NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT 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

CA738/2018
[2020] NZCA 375

BETWEEN	G (CA738/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	30 July 2020
Court:	French, Woolford and Dunningham JJ
Counsel:	C J Tennet and O E Harold for the Appellant K S Grau and Z W Q Andrew for the Respondent
Judgment:	31 August 2020 at 9 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence on appeal is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

[1] Following a seven day trial in the Manukau District Court from 16–24 July 2018, the appellant was found guilty by a jury of one representative charge of sexual violation by rape. The complainant was his step-daughter. The offending was alleged to have occurred between 1 October 2013 and 5 May 2016, when she was between

nine and 12 years old. Judge A J Johns subsequently sentenced the appellant to nine years' imprisonment.[1] He now appeals against conviction. An appeal against sentence has been abandoned.

Factual background

[2] The appellant faced trial on eight charges — four charges of sexual violation by rape, one charge of sexual violation by unlawful sexual connection and three charges of threatening to kill. The following summary of allegations is taken from the Crown submissions on appeal.

[3] The complainant, her family and the appellant lived together at an address in [town A] from about May 2005 to October 2013. The complainant alleged the appellant began sexually abusing her from about December 2012, when she was nine years old. The complainant said it occurred on a weekly basis, sometimes three times a week. The offending continued when the family moved to a new address in about October 2013. The offending was frequent and occurred when her mother was in the shower, or when she was not in the house. The complainant said she would often call out to her younger sister, who was usually in the house, but the appellant would tell the sister to go away. The complainant said she once woke up, at the second address, and the appellant had his finger in her private parts. She also described threats by the appellant that he would kill her, her mother and her sister if she told anyone or refused or resisted the appellant's advances.

[4] The allegations came to light on 5 May 2016, when the complainant's mother walked into the complainant's bedroom after hearing her protest to the appellant and saw the appellant jump back from the bed and adjust his shorts. The complainant alleged that before her mother came in, the appellant had raped her, during which she spat at him, he licked the side of her face and she wiped it on her pillow.

[5] The complainant's description of the offending has assumed real significance in this case because of the expert evidence sought to be led by the appellant. We, therefore, set it out in some detail below.

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1 *R v* [*G*] [2018] NZDC 25302.

[6] In her evidential video interview, which was played as part of her evidence-in-chief at trial, the complainant initially described the offending as the appellant putting his private part into hers. When asked whether there was another name for his private part and for her private part, she replied penis and fanny. She also said that the appellant had spat on her and put his penis into her vagina. She then described the appellant as spitting on it and just shoving it in. When she told him to stop and tried to kick him off, he just kept pushing harder.

[7] In cross-examination at trial, the following exchange took place:

> Q. … when you say that [the appellant] put his penis into your vagina and things like that –
>
> A. Yeah.
>
> Q. – do you mean that he put it all the way in or just touched the outside?
>
> A. He put it in.
>
> Q. You mean all the way in?
>
> A. Yeah, not like yeah, he just put it in.
>
> Q. So it went further than just the outside of your genitalia, is that right?
>
> A. Yeah.
>
> Q. Further than that and you could feel that every time?
>
> A. Yeah.

[8] Later, the following exchange took place:

> Q. … So I just want to be clear about what you're meaning, you said it didn't go all the way in. Are you saying that it went in say two or three inches or something like that?
>
> A. I didn't measure it.
>
> Q. No, I know, I'm sorry, I wasn't meaning to put you on a spot like that, but I meant that it went in a way, have I got that right that it went in a way?
>
> A. What?
>
> …
>
> Q. Do you have any idea about how far it went in?

A. No, I didn't measure it. I wasn't really concentrating on how far it went in.

[9] As to the number of occasions that the appellant had put his private part into hers, the complainant said in her evidential video interview it had happened lots of times. Then, the following exchange took place:

Q. So I'm just [trying to] figure out how often it happened when you were 10. You said it happened every time mummy was in the shower so I'm [trying to] figure out whether it happened every day, every week, once a month or something else.

A. It's been happening every week and sometimes like three times a week.

Q. Mhm.

A. Or more.

[10] In cross-examination at trial, the following exchange took place:

Q. So those were many, many times, weren't they?

A. Yeah.

Q. Would it be fair to say it was over 100?

A. Yeah, probably.

Q. Do you think it was much more than that?

A. I'm not sure.

[11] As to any injury suffered by the complainant, she said in her evidential video interview that her private part was sore, and it hurt when the appellant put his private part into hers. She also said that her vagina was sore and that once it started bleeding "[a]fter he done it". She saw the blood on the toilet paper. She was 10 at the time.

[12] In cross-examination at trial, the complainant said her vagina was not sore every time the appellant put his penis in her vagina. She then reiterated her evidence that there was bleeding once when she was 10. When counsel referred to evidence to be given by the complainant's mother about once seeing blood on the complainant's underwear when she was 11 and suggested it must have been something completely

different because of the differences in ages described (10 vs 11), the complainant said she did not remember.

