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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA361/2010
[2013] NZCA 179

BETWEEN	S (CA361/2010) Appellant
AND	THE QUEEN Respondent

Hearing:	9 April 2013
Court:	Stevens, Allan and Clifford JJ
Counsel:	R Stevens and H Steele for Appellant K A L Bicknell for Respondent
Judgment:	30 May 2013 at 10.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Allan J)

Introduction

[1] At the conclusion of his trial in the Auckland District Court before Judge Gittos and a jury, the appellant, S, was convicted of four counts of rape (two representative) and three counts of sexual violation by unlawful sexual connection (one representative). All of the offending concerned his stepdaughter J, who was

aged between nine and 14 years at the time. The appellant was subsequently sentenced by Judge Gittos to 16 years imprisonment, with a minimum term of 10 years.[1] An appeal against sentence has been abandoned.

[2] In this appeal against conviction, the appellant raises six separate grounds. All of them are concerned with the adequacy of his representation at trial by his counsel, Mr Lawry. S argues that Mr Lawry failed to call a crucial defence witness, preventing counsel from properly cross-examining J on her earlier statements; that he failed to introduce evidence that corroborated the appellant's evidence; that he failed to cross-examine J adequately or effectively on her various contradictory and inconsistent statements; that he failed to brief the defence expert medical witness adequately and to lead her evidence properly; that he failed effectively to cross-examine the Crown's expert medical witness; and that he failed to deal adequately and effectively with a number of significant issues during his closing address.

[3] S contends that the failure to call the crucial defence witness was a fundamental error that of itself gave rise to a miscarriage of justice. Alternatively, he maintains that Mr Lawry's conduct, considered in its entirety, gave rise to a miscarriage of justice justifying the intervention of this Court.

[4] We have concluded that the appeal must be dismissed. We set out below our reasons for that conclusion.

Background

[5] The appellant's offending commenced when his stepdaughter was about seven years old. At the time the family was living in Australia. The appellant touched and rubbed her in the area of her vagina. When she complained to her mother, she was told not to "make up rubbish". From the age of eight the touching was occurring at least once a month and was accompanied by open mouth kissing. J was told not to tell her mother because she would get into "big trouble". The bond between J and her mother was never strong. Indeed, J had been in the primary care of her maternal grandmother until she was four years old.

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1 *R v [S]* DC Auckland CRI-2008-090-3508, 18 May 2010.

[6] The family returned to New Zealand in 2004 when J was about ten years old and settled in Huntly. There, the relationship between the appellant and J's mother gradually broke down and they eventually separated. It seems that the fragile mental health of J's mother may have been a significant factor in the separation.

[7] With the departure of J's mother, the family unit consisted of the appellant, J and her younger brother. From then on, the appellant's offending worsened. J was raped for the first time in Huntly, on the couch in the lounge in front of the television. She had resisted S's advances and gone to her bedroom, but he tipped her bed over and forced her to return to the lounge where the first rape occurred. There were four or five similar incidents in Huntly when J was aged between 10 and 12 years. The family moved to Auckland in 2006 when J was 12. From then on, for about two years, the appellant forced J to sleep with him in his bed and J was raped "every day or every second day". The appellant talked of marrying J when she turned 16. J sometimes tried to retreat to her bedroom but she was often pursued there by the appellant who tipped her out of bed and forced her to return to his bed.

[8] There were restrictions on J's contact with friends outside school hours and the use of the telephone. She was not permitted to stay overnight with her friends or have them to stay at her house.

[9] But in late March 2008, there was a remarkable development. J was then 14. The appellant agreed that J's school friend, SG, could stay overnight at the family home. But he imposed a condition that Ms Bicknell accurately characterises as "bizarre". The appellant said that SG could stay overnight provided that J told her of the relationship between J and the appellant. J did so. She says she instructed SG to just "act normal".

[10] That night, J was permitted to sleep in the same room as SG, but the appellant said she must visit him in his room early in the morning. The next morning, the appellant called for J who says she was raped by the appellant in his room. SG gave evidence of J looking distressed a little later in the morning. She also gave evidence of seeing J sit on the appellant's lap as if they were a romantic couple and of open mouthed kisses between them.

[11] The next day the girls went shopping. J bought some underwear for herself. SG gave evidence that when J showed the underwear to the appellant, he looked at SG, laughed, and said "I'll have fun taking those off tonight won't I?"

[12] SG reported these events to her mother, and within a day or two the police had become involved.

First ground – failure to call defence witness

[13] Mr Lawry was briefed relatively late in the piece. The appellant's former counsel was Ms Sellars who for unexplained reasons, became unable to take the brief a week or so prior to the scheduled trial commencement date. Mr Lawry agreed to take over. He received the file from Ms Sellars on 21 October 2009. The trial was scheduled to commence on 28 October 2009. Mr Lawry said in his evidence before us that the files were extensive. The relevant documents were contained in several Eastlight binders. Ms Sellars described the case to him as "fully briefed and ready to go".

