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

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA213/2013
[2013] NZCA 584

BETWEEN	O (CA213/2013) Appellant
AND	THE QUEEN Respondent

Hearing: 14 November 2013

Court: Wild, Simon France and Asher JJ

Counsel: J P Temm and A J More for Appellant
P K Feltham for Respondent

Judgment: 27 November 2013 at 10.30 am

JUDGMENT OF THE COURT

The appeal, which is against both conviction and sentence, is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This is an appeal both against conviction and sentence.

[2] Following a trial in the District Court at Rotorua in October 2012 the jury found the appellant guilty on five counts of sexual violation by unlawful sexual connection and one count each of inducing a girl under 12 years of age to do an indecent act, indecent assault on a girl aged under 12, doing an indecent act with a young person under 16 years of age and indecently assaulting a girl aged between 12 and 16. All those were representative counts. All related to offending against his granddaughter. We will call her Victim A. The jury were unable to agree on a further five counts relating to Victim A.

[3] On 22 March 2013 Judge Weir sentenced the appellant to 15 years imprisonment with a minimum period of imprisonment of seven and a half years.[1] The sentence comprised 13 years imprisonment for the offending in relation to Victim A, with an uplift of two years for further offending against Victim B. Before his trial for his offending against Victim A, the appellant had pleaded guilty to charges relating to Victim B. These were a charge of meeting a young person following sexual grooming and one of unlawful sexual connection with a young person under the age of 16. Both were representative charges. Victim B was the daughter of friends of the appellant and his former wife.

The offending

[4] This is the way Judge Weir summarised the offending in his sentencing remarks:

> [4] Insofar as Victim A is concerned, she was your granddaughter. From a young age she spent a significant period of her life [on the farm] where you were a manager. She developed a close personal attachment to you and you exploited that attachment for sexual purposes. Between the dates that I have referred to, you perpetrated a number of sexual acts against her on repetitive occasions. In particular, you sexually violated her by penetrating her genitalia with your finger while in vehicles and elsewhere on the farm. You got her to perform oral sex on you. On some occasions, you had her watch SKY TV's Playboy channel and replicate the acts of oral connection viewed on that channel. On other occasions, these acts occurred in the spa bath. You got her to masturbate you in various situations before and after her 12th birthday. Finally, you began to simulate sexual intercourse with her later in the period of offending following her 12th birthday. It was this that caused her to tell her mother.

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1 *R v [O]* DC Rotorua CRI-2011-063-3651, 22 March 2013.

> [5] In addition to this and in order to gain and maintain her trust and confidence, you gave her gifts and attention to create the opportunities in which the sexual exploitation could occur and to maintain her silence. A number of witnesses in the trial gave evidence to the effect that your gift giving was excessive. There was evidence given as well of course that you would also pick her up from school early or fail to take her to school, which also created the opportunity for you to offend against her. You also used threats against her to maintain her silence. The threats made in relation to her beloved horse … featured prominently in the trial. There was also another occasion when she attempted to tell on you and evidence was given that you reacted aggressively towards her by ripping a phone from the socket on the wall.
>
> [6] Insofar as Victim B is concerned, she met you through her parents. Like Victim A, she became fond of the farm and enjoyed spending time with you in that environment. In 2007, you began to groom her by communicating with her by phone. Her parents became aware of this and told you to desist in your approaches towards the victim and you were warned by the police to stop communicating with her. Despite her parents taking steps to prevent further contact, you managed to resume contact with her which led to the offending in 2011. This grooming included meeting in secret locations such as the New World Supermarket carpark here in Rotorua and also returning to the farm on numerous occasions. The grooming involved sentimental and explicit text messages and on one occasion involved you buying her an erotic outfit, a Playboy bunny suit, in fact referred to by another witness in the trial as far as Victim A is concerned.
>
> [7] On some occasions, she stayed the night with you at the farm before being taken back to Rotorua the next morning. It happened on a number of occasions. On one occasion you took her to Auckland and checked into a hotel and stayed for two nights before returning. Between those identified dates, you had sexual intercourse with her on a number of unspecified occasions. It is likely the sexual intercourse occurred on the numerous occasions when she stayed at your home and during the visit to Auckland, although it cannot be said that the sexual activity was limited to those occasions. At all times the victim was a young person and of course you knew that fact.
>
> [8] I have read through the extensive summary of facts several times prior to undertaking this sentencing exercise and it is clear, from reading the context of those texts, that you were the person who was doing the grooming.