Grounds of appeal

[13] The appellant appeals on the basis that a miscarriage of justice has occurred for the following reasons:

(a) The guilty verdict on the representative charge of sexual violation by rape over the period 1 October 2013 to 5 May 2016 is inconsistent with other verdicts, in particular, the not guilty verdict on another representative charge of sexual violation by rape covering an earlier period from 28 December 2012 to 1 October 2013.

(b) Following a pre-trial hearing on 13 July 2018, Judge Johns was wrong to have ruled the evidence of Dr Steven Gabaeff as inadmissible at trial.[2] Dr Gabaeff was briefed to give evidence that observable injury is inevitable if there has been full penile penetration of a prepubertal girl.

(c) In an earlier decision dated 30 May 2018, Judge R J Earwaker was wrong to have ruled the evidence of Dr Susana Pereira as admissible at trial.[3] Dr Pereira gave evidence at trial that a normal genital examination does not exclude the possibility of sexual abuse.

(d) Judge Johns was wrong in ruling during the course of trial to allow the evidence of forensic scientists from the Institute of Environmental Science and Research (ESR), Dianne Crenfeldt and Kate Stevenson, as to probable saliva staining found on the complainant's pillow and DNA analysis to be led at trial.[4]

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2 *R v* [*G*] [2018] NZDC 19383 [Gabaeff admissibility decision].
3 *R v* [*G*] [2018] NZDC 10785 [Pereira, Crenfeldt and Stevenson admissibility decision].
4 *R v* [*G*] [2018] NZDC 14550 [Oral Ruling No 1 — Crenfeldt and Stevenson admissibility].

(e) There was a substantial misdirection by Judge Johns in dealing with the expert evidence of saliva staining and DNA when it was established in evidence at trial that it was not probative. The Judge did not direct the jury adequately in her standard directions on expert evidence or in dealing with the defence case, nor did the Judge correct how the prosecutor used that evidence.

Application for leave to call fresh evidence

[14] We accept the statements of principle in relation to fresh evidence on appeal as set out in the Crown submissions on appeal. In brief, the overriding test is whether it is in the interests of justice to admit the evidence.[5] In general, the court should apply a series of sequential tests. The evidence must be:[6]

(i) sufficiently fresh (in that it could not with reasonable diligence have been called at trial);

(ii) sufficiently credible; and

(iii) cogent in the sense that it might reasonably have led to a different verdict.

The public interest in finality of proceedings is also relevant to the interests of justice.[7]

[15] For expert evidence to be admissible, it must be of substantial help in the fact finder in understanding other evidence or ascertaining any fact that is of consequence to the determination of the proceedings.[8] It is not sufficient for an appellant to point to evidence helpful to the defence that was absent at trial (for whatever reason).

[16] The appellant has tendered three affidavits in support of his appeal and seeks leave for them to be admitted on appeal.

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5 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [116].
6 At [120].
7 *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
8 Evidence Act 2006, s 25(1).

Affidavit of Dr Steven Gabaeff dated 2 November 2019

[17] Dr Gabaeff is a consultant physician residing in Healdsburg, California. He confirms that he was briefed by counsel for the appellant prior to trial to give evidence at the trial of the appellant. His evidence was, however, ruled inadmissible by the District Court at Manukau. In the affidavit he makes comment on the District Court decision and also further comments on the evidence in the case.

[18] Dr Gabaeff's evidence is clearly not fresh. As to whether it is sufficiently cogent, Dr Gabaeff's affidavit attaches the two reports which were ruled as inadmissible by the Judge prior to trial.[9] He criticises the Court's decision at some length, saying the Judge misconstrued or misconceived both his evidence and the issues in the case. In further comments he reiterates his view that the failure to complete a full examination of the complainant:

> …would be to allow the [complainant] to continue to live a lie and suffer the deleterious effects of this into adulthood as well as to continue the pain and suffering of all concerned, including the [complainant's] mother and extended family and, of course, the Accused and his family, including his biological daughter.
>
> Such a failure in my view is an example of callous indifference to these concerns.

This is a firmly expressed view that the complainant is lying about the allegations she has made regarding the appellant. This was, however, a matter for the jury, not for Dr Gabaeff.

[19] The Judge's decision ruling Dr Gabaeff's evidence inadmissible is one of the grounds of appeal and will be fully dealt with later. But Dr Gabaeff's affidavit is not fresh nor sufficiently cogent to allow its admission post-trial. His affidavit is therefore inadmissible on appeal.

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[9] Dr Gabaeff states that he was only to give evidence of matters contained in the first report dated 31 March 2018.