[14] The file included a number of documents that were plainly copies from a file maintained by CYFS, which has had an involvement with this family over a period of some years.[2] The CYFS documents tended to suggest that a Ms Peters (a CYFS case officer) had at times played a central role in monitoring the progress of the family. A number of the documents bore her name. Ms Sellars' file did not include a brief for Ms Peters, nor did it contain any indication that she might be called as a witness.

[15] During J's cross-examination by Mr Lawry at the trial, J accepted a number of propositions put to her on the strength of information contained in the CYFS documents. But she was unable to answer some questions because she had no recollection of the matters concerned, nor even the identity of some of the CYFS staff with whom she had come in contact. In particular, when asked about some answers she had apparently given to CYFS in a questionnaire, J pointed out that the answers were not in her handwriting and that she had no recollection of giving them.

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[2] The abbreviation "CYFS" denotes the Child, Youth and Family service established pursuant to the Department of Child, Youth and Family Services Act 1999.

[16] That presented Mr Lawry with a problem. He could not put the CYFS documents in evidence unless their provenance was proved by calling an appropriate CYFS witness. That was made clear by Judge Gittos. But nothing had been done about having a CYFS witness on standby. Mr Lawry had not expected to encounter any significant difficulty in obtaining helpful answers from J. Neither it appears had Ms Sellars, because nothing had been done about approaching CYFS to provide a witness.

[17] The defence wanted to use the documents principally to assist in showing that J had never complained to CYFS of the sexual abuse she said she had suffered at the hands of the appellant, although there had been opportunities to complain if she wished.

[18] Upon encountering the problem, Mr Lawry took immediate steps to have Ms Peters located. That was on Thursday 29 October, the second day of the trial. Contacting Ms Peters proved difficult. Mr Rhodes, a private investigator instructed by Mr Lawry, finally spoke to her on Monday 2 November. Mr Rhodes's evidence is that Ms Peters recalled J from some years earlier, but told him that she had explicit instructions from her superiors not to talk about her dealings with J. She also indicated to Mr Rhodes that the department insisted on three clear days notice from service of the summons before Ms Peters would attend court, and that she would not discuss the case in advance with the appellant's lawyers. It seems also that there was the possibility that the department might argue that its files were confidential, although its position was not finally clarified.

[19] The upshot was that no summons was served on Ms Peters, and she was not called to give evidence. It might have been open to the appellant to seek an adjournment of the trial, in order that appropriate steps might be taken to serve a summons on Ms Peters and have her come to court to give evidence. Mr Lawry's failure to ensure that Ms Peters was available to give evidence, or to obtain an adjournment until she was, forms the basis of this first ground of appeal.

[20] Mr Lawry's evidence before us was that the pros and cons of seeking an adjournment were discussed by him with the appellant, and that he received explicit

instructions to proceed without Ms Peters. By then, a number of admissions and concessions had already been obtained from J during the course of cross-examination. Mr Lawry considered that there was little further benefit to be gained from requiring Ms Peters to give evidence.

[21] S's evidence before us was quite different. He says that he was never given an opportunity to consider whether or not an adjournment should be sought. He understood throughout the trial, once the difficulty about the CYFS file had emerged, that Ms Peters would ultimately be called to give evidence for the defence.

[22] If Ms Peters was not called on the appellant's instructions after receiving advice, then he is of course unable to argue that a miscarriage of justice occurred.[3]

[23] It is necessary to resolve that conflict. The appellant and Mr Lawry each filed detailed affidavits and were cross-examined at length before us. We are satisfied Mr Lawry did obtain instructions from the appellant not to pursue an application for an adjournment, for reasons which we now summarise.

[24] The issue in this case of alleged sexual offending was whether the incidents of which J complained ever occurred. The jury's view of J's veracity was crucial to the outcome of the trial. Some of the CYFS documents contained material tending to show that J had not complained to CYFS on occasions when, at least arguably, a complainant might have been expected to do so. So Mr Lawry's inability to pursue with J the detail of the contents of the CYFS documents was plainly an important issue both for him and for the appellant. The appellant was readily available to Mr Lawry. For part of the trial he was seated immediately behind counsel. Mr Lawry says also that in the morning and afternoon adjournments the appellant was held in a holding room immediately outside the court door, although he was taken down to the cells for lunch. So there were many opportunities for consultation. Moreover, of course, on an important matter such as this, any trial Judge would grant a brief adjournment to enable counsel to take instructions.

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[3] See *Witehira v R* [2011] NZCA 255 at [38].

[25] It is common ground that on one occasion Mr Lawry himself left the Court in order to see whether Ms Peters was waiting outside the courtroom door. That was at a time when Mr Lawry understood that a summons had been served on her. At that stage, it must have been obvious to the appellant that there was a serious issue about whether she was going to be available. It is simply not tenable to suggest that the matter was never discussed with Mr Lawry and the appellant was given no opportunity to make an informed decision about whether or not to apply for an adjournment. Mr Lawry says that a written note of his instructions appears to have been lost from the file, there having been changes of counsel since the trial.

