NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA164/2018
[2019] NZCA 443

BETWEEN	MARGARET AILEEN RANKIN Appellant
AND	THE QUEEN Respondent

Hearing: 22 August 2019

Court: Brown, Simon France and Dunningham JJ

Counsel: W C Pyke for Appellant
J E L Carruthers for Respondent

Judgment: 20 September 2019 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Dunningham J)

[1] The appellant, Margaret Rankin, was charged with six charges of sexual offending and 41 charges of violent offending against two young girls, who lived with her and her husband during their primary and intermediate school years.

[2] The jury found her not guilty of the charges alleging sexual abuse and some of those alleging physical abuse, but guilty of the remainder. She was sentenced to four years, nine months' imprisonment.[1]

[3] She appeals her convictions on the ground that the Judge misdirected the jury on the use that could be made of counterintuitive evidence, with a consequent real risk that the outcome of the trial was affected.[2]

The facts of the offending

[4] The complainants are sisters who moved in with the appellant and her husband, a relative of the complainants, when L was approximately seven years of age and Z approximately five years old. L suffered from reduced cognitive function. They lived in that household for approximately 10 years.

[5] The offending was alleged to have occurred in the context of the appellant physically disciplining the girls. However, L also alleged that the discipline extended to sexual assaults, for example, twisting the skin by her vagina. The appellant was acquitted of these charges.

[6] Both complainants gave evidential video interviews. A young friend of the complainants gave evidence of having seen Z come to school wearing makeup around her eye which accorded with evidence given by the teacher (although the teacher did not notice any bruising or injury).

[7] The allegations emerged when the complainants went to live with an aunt and uncle in 2015. When an altercation occurred between the girls, Z expressed surprise that the aunt had not physically punished them. When her aunt told her that hitting people was illegal, the disclosure of the offending occurred. The aunt then told the girls to write down in a diary what had occurred in their own words.

[8] The appellant denied the allegations. Her defence was that Z had fabricated them and encouraged L to play along. The appellant gave evidence herself and called

1 *R v Rankin* [2018] NZDC 4441.
2 Criminal Procedure Act 2011, s 232(4).

a number of witnesses to give evidence that they saw nothing untoward happen and that the appellant cared well for the complainants.

[9] The appellant was found guilty of assaults using tongs, knives, a hairbrush, a broom and spoons as a weapon against L, and of assault using a walking cane against both L and Z. She was found guilty of injuring Z with intent to injure and assaulting her, including assaults where she used tongs and a hairbrush as weapons.

The counterintuitive evidence

[10] One of the witnesses called at trial was Dr Yvette Ahmad, a clinical psychologist, who gave counterintuitive evidence about the reporting of alleged physical and sexual abuse. She explained early on in her evidence that her role was "an educative role, in correcting some of those misconceptions" and that she was "not here to talk about this case".

[11] She noted that research on physical abuse is more limited than that on sexual abuse and that alleged victims of physical abuse do not always report it. She said that delay in reporting may be longer where the abuse is by someone the victim has a close personal relationship with.

[12] In relation to sexual abuse, there was no set reporting pattern and there was a wrongly held belief that young people would immediately tell someone if they had been sexually abused. For that reason, the timing of the report was not indicative of credibility. She pointed out that there are a multitude of reasons why children may not report sexual abuse, including fear they will not be believed, a sense of embarrassment, a reluctance to burden others, a fear of getting themselves or someone else in trouble, and not wanting to upset parents. She noted that when the offender is known to the child, the reporting of sexual abuse is associated with longer delays and lower reporting rates.

[13] Dr Ahmad also referred to what is known as traumatic bonding, where young people or children are in unpredictable violent situations and yet they do not want to leave that relationship and can actually show love and affection. Indeed, the victim can become dependent on the abuser and may resist being removed from offending

parents or caregivers. She also noted that children with developmental disabilities are at higher risk of sexual abuse.

[14] She clarified in cross-examination that the information she was giving was "educative" and she was not there to comment on this particular case, nor these particular witnesses.

[15] The Judge was quite interactive in his questioning of the expert witness. He had her clarify that there are a wide range of responses that can happen when abuse has occurred and there can be delay with both true and false accounts, just as immediate complaints can also be both true and false. The Judge put it to Dr Ahmad that in practical terms for the jury, "they have to look at the totality of all the evidence and come to decisions not necessarily based on time or delay or relationship". Dr Ahmad agreed with that statement.