Affidavit of Dr Theodore Hariton dated 20 December 2019

[20] Dr Hariton is a physician residing in Tucson, Arizona. Subsequent to trial, he was briefed by counsel for the appellant to prepare a report for the purpose of the appellant's appeal against conviction. His report, which he annexes to his affidavit, takes issue with Dr Pereira's evidence. He contends that:

(a) Dr Pereira's physical examination of the complainant was inadequate and flawed.

(b) Dr Pereira should have taken photographs of the examination.

(c) Dr Pereira had an "inability to deal with and have knowledge of the actual anatomy and histology of the hymen in normal pre pubertal girls".

(d) Dr Perieria used flawed medical articles to support her position.

(e) Dr Perieria chose not to consider medical articles that conflicted with her position.

(f) Dr Perieria was accurate in her statement that without photos and a more complete examination there is no way that we can know if there was a healed transection hidden behind one of the labial folds, but this ignores the noteworthy absence of the expected actual effects of trauma of over 100 episodes of penile vaginal penetration in a prepubertal girl. It would be expected that there would be multiple transections of the hymen and other healed evidence of significant trauma to the hymen and surrounding tissues with a history of pain and bleeding at these events.

[21] Dr Hariton's evidence is clearly not fresh. An article by Dr Hariton was referred to by Dr Gabaeff in his report to counsel for the appellant, dated 20 May 2018, as "very useful as it succinctly summarizes many of the issues that arise in considering

what Dr Pereira calls the 'literature' surrounding sexual injury". Dr Hariton could have been called at trial.

[22] Dr Hariton's evidence is also not sufficiently cogent to allow its admission post trial. As this Court has previously stated, we will not generally allow post-trial shopping for another expert to challenge directly relevant expert evidence, which was admitted at trial and cross-examined on.[10] Dr Hariton does not demonstrate that Dr Pereira was plainly wrong. His is simply a different view on the significance of the lack of injuries found on the limited examination of the complainant. His affidavit is therefore inadmissible on appeal.

Affidavit of Dr Arie Geursen dated 23 October 2019

[23] Dr Geursen is a semi-retired consultant forensic scientist residing in Auckland. He confirms that he was briefed by counsel for the appellant prior to trial to review the forensic work undertaken by the ESR and to assess the strength in scientific terms of the DNA evidence. He provided a number of reports to counsel, which he attaches to his affidavit.

[24] He confirms that he was in the District Court to hear the evidence-in-chief of the ESR forensic scientist, Ms Stevenson, and her cross-examination by counsel for the appellant. He states that after the witness had concluded her evidence, counsel for the appellant conferred with him. He states that counsel then decided that it was not necessary for Dr Geursen to give evidence as Ms Stevenson had conceded all the points raised in his reports. Dr Geursen states:

> The questions Mr. Harold asked and the answers eventually given in evidence by Ms. Stevenson proceeded from sound scientific principles.

[25] Dr Geursen's evidence is clearly not fresh. He could have been called at trial. His evidence is also not cogent in the sense that it might reasonably have led to a different verdict. His affidavit is therefore inadmissible on appeal.

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[10] *Wallace v R* [2010] NZCA 46 at [76].

Appeal Ground One: Inconsistency of verdicts

[26] At trial, the appellant faced four charges of sexual violation by rape, in addition to other charges. There were two specific charges alleging rape of the complainant on the first and last times (Charges one and eight). The first time was alleged to have been at an address (the first address) where the family lived between 28 December 2012 — when the complainant turned nine years old — and 1 October 2013 — when the family moved to a second address. The last time was alleged to have been at the second address on 5 May 2016, when the complainant's mother found the appellant in the complainant's bedroom, which led to police involvement.

[27] The other two charges of sexual violation by rape were representative charges, alleging rape of the complainant on an unspecified number of occasions between the first and last times (Charges three and five). These were split in to two — when the family lived at the first address (Charge three) and when the family lived at the second address (Charge six). The time periods were, accordingly, different — Charge three covered a nine month period from 28 December 2012 to 1 October 2013, and Charge five covered a two and a half year period from 1 October 2013 to 5 May 2016.

[28] We accept that an appellate court may allow an appeal against a guilty verdict on one charge if it is inconsistent with a not guilty on another charge. As this Court stated in *Parkinson v R*:[11]

> [7] … The question is whether an acquittal on one charge renders the verdict on another charge unsafe, in the sense that no reasonable jury could have arrived at different verdicts on the two counts. That may arise when the evidence of one count is bound up with another such that they are not logically separable. If there is some evidence to support the verdict, an appellate court will not usurp the jury's function by substituting its view of the facts. A jury is entitled to accept some of a witness's evidence and not all of it. It is also open to a jury to take a merciful view of the facts on one count but not on another. However any reasonable explanation for different verdicts must be founded in the evidence properly used and must not be an affront to logic and common sense.