Appeal against conviction

Refusal of trial Judge to adjourn trial meant there was inadequate time to prepare for trial and present a defence, with resulting unfairness to the appellant

[5] Although Mr Temm made alternative submissions, they overlap and we address them together.

[6] Following her complaint to the police, Victim A was interviewed on 22 July 2011.[2] The appellant was interviewed at length, and then arrested and charged, all on 8 August 2011. Mr Lawson was assigned as his counsel, but was granted leave to withdraw in May 2012, after he became aware of a conflict of interest. Mr Te Kani was then assigned as counsel. By mid-September Mr Te Kani felt unable to continue. In an affidavit he swore in relation to this appeal, he explained that it had become "increasingly difficult for me to be able to understand what his (the appellant's) defence was in relation to" a large number of text messages of a sexual nature the appellant had sent Victim B.

[7] Mr Hine took over as counsel for the appellant on 26 September 2012. 19 days – 12 work days – then remained until the appellant's trial started on 15 October 2012.

[8] On or about 9 October Mr Hine applied for an adjournment of the trial.[3] Of the grounds on which Mr Hine based the application, the one relating to the appellant and Victim A allegedly viewing adult channels on Sky TV is not relevant to this appeal. The second ground was that Mr Hine needed expert assistance to evaluate and test "counter-intuitive evidence" the Crown proposed calling from Dr Blackwell, a clinical psychologist. Mr Hine advised the Court that assistance was available from Dr Sandiford, an Auckland based psychologist, but not before the trial commenced on 15 October. The third ground was an opaque reference to "a need to obtain other expert opinion prior to the trial that will require the ability of the accused to be absent from his bail address".[4] Mr Hine advised the Court "finding an available expert and commissioning a report and receiving it in time for the trial is again problematic".[5]

[9] In his further, also undated, memorandum to the Court supporting the adjournment application, Mr Hine again relied on the need for him to obtain

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2 It was the usual videotaped interview, and formed her evidence in chief in the trial.
3 The application, which was by memorandum, is not dated.
4 Memorandum of M J Hine, undated, at [12].
5 At [12].

assistance in dealing with Dr Blackwell's proposed evidence. He also advised the Court:[6]

> [4] My client is seeing a medical practitioner this morning at my request to evaluate whether the issue he has raised with me is significant to be a trial issue. I am hopeful of having an interim report this morning sufficient to make a decision about this aspect of the matter.

[10] In his third (still undated) memorandum in support of the adjournment application, Mr Hine told the Court that he had received the oral results of the medical examination of the appellant. He stated:[7]

> [3] That examination has confirmed what has been reported. It is in my view potentially significant evidence. I will however require to have the evidence confirmed by a specialist.
>
> [4] I am making inquiries to ascertain whether I am able to have my client seen by a specialist who is available to give evidence to the Court, but I have a real concern that the imminence of the trial date will count against this.

[11] The trial Judge, Judge Weir, dismissed Mr Hine's adjournment application on 12 October.

[12] Mr Temm submits that the Judge's refusal to adjourn the trial resulted in a miscarriage of justice. That is because the defence did not have time to deal with Dr Blackwell's evidence, nor time to call expert medical evidence or to deal with the expert medical evidence called by the Crown. That evidence related to the appellant's penis. In evidence the appellant claimed he had broken his penis in an accident in February 2007, resulting in a period of impotence and a permanent curvature in his penis.

