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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA250/2019
[2019] NZCA 522

BETWEEN	CAMERON JAMES MACGILLIVRAY Appellant
AND	THE QUEEN Respondent

Hearing:	8 August 2019 (further submissions received 16 October 2019)
Court:	Kós P, Woolford and Dunningham JJ
Counsel:	D J Allan for Appellant F R J Sinclair for Respondent
Judgment:	30 October 2019 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The request for suppression under s 200 of the Criminal Procedure Act 2011 is declined.

REASONS OF THE COURT

(Given by Woolford J)

[1] Following a jury trial in the District Court at Hamilton between 18 and 20 March 2019, the appellant was convicted of two charges of indecency between males and one charge of sexual violation in respect of offences that occurred

approximately 40 and 27 years previously.[1] On 13 May 2019, the appellant was sentenced to four months' home detention on the two charges of indecency between males and nine months' home detention on the charge of sexual violation.[2] He now appeals against conviction.[3]

Factual background

[2] The first complainant was a relative, X. X alleged that he was offended against by the appellant on two occasions sometime between 1976 and 1979, when he was eight to 10 years old. The appellant was then about 14 or 15 years old. Both offences occurred in the lounge of the appellant's house in Morrinsville.

[3] On the first occasion, X alleged that the appellant grabbed his mouth and squeezed his jaw open before forcing his penis into his mouth, telling him not to use his teeth. The appellant then forced X to perform oral sex on him. X alleged that the appellant ejaculated in his mouth. X spat the semen out on to the floor. X said that he thinks the appellant's siblings were in the room when the incident happened. X also said that he told the appellant's grandmother what happened. She wiped up the semen from the floor but did nothing.

[4] On the second occasion, X alleged that while he was wearing a towel around his waist, the appellant pulled him on to his lap on the floor and told him he would stick his thumb up his bottom. X remembers screaming out in pain. X alleged that the appellant put his hand over his mouth and was also holding him around his waist with the other hand, so said it must have been the appellant's penis he was sticking up his bottom. X alleged that the appellant's father then came into the room in response to his screams and the offending ceased. X said the appellant's father spoke to him about what happened, but he also did nothing. X also said that he believed that there were other children in the room on that occasion too.

[5] The second complainant was another relative of the appellant, Y. Y alleged that she was offended against by the appellant on one occasion in 1992, when she was

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1 Crimes Act 1961, ss 128(1)(b) and 141.
2 *R v MacGillivray* [2019] NZDC 9023.
3 Criminal Procedure Act 2011, s 229.

about 20 years old. The appellant was then 27 years old. The offence occurred in the bathroom of the appellant's house in Walton.

[6] The appellant's wife had been admitted to hospital for the birth of their second child. Y agreed to help the appellant on the farm and to look after their first child while his wife was in hospital. Y alleged that she was in the bath when the appellant entered and asked her if she wanted him to wash her hair. Y said no. She then alleged that the appellant came over and started touching her vagina. Y said she did not know what to do and just closed her eyes and froze. Y alleged that the appellant then inserted his fingers into her vagina. After about a minute, the appellant stopped touching her, got up and left the bathroom.

[7] When questioned by the police, the appellant denied the allegations relating to X, but in explanation for the allegations by Y, said he could have washed her hair. He said he did not touch her vagina, but if he had washed her vagina, he would not have meant anything by it.

Grounds of appeal

[8] The appellant relies on four points to establish a miscarriage of justice:

(a) The forensic disadvantage caused by the delay of at least 37 years from 1979, at the latest, to the police complaint in 2016, made it impossible for him to have a fair trial in 2019 on Charges 1 and 2. The primary prejudice related to the unavailability, through death, of two possible witnesses — the appellant's grandmother (Charge 1) and the appellant's father (Charge 2).

(b) As an alternative to the first point, the Judge failed to give a direction under s 122(2)(e) of the Evidence Act 2006 as to the forensic disadvantage caused by the delay in making a complaint to the police.

(c) The prosecutor cross-examined the appellant on the redacted portion of a diary note written by the second complainant in 1992, which caused his trial on Charge 3 to become unfair.

(d) Finally, as a fourth point which should be considered cumulatively with the third point, the Judge did not give a direction under s 122(2)(c) of the Evidence Act about the motive of a Crown witness, the appellant's former wife, to lie.

Delay

[9] Historical sexual abuse cases will almost always carry some risk of prejudice, because of the effect of delay on the defendant's ability to "check and challenge the evidence of a complainant."[4] A trial judge should take steps to mitigate the risk of delay-related prejudice.[5] Nevertheless, the decades-long delay between the alleged offending and X complaining to the police is not unprecedented and does not by itself mean the trial would be unfair. There is no issue with the reliability of memory caused by age-related decline in cognitive function. The appellant was 54 years old at the time of trial and said that he did not have "memory fade" or anything like that. X was 49 years old at the time of trial and also did not consider that his memory was affected by the passage of time, depression or drug use.