[29] In the present case, counsel for the appellant submits that the jury's guilty verdict on Charge five was unreasonable because it was inconsistent with the not guilty

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[11] *Parkinson v R* [2015] NZCA 618 (footnotes omitted).

verdict on Charge three. He submits there is nothing to distinguish the evidence on each of these charges.

[30] With respect, we disagree. There was no corroborative evidence in respect of Charge three, which made the charge a "she said-he said" case. The not guilty verdict on Charge three when compared to the guilty verdict on Charge five only demonstrates that the jury wanted more evidence before they would convict or that they were prepared to give the appellant the benefit of the doubt absent corroboration.

[31] With respect to Charge five, the complainant said she had noticed bleeding on at least one occasion after the appellant put his penis into her vagina at the second address. The complainant's mother also gave evidence that she found her daughter's bloodstained underwear crumpled up and hidden in her bedroom. Importantly, the complainant's mother confirmed she found the bloodstained underwear at the second address and it was several years before her daughter got her period. That evidence, if accepted, was corroboration of the penetration and distinguishes Charge five from Charge three, which related to offending at the first address, and for which there was no other evidence, other than the complainant's account.

[32] The jury were directed to consider each charge separately even though, obviously, a lot of the evidence overlapped. The Judge directed them to isolate the evidence and the issues of law that related to the charge they were considering and come to separate decision about it. The jury's verdicts demonstrate they followed this direction.[12] This ground of appeal fails.

Appeal Ground Two: Evidence of Dr Steven Gabaeff

[33] Dr Gabaeff was briefed by counsel for the appellant prior to trial to give evidence at the trial of the appellant. The prosecutor objected to his evidence.

[34] Following a hearing on Friday, 13 July 2018, immediately prior to the commencement of the trial on Monday, 16 July 2018, Judge Johns ruled that his evidence could not be led as expert evidence at trial by the defence. The Judge found

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[12] During the course of their deliberations, the jury asked about the evidence relating to the complainant's bloodstained underwear, which was read to them by the Judge.

that he was not an expert, he lacked impartiality and was clearly an advocate for the defendant.

[35] The Judge summarised Dr Gabaeff's proposed evidence as follows:[13]

> [7] In Dr Gabaeff's opinion Dr Pereira is wrong in her claim that lack of genital injury neither confirms nor denies an allegation of sexual abuse, the current thinking and research to support her expert evidence is wrong, and any prepubescent child who has experienced full penetration by an adult male penis would have findings involving complete tearing of the hymen, a deep cleft of the vaginal wall and highly likely ripping of the vaginal wall. In his opinion children who have been subject to full intercourse demonstrate the damage described "in virtually 100% of cases". Further, in his opinion there has never been a documented case of intercourse without this type of damage due to the very dramatic size difference between the hymnal opening of the vagina and the adult male penis, anywhere in the world.

[36] We set out below the Judge's decision:

> [23] Dr Gabaeff is not a qualified paediatrician and has not conducted an examination of a child alleging some form of penetrative sexual abuse for over 28 years. In relation to the fifty or so examinations he did before 1994, he gave no detail about the nature of the allegations made, the examinations conducted, or his findings.
>
> [24] He has not published any articles on the issue of genital injury or been part of a published study. He believes his opinions do not need to be scrutinised by other Doctors.
>
> [25] His opinion that the number of children penetrated by a male penis annually in the US is in the hundreds is not supported by any credible literature or study. His opinion that identifiable injuries in cases of penetration of children by a male penis is virtually 100% is not supported by any credible literature or study.
>
> [26] His belief that few people in the world have more forensic experience in forensic analysis in these cases than himself is simply his belief, but he could not point to anything to back up his claim. As I have already noted he has not published anything of note, believes he has no need to, and is not prepared to have his opinions scrutinised by other professionals practicing in this area.
>
> [27] His contention that there is no documented case in the world where there has been intercourse with a child that has not resulted in genital findings is troubling. There is clearly literature and studies referred to by Dr Pereira which indicate the contrary.
>
> [28] I find his view that children must be fully examined no matter what it takes disturbing, and I cannot accept that any right minded paediatrician would ever consider taking such action.

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13 Gabaeff admissibility decision, above n 2.

> [29] His suggestion that the allegations in this matter cannot be true because the complainant did or did not behave in a certain way during the course of the offending flies in the face of the counter intuitive evidence routinely given in New Zealand Courts[.]
>
> [30] His view that the American Academy of Paediatricians guidelines are wrong, without having undertaken any meaningful research himself, coupled with his unwillingness to publish anything to back this view up, demonstrates his complete lack of independence in these matters.
>
> [31] For the reasons above I do not consider he is an expert in this field, but rather a person who has been on a crusade since the early 1990's to right wrongs as he perceives the wrongs to be.
>
> [32] Even if I was satisfied he was an expert, his proposed evidence clearly breaches the Code of Conduct for expert witnesses because he lacks impartiality and is clearly an advocate for the defendant.

