, the presiding Judge should distinctly hesitate before concluding that he or she can safely rely upon counsels' closing speeches. What is said by a Judge in a criminal jury trial in summing up is said from a position of great authority, and in our experience it is viewed as such by juries. It is for this reason that balance is so important on the part of a trial Judge. Where the heart of the defence is omitted, or some distinctive part of it, there is a very real risk that a jury will infer that the Judge is unimpressed with that defence.

[37] We do not agree that Judge Perkins' summing up was defective in this respect. In *Shipton* there were multiple accused. In summing up the Judge effectively rolled the defence case of one accused (Mr Hales) into the defence cases of the others, treating them as essentially one and the same. But they were not, and this Court held that the Judge was required to separate out the individual defence case of Mr Hales and put it to the jury: at [54] – [58]. We do not see *Shipton* as effecting any change in the law in this respect.

[38] The present case differs from *Shipton*. Here the trial was a short one. The summing up followed immediately after the two closings. The Judge identified several times the core defence contention, which was that the alleged offending did not occur, and told the jury how they should approach determining that issue. In other words, the essence of the defence case was put to the jury.

[39] In a reasonably lengthy closing address, defence counsel had argued that the jury could not be sure that the appellant had committed the acts alleged, and gave ten reasons for this. Mr Lawry accepted that the Judge could not sensibly have been expected to repeat that analysis, but said that some form of summary was necessary.

[40] However, it is well accepted that in summing up to a jury a Judge is not required to address the cogency of the evidence: see *R v Foss* (1996) 14 CRNZ 1 (CA). *Foss* is a very similar case to the present. The appellant was convicted of sexual violation by rape. He and the complainant knew each other and he said they

had been intimate in the past. His defence was consent, or reasonable belief in consent.

[41] The trial lasted for three days, the evidence taking only two. The summing up followed immediately after counsel's addresses. In her summing up the trial Judge did not follow what the Court described as "the now conventional practice" of reviewing the respective cases by reference to the points made by counsel in their closing addresses. Despite this, the Court held that what the Judge had done was sufficient. The Court said (at 5):

> Counsel for the appellant has in brief summarised what the Judge could well have said about the respective cases dealing with the various aspects which made the complainant's evidence more cogent than the appellant's and likewise those items of evidence that could be seen in reverse. In most cases we would expect that to be done but in the end every case must depend on its own circumstances and here the issues could not have been more starkly made out following the addresses of counsel, and very little the Judge might have said about them could have really assisted the process.

[42] The Court went on to say that the critical point was the way the Judge had dealt with the evidence overall. This was to advise the jury that although the appellant had given evidence he had no obligation to prove his innocence. The Judge then summarised the various consequences of the jury's accepting or rejecting the appellant's evidence, in similar terms to Judge Perkins in the present case: see [31] above. For a further case where a similar approach was taken, see *R v Murphy* CA310/96 26 September 1996.

[43] Accordingly, in the particular circumstances of this case, we consider that Judge Perkins did fairly put the appellant's defence to the jury. What the Judge did was sufficient to draw the jury's attention to what was in issue in the case, and to provide the jury with assistance as to how they should go about determining the issues. We note that the Judge went further than defence counsel in drawing attention to elements of complainant B's demeanour when giving evidence (see [15] above), in a way that was favourable to the defence.

[44] Accordingly, this ground of appeal fails also.

Decision

[45] For these reasons, the appeal is dismissed.

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