NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND/OR 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA46/2017
[2018] NZCA 602

BETWEEN	JEFFREY ROBERT BUNTING Appellant
AND	THE QUEEN Respondent

Hearing: 14 August 2018

Court: Kós P, French and Miller JJ

Counsel: L A Andersen and C M Andersen for Appellant
K S Grau for Respondent

Judgment: 20 December 2018 at 4.00 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Bunting was convicted by a jury on three charges of indecently assaulting two sisters aged between four and eight. The alleged offending occurred when Mr Bunting was doing electrical work at the complainants' father's house. Mr Bunting appeals those convictions on the basis a formal visual identification procedure should

have been undertaken, his prior conviction for indecent assault of a 15-year-old girl should not have been admitted in evidence and because of other trial counsel error.[1]

Background

[2] Mr Bunting faced four charges of historic indecent assault against two sisters, A and B. The charges were laid in 2015, and concerned offending between 2003 and 2006. A would have been four to six years old over the period of the offending against her, and B six to eight years old. Their parents had separated and they lived with their father. Mr Bunting was an electrician who undertook work at A and B's father's house, and a regular visitor.

[3] The three charges on which Mr Bunting was convicted were:

(a) The "nightie" incident, when Mr Bunting was said to have arrived at the house with another electrician and (after the latter had gone inside) touched B's bottom and private parts under her nightie.

(b) The "roly poly" incident, where A was playing on a landing at the top of the stairs where she used to "roly poly" down. Her father and Mr Bunting were working on a fuse box in the father's bedroom and Mr Bunting was alleged to have touched A's buttocks and private parts on the outside of her tights, pulled her tights down and tried to penetrate her private parts.

(c) The "boner" incident, where A alleged that Mr Bunting placed her hand on his penis, telling her it was a "boner". B witnessed the incident also, describing it in similar terms.

[4] Mr Bunting was acquitted of a fourth charge, the "under the stairs" incident, where he was alleged to have touched B's bottom while her father was working in a cupboard under the stairs. A alleged seeing this incident, but B herself did not recall it.

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[1] Mr Bunting was also convicted and discharged on a related charge of breaching a suppression order. But that is not challenged on this appeal.

[5] Four issues arise on appeal:

(a) First, was a formal visual identification procedure required?

(b) Secondly, was Mr Bunting's prior conviction for indecent assault wrongly admitted as propensity evidence?

(c) Thirdly, was there material trial counsel error?

(d) Fourthly, did a miscarriage of justice occur?

Issue 1: was a formal visual identification procedure required?

[6] The allegations came to light in 2015 when B was 18. She was working at her mother's business. One afternoon, when B was working there, she was stationed outside, touting for customers. After returning inside, and being told by her mother to go out again, she said she could not because "Jeff's coming down the [street]". Her mother asked, "Jeff who?", and B said "Jeff that used to come to Dad's". B then told her mother that he had put his hand up her nightie when she had no knickers on. B and her mother then went home.

[7] When A came home from school her mother asked if she remembered a man that used to go up to their father's house. A asked if she was talking about Jeff. Her mother asked A if she needed to tell her anything. A said she did not. But shortly afterwards A joined her mother in the kitchen in a state of considerable upset. She talked about sitting on his (that is, Mr Bunting's) knee, feeling very uncomfortable, of him saying to touch "his boner" and a few other "small incidents". Her mother contacted the police.

[8] A and B were interviewed by the police. Evidential video interviews were recorded. Those interviews proceeded on the basis that the subject of the complaint was Mr Bunting. In the evidential interviews he is referred to by each complainant as "Jeff". B unequivocally distinguished the other electrician from "Jeff". A's evidential interview did not initially name Mr Bunting, but soon refers to the offender as "Jeff". There is no suggestion that there are two offenders who have separately offended

against the two girls. The other electrician gave evidence for the defence. No suggestion was made that he was the offender.

