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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA440/2009
[2010] NZCA 49

BETWEEN	RICKY TAMATI Appellant
AND	THE QUEEN Respondent

Hearing: 15 February 2010

Court: William Young P, Wild and Heath JJ

Counsel: P E Dacre for Appellant
M D Downs for Respondent

Judgment: 3 March 2010 at 4 pm

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] At the end of a trial in the District Court presided over by Judge Field, the appellant, Mr Ricky Tamati, was found guilty of four representative charges of sexual violation and one representative charge of indecent assault. These charges related to a single male teenage complainant, and covered the period between 1 January 2006 and 25 March 2006. The complainant was aged 15 to 16 at the time of the offending.

[2] The appellant stood trial jointly with another man, JR, who faced four charges arising out of two specific alleged incidents involving the complainant. He was found not guilty on all four counts and the appellant, who was jointly charged in relation to one of these counts, was found not guilty on this count. The appellant was also found not guilty on a specific charge that related to the first incident of alleged offending.

[3] The Judge later sentenced the appellant to 11 years imprisonment and imposed a minimum period of imprisonment of four years.[1]

[4] The appellant now appeals against conviction and sentence.

The general factual context

[5] When the complainant was 13 he suffered brain injuries as a result of an accident. These injuries have left him with severely compromised intellectual functioning and, as well, there are associated behavioural difficulties. The primary issue in the case turns on the impact of his brain injury on the reliability of his evidence.

[6] The complainant has primarily lived with his mother and step-father. They knew the appellant through membership of a local church. The appellant had

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1 *R v Tamati* DC Auckland CRI-2006-090-11405, 21 July 2009.

befriended them and had helped them out in various ways, particularly in relation to caring for the complainant.

[7] During 2005, the complainant's behaviour caused a good deal of difficulty within the household and at times he lived away from his mother and step-father. On 1 January 2006, his step-brother committed suicide. This tragedy, and the resulting upset, set the scene for the complainant going to stay with the appellant. The process by which this happened seems to have been gradual. The drift of the evidence (which was far from clear on this and indeed other contextual issues) was that it was not until the end of January or the beginning of February 2006 when he fully moved in with the appellant.

[8] Also living with the appellant was a boarder, WT.

[9] While the complainant was living with the appellant, he saw his mother frequently, including before and after school. She was also in contact with staff at his school. As a result of some concerns expressed to her by school staff, she went to the appellant's house one evening. This was probably in the latter part of March 2006. On her evidence, she discovered her son drinking alcohol and there was something of a confrontation between her and the appellant. The evidence as to the detail of this (particularly as to timing) was confused but the tenor of the mother's evidence was that the complainant, either on this occasion or very soon afterwards, made it clear to her that he wished to leave, resisted attempts by the appellant to hug him and indicated that he intended to kill himself and would prefer to do so rather than stay at the appellant's house another day.

[10] The mother's evidence as to what happened at this time was, at least in very general terms, supported by that of WT and to some extent by the complainant (see [26] below but cf [17]). But the rupture, if there was one, between the appellant and the complainant was short-lived as he continued to see a good deal of the appellant and to go around to his house. There was thus no immediate complaint of any sexual offending. Indeed, the complainant's explanation to his psychologist as to why he did not wish to continue to stay at the appellant's house (and as to his conduct when he left) was that he had thought that his mother did not love him.

[11] No complaint was made about the alleged offending until August 2006. The initial complaint was to his step-father and his aunt and uncles and shortly after that to his mother. At some point (and the date is not clear in the evidence) the decision was made to contact the police. This resulted in the first of two evidential interviews.

The first evidential interview

[12] The first of two evidential interviews was on 10 October 2006.

