NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS/ PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS [OR NAMED WITNESS UNDER 18 YEARS OF AGE] PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA623/2017
[2019] NZCA 241

BETWEEN	JOHN DOUGLAS SEDDON TURFREY Appellant
AND	THE QUEEN Respondent

Hearing: 27 May 2019

Court: Collins, Peters and Mander JJ

Counsel: P N Ross for Appellant
K S Grau and K Peirse-O'Byrne for Respondent

Judgment: 21 June 2019 at 12.30 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Mander J)

[1] The appellant, Mr Turfrey, was convicted of serious sexual offending, including multiple charges of sexual exploitation of a person with a significant impairment, rape, and unlawful sexual connection against three complainants following a jury trial.[1] He appeals his convictions on the grounds the verdicts were unreasonable and that directions relating to demeanour and the complainants' possible motive to lie were not provided by the trial Judge.

Background

[2] Mr Turfrey and his wife were caregivers for persons with intellectual disabilities and children who had been placed in state care. In 2005, CG, who has significant intellectual impairments, was placed, at the age of 17 years, with the Turfreys. She would remain with them for some nine years. Over that period, Mr Turfrey engaged in sexual intercourse and oral sex with her on multiple occasions. Mr Turfrey was convicted of two representative charges of sexually exploiting CG, being a person with a significant impairment, two representative charges of committing an indecent act on her and a further charge of sexual exploitation.

[3] KW was a child aged seven years when she was placed with the Turfreys. Sexual offending against her started when she was about nine. It began with Mr Turfrey rubbing her vagina with his fingers and escalated in seriousness to the point where he attempted to have sexual intercourse with her on a number of occasions while his wife was working. By the age of 10, the conduct had progressed to full sexual intercourse and oral sex. When aged 12, KW disclosed the offending and she was removed from the Turfreys' care. In relation to KW, Mr Turfrey was convicted of two charges of committing an indecent act on a child under the age of 12, one charge of unlawful sexual connection, and five charges of sexual violation by rape, including four representative charges.

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[1] *R v Turfrey* [2017] NZDC 22269.

[4] AT is a non-verbal intellectually impaired young woman who would periodically stay with the Turfreys for respite care. AT did not give evidence. Proof of the charges of attempted rape and indecent assault against AT, of which Mr Turfrey was convicted, came from KW, who witnessed those acts.

[5] There was a fourth complainant, AM, who had moved in with the Turfreys at the age of 16 years. She was interviewed by the police but died before the trial. The Crown relied upon her evidential interview, which had been the subject of a successful hearsay application. However, Mr Turfrey was acquitted of the sole charge of indecent assault relating to this deceased complainant.

Unreasonable verdict

[6] Mr Turfrey's complaint that the guilty verdicts were unreasonable essentially rests on the proposition that the complainants' evidence was not reasonably capable of being accepted as credible. Mr Ross for the appellant submitted that each of the charges rested entirely on the complainants' evidence and that, when regard is had to the iterative nature of CG and KW's disclosures and the inconsistencies in their evidence, they were not capable of being believed. Counsel also placed emphasis on the implausibility of the offending having occurred unnoticed in a busy household, and the absence of forensic evidence, or other corroborative or supporting material.

Approach to this ground of appeal

[7] The threshold for finding a verdict unreasonable is only reached if the appellate court is satisfied that the jury could not reasonably have been satisfied on the evidence that the defendant was guilty.[2] In carrying out its review function, an appellate court must recognise that the weight to be given to individual pieces of evidence is essentially for the jury and that reasonable minds may disagree on matters of fact.[3] It is not the role of this Court to substitute its view of the evidence for a view that was reasonably open to the jury.[4]

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[2] *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].
[3] *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [87].
[4] *Tamati v R* [2010] NZCA 49 at [48], citing *R v Owen,* above n 2, at [13].

Discussion

[8] In support of this ground of appeal, Mr Turfrey placed weight on the manner and timing of the complainants' disclosures and the risk of possible collusion.

[9] CG was first interviewed by police on 7 October 2014, at which time she did not disclose any offending. AM was interviewed a week later, during which she disclosed sexual abuse. She gave an account of unwanted touching beginning when she was about 17. She described how she would go onto the deck outside her bedroom at the Turfreys' house to drink alcohol and Mr Turfrey would join her there and get her to sit on his knee and try to kiss her. AM referred to a specific incident when Mr Turfrey had taken her in his vehicle to a location under a bridge. He had instructed her to put some lingerie on and asked her to have sex with him, touching her breasts and kissing her with his tongue, after which she protested and he reluctantly stopped.