[37] We agree that Dr Gabaeff's evidence, in the form it was presented to the District Court, was inadmissible in terms of s 25 of the Evidence Act 2006. In his first report dated 31 March 2018, Dr Gabaeff refers to Dr Periera's incomplete genital examination of the complainant and states:

> In this case, there was no visible or identifiable genital damage and the hymen had the configuration of a child who has never been penetrated, to a virtual 100% certainty.

[38] This bald, categorical statement is not substantially helpful because it omits the important qualification that the examination was incomplete as Dr Periera was not able to separate out the folds of the hymen or to see anything of the complainant's vagina beyond the hymen. Dr Periera was therefore unable to say whether or not there were any irregularities to the hymen because she could not see the hidden hymenal folds.

[39] Furthermore, Dr Gabaeff does not specify what type of penetration he refers to. In his affidavit filed post-trial, Dr Gabaeff states:

> I have no difficulty agreeing that most studies show that children who have been sexually abused, even where some kind of "penetration" is alleged, show no or little physical symptoms of injury.

[40] After reviewing Dr Gabaeff's first report, Dr Periera assumed that in making the statement in [37], Dr Gabaeff was referring to penetration through the hymen. Dr Gabaeff responded in his second report dated 20 May 2018:

> Yes, I am referring to fully penetrative sexual intercourse beyond the [hymenal] ring of the complainant … from the age of 9 years by a fully erect adult male penis. This is what the complainant stated happened and continued to happen up to age 12 when any child should be able to state the difference between insertion or not as well as feel the difference with reliability and the ability to express that in words clearly.

[41] Here, Dr Gabaeff is usurping the role of the jury as fact-finder to determine what the complainant meant when she said the appellant "shoved it in". The complainant resisted attempts in cross-examination to specify how far the appellant put his penis into her vagina, saying, "I didn't measure it. I wasn't really concentrating on how far it went in."

[42] The approach of Dr Gabaeff can be contrasted to that of Dr Periera, who said in evidence:

> What we don't know is what a child means, and we don't go into that. That's not our job.

Dr Periera recognises limits to her expertise and role. Dr Gabaeff does not.

[43] Furthermore, in his second report dated 20 May 2018, Dr Gabaeff states:

> Moreover, in this case the complainant alleges that the forceful penile penetrations beyond the [hymenal] ring occurred at the rate of about every second day for over three years. This amount of intercourse is mind boggling, but stated clearly. The idea that no signs of such activity in behaviour, stains or proximity renders such a statement implausible. The absence of physical findings corroborates that implausibility if not near impossibility.

[44] Here, Dr Gabaeff clearly becomes an advocate for the defence in breach of the Code of Conduct for Expert Witnesses. In the statement, Dr Gabaeff also refers to other evidence in the case and attributes some significance to what he has concluded is a lack of any noticeable change in the complainant's behaviour and the fact that the offending is alleged to have occurred in proximity to her mother when she was having a shower and/or her sister who was in the house at the time.

[45] In making that statement, Dr Gabaeff may not have been aware that a statement relating to counter-intuitive evidence was admitted by consent in the case. It commences:

a. This is educative evidence that is designed to correct any misapprehensions or misunderstandings that may be held about the behaviour of children who have been sexually abused. This is because we know from research that there are misconceptions about aspects of child sexual abuse and the behaviour of children and teenagers who have been sexually abused. Research tells us that these misconceptions have been held by a number of people, including the public at large, some school teachers, some police officers, some physicians,[14] some psychologists and some jurors.

b. This evidence does not prove or disprove that sexual offending has occurred in this case. It is evidence designed to inform about the behaviour of sexually abused children. It says nothing about children and adolescent children who have not been sexually abused.

c. It relates to the behaviour of children who have been sexually abused, as represented by a sound and replicated body of literature that has developed over the last thirty to fourty years and also draws upon more than forty years professional experience with both offenders and victims in relation to sexual offences against children.

[46] The statement continues:

<u>The proximity of others during child sexual abuse</u>

k. It may be difficult to consider that someone would take the risk of committing a sexual assault in close proximity to others, even if those others were asleep, or in another part of a building. However, while sexual abuse usually takes place in secret, it often occurs with others nearby.

l. Available research literature, court records, incarcerated sexual offender files and the clinical experience of clinicians with both sexual offenders and victims over the last 40 years, collectively indicate that children are sexually abused in virtually any environmental situation. In some cases, normalising of sexual abuse and/or threats by the offender ensures lack of detection by others who may be in the vicinity.