[13] In the course of the introductory stages of the interview the complainant made it clear that he understood what truth was but he was initially not as good about the significance of a promise to tell the truth, as the following exchange indicates (where "I" is the interviewer and "C" is the complainant):

> I OK and if you promised to tell the truth what would you do?
>
> C I would be lying most of the time if I had kept it but then but then I don't know I might keep the truth
>
> I So if you promised someone that you would tell the truth what would you do?
>
> C I'd be lying
>
> I How come?
>
> C Cos I don't actually tell the truth most of times
>
> I OK
>
> C To them except for when I'm ashamed um oh um sorry but I got this girl at school and I go up to her and I go oh sorry man I'm just really into what you do and stuff and she goes Oh thank you that's very nice
>
> I Mm I think what I'm trying to figure out [C] is that today in this room it's really important that you tell me the truth so I need to figure out
>
> C I will tell you the truth
>
> I OK its very important that today you only tell me the truth is that something that you can do?
>
> C Yes
>
> I OK well what I need you to do is make me a promise

C Yeh

I that everything you tell me in this room today is the truth

C Yeh and you promise me if you promise me that everything I say in this room is the truth then yous have to keep it only in this room

I Sure absolutely, but can you promise that everything you tell me in this room today is the truth?

C Yes I promise.

[14] When the complainant came to discuss what had happened between him and the appellant, he claimed to have been molested on the first night he stayed with the appellant and, after that, every second night. His understanding of how long he had stayed was that it was between November 2005, "till like um Aug, June this year or March". He initially spoke of offending against him involving the appellant putting his penis in his mouth or in his anus (which he usually expressed as the appellant putting his "rod" up his "bum").

[15] As to context, the complainant explained that he knew the appellant through church and that he went to live with him because "my mum kicked me out of the home". He noted that WT had also lived at the appellant's house but that he was "hardly home". The appellant used to call him "baby", to say that "sharing [ie his body] was caring" and to make him promise not to tell anyone. The complainant said that the sexual incidents usually occurred after he had gone to bed, with the appellant coming into his bedroom, or in the appellant's room where he would be required to suck the appellant's "rod". As to the former incidents he said that he screamed so loud that the appellant to him to "ssh keep it down don't want the neighbours to hear".

[16] In this interview the complainant mentioned JR who he said came to the house for around two days every week. He claimed that every time JR left the house, JR would "always have the clear white goo around his mouth and stuff" and that this came from the appellant's "rod". The complainant did not allege that JR had molested him. It was, however, in the context of discussing JR's visits to the house that he discussed drug use and in particular using cannabis at the appellant's house.

[17] The complainant explained how he left the appellant's house by saying:

> I just jumped in my mum's car took it for a drive and mum goes hey he doesn't have his licence yet and I was just on the next street and yeh and that's how I managed to move back with mum.

We interpose that, based on notes taken by his counsellor, Mr Geoffrey Marchant, an incident having some similarities to this occurred shortly before the complainant left the appellant's house, see below at [35].

[18] After discussing briefly what had happened between the appellant and JR, the complainant then alleged that he had been required to insert his penis in the appellant's anus:

> I is there anything different that has happened to your body?
>
> C No
>
> I by Rick?
>
> C oh except that he forced me to stick mine in his bum and I was like ooh no that's just disgusting
>
> I So when you say forced like explain what happened to me, explain what you mean by that?
>
> C he forced me by telling me oh he's gonna slit my throat yeh
>
> I and so you had to put your up his bum is that right?
>
> C Mmm
>
> I How many times did that happen?
>
> C Like I don't know I can't remember 3 or 4 times I think

[19] Shortly afterwards, the interviewer left the room to consult with the investigator. In the discussion which followed after she returned, the complainant discussed alcohol use at the house and gave a graphic description of the details of oral sex between him and the appellant. He mentioned being required to watch pornography at the appellant's house as a precursor to being required to suck the appellant's penis, and how the appellant would watch pornography before having anal sex with him. He also alleged that the first time that the appellant had anal sex with him was the first night that he stayed at the appellant's house.