[10] In March 2015, CG was interviewed again. On this occasion she disclosed that Mr Turfrey had touched her breasts and "down below". CG stated that her clothes would be taken off, they would kiss, he would touch her, and he would get "all crazy" touching his penis. She described how Mr Turfrey would place his penis inside her vagina which made her vagina feel "a bit uncomfortable" and afterwards it was "a bit broken". She described how Mr Turfrey would "rock" when he was on top of her, and it made her feel "a little bit scared". She described it happening "lots of times" when Mrs Turfrey went to work. She thought she would be in trouble for what had happened.

[11] During a further interview in October 2015, CG disclosed further details. She referred to Mr Turfrey looking at porn on the computer and instructing her to look at it, after which he would tell her to come to his room, where he would take her clothes off and they would get into bed. She described Mr Turfrey touching her breasts and vagina and instructing her to touch his penis. Mr Turfrey would also tell her to suck his penis. CG described how, after putting his penis inside her vagina, he would finish when "stuff" from his penis squirted into her vagina. She described it as being "just disgusting". It was also in this interview that CG disclosed an occasion when, before

being taken to another residence for respite care, he stopped on the way and instructed her to suck his penis. She described the way it ended by using the words "horrible... disgusting... yucky... it feels like it's ah, slimy".

[12] KW's complaint also evolved through a number of interviews. On 17 September 2014, she spoke to police but did not disclose any offending. However, in subsequent interviews on 25 September 2014 and 3 March 2015, she disclosed sexual offending by Mr Turfrey. Shortly before a trial set to commence on 1 May 2017, KW made further allegations which were the subject of two further interviews. KW ultimately gave viva voce evidence at Mr Turfrey's trial.

[13] KW said the offending first occurred when she was about eight or nine years old. She recalled getting ready for bed and Mr Turfrey talking to her about having pulled the fingers at another child. She thought she was in trouble. Mr Turfrey directed her to come to him. He started touching her vagina, firstly on the top of her clothing and then underneath. She described being confused and not knowing what he was doing. This type of offending continued regularly.

[14] KW also related how Mr Turfrey would lie on top of her and try to place his penis into her vagina, but that it was "really sore". He would also make her perform oral sex. She recalled that when she was around 10 there was another attempt at sexual intercourse and his penis "went in fully". She described how her vagina was sore and started bleeding. After that time, rape became the most common form of abuse. It would occur at various locations at the house. KW's evidence was that Mr Turfrey told her that "every nine year old did it", and she thought it was normal until, aged between 10 and 12 years, she learnt from school that it was wrong. She recalled raising with Mr Turfrey, "What if you get caught?", and him saying, "we'll just both just deny it". Finally, KW disclosed the offending to a person at school. As a result, she was removed from the household.

[15] KW gave evidence about witnessing Mr Turfrey sexually abusing both CG and AT. While going to the bathroom one night she observed Mr Turfrey being on top of CG in her bed, both with their pants down. On another occasion she witnessed

Mr Turfrey asking CG to give him a "blow job" and CG complying. Because CG was an adult, KW just thought Mr Turfrey was cheating on his wife.

[16] In relation to AT, it was KW's evidence that she sometimes looked after AT when she was at the house for respite care and Mrs Turfrey was unavailable. That included assisting AT with going to the bathroom and getting changed. She recalled an incident when changing AT into her pyjamas and Mr Turfrey coming in and insisting he would dress her. KW left the room. After hearing AT making noises, she went back to the room and found Mr Turfrey moving back and forth on top of AT with his pants halfway down. On another occasion, KW undressed AT and briefly left the room. When she returned she found Mr Turfrey touching AT's breasts and vagina.

Decision

[17] We do not accept that the manner or sequence of the complainants' disclosures gives rise to concerns about the complainants' reliability or truthfulness.

[18] The evolution of KW's account over several interviews was explored in cross-examination before the jury. It was an issue highlighted in the defence closing and canvassed in the Judge's summing up. We accept the Crown's submission that this type of issue, which is not uncommon in these types of cases, was a matter for the jury to assess having regard to all the evidence, including the nature and content of KW's evidence, parts of which we have set out to provide some flavour of its nature and detail.

[19] Similarly, the allegation that the deceased complainant, AM, had spoken to KW and CG about what had happened to her, and the proposition they had copied or been prompted to make up similar allegations were matters put before the jury for its consideration. KW denied having spoken to AM or CG about KW's allegations. KW maintained she did not have contact with CG after leaving the Turfreys, or with AM.

[20] Expert evidence was adduced regarding CG's intellectual functioning. Because of her significant intellectual impairment, the jury was informed that her brain processed information very slowly and she had a short attention span. CG was described as having a very limited vocabulary with no capacity to engage in abstract

thinking. She would be unable to place events into a timeframe and had a very poor ability to reason and problem solve. Questions that were put to her needed to be simple, and she would not understand questions which contained more than one proposition.