[13] In these circumstances, the appellant needed to demonstrate that the trial Judge's refusal to adjourn the trial prevented the defence calling evidence, and/or questioning Crown evidence, that may have made a difference to the outcome at trial. In short, he needed to demonstrate to this Court that there was a real risk that he had not received a just and fair trial. Mr Temm accepted that.

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6 Further memorandum of M J Hine, undated.

7 Second further memorandum of M J Hine, undated.

(a) Dr Blackwell's evidence

[14] Mr Hine did not cross-examine Dr Blackwell. No expert evidence is put forward in support of this appeal countering what Dr Blackwell said in her evidence. We draw the only available conclusion: the refusal of an adjournment did not result in any miscarriage in relation to Dr Blackwell's evidence.

[15] We add that Dr Blackwell has given similar evidence in many trials involving complaints of sexual offending against young girls. She is an acknowledged expert whose evidence, at least to this Court's knowledge, has seldom been controverted.[8]

(b) Medical evidence

[16] In the affidavit the appellant swore on 17 October in support of his appeal he deposed:

> I believe the urology evidence was critical and if I had been able to call evidence it would have put my defence fairly before the jury.

[17] In his evidence at trial the appellant described the accident and injury to his penis he claimed he had sustained. He said this had happened in February 2007 when he and his then wife were staying in an hotel at Auckland, where they had gone to see a performance of Cirque de Soleil. He said he was lying on his back in the bed with an erect penis when his wife had come into the bedroom and jumped or fallen on top of him. He described immediate pain, staying in bed, but being able to go to the performance the following day. He said that he was impotent for a period of about 15 months. He stated that it was some time later that he first noticed a curve in his penis. He told the Court that at no time had he ever sought medical assistance for the injury.

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[8] In *B (CA196/2010) v R* [2011] NZCA 654 this Court dismissed an appeal against conviction. The ground of appeal was that evidence of a proposed defence expert had wrongly been ruled in admissible as not substantially helpful. The defence had sought to call an expert to rebut evidence from Dr Mark Earthrowl who had given evidence essentially similar to that Dr Blackwell had given in the present case. The proposed defence evidence queried aspects of the 'Earthrowl/Blackwell' theory of delay in reporting, in those cases where the child had, early on, been formally interviewed. The appeal was dismissed and the Supreme Court subsequently declined leave to appeal.

[18] The defence called a close friend of the appellant (we will call him Mr V). Mr V told the Court that he and his wife were in Auckland with the appellant and his wife for the Cirque de Soleil performance. He recounted the appellant telling him over breakfast that, unfortunately, his wife "jumped on me and broke it … broke me old fella". He said the appellant had described the pain when it happened as "excruciating" but had said "it's calmed down and I'm OK this morning".[9]

[19] The appellant did not mention this February 2007 injury and accident to his penis in the course of his lengthy DVD interview with the police on 8 August 2011. In his affidavit in support of this appeal the appellant rejects "the Crown submission that I made no comment about my penile dysfunction to my previous lawyers". It seems that he did not mention it to his first counsel, Mr Lawson. He does not say that he did, and Mr Lawson makes no mention of it in the affidavit he swore on 10 September. It is clear from Mr Lawson's affidavit that the appellant's focus, at the time Mr Lawson was acting, was a challenge to the conduct of the officer in charge relating to the way the police inquiry had been and was being conducted. The appellant deposes in his affidavit that he did mention his 2007 accident and resulting period of impotence and erectile dysfunction to Mr Te Kani. That is confirmed by the appellant's friend Mr V, in an affidavit he affirmed on 24 September in support of this appeal. Mr V recounted going to see Mr Te Kani with the appellant and discussing in detail the 2007 accident and resulting erectile dysfunction.

[20] In the affidavit he swore on 27 September in relation to this appeal, Mr Te Kani confirms that the appellant did advise him that he had a broken penis. He states:[10]

> I had no idea what a broken penis was or what that meant … I did not know what to do with the information. I was still of the opinion that there was enough evidence in the text messages that were too "damning" and that he should plead guilty.