Submissions

[9] For Mr Bunting, Mr Andersen submitted that there was no proper identification of Mr Bunting by A and B. There was reason to question B's identification of Mr Bunting in the street: the defence called Mr Bunting's wife (with whom he was said to be walking) and she said she was overseas at the time. A, on the other hand, was reliant on memory. There was a risk of contamination by discussion with the mother.[2] Good reason still existed to conduct a formal procedure despite the fact that the two complainants knew Mr Bunting. No justification existed here for not following a formal procedure, and accordingly the evidence of identification was only admissible where the prosecution could prove beyond reasonable doubt that a reliable identification was made under s 45(2) of the Evidence Act 2006 (the Act).

Analysis

[10] Identification evidence is a "species of opinion evidence".[3] Visual identification evidence is defined by s 4 of the Act in this way:

> **visual identification evidence** means evidence that is—
>
> (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
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> (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

As that makes clear, visual identification evidence is concerned with the asserted presence of the defendant at or near the location where the offence is alleged to have occurred. But identification may go beyond mere presence, to consider also whether the accused can be reliably identified (among others present) as the *perpetrator* of the crime alleged.[4]

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2 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [31].
3 At [15].
4 *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [26].

[11] The question ultimately is whether the reliability of the witnesses' identification of the defendant as the offender is in issue — in the sense that there is a possibility that the offender might be someone else. Assuming for present purposes that a crime has been committed, has the right person been charged? Might it have been someone else, so that reliability needs pre-evaluation via a formal identification procedure? Those issues are the foci of visual identification evidence and ss 45 and 126. Whether the further assertion by the complainant — that the defendant so conducted himself as to commit an offence — is reliable or not, is another question altogether. It is one beyond the scope of the identification provisions in ss 4, 45 and 126.

[12] In our view, the appellant's argument is misconceived. It assumes the correctness of the identification of the man on the street is material. It was not. The only relevance of the encounter on the street is that it triggered the complaint about the electrician who worked for their father. There was no issue Mr Bunting was present, working for the complainants' father as an electrician. There was no suggestion the other electrician (who gave evidence for Mr Bunting) was the perpetrator. Proof that Mr Bunting was the electrician who had abused them rested on other evidence, not proof that he was the man in the street. Whether the man in the street was actually Mr Bunting, or someone who resembled him or someone who for some reason reminded B of her alleged abuser, was irrelevant to the Crown case, other than its peripheral significance as triggering B's memory.

Conclusion

[13] We answer Issue 1, "no": a formal visual identification procedure was not required.

Issue 2: was Mr Bunting's prior conviction for indecent assault wrongly admitted as propensity evidence?

[14] A s 9 statement of agreed facts signed by trial counsel admitted Mr Bunting had been convicted of indecently assaulting a 15-year-old-girl, C, in 2008.

The statement recorded that C was the daughter of a fellow employee. She had come to her father's work that day because of ill health. Mr Bunting invited C to accompany him on some electrical trade callouts. At the third callout location Mr Bunting began a discussion about sexual activity, asking C whether she was sexually active with boys. C became uncomfortable. She attempted to change the subject. Mr Bunting again subjected her to "sexual talk … where he … stated that it is common for girls her age to be sexually involved with men his age due to their experience". The statement continues:

> [T]he defendant … held the complainant's shoulders from behind, slid her across the tile floor until she was facing away from him and toward the front loader washing machine.
>
> The defendant … then rubbed the victim's back and shoulders before kissing her twice on the right side of her neck and whispering "when you get a boyfriend tell him to do this to you".

C then pulled away, saying "I've had enough". Mr Bunting apologised to her.

[15] In a further s 9 statement Mr Bunting acknowledged having said to the police:

> Okay, like that, the thing I got hit with in 2008 you know right from when it happened, I totally accepted it, I got way over friendly without realising it …

[16] This evidence was admitted as propensity evidence at trial. There was no complaint about the Judge's propensity direction to the jury. We put to one side the question of whether trial counsel erred in signing the two admissions. We revert to that topic under issue 3.[5] The issue we now address is whether this was admissible propensity evidence at all.