[20] When he discussed his relationship with WT there was the following interchange:

> I and was he a nice guy or not a nice guy?
>
> C Yeh he was real nice
>
> I He was OK to have in your home?
>
> C Mm and I knew that wouldn't do that because like um he got charged (yawns) excuse me
>
> I it's alright, you just take your time
>
> C he got sent in jail for doing that to another younger boy
>
> I How do you know that?
>
> C Because [the appellant] told me.

[21] In the wrap-up phase of the interview, the complainant also alleged that he had been required to rub the appellant's penis and also, on occasion, to put his penis in the appellant's mouth.

The second evidential interview

[22] The second evidential interview was on 17 April 2007. It followed the complainant alleging that he had also been molested by JR.

[23] In the introductory phase of this interview the complainant was not, when first asked, able to say how old he was and incorrectly gave the date of his birthday that year. He noted that he had changed schools which he said was because he was "too smart" for his former school.

[24] When the interview turned to discuss the actions of JR (referred to slightly oddly initially by the complainant as a "third party") the discussion started this way:

> I So you've come in before
>
> C Ahum
>
> I And you did some talking with me about [the appellant] is that right, is that?

C Yeah

I Yep, so how come you didn't tell me about this third party when you were here last time?

C Oh I don't know I just forgot I think

I Mmm any reason why you think you might have forgot?

C Oh no probably because you're so beautiful

I Oh

C Nah I don't know.

[25] In the discussion which followed he said that JR had come into his room while he was sleeping because the appellant had "dared him or he'd kill him". He claimed that this happened "only a few times" and later "only twice". His account of what happened on these occasions was somewhat sketchy and not always consistent, but broadly he alleged that:

(a) On one occasion, JR had anal sex with him, the appellant then came into the room and that this was followed by both men having anal sex with him and that they both put their penises in his mouth.

(b) There was another occasion when JR had put his penis in his mouth. This was in the sitting room. It followed an incident in which the appellant had had anal sex with him and occurred after the appellant had left the room. This second incident was followed by the appellant coming inside the house with a woman called Michelle.

The complainant claimed that he had been molested by JR when he had been "totally wasted" because JR had given him marijuana and he had also consumed alcohol.

[26] When asked if he thought that what had happened was "ok" he said:

> Nah, I was, nah because I even threatened to kill myself by running down onto the road just cause what they had done.

The evidence at trial

The complainant

[27] The complainant's evidence at trial differed in some respects from what he had said in his evidential interviews and as well there were some other (at times related) difficulties with his evidence. He did not claim to have yelled when the offending occurred (in contradistinction to what he said when interviewed). He struggled to explain why he had not complained earlier about the appellant or mentioned offending by JR at his first interview. The detail of the alleged offending involving JR and his associated account of when Michelle was at the house, which were already far from clear from the second of the two evidential interviews, became even more confused. Also confusing was evidence he gave as to dreaming that he had been molested by JR. He was not entirely consistent in his account of the circumstances in which he first disclosed the offending (particularly as to whether he had consumed alcohol). His account as to leaving the appellant's place (and particularly as to driving a car) also became even more scrambled than it had been.

[28] On the other hand, he was able to give a coherent account of how old he was, when his accident occurred, his involvement with the church, WT living in the house and his schooling arrangements over the relevant period. The main difficulties with his evidence were associated with the second evidential interview and his allegations involving JR.

The complainant's mother and step-father

[29] The evidence of the complainant's mother and step-father was extremely vague as to contextual detail and particularly dates.

[30] To at least a limited extent, their evidence provided some support for the complainant's allegations. In the case of the mother this was primarily as to what happened when her son left the appellant's house towards the end of March and, perhaps, her finding him drinking while at the house. The complainant's step-father

gave evidence of finding him in possession of pornography which appeared to have come from the appellant's house.

WT

[31] WT moved into the appellant's house in early 2006 and he was living there at the same time as the complainant. He knew the appellant and the complainant's mother and step-father through the church. He has convictions for sexual offending against young girls.

[32] WT's evidence provided some contextual support for that of the complainant as to:

(a) The use of cannabis at the house which included the appellant 'spotting' hashish with the complainant.