[21] Mr Te Kani's reference to text messages is to the large volume of text messages between the appellant and Victim B. It is clear from Mr Te Kani's affidavit that he was acting for the appellant in relation to the complaints both by Victim A

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9 Notes of evidence at 406/18–27 [NoE].

10 Affidavit of Louis Te Whakaotinga Te Kani, sworn 27 September 2013, at [13].

and Victim B, although he described the latter as "at the periphery … that complaint was not part of this trial".[11]

[22] To summarise thus far, although the appellant did mention the 2007 accident to his friend Mr V the following morning, he did not mention it either to the police when he was interviewed or to his first counsel, Mr Lawson. He did mention it to Mr Te Kani, his second counsel.

[23] As we understand it, the significance of the appellant's claimed penis injury is twofold. First, following the injury he had "a period of penile impotence and dysfunction and a significant amount of discomfort". The appellant deposed in his affidavit that the first time he had any kind of sexual relationship following the injury was with a new partner in 2010/11. It follows that Victim A could not be telling the truth when she describes the appellant having her perform oral sex on him, masturbate him and simulate sexual intercourse with him through this period of penile impotence and dysfunction.

[24] Secondly, if Victim A is telling the truth, she would have seen the noticeable bend in the appellant's penis, but made no mention of this in her DVD interview with the police or her evidence at the trial. This supports the appellant's denial that he committed the alleged sexual offences against Victim A.

[25] Dr Brons, a general practitioner, gave evidence for the defence at the trial. The doctor had examined the appellant's penis on 11 October 2012. He observed it bent upwards at approximately a 20–30 degree angle, two–three centimetres back from the glans penis (the glans is the head of the penis). In answering questions from the prosecutor about the appellant's penis, Dr Brons told the Court "the appearance is a little bit different".[12] The doctor explained that his examination of the appellant was on the first occasion he had met him. He said he would only have referred the appellant to a urologist for follow up attention if he complained of significant pain or problems, which was not the case.

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11 At [9].
12 NoE at 402/23.

[26] The Crown had called Mr Liam Wilson, a urologist. Mr Wilson told the Court that penile fractures, though rare, were a severe and acute injury. There was an audible snap with severe pain and almost instant very severe bruising. If there was not urgent surgical intervention, a period of no erectile function would ensue and after 12–18 months significant scar tissue would form causing a degree of bend in the penis. Mr Wilson said that the injury was almost always to the underside of the penis, causing it to bend downwards. Although it was possible for an injury to occur to the top surface of the penis, that usually required manipulation or instrumentation and resulted in even more serious immediate and long term effects. Mr Wilson was referred to Dr Brons' evidence of his findings on examination. Mr Wilson's opinion was that those findings, in particular the upwards curvature of the penis, were classic symptoms of Peyronies disease, which is a gradual but chronic scarring condition, as distinct from an acute injury.

[27] Under cross-examination the appellant accepted that what Mr Wilson had described was more severe than what had happened to him, and he accepted that he did not really know what he had done to his penis.

[28] The appellant's former wife gave evidence for the Crown. In cross-examination, counsel for the appellant asked her about the appellant's alleged penis accident. This was the exchange:[13]

> Q Now on the night of the 10th of February when you returned to the hotel, do you remember jumping on your husband?
>
> A Remember what?
>
> Q Do you remember jumping on your husband in the hotel room?
>
> A Jumping on my husband?
>
> Q Yes.
>
> A As in what?
>
> Q Jumping on him. Physically jumping on to him.
>
> A I don't remember that. As in jumping with my feet on him or jumping …?

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13 NoE at 228/30–229/17.

Q Jumping your body on to his body?

A No, I don't think so.

Q So he is going to give some evidence that that night you jumped on him. He had an erection and you broke his penis.

A I don't think so.

Q He's going to say that he was in agony when you did that.