Submissions

[17] Ms Andersen (addressing us on this issue) submitted that the admission of that evidence and the conclusion was incorrect. She acknowledged that a sexual predilection towards young girls can constitute a sufficient degree of specificity for admission as propensity evidence. The 2008 conviction demonstrated Mr Bunting was prepared to engage in inappropriate sexual conversations, and touch and kiss the neck of a 15-year-old girl. But it had no correlation to alleged indecent assaults

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5 See below at [26].

on girls aged between four and eight years of age, the touching of their private parts and buttocks, or attempting digital penetration of the former. The offending against C involved taking her to a work address, where no-one else was present. The alleged acts in relation to A and B occurred at the family home, with another family member present in very close proximity. Even if the conviction was capable of being propensity evidence, it should have been ruled inadmissible pursuant to s 43, on the basis that its probative value was outweighed by the risk of unfair prejudicial effect.

Analysis

[18] We do not accept Ms Andersen's submission on Issue 2.

[19] Propensity evidence is evidence of a tendency to act in a particular way or to have a particular state of mind. Its probative value is a function of relevance and quality. There is no quality issue here, given the conviction and admission. The central issue at trial was the credibility and reliability of A and B. The propensity evidence is relevant to that issue because of linkage and coincidence reasoning.[6]

[20] Coincidence reasoning concerns the improbability that distinct complainants would falsely accuse a defendant of similar acts.[7] Linkage reasoning considers the degree of similarity in the propensity and index offending. How probative the propensity evidence is therefore depends both on the strength of the demonstrated tendency and how unlikely the coincidence of false accusation is. That in turn depends on factors such as those set out in s 43(3) of the Act: similarity, singularity, frequency and so forth.

[21] In this case the similarities are significant. The conviction demonstrates a sexual predilection towards young girls, and a willingness to act upon that impulse in a physical, insinuating manner. Sexual interest in children by an adult male is in itself distinctive. While there is an age gap between complainants, there are common behavioural traits in the offending.[8] In any event, the more significant age gap is that

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6 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3] and [51].
7 At [51].
8 Compare *O (CA736/2017) v R* [2018] NZCA 434.

between Mr Bunting and the complainants. The age difference among the complainants does not necessarily diminish the probative value of the evidence. For example, in *L (CA792/2013) v R* the complainants were 10 and 17 years old respectively, and there was a 10-year gap between offending against each.[9] In the present instance, the offending was reasonably close in time. The propensity offending occurred in January 2008. The index offending occurred between September 2003 and September 2006. It may also be observed that each offence occurred in a workplace context, with the children of a friend or workmate. Each set of offending involved touching; a common though not consistent feature was prurient suggestion. The Judge's directions noted the different degree of touching that is said to have occurred.

[22] As we have noted earlier, the central issue at trial was A and B's credibility and reliability. Mr Bunting's admission of sexually offending against another underage girl at a similar time made it more likely that they were telling the truth. The propensity evidence also had probative value in rebutting any suggestion of collusion between the two sisters, as complainant C was not known to them. Accordingly, the probative value of the propensity evidence was high.

[23] Evidence of prior sexual offending against children will always have a prejudicial effect. But in this case it was admitted only because it has significant probative value. The prejudice is not unfair. The proper response is an appropriate and robust judicial direction. No complaint is made about the direction given by the Judge. We have considered that direction ourselves in any case. It is fair, extensive and careful. It emphasises distinctive aspects, such as age and the extent to which touching occurred. It warns against shortcut reasoning, and notes that any evidence of tendency is of circumstantial value only.

Conclusion

[24] We answer Issue 2, "no": the prior conviction was admissible.

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9 *L (CA792/2013) v R* [2014] NZCA 31 at [17].

Issue 3: was there material trial counsel error?