[10] Two possible witnesses had, however, died — the appellant's grandmother (Charge 1) and the appellant's father (Charge 2). It is not known what either would have said at trial.[6] X said that the grandmother was, however, not present when the first incident happened, and that the appellant's father only entered the room when he screamed during the second incident.

[11] X did say that he thought Y and her brother, and possibly his brother, were in the room when the first incident happened and believed that there were children in the room during the second incident too.

[12] When questioned at trial, Y said that she never witnessed any such behaviour and did not recall being in the room. She, therefore, did not support X's allegations. Her brother was not called by either the Crown or defence and it is not known whether

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4 *CT (SC88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [26] and [49].

5 At [51].

6 Although not led at trial, Y said that when she questioned the appellant's father when he was alive about X's allegations, he told her that X was lying.

he was even asked if he had witnessed anything or what he would have said at trial. The Crown advised the Court that X's brother and mother were, however, spoken to by the police. They had no recollection of any incidents and were not called at trial.

[13] In the circumstances where other nominated witnesses were either questioned at trial (Y), or available to be called at trial (Y's brother), it cannot be said that there has been a miscarriage of justice because of the death of the grandmother, and the appellant's father when it is not known what they would have said at trial. Neither was a direct eye witness to what happened.

[14] The passage of time alone is not sufficient to say that the trial was unfair. The accusations were specific in relation to place and circumstances. There were also adequate explanations for the lengthy complainant delay.

Direction on delay

[15] Section 122(1) and (2) of the Evidence Act provides:

> **122 Judicial directions about evidence which may be unreliable**
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> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
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> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> (a) hearsay evidence:
>
> (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
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> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
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> (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
>
> (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
>
> …

[16] We agree with the Crown that the delay does suggest the issue of prejudice inevitably arose and s 122(2)(e) was engaged.[7] The Crown acknowledges that a warning under s 122(1) should have been given on the effect of delay on memory, including the appellant's memory and prejudice arising from the unavailability of witnesses.

[17] The Judge did address the jury on delay and its effect on memory. He did so in his closing address in a passage that followed his instructions on the possible reasons for complainant delay:

> [15] A further issue that arises in this case relates to memories. We are dealing with matters many years ago. In light of the fact that there has been a significant lapse of time since it is alleged these matters occurred, it may be helpful for me to give you some guidance about memories given that we are referring back to events that it is said happened 40 years ago in relation to the complainant [X] and 27 years ago in relation to the complainant [Y]. Passage of time will affect the accuracy of memory and I am sure that is no surprise to you. You might not expect every detail to be the same if a witness gives accounts of the same event twice, or many months, or years apart because as we all know memories fade. Details can be lost and errors in the sequence of events can occur. The accuracy and level of detail of a witness' memory may depend on a number of factors. They include the following. First and most obviously the time that has passed since the event. Secondly, the personal [significance] of the event. Third, the emotional content of the event. Fourth, the occurrence of other related events. Fifth, why, when and by whom the person has been asked to recall and finally the kinds of retrieving cues provided at the time of recall. By that I am sure you are aware that means that sometimes people can relate matters to an issue of significance, a wedding, a death, an anniversary, those sorts of things that can be dated.
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> [16] The nature and the quantity of inconsistencies between a witness' evidence and other reliable evidence will affect your assessment of the reliability of a witness' memory. If there is an acceptable explanation for an inconsistency your assessment of reliability may well be unaffected. The opposite conclusion might be drawn if there is no acceptable explanation for a significant inconsistency. These sorts of things need to be considered when you are assessing the reliability and accuracy of witnesses' recollection of what was said and done.

[18] This direction was given in neutral terms and is certainly wide enough to cover inconsistencies in the appellant's several accounts. We are, therefore, of the view that

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7 *CT (SC88/2013) v R*, above n 4; and *L (SC28/2014) v R* [2015] NZSC 42, [2015] 1 NZLR 658 at [25]–[32].

the effect of delay on memory was broadly covered in this way. It is not necessary for a judge to use a particular form of words in giving such a warning.[8]

[19] However, *CT (SC88/2013) v R* also referred to the desirability of a direction to cover prejudice arising from potential witnesses having died.[9] The Supreme Court referred to adding "the imprimatur of the judge" to the need for caution or the jury would be left with "competing contentions from counsel and without any real assistance in addressing them".[10]

[20] In this case, the Judge did not specifically direct the jury on the respects in which there may have been prejudice to the appellant relating to the dead witnesses.