(b) The appellant watching pornographic films.

(c) A woman called Michelle visiting.

(d) The appellant on one occasion patting the complainant on the bottom in a sexually suggestive way.

(e) The upset when the complainant left the house, including his threats of suicide.

[33] On the other hand, although he lived in the house when, on the Crown case, sexual offending was a regular occurrence, he saw and heard nothing of relevance (beyond what we have already mentioned). The Crown explanation, supported in part by what WT and the complainant had to say, was that WT was not at the house all the time, that on some nights when the complainant was there, he was at hospital, and that when he was awake in his bedroom, he normally had a headset on while watching DVDs. He also confirmed that except for the day that the complainant left, he seemed to be happy.

The complainant's counsellor

[34] Mr Geoffrey Marchant, a registered psychologist, was the complainant's counsellor over the relevant period. His notes as to discussions he had with the complainant and his family provide considerable assistance in relation to the key dates. He was also able to provide an expert opinion as to the complainant's intellectual functioning and memory.

[35] In terms of narrative Mr Marchant's evidence was in these terms:

(a) The first time he heard the appellant's name was on 25 January 2006 when the complainant's mother told him that the appellant was helping to support her son to adapt to the world and that she had met the appellant through church.

(b) On 2 March 2006, he was told that the complainant was spending weekends with the appellant and that the appellant was being paid board. The complainant's interest in pornography was mentioned but in a context which suggested that since he had been staying with the appellant he was not "so involved with that sort of thing".

(c) On 22 March 2006, he had a discussion with the complainant who "seemed to be in a good space" but had an issue affecting him which he did not want to talk about. The reason he gave for this was that his step-father did not like people knowing their business.

(d) On 3 April 2006 he had a report from the complainant's school that his behaviour was getting worse, "becoming more aggressive, more introverted, swaggering, non-[complainant] type behaviour".

(e) On 7 April 2006, he had a discussion with the complainant's mother who was very upset over his behaviour and his talk of killing himself. She also made it clear that the complainant was no longer staying with the appellant and that this had been so for the last two weeks. The

complainant told Mr Marchant that he now felt better than when he was living with the appellant and that he had been angry while living there because he had thought that his mother did not love him. It was clear, however that he was still going around to the appellant's house after school. Also mentioned were difficulties which the complainant had with a "tough boy" at school and over an attempt by him to drive the family car, both of which he has noted as occurring on 22 March 2006.

(f) On 23 August 2006, he had a discussion with the complainant's mother in which she said that he had been talking about getting drunk while at the appellant's house and being sexually abused by the appellant.

[36] As an expert, Mr Marchant expressed the view that while the complainant could recall things which he had actually experienced, he did not have a sufficiently good memory to fabricate a story and maintain it.

The other experts

[37] Three other experts gave evidence: Dr Kristine Fernando, a clinical psychologist specialising in neuropsychology; Ms Tania Breen, a clinical psychologist whose special interests include dealing with people with intellectual disabilities and those who have been victims of sexual abuse; and Dr Ian Goodwin, a forensic psychiatrist who has in the past dealt with people who have suffered head injuries.

[38] Dr Fernando assessed the complainant in October 2005 and again in 2007. This was at the request of the ACC. She also reviewed the first and second evidential interviews. She assessed his memory as poor. She noted,

> I wouldn't be surprised if he sees things as fairly fuzzy at times and probably a lot of events that he participates in I would see them as possibly being quite fragmented.

She thought that the more significant or emotionally-laden an event, the better the complainant's recall of it would likely be, particularly in relation to the "central main details" of the event. Her assessment (based on what others had told her) was that he was reasonably suggestible in the sense of being willing to carry out actions which others had suggested to him and that he could possibly be led into saying things which he did not intend, or admitting things which may not have happened.