[25] Mr Bunting's primary and secondary complaints against trial counsel are resolved by conclusions we have reached on Issues 1 and 2. What remains are two other points. First, that trial counsel (Mr Simon Claver) failed properly to consider and follow a theory of the case meeting his client's instructions that Mr Bunting did not commit the indecent assaults. Secondly, that trial counsel failed to act diligently and appropriately in refusing to consider evidence supporting an attack on A's honesty.

[26] Before addressing these two complaints we return to the subject of propensity evidence. On this appeal Mr Bunting says that the admission of the propensity evidence was contrary to instructions. He gave evidence to that effect. We do not however accept that evidence. We are satisfied on the evidence that Mr Bunting was cognisant of the fact that the Crown sought to lead evidence of his previous conviction, that trial counsel took the view that that could not successfully be opposed (an opinion which we have endorsed by our conclusion on Issue 2), and that he was aware that the s 9 admissions were being filed. Trial counsel could have advanced a basis for resisting its admission, rather than capitulating without firing a shot and advocating admission. But inasmuch as ultimately the evidence was admissible, no miscarriage can arise.

Submissions

[27] Mr Andersen submitted that trial counsel was instructed that the offending against A and B did not happen, meaning that A and B were either lying or mistaken. Trial counsel's opening statement did not express any coherent theory of the case, and did not make clear whether the complaints were a fabrication or a mistaken. The defence instead advanced appeared to be some things had occurred involving the appellant, but they had been distorted and changed by the complainants and that he did not do anything untoward to them. There was no adequate attempt to explain how the incidents could be distorted or changed. The closing address was replaced by the vague concept of mistakes being made for unspecified reasons. Trial counsel expressly acknowledged that he neither cross-examined on the basis of lying or suggested that the complainants were lying.

[28] The second submission made by Mr Andersen was that trial counsel had been provided with a report from a private investigator which identified a person, whom we will call X, who alleged that A had disputed the identity of her biological father and claimed that she had been sexually abused instead by her true biological father. It also said X had made a false claim that a boy urinating against a fence then attempted to force himself on A. The report said that X claimed to have observed the latter incident. This information came to trial counsel two weeks prior to trial, but he did not pursue it, concluding it was not relevant and could not be verified.

Analysis

[29] We do not accept Mr Andersen's submissions on Issue 3.

[30] Having heard trial counsel cross-examined, and having read the transcript and the closing addresses, we do not on balance consider a miscarriage of justice arose by virtue of trial counsel error. As we have noted already, the primary and secondary complaints against trial counsel's tactical decisions have not been sustained. The remaining complaints are of another order altogether. The closing address reflected the reality of the trial: A and B had been tested in cross-examination and their evidence had not been significantly damaged.

[31] Complainants A and B were evidently intelligent well-spoken young women. Cross-examination would have been difficult in any circumstances. Trial counsel made a tactical decision not to contend that they had lied or colluded in their evidence, but instead to contend that their evidence infected by error (whether in memory or by misconstruction). That tactical judgment was one open to counsel to make. This Court has noted previously the inherent difficulty of cross-examining young witnesses in cases of this kind. There is the risk that a jury will regard young and vulnerable complainants as having been subjected to unnecessary defence brow-beating. And there is the risk that further compelling detail is elicited unwittingly. As we said in *S (CA361/2010) v R*:[10]

[10] *S (CA361/2010) v R* [2013] NZCA 179 at [60].

> This Court will ordinarily be slow to second guess defence counsel who must make immediate important distinctions about the extent of cross-examination, often based simply upon instinct and experience.