A Really?

Q He is.

A Well, did I call the hospital or what. If he had a broken penis, I would think he would have been in agony all right. Maybe he would have needed medical treatment.

Q Do you recall that?

A Not at all.

[29] The one point of agreement between the former wife's evidence and that of the appellant was that their marriage was breaking down for some time before they separated on 11 November 2009. Indeed, Mrs O stated:[14]

> Thinking back now I don't think I've seen him naked for a long time actually, for what like probably two maybe three years before I left.

[30] Victim A gave evidence that she did not notice any particular change in the appellant's penis in or after 2007. On the other hand, she gave quite graphic evidence about the appellant's genital area being bruised after he had a vasectomy and that she had only masturbated him once following that operation because it hurt him. Victim A accepted that she did not pay a lot of attention to the appellant's penis and how it looked, because she felt that touching or licking it was gross and she "kinda switched off a bit" when asked to do those things.

[31] In contrast to the lack of any evidence contraverting that of Dr Blackwell, the Court has affidavits sworn by two urologists in support of this appeal. The first, sworn on 18 October, is by Mr Cresswell, a consultant urologist practising in Rotorua. He confirms that he performed a routine vasectomy on the appellant on 5 May 2011 in Rotorua. He confirmed that some bruising, better called

[14] NoE at 230/15–16.

discolouration and often extending up the penis, is inevitable following a vasectomy. He had no record of the appellant requiring any post-operative care from him. He was unable to say whether the appellant has Peyronies disease, because he had not examined the appellant for that. He made the point that Peyronies disease is only noticeable when the penis is erect, which was not the position during the vasectomy. Finally, Mr Cresswell confirmed that he was practising urology in Rotorua in October 2012 and would have been able to examine the appellant if requested at that time.

[32] We observe that Mr Cresswell, having performed a vasectomy on the appellant a little over a year earlier, was the obvious and available specialist to examine the appellant in October 2012 in relation to the claimed penis injury. There is no explanation from the appellant as to why he did not suggest this to his counsel, Mr Hine.

[33] The second affidavit is from Mr Kennedy-Smith, a consultant urologist practising in Wellington. He examined the appellant on 11 November 2013, to assess his penis. His affidavit recounts the history the appellant gave him, including of the 2007 incident:[15]

> … He sustained a forced deflection of the erect penis. This was when his wife (now ex-wife) accidentally collided with him when he was lying in bed with an erect penis, whilst she was getting into bed …

[34] Upon examination Mr Kennedy-Smith found the appellant's penis normal in the flaccid state, with no palpable defect and no specific skin abnormalities. The doctor then induced penile erection and said this of his further examination:[16]

> … Accepting the incomplete rigidity, there was minor dorsal deviation of the penis from the midshaft of the induced erection. The observed degree of angulation is not significantly abnormal. …

[35] Mr Kennedy-Smith then deposed:

> [10] My clinical assessment from the history and examinations today is that [Mr O] likely sustained an injury to the tunica of the corpora cavernosa. Although impalpable, the injury likely healed with scarring which, lacking in

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15 Affidavit of Dr Andrew Kennedy-Smith, sworn 13 November 2013, at [6].
16 At [9].

> elastic tissue, has resulted in mild dorsal penile angulation with erection over time. He has recovered erectile function and has no residual disability.

Referring to Peyronies disease he added:[17]

> … the underlying pathology of scarring and loss of elasticity is identical to that of Peyronies disease and Mr [O]'s penile problems may be considered similar to Peyronies disease.

[36] The first point is that Mr Cresswell was available to examine the appellant in October 2012. Had his findings been helpful to the defence, we assume he would have been available to give evidence. He does not depose otherwise. We thus do not accept that the Judge's refusal to adjourn the trial prevented the defence from obtaining expert evidence from a urologist.