[39] Ms Breen first saw the complainant in February 2009. She assessed him particularly for suggestibility (as a result of concerns raised by Dr Fernando to which we have already referred and also by Dr Goodwin), recall and IQ:

(a) She concluded that he was not particularly suggestible; in fact that his suggestibility was average (in the sense that 68% of the population would have a suggestibility score within the same range as him).

(b) His powers of recall were very poor (in that he was able to recall only 10 out of 40 ideas referred to in a short passage which was read to him). Only 2.2 per cent of the population would do as badly.

(c) His score on Wechsler Adult Intelligence Scale (3rd edit) was between 66 and 74, putting him in the lowest 2 per cent of the population.

She also discussed confabulation (effectively the forming of false memories) in the context of the possibility that the complainant's recollections of sexual abuse at the hands of the appellant and JR might be confabulated.

[40] She related her associated assessments to what the complainant had said during the evidential interviews in a way which generally supported the Crown case.

[41] Dr Goodwin gave evidence for JR. His primary focus was thus on the second evidential interview and the allegations against JR. But he also gave some evidence that was germane to the case against the appellant. He noted an absence of emotional response on the part of the complainant when he was discussing the abuse he had been subjected to (which he, but not Ms Breen, regarded as unusual). He also

commented on the problems the complainant had with the promise to tell the truth and suggested that he appeared to be trying to please the interviewer. He considered that the description of JR leaving the house with "white goo around his mouth" was "a clear example of confabulation". He suggested that confabulation may have been associated with exposure to pornography and his awareness that WT had been to prison for sexual offending against children.

[42] His analysis of the second evidential interview was far more detailed. He commented on the complainant giving a wrong birthday, his use of the phrase "third party", and his inability to give a good reason for not making allegations against JR at the first interview. Dr Goodwin expressed his concern at the possibility that the allegations might have arisen at a time when the complainant may have been in trouble at home. He also noted the greater detail of the complainant's discussion of the offending in the second interview, some variations in this detail, incongruities in terms of him remembering quite dramatic incidents but not what happened next and a number of instances of what he considered to confabulations. By way of illustration, he commented on the complainant saying that JR would come into his bedroom when he was sleeping because the appellant had "dared him or he'd kill him" (information which Dr Goodwin thought the complainant could not know). He also considered that some detailed recollection about interactions between the appellant and Michelle which came up first when the complainant was giving evidence at the trial were confabulations.

[43] It is right to say that Dr Goodwin made some concessions in cross-examination, particularly as to the significance or otherwise of lack of emotional response during interviews (in respect of which he was driven to reliance on his own experience rather than current research), as to the complainant's suggestibility (which he accepted was average), as to the problem for the complainant in maintaining a lie given his poor recall and the appropriateness of the interviewing techniques. He did, however, generally maintain his ground as to the risk of confabulation.

Evaluation – conviction appeal

[44] A number of potential issues can be put on one side.

[45] It is accepted that the complainant had sufficient intellectual capacity to give evidence. Further, it was not suggested by Mr Dacre that the pattern of verdicts involved an unacceptable inconsistency. They are, indeed, explicable on the basis that the jury was more sceptical about the allegations which appeared in the second evidential interview than the first (which is why JR was acquitted), and that this, and perhaps an underlying scepticism as to the complainant's ability to be accurate as to detail provide an acceptable explanation for the appellant's acquittals in relation to the incident in which he and JR were both alleged to have offended against the complainant and also the first and non-representative count against him (relating to events which were said to have occurred on the first night that the complainant stayed with him).

[46] As well, it cannot fairly be suggested that the difficulties in relation to the complainant's evidence were overlooked or played down. Indeed, the primary focus of the trial was on the reliability of his evidence. There was no challenge to the way in which the Judge summed up on this issue.

[47] In the absence of any viable basis for a process challenge to the verdicts, Mr Dacre for the appellant was driven to rely on the ground that the verdicts were "unreasonable or cannot be supported in having regard to the evidence": see s 385(1)(a) of the Crimes Act 1961.

[48] We readily accept that this ground of appeal calls for a qualitative analysis of the evidence: *Owen v R*.[2] But that said, as the Supreme Court made clear in *Owen* this is not a second trial and in particular, it is not our function to substitute our view of the evidence for a view which was reasonably open to the jury.[3]

[49] As our review of the evidence given at trial indicates, we have fully engaged with the facts of this case.

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2 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37.
3 At [13].

[50] The impression we have of the complainant from the evidence is of a young man who is significantly compromised as a result of his accident. This is to an extent which is greater than he and his immediate family (ie his mother and step-father) accept or, at least, would like to accept. As a result of his injuries, his general recall is poor and his ability to systematise information in an orderly (including a chronological) way is also significantly impaired. We have no doubt that he is particularly prone (and more so than most people) to confuse incidents and details and perhaps, as well, to get the wrong end of the stick. It is also perfectly possible that in circumstances where he cannot recall contextual detail, he may fill in the gaps; something which is far from uncommon in people who do not have the complainant's problems.

[51] That said, he is perfectly able to recall the experiences which he has undergone. And the more significant and emotionally laden those experiences are, the better his recall can be expected to be.

[52] At this point, we mention a number of potential issues which the jury must have resolved in favour of the Crown.

[53] We think that it was well open to the jury to conclude that the allegations made at the complainant's first evidential interview were not the result of suggestions which had been implanted in his mind either by his immediate family or the interviewer. As well, the jury was also entitled to put on one side the possibility that his allegations against the appellant were in the nature of conscious lies, made up by him with a view to perhaps getting out of trouble at home or out of a sense of vindictiveness towards the appellant.

[54] The more difficult issue for the jury was whether they could exclude to the required standard the possibility of confabulation. On the argument advanced by Mr Dacre, it was not reasonably open to the jury to do so.

[55] In this context, it is relevant that Dr Goodwin did not identify much likely confabulation in the first interview, leaving aside the "white goo" statements made about JR. Ms Breen saw no indications of confabulation. Further, it is far from clear

how or why the complainant would have confabulated his recollection of being sexually abused. Dr Goodwin suggested exposure to pornography and his awareness of WT's background. But unexplained on this approach is why exposure to what, on the whole, appears to have been heterosexual pornography, along with the complainant's slightly scrambled understanding of WT's paedophile background, would result in him developing a false memory of having been sexually abused by the appellant.

[56] Further, there was some contextual evidence which the jury may have found to have been of some assistance in accepting the broad thrust of what the complainant had to say, in particular:

(a) His account was generally consistent with what we know of the general chronology. The appellant certainly had the opportunity to commit the offending and there is nothing inherently incredible about the core allegations made by the complainant, albeit that the jury had grounds to be sceptical about some of the detail which he provided.

(b) There was support from the mother, step-father and WT for what the complainant had to say in relation to being exposed to alcohol, cannabis and pornography while he was staying with the appellant.

(c) The evidence of WT about a pat on the bottom if accepted suggested some sexual interest on the part of the appellant in the complainant.

(d) The high level of emotion associated with the complainant's departure from the appellant's house, while of course able to be explained innocently (as the complainant indeed did explain it when discussing the incident with Mr Marchant) again, in context of the case as a whole, is also consistent with his narrative. After this point, the complainant, who plainly liked the appellant, often enough saw him but did not stay with him overnight.

[57] All in all we are not persuaded that the verdict was unreasonable in the required sense. Accordingly the appeal against convictions is dismissed.

The sentence appeal

[58] The sentence appeal was not heavily pressed by Mr Dacre.

[59] Given what was said by this Court in *R v H*,[4] the offending warranted a starting point of between 13 and 19 years.

[60] In his sentencing remarks, the Judge referred to this range and then adopted the minimum starting point available, namely 13 years. He reduced that to 11 years to make allowance for the appellant's mental health difficulties. We see this as a reasonable allowance. The non-parole period imposed (of four years imprisonment) was, in the circumstances, merciful.

[61] Accordingly the appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[4] *R v H* [2009] NZCA 77.