[26] Mr Lawry's evidence, the contents of the appellant's affidavit, and our observation of the appellant's demeanour during his evidence, all confirm for us that the appellant is an intelligent, articulate man, who throughout has taken a detailed interest in the conduct of his case. We are satisfied that he did instruct Mr Lawry to proceed with the trial without making an application for an adjournment, although we accept that neither of them would have regarded the decision as easy.

[27] That leaves for consideration the question of whether Mr Lawry's advice to proceed with the trial was competent and reasonable. The mere fact that other trial counsel may have given different advice does not of itself give rise to a miscarriage of justice.[4]

[28] We are satisfied that Mr Lawry's advice to the appellant to proceed without applying for an adjournment was reasonable in all the circumstances of this case.

[29] We consider the advantages and disadvantages of calling Ms Peters as a witness to have been relatively finely balanced. Of course, precisely what she might have said is unknown. There has never been a draft brief for her. On the evidence it appears that she may not have been a particularly cooperative witness.

[30] There is material in the CYFS files that suggests that J was relieved that her mother had left home, that she had denied any "bad touching" at home when that was directly put to her, had praised her father at times, and said that she would prefer

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4 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [66].

to live with him. But J had already conceded in evidence at trial that she never complained to CYFS about the appellant's behaviour, albeit she says, because he always told her not to do so. She also agreed that she had made positive and even glowing statements about the appellant to CYFS when cross-examined about some of the material in the CYFS file. She conceded that she had expressed a preference to live with him. Moreover, and importantly, there was evidence from SG's mother that immediately following SG's overnight stay at the appellant's house, she had pressed J, who had denied any sexual abuse by the appellant. That was at the very end of this long period of offending. So, much of what might have been elicited from Ms Peters was already before the Court in one form or another.

[31] J's failure to complain about the abuse either to CYFS or to SG's mother, or to anyone else, is, as Ms Bicknell submits, quite unexceptional counter-intuitive conduct.[5] Had the defence relied too strongly upon the absence of a complaint from J or indeed upon evidence that there was an outwardly affectionate relationship between J and the appellant (for example, in reliance upon exhibits such as loving cards and messages from J to the appellant), then it would have been open to the Crown to call expert evidence to dispel possible jury misconceptions. It is now well established that a young victim of sexual abuse will often maintain an outwardly loving relationship with the perpetrator of the abuse. So there was limited probative value in evidence which might have been obtained from Ms Peters of a failure by J to complain to the authorities.

[32] Moreover, there was material in the CYFS documents which was significantly detrimental to the appellant's case, and which could have been deployed by counsel for the Crown once the documents were put in evidence. For example, there was material that suggested the appellant was controlling and violent, that he had threatened to kill his mother-in-law, that he had been arrested and charged with wilful damage and assault following an incident involving his wife and children, that there were concerns that he did not put the children's needs before his own, and that he had neglected and physically abused J. There was also material on the file that suggested that J's relationship with the appellant was "adultified", and that she was not permitted to be a child. Evidence of that sort might well have been

5 See *M v R* [2011] NZSC 134.

of significant concern to the jury. Some of the material was arguably mere opinion, and so of doubtful admissibility, but some of it was purely factual.

[33] In our view, the ultimate decision not to seek an adjournment was one that was well open to defence counsel insofar as the cross-examination of J was concerned. We agree with Mr Lawry that there would have been a significant loss of trial momentum arising from an adjournment. That risk was even greater where the outcome of such an adjournment was at best uncertain. We are satisfied that the appellant has not established that a miscarriage of justice occurred on this ground.

Second ground – failure to introduce evidence that corroborated the appellant's evidence

[34] This ground is also concerned with the decision not to seek an adjournment so that Ms Peters might be called as a witness. Mr Stevens argues that material in the CYFS file would have provided important corroboration for certain evidence given by the appellant in relation to:

(a) his former wife not returning to the family home at the direction of CYFS (and not because he forced her out in order to facilitate his relationship with J);

(b) the cancellation of a without notice custody order in favour of his wife, and in particular the overt steps taken by the police to support the appellant's case for custody;

(c) the alleged rape of the appellant's former wife by her stepfather.

[35] On each of these points the appellant was cross-examined by counsel for the Crown. The trial Judge also commented on these points in his summing up. Mr Stevens submits that the effect of Mr Lawry's failure to ensure that CYFS file material was before the Court was to deprive the appellant of the opportunity to rely on material that corroborated what he had said in evidence. He submits that this seriously undermined the appellant's credibility in the eyes of the jury.

[36] All three of these issues were the subject of questions from the jury. It is therefore a reasonable inference, as Mr Stevens submits, that the issues would have been of interest to the jury when they were considering the appellant's evidence.