[37] Nevertheless, we have considered whether the outcome at trial might have been different had Mr Kennedy-Smith's evidence been called by the defence. We are firmly of the view that it would not. Our reasons are these:

(a) The appellant's evidence about the acute nature of the injury to his penis was not credible. His former wife said no incident or accident of the sort the appellant described had happened. She expressed disbelief, nigh incredulity, when the appellant's account was put to her. The consequences of breaking a penis also cannot be reconciled with Mr V's account that the appellant told him over breakfast the next morning that the injury "had calmed down" and he "was OK". It is inconsistent also with Victim A's evidence that she was performing oral sex and masturbating the appellant throughout the period he claimed to have had erectile dysfunction as a result of the injury. Had the appellant's evidence about the injury and its effects been truthful, we find it inconceivable that he would not have mentioned it to the police when confronted with Victim A's allegations. As he now claims, it was – if true – a critical point. Similarly, the appellant appears not to have mentioned this highly relevant matter to his first counsel, Mr Lawson.

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[17] At [12].

(b) Under cross-examination the appellant accepted that Mr Wilson's description of a penile fracture and its effects was not what had happened to him, and that he did not really know what he had done to his penis.

(c) Mr Kennedy-Smith described the appellant's penis as having "no palpable defect" in its flaccid state, and as not having a "significantly abnormal" degree of angulation in its incompletely rigid state.

(d) What Mr Kennedy-Smith observed on examination of the appellant was "similar to Peyronies disease".

(e) It was only the history provided to him by the appellant that caused Mr Kennedy-Smith to opine that the appellant "likely sustained an injury to the tunica of the corpora cavernosa".

[38] This ground of appeal is not made out.

Inadmissible and prejudicial evidence introduced at trial

[39] This ground related to the DVD interview of Victim A, which was played to the Court as her evidence in chief.

[40] Ms Feltham was able to point out that this ground was based on an unedited transcript, not on the edited transcript which recorded what had in fact formed Victim A's evidence in chief. That confusion was not the fault of Mr Temm, who was not of course trial counsel.

[41] Once that confusion was cleared away, Mr Temm accepted that this ground lost much of its gravitas. All that could be complained of were two references by Victim A to her telling another young girl about the things the appellant was doing to her. Section 35 of the Evidence Act 2006 ruled out such evidence here, and it ought not to have been given. But in the context of the appellant's trial, this evidence was innocuous and inconsequential. It could not conceivably have resulted in or contributed to a miscarriage of justice.

[42] This ground of appeal fails.

Sentence appeal

[43] Mr Temm submitted the sentencing starting point should have been 11 rather than 13 years imprisonment. We do not accept that. Judge Weir took the charges of sexual violation by unlawful sexual connection relating to Victim A as the lead charges. As two of those charges involved penile penetration of Victim A's mouth, the Judge correctly noted that they fell within the rape rather than the unlawful sexual connection bands of this Court's sentencing guideline decision in *R v AM (CA27/2009)*.[18]

[44] Judge Weir omitted to state which of the sentencing bands he placed the offending in. We accept Ms Feltham's submission that it falls squarely within band three, calling for a sentencing starting point in the range 12–18 years imprisonment. That is because five of the factors this Court identified in *R v AM* as increasing culpability were present here, and each to a moderate if not a high degree. All of these factors were present in relation to both Victim A and Victim B. They were planning and premeditation, the vulnerability of the victims (particularly Victim A), the harm to the victims, the scale of the offending and the breach of trust involved (again, particularly Victim A). We reject Mr Temm's submission that a starting point of 13 years imprisonment was manifestly excessive. Indeed, there is some force in Ms Feltham's submission that a starting point several years higher could not have been criticised.

[45] Mr Temm responsibly did not take issue with the two year uplift to reflect the offending against Victim B. That uplift was, if anything, lenient.

[46] The appeal against sentence fails.

Result

[47] The appeal is dismissed, both in relation to conviction and sentence.

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[18] *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

Solicitors:
East Brewster, Rotorua for Appellant
Crown Solicitor, Wellington for Respondent