[32] We have reviewed trial counsel's cross-examination of A and B. His tactical decision to focus on mistake and improbability, rather than to suggest falsity and collusion, is a conventional one. More capable counsel might have made more progress in cross-examination, but it is not inept. It focuses on uncertainties, inconsistencies and improbabilities (for example, as to how Mr Bunting might have inserted his hands, the proximity of the girls' father, the inexplicable failure of the father to see these incidents or their consequences and the improbability of the alleged "roly poly" incident on a potentially dangerous staircase). The essential allegations are challenged, as far as they could be in a context where the defendant had not elected to give evidence himself. The complainants stuck to their guns in the face of challenges based on error, improbability and (ultimately) that they did not occur. The cross-examination was adequate in advancing a defence case on the basis that Mr Bunting had not committed the alleged acts, but without his directly denying them in evidence. Counsel was entitled to judge it inappropriate to allege lying (and it is not suggested on Mr Bunting's behalf that the alternative defence theory of error was unavailable on the facts).

[33] We consider the complaint made about the defence opening overstates matters. These are frequently relatively perfunctory. The important point was that the opening could hardly have been clearer in stating: "Mr Bunting, my client, says these things did not happen. Never."

[34] We have reviewed the closing address. We do not consider think it reaches such a degree of ineptitude as to give rise to a miscarriage of justice. The relevant requirements are those set out by this Court in *E (CA113/2009) (No 2) v R*.[11] Trial counsel in closing are required to highlight the weaknesses and inadequacies of the Crown case, and should indicate those factors in the defence case which should have precluded the jury from being satisfied of essential ingredients to the requisite standard. The closing address by trial counsel here was just adequate. It was not so

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[11] *E (CA113/2009) (No 2) v R* [2010] NZCA 280.

incompetent or unprofessional as to deprive Mr Bunting of an adequate defence, such that the jury could not fairly judge the case.[12]

[35] The difficulty faced by counsel was the obvious and not unfamiliar one that the complainants had proved to be effective witnesses for the Crown, having sustained little damage under cross-examination, and the defendant had not himself given evidence. It seems trial counsel advised against Mr Bunting giving evidence. The wisdom of that might perhaps be questioned in the circumstances, but no particular point was taken about that aspect of counsel's advice. Mr Bunting's evidential video statement to the Police, which was exculpatory in nature, was in evidence.

[36] By closing, the trial was no longer finely balanced. The closing address has to be read and understood in that context. The closing address discusses the evidence and rehearses the points where some doubt might be said to exist in the accounts offered by the complainants. It provides Mr Bunting's account of the conviction, and it notes his "gob-smacked" reaction to the allegations in the evidential video interview played to the Court. The closing address is relatively brief, as was the Crown address. All this can be contrasted with *Kaka v R*, in which the defence closing lasted but five minutes, approximately one-tenth the length of the Crown closing address.[13] We do not think the closing address so deficient as to cause miscarriage.

[37] Finally, we can make nothing here of the entirely vague and speculative possibilities offered by potential witness X.[14] As this Court said in *Clutterbuck v R*:[15]

> … it remains necessary to show a miscarriage has resulted. This imposes requirements for an appellant. If it is said a witness has not been called, it is not only relevant why they were not called, but what evidence they would have given. This should normally be provided by the witness who confirms they were available, and what evidence they were willing to give then and now. Likewise with absent real evidence, efforts should be made prior to the hearing of the appeal to produce that evidence for the appeal so that its potential impact can be assessed. For example, it is seldom of use to allege inquiries that could have been made unless evidence is now provided as to

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12 At [29].
13 *Kaka v R* [2015] NZCA 532.
14 See above at [28].
15 *Clutterbuck v R* [2017] NZCA 361 at [15].

> what information would thereby have become available. Otherwise the potential consequence of not making the inquiry remains speculative.

[38] Compliance with the minimum requirements of the Court of Appeal (Criminal) Rules 2001 would require the available evidence of X in affidavit form. It is however evident that X is unwilling to cooperate. No inference consistent with miscarriage, either because available evidence was not called or new evidence is available now, can be drawn in these circumstances.

Conclusion

[39] We answer Issue 3 "no": trial counsel error here was not material.

Issue 4: did a miscarriage of justice occur?

[40] Given our conclusions on Issues 1 to 3, Issue 4 does not arise.

Result

[41] The appeal is dismissed.

Solicitors:
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Crown Law Office, Wellington for Respondent