<u>Continued contact with abuser</u>

m. It is not uncommon for a child to continue having contact with someone who has abused them sexually. Due to their age or relationship, some children may not have a choice about continued contact with the offender. If the offender has used threats or intimidation during the sexual abuse, which has inhibited the child from reporting the sexual abuse to others, the child may also continue to have contact with the offender to avoid the sexual abuse becoming known to others.

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14 Dr Gabaeff is evidently one of these physicians.

[47] The statement relating to counter-intuitive evidence admitted by consent is directly contrary to Dr Gabaeff's opinion that the complainant's lack of behavioural changes and the proximity to others when the offending is alleged to have occurred made the allegation of offending implausible.

[48] The Judge was right to exclude the evidence of Dr Gabaeff in the form it was presented to her. It may be that parts of his reports may have been admissible in some other form, but it appears that counsel for the appellant made no attempt to edit Dr Gabaeff's reports in order to limit them to what an expert can properly give evidence on or to reconcile them with other evidence, such as the agreed statement relating to counter-intuitive evidence. This ground of appeal also fails.

Appeal Ground Three: Evidence of Dr Susana Pereira

[49] Dr Pereira is a paediatrician with the Child Protection Team at Starship Hospital, Auckland. She was briefed by the prosecution to give evidence of her incomplete examination of the complainant and to comment on the significance of the fact that no apparent injuries were observed. The appellant objected to her evidence.

[50] In a pre-trial decision dated 30 May 2018, Judge Earwaker ruled the evidence of Dr Periera to be admissible.[15] The Judge found that the Court of Appeal decision in *D (CA171/2009) v R* was directly applicable to the circumstances of this case.[16] Dr Periera detailed the examination of the complainant. She provided her conclusions based on her expertise and her experience, which was extensive and not challenged. With reference to the relevant literature, she provided a full opinion as to how sexual abuse, as alleged in this case, could occur and yet not cause any observable injury. The Judge ruled that Dr Periera's opinions could be challenged in the normal way by the defence in the course of the trial. He considered her evidence to be both relevant and substantially helpful. Accordingly, when the provisions of ss 7, 8 and 25 of the Evidence Act were applied, the evidence of Dr Periera in its current form was admissible and he ruled accordingly.[17]

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15 Pereira, Crenfeldt and Stevenson admissibility decision, above n 3.
16 *D (CA171/2009) v R* [2010] NZCA 533.
17 Pereira, Crenfeldt and Stevenson admissibility decision, above n 3, at [49].

[51] We agree that Dr Periera's evidence was admissible in terms of ss 7, 8 and 25 of the Evidence Act. Dr Pereira met with the complainant and her mother on 12 May 2016 for the purpose of a genital examination. When Dr Pereira examined the complainant, she was able to see her external genitalia including the labia majora and labia minora. Beyond that, Dr Pereira could see the introital area, which is the entrance to the vaginal area, and all appeared normal. Dr Pereira noted that the complainant's hymen was a folded hymen, which indicated that she had commenced puberty. She explained that the hormone estrogen affects the nature of the hymen and makes it a folded tissue. Beyond the hymen is the actual vagina.

[52] Dr Pereira explained that they always try and use a swab to smooth out the folds of the hymen so that it can be fully examined. However, when she touched the complainant's introital area with a swab, she expressed discomfort and was reluctant to proceed further. Dr Periera was therefore unable to examine the folds of the hymen, nor she was able to examine the complainant's vagina at all. She was not able to see anything beyond the hymen. She says that the tissue of the hymen that she was able to see was normal, but she was unable to comment on the folds of the tissue that were hidden because she was unable to see those. Dr Periera was therefore unable to complete a full genital examination.

[53] Dr Periera was then asked about the prevalence of abnormalities in the hymen when a child or adolescent alleged sexual assault. Dr Periera said that it is uncommon to see any injuries or any signs of previous injury. The following exchange then took place:

> Q. … is it fair to say that some non-medical people assume that any sexual contact involving penetration would result in damage to the genital area which a doctor will be able to [see]?
>
> A. That is correct, that's the generally held belief in non-medical people.
>
> Q. And from a medical perspective is that actually correct?
>
> A. Well, no, it's not. From a medical perspective, we know that most sexual contact does not cause any visible damage.
>
> Q. Even when there have been allegations by a child that their genitalia has been penetrated by an adult male penis? Does that make any difference?

A. No, it doesn't make a difference in general, in that most of the children that we see who make those allegations will have a normal examination. What we don't know is what a child means, and we don't go into that. That's not our job.

[54] Dr Periera then went on to outline the types of injuries that may be seen, including bruises, lacerations and abrasions.