[37] The argument for the appellant focuses in particular on four documents that were in the CYFS file but not before the Court. The first appears to be a report to a family group conference relating to the family, but it is undated and unsigned. It seems to confirm that the Huntly police did make representations to the Family Court outlining their concerns over J's mother having custody, and it confirms that the custody order in the mother's favour was "withdrawn". But the report also contains material that would have been significantly detrimental to the appellant. For example, the unknown author says that he or she has "a reasonable level of concern around both of these parents". Further, it speaks of " …power & control exerted by [the appellant] over [J's mother] …". The report also discloses that the appellant had been arrested and charged with wilful damage and assault following an incident involving J's mother and the children at J's grandmother's house. The report continues:

> There are numerous other instances of alleged physical violence & controls being imposed on [J's mother] by [the appellant]. It has also been suggested that there is a possible flight risk involving [the appellant].

[38] The report also deals briefly with the allegation of rape by J's mother against her stepfather. All in all, this document, even if admissible (and there is nothing to connect it directly with Ms Peters), might be thought to contain as much that was detrimental to the appellant's case as was favourable to it.

[39] The next document is an affidavit by one Anna Palmer who says she was at the time the social worker assigned to the family. It was sworn on 7 April 2008, the time at which the present allegations surfaced. It annexes a draft unsworn affidavit in the name of Ms Peters, apparently dating back to September 2005 (that being the month and year typed into the jurat of the affidavit). This draft affidavit records some of the history of J's mother's deteriorating mental health, and outlines in some detail some of the difficulties experienced by the family.

[40] But it also records certain material that, if true, is discreditable of the appellant. For example, it confirms the occasion upon which the appellant was charged with wilful damage and assault and an incident in which he is said to have threatened to kill J's young brother and himself. There are also numerous allegations of the appellant's controlling behaviour. The affidavit is not sworn, and so the reaction of Ms Peters to it, even if she had been called at the trial, is unknown.

[41] The third document appears to be a series of CYFS case reports downloaded from CYFS files on 23 November 2005. Some of these reports appear to be from Ms Peters, others are not. They tend to suggest that J's mother did indeed present with significant behavioural problems, and that concerns about her disengagement from a role within the family may have resulted in large part from her deteriorating mental health.

[42] But again these reports are not wholly favourable so far as the appellant is concerned. For example, one report writer (seemingly Ms Peters) says that she has a "reasonable level of concern around both of these parents". She repeats her concern that the appellant may be a flight risk.

[43] The final document appears to be a handwritten clinical note relating to J's mother. Its authorship is unknown. It is difficult to see how it would be admissible in the hands of Ms Peters.

[44] The argument for the appellant is that, had Ms Peters been called to give evidence (and an adjournment obtained for that purpose if necessary), then she could have produced all of these documents. Trial counsel for the appellant could then have deployed the material in the documents to demonstrate to the jury that what the appellant had said in evidence on the three relevant topics was indeed correct.

[45] Questions from the jury were received by the trial Judge over the luncheon adjournment at a time when the appellant was being cross-examined. The defence case closed later that afternoon and counsel's addresses commenced the following morning. So there was effectively no time within which to call Ms Peters for the

purpose of producing the documents which Mr Stevens says she ought to have produced.

[46] The appellant's evidence before us is that he had expected throughout that Ms Peters would eventually be called. He had given Mr Lawry explicit instructions about that and there had been no suggestion that she would not ultimately arrive.

[47] For his part, Mr Lawry says that he carefully explained the pros and cons of seeking an adjournment, and that he received instructions from the appellant not to do so. The gravamen of this is set out above. We have already concluded that Mr Lawry's evidence is to be preferred to that of the appellant on the point.

[48] By the time the jury questions emerged late in the trial, it was simply too late to do anything about an adjournment. It is extremely unlikely that the trial Judge would have permitted an adjournment, simply in order to allow the defence time to meet the jury's questions about collateral issues that might possibly have affected their view of the appellant's credibility.

[49] Moreover, as we have earlier explained, there was a significant risk in having portions of the CYFS file produced because there was material in the file unfavourable to the appellant that might well have been used by counsel for the Crown to engage in further cross-examination if leave was sought to do that.

[50] In all the circumstances we are satisfied that Mr Lawry's decision not to seek an adjournment was open to competent trial counsel and cannot be said to have given rise to a miscarriage of justice.

Third ground – failure to cross-examine adequately

[51] Mr Stevens argues that Mr Lawry failed to cross-examine J adequately and effectively. Her credibility was plainly one of the central issues for the jury to consider. If they had doubts about her veracity, then they could not have convicted the appellant on any of the counts in the indictment. Mr Stevens maintains that Mr Lawry failed to cross-examine adequately on the following topics:

(i) The various inconsistent and contradictory statements made by the complainant which are recorded in the CYFS material;

(ii) The inconsistent statements made by the complainant during her evidential interview ("EVI") as compared to the evidence she gave at trial;

(iii) The number of times that the complainant alleged she was raped by the appellant;

(iv) The contradictory and inconsistent statements made by the complainant in relation to the last occasion that she alleged she was raped by the appellant;

(v) The contradictory and inconsistent statements made by the complainant in relation to the alleged incidents of sexual violation by unlawful sexual connection (oral sex);

(vi) The complainant's evidence in relation to the diary that she alleged she kept, which was raised for the first time during cross-examination.

