NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA343/2018
[2019] NZCA 51

BETWEEN	MPK (CA343/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	14 February 2019
Court:	Miller, Simon France and Peters JJ
Counsel:	W C Pyke for Appellant E J Hoskin for Respondent
Judgment:	14 March 2019 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We quash the appellant's convictions and order a retrial.

C Matters of bail are to be determined in the District Court.

D The record of the first warning given to the appellant by the District Court at Manukau on 7 February 2018 is cancelled in respect of the convictions quashed.

E MPK's name is to be removed from the Child Sex Offender Register.

REASONS OF THE COURT

(Given by Simon France J)

[1] MPK was convicted following a trial before Judge Hikaka, sitting with a jury, of sexual offending against a stepdaughter, aged around five at the time of the alleged events. He appeals his conviction on the ground that the trial Judge's failure to sum up the defence case has caused a miscarriage.

Facts

[2] MPK was in a relationship with the child's mother for around three years. It ended when the complainant was six. About two years later the complainant was staying with her father and his partner. The occasion arose when it was considered necessary to talk to the complainant about sexual matters. It was during this conversation that the offending was disclosed.

[3] During the time he was part of the family, MPK would sometimes have care of the complainant at night while her mother worked. It was alleged that on several occasions MPK undressed the complainant and licked all over her body. On one occasion this included the genital area. It was also alleged that during these events MPK would lie on top of the complainant and rub his penis against her vagina.

[4] MPK was convicted of the three charges the faced, all being charges of indecent act on a child under 12 years of age.[1] He was sentenced to a term of three years and three months' imprisonment.[2]

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1 Crimes Act 1961, s 132(3).
2 *R v [MPK]* [2018] NZDC 10552.

The trial

[5] The trial began on 30 January 2018 and ended on 5 February 2018. The appellant denied the offending. He gave a detailed video statement to the police that was played at trial. He did not testify but called two witnesses. Themes that emerged from the extensive cross-examination of the complainant were:

(a) The complainant's acknowledgement of often having detailed dreams;

(b) An inconsistency between the complainant and her father and his partner over why the conversation about sex occurred, and what she described to the father as having happened. The complainant disagreed with the detail provided by her father to the police;

(c) The complainant's propensity to throw temper tantrums and be stubborn when she could not get her own way; and

(d) Exploration of the conduct underlying the charges. The complainant said the appellant called it "the eating game". It was put to her the eating game involved different conduct (mainly tickling) and that as well as her and the appellant, her brother was a participant. The complainant rejected this.

[6] The first witness called by the defence was the head of a pre-school the complainant had attended when aged three. It is plain she was then a difficult child behaviourally. The second witness was the appellant's mother who also commented on the behaviour of the complainant when she was visiting. The defence's focus was on reinforcing the stubborn nature of the complainant, the point being her unwillingness to acquiesce to things she did not like.

The summing up

[7] The Judge's summing up of the respective cases was brief and consisted of:[3]

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[3] *R v [MPK]* DC Manukau CRI-2016-092-9436, 5 February 2018.

> [23] … simply put, the Crown ask you to accept the complainant is a truthful and reliable witness and if you accept her evidence the charges will be proved beyond reasonable doubt and your verdict will be one of guilty. *The defence ask you to consider all the background, the behavioural issues that have been highlighted in his closing and accept the defendant's denial, or at the very least, after looking at all the evidence, the defence says you will be left in a state of reasonable doubt about what really happened, and your verdict will be one of not guilty*.
>
> (Emphasis added).

[8] We note for the record that when the Judge instructed the jury on the elements of the offence there was no elaboration of what was in issue or the respective arguments. We also note that the Judge in the usual way invited comments from counsel following the summing up. Counsel apparently queried the brevity of the description of the respective cases, but unfortunately the Judge did not act on that.

Discussion

[9] The appeal is of narrow scope and irresistible.

[10] The law concerning the obligation to sum up the nature of respective cases is settled.[4] It is well recognised that the complexity of the case, and the logistics, such as when closing addresses were made, will influence the depth to which a Judge must go, but the obligation is to identify the key themes of the respective cases. These passages from a recent decision of this Court in *Waters v R* capture the points:[5]

> [8] … there are limits on a judge's duty to put the defence case to the jury. The judge must be satisfied that the defence case is fully understood by the jury. The extent of the detail that the judge must traverse will depend on the case. In a complex case, the judge will generally need to go through the key factual allegations for both sides, to give them order and coherence for the jury, and make it easier for them to carry out their assessment. In a simple case this is not as important, because the issues will be obvious and the facts to be determined will not require particular organisation to assist in deliberations, or particular elucidation to ensure a clear understanding of the respective positions. A judge is not required to repeat all defence counsel's arguments or assist the defence case by setting out inconsistencies or other matters already referred to by counsel.