[21] We are, however, of the view that it was made obvious to the jury that the defence case was prejudiced by the delay, including the fact that certain witnesses were no longer available, and we have confidence that the jury had this issue clearly in mind. The Judge had also directed the jury on the effect of delay upon memory. Although the failure to give a s 122 direction relating to the deceased witnesses was an error, it did not cause a miscarriage in the particular circumstances of this case.

[22] For example, the following exchange took place in the cross-examination of X:

> Q. You refer to [the grandmother], apparently coming into the room after the oral sex incident, right?
>
> A. Yes.
>
> ...
>
> Q. Conveniently she's dead, isn't she, so she can't tell us anything about what might have happened?
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> A. That's correct.
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> Q. Similarly, you talk about [the appellant's father] having an argument, or you having a conversation with him, but he's dead too, isn't he?
>
> A. Well I can't help that, sorry.

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8 Evidence Act 2006, s 122(4).
9 *CT (SC88/2013) v R*, above n 4, at [55].
10 At [50]–[51].

Q. Well if you — if this complaint was a valid one, you could have gone to the police a lot earlier while these people were alive, so, we could've had some other information available to the Court, correct?

A. Correct.

Q. So you've waited until the only potential witnesses, being adults, are dead?

[23] Similarly, in the closing address for the appellant, the issue of prejudice arising from the death of two witnesses was referred to several times. For example:

> Now [X] says that he waited 40 years to come to the police. This happened 40 years ago and he says he's been sitting on this for 40 years. He knows, when he does go to the police, that [the grandmother] and [the appellant's father], two people that he says knew something about this, he knows they're dead, so he can say what he likes about their involvement, can't he, because they're not around to challenge him.
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> …
>
> How can Cameron MacGillivray defend himself against a claim that's 40 years old, when the only two apparent adult witnesses are dead and no other witnesses are presented apart, as I say, from [Y]?

[24] Finally, the Judge did refer to the defence position on the prejudice arising from the delay without specifically cautioning the jury in terms of s 122(1). He said:

> [38] … [Defence counsel] argued that there was little more that the defendant could do beyond that denial. He says that potential witnesses from these alleged events many years ago were either dead or not called by the Crown. The exception was [X] giving evidence that [Y] was in the room when he was abused but she did not have that same recollection.

Cross-examination on diary note

[25] The complainant, Y, had written notes and letters as a form of therapy in which she had referred to sexual abuse, not only by the appellant, but also by another relative. The other relative was not on trial and references to him were not in general redacted from the notes and letters produced at trial. Defence counsel considered that references to sexual abuse by yet another relative, Z, were helpful to the defence.

[26] A redaction was, however, made in one diary note, dated 17 February 1992, which in its unredacted form read:

> But most of all I hate life, and being at home **because I hate [Z] for melestering me several times from when I was about 6 years old and older. Then** I hate … Cameron for doing the same **one time about 3 years ago, then just** at the beginning of this year — THE BLOODY BASTARDS!

[27] The highlighted words were removed from the document included in the photographic exhibit bundle. This redaction was made not because of its reference to sexual abuse by Z, but because of the reference to the appellant "doing the same one time about 3 years ago". When Y was questioned by the police about the reference to the appellant doing the same three years earlier, she was not able to recall any such incident. Because she could not recall any incident three years previously, the reference to doing the same about three years ago was redacted on the basis that it had no relevance to Charge 3 and was prejudicial.

[28] When the appellant was being cross-examined by Crown counsel, he appeared to deny that the diary note related to sexual abuse:

> Q. Well, you think it's common for [relatives] to make diary entries about [relatives] that have sexually abused them?
>
> A. It doesn't say that, does it? What does it say?
>
> Q. You know, you know what the context of it was?
>
> A. What does it say, what does it say?
>
> Q. You know what the portion was that was blacked out?

[29] The appellant was then referred to the diary note and asked whether there was a reference to somebody else known to the appellant. The appellant acknowledged that he knew who it was and that he knew the substance of the redacted material. He then agreed that he knew that the diary note said he had sexually abused her. When asked why he had earlier been trying to say something else, the appellant replied because he did not in fact sexually abuse her.

[30] The redacted passage was mentioned in the context of a disagreement about the meaning of the note. It was a central part of the Crown case that Y referred to sexual abuse in that note. Cross-examination of the appellant was relevant to that issue. In context "Cameron for doing the same" plainly meant that doing the same thing concealed by the redaction, which was sexual abuse. It was necessary for Crown

counsel to challenge the appellant by referring directly to his knowledge of the redacted passage and received an acknowledgment that the note did indeed refer to sexual abuse. At no stage did Crown counsel refer to the appellant doing the same about three years earlier. Cross-examination of the appellant on the redacted portion of the diary note therefore did not cause his trial on Count 3 to become unfair.