[52] J gave an evidential videotaped interview (EVI) in April 2008 when she was 14 years old, just a few days after the last of the appellant's alleged offences, on the morning when SG was still in the house. At trial however, she was 15 years old and gave evidence in the usual way in the witness box. The EVI was not produced or played or relied upon by the Crown in any way. J was extensively examined by Mr Lawry in reliance on some of the documents in the CYFS files. But she could not remember some of the detail of her dealings with CYFS social workers over the years.

[53] Mr Stevens argues that had the CYFS documents been produced through Ms Peters, J could have been cross-examined to much greater effect, with a view to having her accept that she did make a number of statements supportive of the appellant, and the way in which she was treated by him.

[54] That may be the case, but in our view it is overwhelmingly likely that she would have explained, as she did at other points in her evidence, that she was constrained to lie to the social workers because the appellant had told her that if she disclosed this offending to anyone, she would be separated from her younger brother with whom she was closely bonded, and whom she dearly loved. Quite apart from that, as we have observed earlier, it is now well established that young victims of

sexual abuse will often lie to others about the offending, and indeed will give every appearance to outsiders of maintaining an affectionate relationship with their abusers.

[55] That phenomenon is illustrated in the present case. In cross-examination Mr Lawry produced to J various cards, letters and other documents in which she expressed her love and admiration for the appellant. The majority of these were in 2007 and 2008 when the appellant had allegedly been offending against her for some years. So there was a good deal of documentary material to support the defence claim that this was a conventional father-daughter relationship. J did accept in evidence that she told a police officer in 2005 that she was happy living with the appellant, and she denied to SG's mother in April 2008 that the appellant had done anything improper to her. In our view, the defence had ample evidence to support the appellant's claim that J was lying to the Court.

[56] We do not consider the absence of the CYFS material to have made any significant difference to the effectiveness of Mr Lawry's cross-examination.

[57] We turn to the differences between J's EVI on the one hand and the evidence she gave at trial on the other. Mr Lawry spent some time in cross-examination, taking J through some of the differences in her respective accounts of the offending. The earlier EVI was in April 2008, her evidence at trial was given in October 2009. It is therefore unsurprising that there would be some discrepancies or variations.

[58] In evidence at trial (but not before), J said that the appellant had threatened her with the loss of her brother if she reported his offending and that he had licked her vagina more than once. When cross-examined on the newly introduced evidence, she explained that she had just wanted to get out of the video interview and could not remember every question the interviewer had asked her at that time.

[59] At trial, J gave much more detailed evidence about the circumstances of the first rape than she had in the EVI. She detailed the television programme that was on, the manner in which the appellant had threatened her, and the incident (related above), in which she was literally tipped out of bed and forced to return to the lounge

where the first rape occurred on the couch. There was little cross-examination about the detail of this first rape, but we accept Ms Bicknell's submission that further questioning may well have elicited further detail and responses detrimental to the defence.

[60] Defence counsel who are required to cross-examine a complainant in sexual abuse cases, and particularly a young complainant, are faced with a tricky forensic task. On the one hand it is necessary to test the evidence, but on the other, there is a risk that a young and vulnerable complainant may be seen as subjected to unnecessary defence browbeating. Moreover, there is the real risk that as defence questioning proceeds, further compelling detail is elicited unwittingly. This Court will ordinarily be slow to second-guess defence counsel who must make immediate important decisions about the extent of cross-examination, often based simply upon instinct and experience. In that respect, Mr Lawry has significant criminal trial experience, both as a prosecutor and more recently as defence counsel.

[61] There was no cross-examination on a number of other topics, including the number of times the appellant allegedly made J suck his penis, the frequency of sexual intercourse when she was aged between 10 and 11 years, or uncertainty over the precise date when intercourse last occurred (both 28 and 30 March were mentioned). We accept Ms Bicknell's submission that all of these matters come within the degree of latitude accorded to counsel as to how to conduct a cross-examination, particularly of a vulnerable witness.[6]

[62] In some respects, the account given by J in her EVI was somewhat more truncated and the scale of the sexual activity disclosed in it was rather more limited than at trial. But that is not unusual. J explained in evidence that she was desperate to get away from the interview. She was significantly distressed by the trauma of bringing the alleged offending to a conclusion, and by her experience in having to give an account of the offending to the police interviewer.

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[6] *H (CA177/02) v R* CA177/02, 21 September 2004 at [36] and *Duncan v R* [2011] NZCA 307 at [27].