[21] Mr Ross cited CG's answers under cross-examination, in which she appeared to accept AM had told her what to say in making her allegations against Mr Turfrey as an important indicator of her unreliability and lack of credibility. Under cross-examination she was asked:

> Q. The first time you ever told anybody about any of that was in your first police interview that was recorded that we watched yesterday wasn't it?
>
> A. Yes.
>
> Q. And that came after what [AM] had told you as to what she had told the police hadn't it?
>
> A. Yes.
>
> Q. And so you told the police those things because [AM] told you that if you said something about [Mr Turfrey] touching you, you wouldn't have to live with them anymore, didn't she?
>
> A. Yes.
>
> Q. And by that stage you wanted to leave [the Turfreys' house] because you found it boring, didn't you?
>
> A. Yes.

[22] Under re-examination different answers were elicited:

> Q. I want to talk to you about [AM].
>
> A. Okay.
>
> Q. Did you see [AM] after she left [Mr Turfrey's] house?
>
> A. Urn I think I did.
>
> Q. Where did you see here?
>
> A. When, um, at her – at, um, [the Turfreys'].
>
> Q. Okay, so is that when she visited?
>
> A. Yes.

Q. After she stopped visiting [the Turfreys], did you ever see her again?

A. No.

Q. Did you ever talk to her again?

A. No.

Q. Do you know what she told police?

A. No.

[23] We accept it was open to the jury to conclude that CG's answers in cross-examination were a result of her not understanding the questions that were being posed. Moreover, the jury was well-placed to assess CG's evidence and the allegation of collusion or suggestibility which was squarely put for their assessment. We do not consider CG's evidence on this topic rendered her an unbelievable witness, particularly when regard is had to the nature and detail of her testimony and her intellectual deficits.

[24] Mr Ross also referred us to other instances of inconsistencies in the complainants' evidence. However, we are not persuaded that those matters are of such significance that they render the jury's verdicts unreasonable.

[25] Judge Mackintosh in her summing up clearly articulated to the jury the centrality of the complainants' credibility and reliability and that the Crown's case rested on the jury accepting their evidence as truthful and reliable. The Judge described it as a very important issue upon which the Crown's case "stands or falls". The jury were expressly directed to look at the evidence and weigh up any inconsistencies in making their assessment.

[26] Specific examples of inconsistencies were highlighted by the trial Judge, including CG's evidence regarding the possible influence of AM. The Judge canvassed in some detail the various aspects of the evidence upon which the defence relied to demonstrate that the complainants were unreliable and not credible. These included the way in which CG's complaint had been disclosed across a number of interviews and her initial denial of anything inappropriate having happened. No complaint is made regarding the way in which Judge Mackintosh drew the jury's

attention to the inconsistencies in the complainants' evidence, or that her directions were anything other than appropriate and thorough in that respect.

[27] Various aspects of the evidence were relied upon by Mr Turfrey. Contradictory evidence from CG regarding the viewing of pornography, the implausibility of the offending having occurred in the midst of a very busy household, and possible motives on the part of CG and KW to lie in order to leave the Turfreys' household were raised. These and other matters which were canvassed before the jury and repeated to us on the appeal were thoroughly reviewed at the trial. They were matters for the jury to assess in the context of all the evidence. We find that none of them, either singularly or cumulatively, render the verdicts unreasonable.

[28] Before leaving this topic two further points are required to be made. The first is Mr Turfrey's argument that the complainants' evidence stood in isolation and was unsupported by any other type of evidence. That submission overlooks the cumulative effect of the propensity evidence which was described by this Court on a pre-trial appeal against the joinder of the charges as highly probative.[5] The distinctiveness of the circumstances of the offending against four complainants over an overlapping period of time provided considerable mutual support for each complainant's account.

[29] Secondly, it is apparent the jury closely scrutinised the evidence. Emphasis was placed, both at the trial and this appeal, on AM's background, which revealed her to be a troubled young woman with a record of dishonesty. Judge Mackintosh warned the jury about the approach required to be taken to the evidence of this deceased witness and that there was no opportunity to cross-examine her. The Judge directed the jury to take care before relying on AM's evidence. It is likely the jury was unable to agree on the single charge Mr Turfrey faced in relation to this complainant, which was ultimately dismissed, because of those considerations. We accept this is an indication of the care with which the jury approached its task in individually assessing the complainants' allegations and the strength of the evidence as it related to each.

[30] For the reasons discussed, we do not consider the verdicts were unreasonable.