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4 In *Gurran v R* [2015] NZCA 347 at [54], the Court emphasised it is the "nature" of the case that must be summarised, not all the detail, citing *R v Shipton* [2007] 2 NZLR 218 (CA) at [37] and *Rangihuna v R* [2010] NZCA 540 at [23].

5 *Waters v R* [2018] NZCA 84.

> [9] But the Crown and defence case should be summarised at least as to their broad form in a balanced and clear way by the judge. It is a judge's duty to assist a jury in its difficult task, and such a summary will help them. In his summing-up in this case, the Judge should have briefly outlined what the complainant said and what [the defendant] said. It did not need to be exhaustive or deal with the facts of each particular charge. A few paragraphs could have set out the essence of the two conflicting accounts. But this was not done. Good practice was not observed.

[11] The brief statement by the Judge in this case did not satisfy his obligation. It is no answer to observe the respective cases were treated the same. That is a different point concerning balance but does not cure an omission to put the cases. The deficiency in the direction that was given is that it does not assist the jury in understanding why it was being asked to look at the complainant's behavioural issues. What is it they are meant to suggest in terms of the allegations? Further, the behavioural issues were only one aspect of several themes that were advanced. Without wishing to belabour the point, the passage we have cited says only that the defence invited the jury to look at behavioural issues and that based on the evidence they should have had a reasonable doubt. That is not putting the case.

[12] In *Waters v R*, the recent case from which passages have been cited, this Court was able to conclude the deficiency in putting the case did not cause a miscarriage. Matters that were noted were the simplicity of the case, the absence of witnesses other than the complainant and defendant, the fact that the closings and summing up all occurred on the same day, the clarity of the defence closing, and the detailed question trails. The Crown urges a similar approach here, characterising the deficiency as one of undue brevity rather than omission.

[13] We have reached a different view on these facts from the Court in *Waters*. The appellant here did not testify but did call evidence. Normally there should be some explanation to the jury about the purpose of such evidence in the sense of what role the appellant sees it playing in his or her defence. To what aspect of the case does it go? Here the defence evidence was to reinforce the complainant's behavioural issues concerning which there were two themes. First, the complainant's behaviour was at its best when MPK was part of her life, the implication being it is therefore unlikely that offending was occurring. Second, the complainant had never been shy about protesting and throwing tantrums when confronted with things she did not want to do;

again, the implication being, that she would not have suffered MPK's assaults in silence. The defence also highlighted inconsistencies between the complainant and her parents about what she said had happened, emphasised the complainant's acceptance that dreams were a significant event for her, and asserted the innocence of any games played involving MPK.

[14] In our view, contrary to the Crown submission, the summing up is an example of not putting the cases, rather than putting them too briefly. There is no profit in speculating on what might have been enough; the appellate task is to assess what was done. A judge's obligation to put the cases exists because it is considered a necessary aspect of the trial process. Its omission will make it difficult to be satisfied the trial has not miscarried. Sometimes, as in *Waters*, that conclusion will be possible, but this is not such a case. There was a defence advanced and evidence called in support, and the essence of it had to be put to the jury, but was not. The convictions cannot stand.

[15] We conclude with some general observations. Summarising the respective cases, especially if the summing up follows immediately upon the closings, can be a difficult task. Closing addresses are not always the models of clarity counsel may imagine them to be. That is the case here where, even with the advantage of the written transcript, we have not found it easy to extract themes or key points.[6]

[16] Where that occurs, and the trial Judge is left with some uncertainty about the matter, it is recommended that the Judge consult with counsel to ensure the main themes are presented. How that is done is a matter for the Judge. Normally it will be a matter of telling counsel the key points the Judge will be putting to the jury and seeking feedback. Sometimes, however, the Judge may just wish to ask.

[17] We are not suggesting this is always necessary or there is some rule that a Judge must do so. Rather, the point is that the Judge has an obligation to sum up the respective cases. If the closings have left the Judge in a situation where he or she is not able to do that, steps should be taken to improve the situation.

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6 Note that Mr Pyke, for the appellant, was not trial counsel.

Result

[18] The appeal is allowed.

[19] We quash the appellant's convictions and order a retrial.

[20] Matters of bail are to be determined in the District Court.

[21] The record of the first warning given to the appellant by the District Court at Manukau on 7 February 2018 is cancelled in respect of the convictions quashed.

[22] MPK's name is to be removed from the Child Sex Offender Register.

Solicitors:
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