[63] There is a further important issue. A detailed cross-examination of J with a view to establishing that her EVI was unreliable and her veracity suspect, would run the risk of a successful application by the Crown for the production and playing of the EVI to the jury in its entirety.[7]

[64] Mr Lawry said in evidence in this Court that J made a favourable impression in the EVI, and that her account of the offending during that interview was "compelling".

[65] Finally, there is the issue of J's diary. During cross-examination she claimed for the first time that she had kept a diary in which she wrote the detail of the appellant's offending against her. It was left behind when she moved away from the house at the time of her disclosure of the offending to the police, and she was unable to retrieve it subsequently. The existence of the diary was unknown to the Crown Prosecutor or to the officer in charge of the case. Mr Stevens submits that Mr Lawry's cross-examination of J about the diary was inadequate. We disagree. Mr Lawry dealt with the diary (and its absence from the trial) to some effect in his closing address, noting J's failure to speak about it to the police, and suggesting that she had told a deliberate lie about it. We are satisfied that Mr Lawry dealt with the diary question in a perfectly competent manner.

[66] We conclude that there is no substance in the argument that Mr Lawry failed to cross-examine J adequately or effectively. The appellant has not demonstrated that a miscarriage of justice occurred on this ground.

Fourth and fifth grounds – failure to deal adequately with the medical evidence

[67] The fourth ground of appeal is concerned with an alleged failure by Mr Lawry to brief the defence medical expert adequately and to lead her evidence properly. The fifth ground is concerned with a claimed failure to cross-examine the Crown's expert medical witness. These grounds are closely related and it is convenient to deal with them together.

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7 Evidence Act 2006, s 35.

[68] J was examined by Dr McLaren on 2 April 2008, just a few days after the last of the alleged rapes. But although Dr McLaren was able to conduct a thorough external inspection of J's vagina and hymen, J's distress prevented a full internal examination. Mr Stevens submits that Dr McLaren, who was the Crown's medical expert witness, ought to have been cross-examined by Mr Lawry about the number of times J had allegedly been raped, and the likely physical effect this may have had on the complainant. Mr Stevens is critical also of Mr Lawry's failure to cross-examine Dr McLaren adequately on a 1994 study by Emans, entitled "Hymenal findings in adolescent women: impact of tampon use and consensual sexual activity", and more generally to put to Dr McLaren the evidence that was anticipated from the defence expert, Dr Felicity Goodyear-Smith.[8]

[69] Mr Stevens contends further that Mr Lawry failed adequately to brief Dr Goodyear-Smith prior to the trial. He maintains that she was not explicitly told by Mr Lawry about the number of times on which J says she was raped, nor was this covered in Dr Goodyear-Smith's evidence in chief. Mr Stevens further submits that Mr Lawry failed to cover the Emans study effectively with Dr Goodyear-Smith. Finally he contends that Mr Lawry "completely undermined" Dr Goodyear-Smith's evidence by asking her whether it would be fair to say that the conclusions that could be drawn in this particular case were limited because of the very limited nature of the physical examination.

[70] We are unable to accept that any of Mr Stevens' criticisms are valid. Dr McLaren referred in her evidence in chief to one particular study, and was taken by Mr Lawry in cross-examination to several others. But she did not depart from her opinion (based upon some years in clinical practice) that:

> … the majority of young women who make allegations of sexual assault have a normal examination and that is certainly what I see in my clinical practice. It's actually uncommon to see a tear in the hymen.

And

> Q. So what would you therefore say if there is a normal finding to the genitalia what does that say?

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[8] SJ Emans and others "Hymenal findings in adolescent women: impact of tampon use and consensual sexual activity" (1994) 125(1) J Pediatr 135.

> A. Well, it just doesn't mean nothing happened, what we tend to put in our medical reports and in our briefs is that a normal examination doesn't confirm sexual abuse and it doesn't rule it out either.

[71] Contrary to Mr Stevens' argument, we consider that Mr Lawry engaged in a detailed and skilful cross-examination of Dr McLaren. He put to her several relevant studies and explored with her the detail of her examination of J. He made little progress, but that was really inevitable for two reasons. First, Dr McLaren's physical examination of J was inhibited by J's distress, so there was only limited examination evidence to work with. Second, as is now well established in the literature, most physical examinations of older girls and young women said to have been engaged in sexual activity are unremarkable in the sense that they can neither confirm nor rule out sexual abuse.[9]

[72] Neither is there any substance in Mr Stevens' argument that Mr Lawry failed to elicit from either expert witness the fact that on J's evidence there had been as many as 800 rapes. The witnesses were already aware of the scale of the allegations because they were provided with a transcript of the EVI in which J said that by the time she was 13, sexual intercourse was occurring every second day or even daily. Her evidence at trial was to precisely the same effect.

[73] So both the expert witnesses and the jury were aware that J was alleging that for a significant period she had been raped daily or almost daily.

[74] We agree with Ms Bicknell, who submits that a decision by Mr Lawry to calculate the total number of rapes over a two year period and to put the resulting figure (several hundred) to the expert witnesses, would have backfired. In our view the jury is likely to have been horrified by such a stark reminder of the totality of the alleged offending.