The submissions

[16] The appellant's case focuses on the directions given by the Judge in relation to Dr Ahmad's evidence during his summing up. While the Judge described Dr Ahmad's evidence as "an important part of the Crown case because she is effectively saying there can be good reason for delay, this is not unusual", Mr Pyke submits that there was no evidence that delay in physical abuse cases "is not unusual". He says that the limitations of the evidence given by Dr Ahmad ought to have been clearly explained.

[17] Mr Pyke also takes issue with the Judge's direction about delay. The Judge's direction was that "the law" says a Judge may caution a jury that:[3]

> …common sense has shown and experience that there can be delays in sexual offences being disclosed, often for good and compelling reasons. So human experience shows that that can be the case. In this instance, we have got the sexual offences against [L] which Ms Barnaart properly characterises as being more about physical abuse but with a sexual overtone to it, the rest of it being physical abuse.

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3 Clearly referring to Evidence Act 2006, s 127.

[18] The criticism is that this direction was both muddled and wrong. First, s 127 of the Evidence Act 2006 does not use the word "compelling". It only refers to "good reasons". The appellant submits this is giving additional legal force to the statutory wording about delay which is not warranted by the legislation and effectively directs that the law endorses delay as a compelling factor.

[19] The appellant is also critical of the fact the Judge blended this direction into a direction about the allegations of physical abuse and had no regard to Dr Ahmad's qualification that there was limited research in connection with physical abuse cases. Because the direction was "clearly wrong", the jury must be assumed to have followed it as the Judge told them to do and that created a real risk of affecting the outcome.

[20] The appellant takes issue with the Judge then directing as follows:

> So I recommend that you consider the evidence of Dr Ahmad carefully, because it is a critical part to the Crown case in saying that this is not a simple case of saying if this was happening then they would have told somebody. The evidence of [the aunt] to some extent explains that delay and the way in which they responded to that.

[21] Mr Pyke submits that this direction impermissibly linked the expert's evidence to the facts of the case in contrast to how the Supreme Court said this type of expert evidence should be used.[4] The effect was to give the Crown case a "hand-up", bolstering the Crown contention that there were good reasons to explain why witnesses called for the defence saw nothing untoward, and for the delayed complaints. This, by implication, adversely affected the defence case which was reliant on the argument that delay in complaining was occasioned by fabrication with Z, who was a "clever, calculating and streetwise girl", making up these allegations and then "infecting" L, who was disadvantaged.

[22] The Judge also failed to provide the standard direction about the jury being the sole arbiters of fact when considering this expert's evidence. The absence of such a direction compounded the risk of impermissible reasoning. When summing up the

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[4] The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30].

Crown case the Judge returned to Dr Ahmad's evidence, directing that the affectionate cards and delay were not countervailing factors when considered against the evidence of Dr Ahmad.

[23] In summary, Mr Pyke submits the directions that were given impermissibly assisted the Crown's case, causing a miscarriage of justice to occur.

Did the Judge misrepresent Dr Ahmad's evidence?

[24] The first issue on appeal relates to criticisms of the accuracy and completeness of the Judge's summary of Dr Ahmad's evidence, for example, because the Judge did not remind the jury that the research on allegations of physical abuse was limited.

[25] However, Dr Ahmad made this clear when she said: "[i]t's also important to note that with the sexual abuse research, there has been extensive research conducted in this area, but with physical abuse, the research is more limited". There was no need to reiterate every aspect of Dr Ahmad's evidence in the summing up and, in any event, the primary purpose of her evidence was to comment on patterns of reporting of sexual abuse, given that is the area where counterintuitive evidence is most obviously required.

[26] The appellant also criticised the Judge for saying "there can be good reasons for delay, this is not unusual", particularly when there was no evidence this was true in relation to physical abuse. We do not agree. Dr Ahmad said that a study in the United Kingdom found that "just over a quarter of the children had not told anybody, informally or formally, until they'd … spoken to the Childline counsellors about physical abuse". Similarly, with sexual abuse, "what we do know from the research is that children often do not tell about the sexual abuse …" and there is "often delay[s] in reporting or not telling about the abuse". The Judge's statement that delay in either case "is not unusual" was an accurate representation of Dr Ahmad's evidence.

Did the Judge err in departing from the wording of the statutory direction under s 127?

[27] The next criticism was the Judge's departure from the language of s 127 of the Evidence Act when directing on delayed complaints or failure to complain in sexual cases. Section 127 provides that the Judge may tell the jury that "there can be good reasons for the victim of [a sexual] offence … to delay making or fail to make a complaint in respect of the offence". Mr Pyke's criticism was that the addition of the words "and compelling" to describe the reasons for delay was to effectively endorse delay as a compelling factor.