Direction on motive to lie

[31] Section 122(2)(c) provides that the Judge must consider giving a warning whenever evidence is given by a witness who may have a motive to give false evidence that is prejudicial to a defendant. The appellant says his ex-wife did have a motive to lie and the Judge should have warned the jury to be cautious about accepting her evidence.

[32] The appellant's ex-wife gave evidence that at some stage after returning from hospital with her second child, she found Y's diary and read the note about her husband sexually abusing her. She says she then confronted her husband, who told her that he had only "finger fucked" her. She also spoke with Y and asked her to rip out the note from the diary, tear it up and then throw it into the fireplace. Y says she complied, but later retrieved it and taped it together again. It was produced to the jury in that form.

[33] The appellant's ex-wife says that for most of their married years she chose to block out the admission and did nothing because she did not want her children to be part of a broken family and not have a father. She did, however, say that she had used the admission as a weapon in arguments with her husband while they were still married.

[34] The appellant's ex-wife also made it clear that she was unhappy with the outcome of her divorce settlement in that she had not received a house in which to live as part of the settlement. In her statement to the police, she also said that when she was approached by the police to make a statement after Y had laid a complaint, she had initially, at least, suggested to the appellant that she would not make a statement if he contributed money towards the purchase by her of a motorhome. After discussions with her parents and a close friend, she says in her police statement

that she realised that this was wrong, and she went ahead and made a statement to the police.

[35] During the trial a charge against the appellant of perverting the course of justice by offering money to his ex-wife to dissuade her from speaking to the police was dismissed when the Judge became concerned that she might incriminate herself if she gave evidence along the lines of her statement to the police.[11]

[36] The appellant submits that in those circumstances a warning was required that his ex-wife had a motive to lie. A warning under s 122(1) is, however, discretionary.[12] A warning is less likely to be needed where the issues of a witness's motivation for giving evidence and their potential unreliability were clearly raised in other ways.[13] In this case, we are of the view that a warning was not necessary. That is because the appellant's ex-wife's motivation for giving evidence and her potential unreliability were clearly raised in other ways. The jury would have been in no doubt that her credibility was in issue.

[37] In his closing address to the jury, counsel for the appellant squarely raised the issue of her reliability. He said:

> [The ex-wife], I suggest to you, is a devious, manipulative witness who tried, at page 55 you will note, to take financial advantage of the defendant when she found that he was in this situation. She tried to manipulate the justice system to make the defendant's situation worse. I suggest to you she's telling lies when she said that, "He admitted to me that he'd fingerfucked her." That's her trying to get back at him, isn't it? She's very unhappy with the fact that she got very little out of the marriage settlement and she's being trying to make up for it ever since, and here we go again.

[38] A judicial warning should be avoided when the issue of reliability is obvious as such a warning may serve as a signal that the judge thinks a witness is lying.[14] Further, the fact that the appellant's ex-wife considered, at least initially, requesting the appellant, in effect, to pay for her silence, does not imply as a matter of logic that her evidence about the allegation itself was less likely to be true. As noted by

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11 *R v MacGillivray* DC Hamilton CRI-2017-019-8199, 19 March 2019 at [9].
12 *Brunsell v R* [2018] NZCA 156, (2018) 28 CRNZ 543 at [30].
13 See, for example, *Williams v R* [2017] NZCA 176, (2017) 28 CRNZ 471 at [48]; and *Archibald v R* [2014] NZCA 443 at [22].
14 *B (CA58/2016) v R* [2016] NZCA 432 at [61].

the Crown, aside from the assertion that the appellant had admitted the "finger fucking", he had accepted the outline of much of what she said. There was, accordingly, no obvious reason to regard the evidence she gave on Charge 3 as being unreliable for reasons not already apparent to the jury. A direction was, therefore, unnecessary.

Suppression and anonymisation

[39] We sought further submissions on these matters after the hearing. The identity of the complainants is automatically suppressed under s 203 of the Criminal Procedure Act 2011, and no application for discharge under s 203(3) has been made. Their identities have therefore been anonymised in this judgment. Because they are related to the appellant we sought clarification whether the complainants sought suppression of the appellant's name. The Crown having made enquiries, we are advised that they do not, despite the potential for their identification by association. The appellant on the other hand does seek suppression, under s 200(2)(a) and (c). No evidence in support of that application has been filed. Suppression was not sought by him upon conviction or sentencing. The request is misconceived and is declined.

Result

[40] The appeal against conviction is dismissed.

[41] The request for suppression under s 200 of the Criminal Procedure Act 2011 is declined.

Solicitors:
Crown Law Office, Wellington for Respondent