[55] In answer to the question, "what are the possible reasons for the absence of any visible or detectable injury?", Dr Periera stated:

A. So there are a few factors that we would consider. Obviously, there is always the possibility that the contact hasn't occurred in the first place. There is the possibility that the contact has occurred but there's been no injury, and that may be because the contact hasn't involved penetration through the hymen. It may be some other different type of physical contact, such as touching. There is also the possibility that there had been contact, with injuries which had healed by the time the examination had taken place. And as I've said before, there are a number of factors that may affect the likelihood of injury such as stretchiness of tissue, for example, and so you may have no injury sustained because of those factors. Yes, so those are the main reasons.

[56] Then, the following exchange took place:

Q. So what is the general medical opinion in terms of what a normal genital examination tells us about allegations of sexual assault?

A. So a normal genital examination doesn't confirm or refute the fact that something has taken place.

Q. And as you said before, you're not actually able to say in this case whether [the complainant's] hymen was normal or not?

A. That's correct.

Q. Or even whether there were any hymen irregularities present?

A. That's right, my examination was limited, yes.

Q. Even if there had been such hymen irregularities would it have been possible for you to say whether or not that must relate to a sexual assault?

A. Not necessarily. As I mentioned earlier on, some of those irregularities may involve notches or clefts which are non-specific and that we can't say what's caused them, so even if she had some irregularities, I may not have been able to give an opinion on the cause of that.

[57] In cross-examination, the evidence given by the complainant in her evidential video interview was put to Dr Periera. The following exchange then took place:

> Q. … Now, do you accept that all of that means that [the complainant] is saying that [the appellant] put his penis into her vagina?
>
> A. Well, as [the complainant] has said, it's gone in. I can't comment on how far that means, whether that means it's gone beyond the hymen or not.
>
> Q. Well, that's a matter for the jury.
>
> **THE COURT:**
>
> Well, it's not, because any penetration is sufficient.

[58] Dr Periera accepted that there will be occasions when there are injuries when a penis is forced into a prepubertal vagina beyond the hymen ring. When asked whether there had been a reliably confirmed account of an adult male penis being forced into the vagina of a prepubertal female without any observable injury, Dr Periera referred to cases in her own unit of children with sexually transmitted infections who have had normal genital examinations. She also referred to studies in the United States where alleged offenders had confessed to what they had done, and those children have had normal examinations. When asked, in this particular case, where the complainant has alleged over 100 penetrations, would one not expect there to be multiple clefts of the complainant's hymen, Dr Periera answered "Not necessarily". When asked if an injury such as the full width tear or cleft or transection of the hymen would be observable from external examination, Dr Periera replied that if one was able to complete an examination, she would imagine it would be, but she was not able to complete her examination of the complainant, so could not answer that.

[59] Although Dr Periera's examination of the complainant was incomplete and she observed no evidence of any injury, her factual account of what she did and what she saw was clearly admissible in terms of ss 7 and 8 of the Evidence Act. The physical examination of the complainant was relevant to the issue for determination by the jury — did the sexual abuse happen as described the complainant?

[60] The contentious evidence given by Dr Periera was the proposition that the lack of any observable injury upon the incomplete examination was neutral. That is, it neither confirmed nor refuted the fact that sexual abuse had happened as described by the complainant. Dr Periera referred to a consensus among professionals. In *D (CA171/2009) v R*, the Court reviewed the literature and concluded:[18]

> A general opinion that a normal examination neither confirms nor denies penetrative abuse and that studies show that most prepubertal girls reporting penetrative sexual abuse have normal examinations, especially where the examination happens some time after the alleged penetration, is in our view an appropriate way of representing the position to the jury.

[61] Dr Periera's evidence was orthodox and in accordance with position thought to be appropriate by the Court in *D (CA171/2009) v R*. She accepted that there would be occasions when there will be injuries when a penis is forced into a prepubertal vagina past the hymen ring but was unable to say how often. It was the defence position that injuries would occur every time. Dr Periera did not agree and referred to studies in the United States where alleged offenders had confessed to what they had done, notwithstanding that their victims had had a normal examination. The defence position is such pleas of guilty were unreliable because they were usually entered following plea bargain negotiations.

[62] In his closing address to the jury, counsel for the appellant addressed them on Dr Periera's evidence as follows:

> I want to talk a little bit about the medical expert, Dr Pereira. Although overall her evidence was neutral I suggest she did leave open the possibility that sometimes serious injury can occur when an adult male penis is forced into the vagina of a prepubescent girl, and that can cause an injury called a transection which can be seen even years later. It's a matter for you Ladies and Gentlemen whether you think that if [the complainant] was meaning that [the appellant's] penis had been penetrating her beyond the entrance way, beyond the hymeneal ring of her genitalia into her vagina, there, whether one would expect some kind of injury, sometime, I'll leave that as a matter for your common sense and life experience.