[28] We accept that the Judge's direction did not precisely mirror the wording of s 127. However, we do not agree that this had the effect of endorsing delay as a "compelling factor" favouring the complainants.

[29] Just as the Judge was careful to confine Dr Ahmad's evidence to general statements about how people may respond and had her confirm she could not "say whether these children … are in the category of children who delayed their reporting and were abused or reported later but weren't abused", he took the same care in his directions. The fact that he said that there could not just be good reasons, but "compelling reasons", for delay was clearly expressed as a hypothetical statement and not a reflection of what occurred in this particular case. He promptly went on to remind the jury that Dr Ahmad's "evidence was not about these two girls, it was about the concept of disclosing sexual and physical offending, predominately sexual offending, by persons who alleged it has happened to them". He again made it clear that "just because there is a delay does not mean it is true, but conversely it does not mean it is false".

[30] In the context of his directions as a whole, we do not consider the suggestion that there can be compelling reasons for delay in reporting a sexual offence had any effect of endorsing delay as a factor in favour of the complainants in this particular case.

[31] The next criticism is that the Judge blended the s 127 direction about delay in reporting sexual abuse into a direction about the delay in reporting the allegations of

physical abuse. However, we see no reason to criticise this. The girls presented a range of allegations of physical and (in L's case) sexual abuse, and Dr Ahmad's evidence covered delay in reporting in both types of cases. It was understandable therefore that the Judge's delay direction encompassed delay in reporting both types of abuse. Although Dr Ahmad accepted there was much less research on delay in relation to physical abuse cases, there was no suggestion that she was tentative in her evidence that there could be delay in physical abuse cases just as there could in sexual abuse cases, and that the same principles applied.

Did the Judge impermissibly link the counterintuitive evidence to the facts of this case?

[32] The final area of criticism was that the Judge impermissibly linked the expert's evidence to the facts of the case and presented it as supporting the Crown case, particularly when he said that Dr Ahmad's evidence was an "important part of the Crown case".

[33] However, we accept the Crown submission that although the Judge noted that Dr Ahmad's evidence was an important part of the Crown case, the overall effect of the summing up was not to suggest that it was somehow probative of the offending. As we have already discussed, the Judge made it clear that the evidence was important for its educative value, to demonstrate that both the delay in reporting the abuse, and the evidence of affection shown for the appellant, were not necessarily evidence that the complaints were false.

[34] We are satisfied that the Judge did no more than link the counterintuitive evidence to the Crown case in this way, saying that a delay "does not mean it is true, but conversely it does not mean it is false" and that the jury would "have to look at the wider issues". Similarly, in terms of the affection a victim may show to his or her abuser, the Judge simply said that Dr Ahmad's evidence meant that they could not rule out, as a possibility, that "a person may manifest affection for their carer … but still may be the subject of abuse which they dislike". That was precisely the relevance of the evidence to the Crown case.

[35] We also do not consider that there was a need to direct the jury on it being the sole arbiter of fact when considering this expert's evidence. Dr Ahmad made it very clear that she was not giving any opinion about the complainants in this case or the factual allegations. That was also reinforced by the Judge, particularly in his questioning of the expert, where he had her clarify that she was not talking about the specifics of the case, but simply that "the international research and [her] own clinical experience shows that there is a wide range of possible responses that could happen". That meant, as the Judge said, the jury would "have to look at the totality of all the evidence and come to decisions not necessarily based on time or delay or relationship".

[36] Finally, we agree that the jury's verdicts suggest that Dr Ahmad's evidence did not have undue influence on the jury. A good portion of her evidence was devoted to what is known of how sexual abuse complaints are reported and yet the jury found the appellant not guilty of all charges of sexual abuse. They also returned mixed verdicts on the charges of the physical abuse, which indicated thoughtful deliberation. On the facts of the case, too, we accept that the counterintuitive evidence probably added little to what the jury already knew about physical abuse and that children may well endure abusive upbringings at the hands of those they love without making a complaint.

Conclusion

[37] For these reasons, we are satisfied there was no error or irregularity that created a real risk that the outcome of the trial was affected. The Judge's directions did not misrepresent Dr Ahmad's evidence, nor impermissibly suggest it was probative of the offending.

[38] The appeal is dismissed.

Solicitors:
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