[75] Likewise, we are unable to attach any weight to Mr Stevens' submission that Mr Lawry ought to have done more to draw out from Dr Goodyear-Smith in her trial evidence, the detail of the Emans study, which suggested on the basis of 100 adolescents who claimed to be sexually active, that the instances of hymen split were

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[9] See the discussion in this Court in *D(CA171/2009) v R* [2010] NZCA 533 at [32]–[39].

high (84 of 100). Mr Lawry did in fact lead evidence from Dr Goodyear-Smith about the Emans study findings, although the author's name was not expressly mentioned.

[76] But as we have already observed, the difficulty here for the appellant was that the physical examination was limited and inconclusive, so there was nothing in the clinical evidence against which the literature could be tested. Besides, decision making of the sort criticised by Mr Stevens falls well within the range of the discretion open to trial counsel.

[77] We are satisfied that Mr Lawry's examination and cross-examination of the medical witnesses was competent and could not possibly have resulted in a miscarriage of justice.

Ground six – inadequate defence closing

[78] Mr Stevens submits that in his closing address, Mr Lawry failed to deal adequately with the medical evidence, corroboration issues, and the thrust of the appellant's evidence. But there is little relevant detail in Mr Stevens' synopsis of argument. Nor did he spend much time in oral argument on this issue.

[79] Mr Lawry did refer to the medical evidence in his closing address. In particular he referred to Dr Goodyear-Smith's evidence to the effect that the risk of hymen damage increased with an increase in the incidence of sexual intercourse. He said also that J's hymen appeared to be normal for a 14 year old girl who was not sexually active. But as we mentioned earlier, there was a limit to what Mr Lawry could responsibly do with the medical evidence. Dr McLaren's examination of J was incomplete, so there was little for the expert witnesses to discuss. Moreover, there is now a well established body of literature and opinion to the effect that even a full medical examination will often prove inconclusive.

[80] Mr Stevens criticises Mr Lawry's reference in his closing address to the absence of corroboration of the appellant's evidence on topics which generated the jury questions. In that respect Mr Lawry simply asked the jury to remember that it was not for the appellant to prove anything. We consider that to be an

understandable way of dealing with an issue which was obviously in the jury's minds. There was criticism also of Mr Lawry's reference to the absence of corroboration of J's evidence. Mr Stevens says that by referring to the lack of corroboration Mr Lawry was in effect, inviting the trial Judge to say (as he did) that the Crown was not obliged to point to material evidence corroborative of J's account. Mr Stevens says there was in fact some corroborative evidence in the form of SG's account of her sleepover at the appellant's house.

[81] We do not agree that Mr Lawry's closing must have caused the Judge to direct the jury that no corroboration of J's evidence was required as a matter of law. That is a conventional direction. There is nothing to suggest it resulted from anything that Mr Lawry had said. It was given near the commencement of the summing up, at a point when the Judge was dealing with relatively general matters.

[82] Finally, Mr Stevens refers in his synopsis of argument to a claimed failure on Mr Lawry's part to address the appellant's evidence properly during his closing address. Mr Stevens provides no detail. We have considered the address in its entirety and believe it covered the appellant's case and his evidence perfectly adequately. In our view there is nothing in the appellant's complaint as to the adequacy of Mr Lawry's closing address.

A further matter

[83] It is necessary for us to deal with another issue which did not form part of Mr Stevens' synopsis or argument, but which was raised by Mr Lawry in his evidence before us and was the subject of questions asked by members of the Court during the course of the appellant's evidence before us. It is clear from that evidence that the appellant remains dissatisfied about the way in which Mr Lawry addressed the jury at the commencement of the trial. The appellant considers that it dictated the way in which he himself was obliged to give evidence.

[84] In his opening address Mr Lawry said this:

> If I can make it quite plain, there has been no offending. He has had no sexual contact at all with [J], in any way. There has been no sexual intercourse with [J]. He has not performed oral sex on her and she has never

performed oral sex on him; it is a total fabrication. Those allegations are completely false and have had a huge, devastating effect on him and his family.

[85] In an affidavit sworn for the purposes of this appeal, Mr Lawry said:

> 23. After the appellant [was] convicted he began to blame the witnesses, the prosecutor, the Judge, then me. His criticism of me was that in my opening address to the jury I had told the jury that there had been no sexual contact between the complainant and the appellant, just as he had instructed me. I then was told for the first time that because I had told the jury that nothing sexual had occurred, that he was forced to lie. I was stunned. I learned for the first time that he had been sexually involved with the complainant but he denied that it was from when she was as young as nine. He said it was all her fault as she took advantage of him.
>
> 24. I visited him in prison and his position changed. He told me that he had been depressed and that when someone is depressed they become vulnerable to addition (sic) and his addition was sex. Later he claimed to me that he was vulnerable and that J had sensed that, and had been sexually abusing him.
>
> 25. I asked him whether he wanted me to withdraw but he was insistent that I should continue to act for him. As we approached the sentencing he instructed me that he wanted me to obtain a psychologist's report on him to demonstrate that he was vulnerable and sexually abused by the complainant. He insisted on speaking directly to the Judge about the need for the report. I cautioned him against doing so but he insisted.