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[5] *T (CA212/2016) v R* [2016] NZCA 266 at [5].

The lack of a demeanour direction

[31] Mr Ross submitted that reliance on demeanour is now a discredited way to approach the assessment of a witness. He submitted that, because of the contended weaknesses and inconsistencies in the complainants' evidence, the jury must have relied on their demeanour in accepting their accounts, despite that being an unreliable gauge of their truthfulness. That submission was said to relate to a defence theory that the complainants, as highly vulnerable people, had come to believe what they had alleged as being true, and that this belief had manifested itself in the way they presented when giving their evidence.

[32] We consider this is a speculative submission for which there is no foundation, and it is also contrary to Mr Turfrey's further challenge to the evidence of CG and KW on the grounds each had a motive to lie. The demeanour of the witnesses was not a focus at the trial. It was not relied upon by the Crown, nor was it identified by trial counsel or the Judge as requiring specific attention or a particular warning. There was nothing to suggest the jury placed any particular weight on such a factor or allowed the demeanour of the witnesses to sway their assessment of the evidence.

[33] In *Taniwha v R*, the Supreme Court confirmed that there is no invariable requirement for a "demeanour warning" in cases where credibility of a witness is in issue.[6] In considering whether it is necessary to provide such a direction, the focus is on whether there is a real risk that witness demeanour will feature illegitimately in the jury's approach to the assessment of veracity or reliability. There is nothing in the approach taken by the parties in this case or any focus on the way the witnesses presented or gave their evidence to suggest that risk arose.

[34] We do not consider the absence of a judicial warning concerning the risk associated with relying on a witness's demeanour gave rise to any error in the circumstances of this case.

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6 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [43].

Motive to lie

[35] Mr Ross acknowledged that the trial Judge cautioned the jury regarding the hearsay evidence of AM and gave a more general warning regarding inconsistencies in the complainants' evidence, many of which she reviewed in the course of her summing up. However, it is contended that a further direction should have been provided regarding a possible motive of CG and KW to make up their allegations. Mr Ross submitted that a warning should have been provided to the jury, pursuant to s 122(2)(c) of the Evidence Act 2006, that both complainants may have had a motive to give false evidence because they wanted to leave the Turfreys' household.

[36] We do not consider this submission has merit. Judge Mackintosh, in the course of her summing up, referred to the contended underlying motivation of KW to make things up because she wanted to be moved. Later, when canvassing the issue of that complainant's reliability or credibility, reference was again made to the defence submission that this complainant was motivated to leave the household and that her allegations were a means by which to achieve that outcome.

[37] No request was made by trial counsel for such a warning. Section 122 does not oblige a Judge to warn the jury of the need for caution. If the Judge is of the opinion that evidence despite being admissible may nevertheless be unreliable, he or she may warn the jury of the need for caution in deciding whether to accept the witness's evidence and the weight to be given to that evidence. That may include considering whether to give such a warning where a witness may have a motive to give false evidence.

[38] The issue of the credibility and reliability of the complainants' accounts was squarely before the jury for its consideration. The suggested motive of the complainants was but one of a number of matters raised regarding their reliability and credibility. It is not surprising the trial Judge did not give an explicit warning. We accept the Crown's submission that specific reference to the motive attributed to two of the complainants in the form of an unreliability warning would likely have overemphasised the issue which did not emerge across the whole of the evidence as

being particularly pivotal. It may well have resulted in a misapprehension on the part of the jury as to its importance.

[39] We further observe that if the attribution of such a motive in cases of sexual offending of this kind is considered sufficient to meet the threshold for such a warning they would likely be given in nearly all cases of this type. While, inevitably, each case must be assessed on its own particular circumstances, we do not consider that was the intended effect of s 122(2)(c).

[40] We consider that the jury would have been well aware of the central importance of the credibility and reliability of the complainants in this case, of which the alleged motives of two of the complainants were a small part. In *B v R*, this Court observed:[7]

> ... often, as here, where it was such a feature of the trial, the need for particular caution in respect of witness reliability will be so obvious to the jury that a warning cannot be said to provide them with material assistance. In such cases, it will be enough for the Judge to reiterate to the jury, in his or her own words, that witness credibility and reliability is a central issue in the case and it will be for them to resolve that question. That is exactly what the Judge did here.

[41] We consider those remarks are apposite to the present case.

Result

[42] Being satisfied the verdicts were not unreasonable and that no error arises from the absence of a direction regarding demeanour or a motive to lie warning, the appeal is dismissed.

Solicitors:
Cathedral Lane Law, Napier for Appellant
Crown Law Office, Wellington for Respondent

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[7] *B (CA58/2016) v R* [2016] NZCA 432 at [60].