[63] Just as had been forecast by Judge Earwaker, Dr Periera's opinions were challenged in the normal way by the defence in the course of trial. The defence complains that the admission of Dr Periera's evidence was unfair, particularly with

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[18] *D (CA171/2009) v R*, above n 16, at [39].

the exclusion of "the alternative view" (of Dr Gabaeff). The "alternative view" was, however, expressed by a passionate advocate and not an expert abiding by the Code of Conduct for Expert Witnesses. An expert should be dispassionate and disinterested in the outcome of the case. Dr Gabaeff was neither. This ground of appeal also fails.

Appeal Ground Four: Evidence of Dianne Crenfeldt and Kate Stevenson

[64] Ms Crenfeldt and Ms Stevenson are ESR forensic scientists. They were briefed to give evidence on ESR's examination of the complainant's bedding for saliva stains and DNA. The appellant objected to their evidence.

[65] In a pre-trial decision dated 30 May 2018, Judge Earwaker ruled the evidence of Ms Crenfeldt and Ms Stevenson to be admissible.[19] The Judge found the ESR evidence was plainly relevant as it had a tendency to support the account given by the complainant. The fact that the DNA may have been transferred directly or indirectly to the pillowcase before or after the alleged rape by one of many alternative mechanisms that exist in a shared living space of the family home could not be excluded. However, this did not make the evidence of the ESR scientists irrelevant as submitted by the defence. The issue of how the DNA was transferred to the pillowcase was a matter for the jury to determine. Any potential prejudicial effect of the evidence did not outweigh its probative value and, accordingly, pursuant to ss 7 and 25 of the Evidence Act, the Judge ruled the evidence was admissible.[20]

[66] The appellant renewed his objection on the first day of trial, 16 July 2018. In a short oral ruling on the same day, Judge Johns accepted the Crown submission that nothing had changed and that the case cited by counsel for the appellant was distinguishable.[21] She said it was common for DNA evidence to be led, even when there was evidence from experts to say it could have got onto the object in question in a number of ways. It was, however, probative because it did fit the account given by the complainant. Judge Johns confirmed Judge Earwaker's earlier decision.[22]

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19 Pereira, Crenfeldt and Stevenson admissibility decision, above n 3.
20 At [33].
21 Oral Ruling No 1 — Crenfeldt and Stevenson admissibility, above n 4.
22 At [8].

[67] The police seized the complainant's bedding, including two pillowcases, and submitted it to the ESR on 7 June 2016. Ms Crenfeldt examined the pillowcases for possible saliva staining on the basis that the complainant had said that on the last occasion when she was raped, on 5 May 2016 (Charge eight), she had spat at the appellant, who had then licked her face and she, in turn, had wiped it on her pillow. One pillowcase contained a probable saliva stain.

[68] Ms Stevenson's evidence at trial was that one of the stains contained the complainant's DNA mixed with male DNA. Ms Stevenson determined that it was 40,000 million times more likely that the DNA originated from the complainant and the appellant, than from the complainant and another person.

[69] Counsel for the appellant accepts that the probable saliva stain was relevant and admissible but submits that prejudice arose because of the DNA trace. Although the sample correlated with the appellant, he lived in the house and the possibility that it was transferred in the way the complainant states was one possibility only.

[70] We are of the view that this appeal ground can be disposed of shortly. The ESR evidence was clearly admissible, essentially for the reasons relied upon by both District Court Judges. Its inclusion at trial has also not caused a miscarriage of justice when it related to a single charge (Charge 8), on which the appellant was acquitted. This ground of appeal also fails.

Appeal Ground Five: Judge's summing up

[71] This ground of appeal follows on from the previous ground of appeal. Counsel for the appellant submits that the Judge should have told the jury that the DNA evidence added absolutely nothing to the case and ought to have been ignored. This is, in effect, the same submission made to Judge Earwaker pre-trial and Judge Johns on the first day of trial. It was rejected then quite properly. As Judge Johns correctly observed:

> [8] … with appropriate direction it will be for the jury to decide whether the expert evidence is helpful and what weight to give to it if they accept that evidence.

[72] At trial the Judge gave the standard direction on expert evidence. She summarised the defence position on the DNA evidence as follows:

> [62] He [counsel] suggested to you that the ESR takes the case nowhere. You will remember that there are many, many ways that DNA, particularly when you are all living in the same house, can be transferred and that also of importance is that there is no semen or blood found on the bedding because the bedding was taken, yet she claimed that she was raped on the bed.

[73] The Crown's case was that the ESR evidence corroborated the complainant's account of the alleged rape on the last time, given that the complainant said the appellant licked her face and she then wiped her face on her pillow. Nevertheless, the Crown conceded, and the Judge reminded the jury, that there were other ways DNA could have been transferred on to the pillowcase.

[74] The Judge's directions were proper. The jury found the appellant not guilty on the sole charge (Charge 8) to which they related. This ground of appeal also fails.

Result

[75] The application for leave to adduce further evidence on appeal is declined.

[76] All grounds of appeal fail. The appeal against conviction is dismissed.

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