[86] A report was obtained from a psychologist, which records the appellant as having made the same allegation to the psychologist, namely that J had sexually abused him, rather than the other way around.

[87] In a reply affidavit the appellant says that he had not instructed Mr Lawry to say that there had been no sexual contact between J and him. He said that his instructions were that he denied the false allegations made by J, and that is the way he answered the questions put to him by counsel for the Crown. However, he says Mr Lawry pressed him to say that it was a normal father/daughter relationship, and that is why he was forced to lie when the trial "all went wrong and I was wrongly convicted".

[88] In his evidence at the hearing of the present appeal, the appellant said that Mr Lawry was wrong to say in his opening address that the appellant had no sexual

contact at all with J in any way. Mr Lawry had no instructions to open in that fashion. However, he accepted that he had not complained about the manner in which Mr Lawry opened at any time during the trial.

[89] It emerges that the appellant's position now is that although the sexual activity alleged by J against him never occurred, the relationship was nevertheless not an ordinary father/daughter relationship. He claims he was the subject of sexual abuse by J, although sexual activity did not take the form alleged by her at the trial. Her sexual abuse was part of a relationship in which she was also emotionally and physically abusive of him.

[90] It is appropriate to observe that duties and obligations between lawyer and client are mutual. While we have been concerned in this appeal with the scope of Mr Lawry's duty to the appellant, and the question of whether he fulfilled that duty, it is relevant also to note that a client has a duty of candour to his lawyer. Here, the appellant says that he gave careful instructions to his lawyers about the case. His position, as conveyed to them (Ms Sellars and later Mr Lawry) was that he denied all of J's allegations. He says he did not claim to have had a normal father/daughter relationship with J. Mr Lawry seems to have inferred that, but he ought not to have done so, the appellant says.

[91] In a reply affidavit, the appellant says that he did tell Mr Hart (who had been briefed by him at an earlier stage) about the abuse suffered by him at J's hands, but was advised by Mr Hart not to raise the matter because no jury would believe it. The appellant did not however tell Mr Lawry.

[92] Although unsurprisingly, this issue is not formally part of the appellant's case, we have considered it appropriate to outline it in some detail because the appellant makes serious accusations against Mr Lawry in his reply affidavit, which if true, go to the heart of the conduct of the defence case at trial. The appellant says:

> 17. I had not instructed Mr Lawry to say that there had been no sexual contact between the complainant and me. My instructions to him were that I denied the false allegations made by the complainant and that is the way I answered the questions put to me by the Prosecutor. I did not want to lie to the Court. I was told by my previous lawyer, Barry Hart, that I would not be

> believed by a jury if I said I was the victim of abuse from the complainant and anything I said would be used against me. Mr Lawry pressed me to say it was a normal father/daughter relationship. That is why I said I was forced to lie when the trial all went wrong and I was wrongly convicted. I note in his "Stream of Consciousness" Mr Lawry confirms my instructions that the complainant was manipulative, violent and rebellious. It was not a normal father/daughter relationship at all. I did what Mr Lawry told me because I was scared and wanted this to end.[10]

[93] There is nothing in this passage to suggest that Mr Lawry was told by the appellant that J had been sexually abusive of him. Neither does the appellant explain how and why he was forced to lie as the result of Mr Lawry's opening address to the jury. Given that the appellant's instructions to Mr Lawry were that all of J's allegations were denied, it is extremely difficult to understand why Mr Lawry ought to have refrained from saying in opening that there had been no sexual contact between J and the appellant. Mr Lawry had been told nothing that suggested otherwise.

[94] Despite the appellant's claims to the contrary, we are satisfied that Mr Lawry's opening address to the jury was perfectly proper, and that it could not possibly have affected the outcome of the trial. We understand why Mr Stevens chose not to include this issue among his grounds of appeal. We wish to make it clear however that, having discussed this matter at some length, we simply put it to one side in our consideration of the grounds actually relied upon by the appellant.

Conclusions

[95] For the reasons we have expressed, we are satisfied that the appellant has come nowhere near establishing that a miscarriage of justice has occurred. Although there may be room for argument on matters of detail relating to Mr Lawry's conduct of the trial, the observations of the majority of the Supreme Court in *Sungsuwan v R* apply:[11]

> There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some

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10 The reference to "Stream of Consciousness" is to a document prepared by Mr Lawry post-trial at the request of other counsel. It records some of Mr Lawry's recollections of the course of the trial.

11 *R v Sungsuwan*, above n 4, at [66].

> cases the accused will have agreed or acquiesced – only to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

Result

[96] None of the grounds advanced by the appellant having succeeded, the appeal must therefore be dismissed.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent