NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA411/2014
[2015] NZCA 229

BETWEEN	F (CA411/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	14 May 2015
Court:	Randerson, Courtney and Kós JJ
Counsel:	M M Wilkinson-Smith for Appellant B D Tantrum and T Hu for Respondent
Judgment:	10 June 2015 at 12:30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Order prohibiting name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Courtney J)

[1] Following a jury trial in the Auckland District Court before Judge Gibson the appellant, F, was found guilty on five charges of sexual conduct with a child under 12 and one of sexual violation by unlawful sexual connection.[1]

[2] The complainant was F's eight-year-old granddaughter. The offending was alleged to have occurred on two days in May 2013. The first day was a Saturday when she and her younger brother stayed overnight with the appellant and his wife, J, (the complainant's grandmother). She said that on that occasion he rubbed her genitals when they were in the kitchen and that when she went downstairs on an errand he lay her down on the top of the freezer and inserted his finger into her vagina. The second occasion was the following Thursday. The complainant said that the appellant made her touch his penis on the outside of his trousers, rubbed her genitals when she was in his car and later in the kitchen and exposed his penis to her when she was in the bath.

[3] The appellant's defence was that these events did not happen.

[4] F appeals his convictions.[2] At the outset of the hearing Mrs Wilkinson-Smith abandoned two grounds of appeal[3] and sought leave to advance two new grounds. Leave to do so was granted and the appeal proceeded on the grounds that there had been a miscarriage of justice as a result of the Judge:

(a) allowing the complainant's entire evidential video interview to be replayed during the jury's deliberations;

(b) declining to read the evidence of the appellant's wife to the jury immediately after the replaying of the complainant's evidential video interview;

(c) failing to give a demeanour direction close in time to the replaying of the evidential video interview.

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1 Crimes Act 1961, ss 132(3) and 128(1)(b). The jury was unable to agree on one further charge under s 132(3).

2 There is no appeal against the sentence of three years and six months.

3 Discrepancies in the majority verdict process and keeping the jury until 10 pm on the first day of deliberations.

The trial

[5] The trial ran over two and a half days on 3–5 June 2013. The jury began deliberating on the afternoon of 5 June. Deliberations continued until that evening and the jury returned on 6 June, returning verdicts shortly after 3 pm that day. The timeline of the trial is relevant and we record the chronology below.

[6] On 3 June 2013:

(a) The complainant began giving evidence at about 12.15 pm. After some preliminary questions her evidential video interview was played. That took about one hour. The complainant then gave her evidence-in-chief until the afternoon adjournment at 3:21 pm. Cross-examination took the rest of the afternoon. Court adjourned at 4.40 pm.

[7] On 4 June 2014:

(b) Court resumed at 10.11 am and cross-examination of the complainant continued. The record does not show when her evidence was completed but it must have been relatively brief because immediately after the complainant had completed her evidence the Crown called the appellant's wife, J.

(c) J's evidence was completed by lunchtime.

(d) Shortly after 2.20 pm the Crown called the complainant's father. His evidence was completed by 3.30 pm.

(e) At 3.47 pm the Crown called the complainant's mother. The record does not show when her evidence was completed.

(f) A police officer also gave evidence on the afternoon of 4 June 2014. He read out the appellant's statement to the police to the Court. His evidence was not completed by the end of the court day.

[8] On 5 June 2014:

(g) At 10.03 am the police officer's evidence continued.

(h) At 10.30 am the Crown closed its case. The defence elected not to call evidence.

(i) Closing addresses and the Judge's summing up followed the close of the Crown case. The jury began deliberating sometime in the afternoon.

(j) Just after 8 pm the Judge enquired as to whether the jury was making progress. It responded "we are close to a unanimous decision on some counts but very evenly split on all the others. We are struggling based on the fact that it is "he said"/"she said" and the requirement of beyond reasonable doubt".

(k) At 8.43 pm there was a chambers discussion between the Judge and counsel followed by a majority verdict direction and a majority verdict handout from the jury which indicated that no agreement had been reached at that time on any charge. The Judge did not disclose the contents of the jury handout to counsel.

(l) At 9.28 pm the jury asked to see the original video of the complainant's interview as well as the questioning undertaken on Tuesday and Wednesday. The transcript shows some uncertainty as to whether the video would be replayed at all and confusion because the jury clearly believed that there was a video of the cross-examination and re-examination available to see. However, the matter was left on the basis of the Judge indicating his intention to replay the video and to direct the jury to read the transcript of the complainant's evidence-in-chief and cross-examination and also the transcript of the appellant's police interview. The jury adjourned at 9.40 pm.

[9] On 6 June:

(m) At 10.06 am the Judge advised counsel that, in addition to the video being replayed, he intended to have the complainant's cross-examination and evidence-in-chief, the appellant's statement to the police and the evidence of the complainant's father about what the appellant had said to him when confronted read back to the jury. There was a discussion about the need for balance and the effect of *S(CA479/2012) v R*.[4] Mr Winter, for the appellant, did not object to the proposed course but asked for the jury to be directed to the relevant passages in J's evidence. The Judge agreed to read out line and page references but declined to actually read all of the evidence back to the jury.

(n) At 10.12 am the jury returned and the evidential video interview was replayed.

(o) At 11.13 am the jury retired. Mr Winter again raised the question of reading back to the jury the evidence of the appellant's wife, J. It is evident from the transcript that Mr Winter's decision not to object to the evidential video interview being played when the matter was discussed the previous night was based on his misapprehension that the jury had reached a decision on some counts and only the parts of the video that related to the undecided counts would be replayed. Mr Winter pointed out that the defence case had been structured principally on J's evidence and the contradictions between her and the complainant. For these reasons he asked that J's evidence be read back to the jury in its entirety in order to achieve balance and fairness. The Judge declined. However, after further discussions, during which Mr Winter repeated his request, the Judge seemed inclined to accede, observing that there was only 15 pages of evidence involved. He eventually indicated that he would read back J's evidence.

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4 *S(CA749/2012) v R* [2013] NZCA 350.

(p) The jury returned at 11.25 am. The Registrar read the examination, cross-examination and re-examination of the complainant. The jury retired at 12.50 pm.

(q) At 12.50 pm there was a chambers discussion. The prosecutor questioned the reading back of J's evidence on the basis that it was too long. The Judge agreed and suggested going back to the original plan of reading just the relevant part of the cross-examination. Mr Winter resisted this suggestion. The prosecutor then proposed that it was unnecessary to read any part of the wife's evidence and it was enough to simply take steps to ensure that the jury read it. The Judge indicated that it was this course he would now take. Mr Winter tried again, submitting that the best way to achieve balance was to have the evidence read back to the jury and, if not the whole evidence, then at least the cross-examination. The Court adjourned for lunch and for the Judge to consider the matter further.

(r) At 2.03 pm Mr Winter again raised the issue of J's evidence. The prosecutor objected to the re-reading of the complete evidence. Mr Winter asked that, at least, the cross-examination be read back to the jury. The Judge, it appeared, was agreeable to that but then dictated a bench note in which he concluded that because of the time and the fact that the jury had not asked for J's evidence to be re-read, it would be sufficient to simply draw the jury's attention to her evidence and its importance to the defence case.

(s) At the conclusion of the Judge dictating the bench note Mr Winter asked whether the Judge intended to give a demeanour warning. He indicated that he would do so at the conclusion of the evidence that was yet to be re-read and the advice to them regarding J's evidence.

(t) The jury returned at 2.12 pm. The Judge dealt with a question previously asked and then drew the jury's attention to the parts of the evidence of the complainant's father and the police officer regarding

what the appellant had said in response to the allegations. The Judge read those passages to the jury himself. He then addressed the issue of J's evidence:

> You also of course need to consider the evidence of [the appellant's wife] who is a key witness because she was in the house at the time that most of these events were said to have happened and what she said in her evidence and what she said in particular cross-examination is relied on by the defence notwithstanding that she was called as a Crown witness and there are a number of contradictions [of] the account given by the complainant in her evidence and you need to consider that. And in particular, if it's of assistance, you should consider passages from page 93 onwards, but overall the whole of her evidence you need to confirm because it is relevant to the defence case.

(u) After that the Judge gave a direction regarding credibility and demeanour that is set out in full at [25] below.

(v) The jury retired at 2.34 pm.

(w) At 2.57 pm the jury returned with verdicts.

Replaying the complainant's evidential video interview

[10] Mrs Wilkinson-Smith submitted that an evidential video interview should never be replayed during deliberations because doing so creates an imbalance that cannot be cured by directions. In particular, it can only be relevant to demeanour, the value of which is doubtful. Further, the jury is only able to assess the demeanour of other witnesses on the single occasion they give their evidence. It is unfair to allow the jury a second opportunity in relation to the witness usually crucial to the Crown case and then only her evidence-in-chief. Alternatively, Mrs Wilkinson-Smith argued that replaying the complainant's evidence-in-chief was inappropriate in this case.

[11] The replaying of a complainant's evidential video interview during jury deliberations was recently considered by a permanent bench of this Court in *E(CA799/2012) v R*.[5] No reasons were advanced that would support a reconsideration of the position in New Zealand. The general principles applicable to the decision to replay a complainant's evidential video interview are those set out at [58] of *E(CA799/2012)*:

> The trial Judge retains a discretion to refuse a jury request for the replay of the complainant's video, but such requests are normally granted.
>
> If the jury requests the video to be replayed during retirement, it is generally to be assumed, in the absence of contrary evidence, that the jury wishes to review the manner in which the complainant gave his or her evidence. That is so because the jury has a full transcript of what was said.
>
> The replaying of the video has the potential to reinforce the Crown case but it is not to be assumed that this will necessarily occur. It is equally possible that the jury may be persuaded that the complainant's account is untrue or that there is a reasonable doubt in that respect.
>
> It is vital in order to ensure fairness that the trial Judge directs the jury about the importance of considering all of the complainant's evidence (including cross-examination and re-examination) as well as any other evidence they consider to be relevant to their verdicts. How this should be done in the individual case depends on the circumstances as we discuss further below.
>
> Whether the Judge needs to go further and whether some form of demeanour warning is also required will also depend on the specifics of the case.

[12] We do not accept that there was any error in the Judge's decision to allow the evidential video interview to be replayed in this case. As this Court concluded in *E(CA799/2012)*, in the absence of any indication to the contrary, it is reasonable to expect that if jurors request that the evidential video interview be replayed it is demeanour that is concerning them, rather than the content of the evidence. In this case there is nothing to indicate that the jury had any other reason for requesting that the evidential video interview be replayed; the substance of the account given by both J and the complainant was sufficiently recent to be prominent in the juror's memories and transcripts of both were available. The jury's purpose is also indicated by the note sent on the evening of 5 June 2014 that they were struggling "based on the fact it is "he said"/"she said" and the requirement of beyond reasonable doubt".

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5 *E(CA799/2012) v R* [2013] NZCA 678 (footnotes omitted).

[13] In these circumstances, where there was an obvious reason for the jury to request that the video be replayed and the means available to provide balance against the effect of that, there was nothing objectionable about allowing the video to be replayed. This ground of appeal fails.

Refusing to re-read J's evidence

[14] The appellant's alternative argument centres on the fourth principle referred to in *E(CA799/2012)*, the need to ensure fairness by providing balance. On that aspect this Court observed:[6]

> [64] …In general, we consider it is sufficient if the trial Judge directs the jury about the importance of making sure they do not treat the complainant's video evidence in isolation from his or her cross-examination and re-examination and they also have regard to all other evidence in the case that they consider relevant to their deliberations. We agree with counsel that it is not usually necessary for the transcript to be read out by the judge to the jury …
>
> [66] We do not consider it will usually be necessary for the trial Judge to remind the jury after the video has been replayed about the defence case except in general terms, particularly if the jury's request for the replay of the video is made reasonably soon after the defence closing and the judge's summing up. In some cases, when a jury requests a replay of the complainant's video, it may be prudent for the judge to draw to the jury's attention particular parts of the transcript that have specific relevance and that should be weighed alongside the contents of the video evidence. If necessary, counsel should be called upon to identify any such specific matters. However, a full-scale review of the defence case is neither necessary nor appropriate. It must be kept in mind that the jury will have already heard counsel's addresses and the judge's summing-up.

[15] A review of the complainant's evidential video interview and J's evidence discloses significant differences on essential factual issues. In particular, their evidence about what they had for dinner on the Saturday night, where J ate and who bathed the complainant and her brother were mutually exclusive.

[16] Mr Winter's closing address focused almost entirely on J's evidence, emphasising the difference between her account and that of the complainant. In summing up the Judge referred to the reliance placed on that evidence by the defence. By the time the jury retired on the afternoon of 5 June 2014 it must have

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6 *E(CA799/2012),* above n 5.

understood clearly that if it accepted J's evidence then it could not accept the complainant's evidence in relation to the events of the Saturday night. J's evidence was given on 4 June 2014 and we think that it would still have been fresh in the jury's mind when the evidential video interview was replayed on the morning of 6 June 2014.

[17] Further, Mr Winter's cross-examination of the complainant, which was read out to the jury after the evidential video interview had been replayed, thoroughly traversed all the significant differences between the complainant's account and that given by J. We consider that the re-reading of that cross-examination would have had the effect of sufficiently refreshing the jury's mind as to what J had said to balance the effect of the evidential video interview.

[18] Nor do we consider that any risk of a miscarriage of justice arises as a result of the verdict being returned only 23 minutes after the jury retired for the final time. By that point the jury had been reminded very clearly and very specifically of the competing accounts given by J and the complainant and warned of the risks in assessing credibility based on demeanour (a matter we come to shortly). The jury had already had ample time to consider all of the evidence including that of the appellant's wife. The evidence on the critical issues as to bath time and the Saturday night dinner took up only approximately 6 pages of the transcript. There is no basis on which to conclude that the jury would have overlooked this evidence.

[19] We add that the Judge went further than he needed to by also reading out the evidence of the complainant's father about the appellant's denial of the allegations and the appellant's police statement in which he also denied the offending.

[20] For these reasons, we are satisfied that the Judge did all that was necessary and appropriate to provide balance. There was no error in declining to re-read J's evidence and nor was there any risk of a miscarriage of justice as a result of his doing so.

The demeanour direction

[21] In *E(CA799/2012)* this Court concluded that it is unnecessary to require an invariable warning regarding the risks of relying on demeanour to assess credibility[7] but that if such a direction is given the jury should be advised that:[8]

> First, the assessment of the credibility and reliability of a witness should be broadly based, taking into account the evidence as a whole and such of the factors we shortly describe as may be relevant to the case. Second, demeanour may properly be taken into account but is best not considered in isolation. Rather, demeanour should be considered as one factor in the broader assessment.

[22] We agree that in this case it was appropriate to give a demeanour direction in summing up and again when the evidential video interview was replayed.

[23] When the Judge summed up on the afternoon of 5 June 2014 he included the following direction regarding demeanour:

> [46] The evidence of all the witnesses and how you assess them is, of course, important and you will take into account all of those factors that I have mentioned. You need to consider when you assess the evidence of each of the witnesses who have given evidence, the way they actually gave their evidence, what was their manner of giving evidence. Did they make appropriate concessions? Were they dogmatic in their answers? All of those sort of things you would ordinarily think about when you are assessing whether someone is telling you the truth or not.
>
> [47] But don't jump to conclusions based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses and people react and appear differently. Witnesses come from different backgrounds and there are simply too many variables to make the manner in which a witness testifies the only and most important factor in your decision. That is a warning I do give you when you assess the witnesses' evidence.
>
> [48] The complainant's evidence, as I have said, is really the key to the Crown case and you must scrutinise that carefully because it is the evidence against the accused essentially. He hasn't admitted anything. He's denied it. So that if you are going to convict you must be sure that the account you have been given is correct and be sure the elements of each of the charges have been proven beyond reasonable doubt. If you're not sure, if you just don't know who to believe or who to disbelieve, well then you've got a reasonable doubt and it is the defendant who is entitled to the benefit of that doubt.

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7 *E(CA799/2012),* above n 5, at [35].
8 At [43].

[24] Mrs Wilkinson-Smith accepted that this direction was adequate in the context of the summing-up.

[25] The evidential video interview was played at 10.12 am the following morning, 6 June 2014 and finished at 11.13 am. Afterwards the complainant's in-court evidence-in-chief, cross-examination and re-examination were re-read to the jury together with passages from her father's evidence and the appellant's police statement. At the completion of that process, shortly after 2.12 pm, the Judge gave the following direction regarding demeanour:

> So there you have it. Now I do remind you that when you are looking at the issue of assessing the complainant's credibility, both Mr Winter and Mr Webby have clearly, in their closing addresses, focused on the complainant's video interview evidence and her answers and any inconsistencies certainly as far as Mr Winter is concerned that he suggests to you will reveal by that evidence of when you compare it with the evidence of other witness[es], in particular [the appellant's wife].
>
> You need to be aware that there are real risk[s] involved in assessing credibility solely on the basis of the complainant's apparent emotions, pauses and body language that you can see during the interview.

[26] Mrs Wilkinson-Smith submitted that, whilst the substance of this direction was adequate, its effect was lost because it was given well after the video was replayed. She argued that it should have been given prior to the evidential video interview being replayed because there was a real risk that the jurors' views would have been formed by the time the second demeanour direction was given; the intended effect of assisting the jurors as to how the video should be assessed was therefore lost.

[27] We do not consider that there is, nor can be, any general rule as to whether a demeanour direction given in connection with the replaying of an evidential video interview should be given before or after the video is replayed. We can see the advantage in giving a demeanour direction beforehand; it is to be expected that jurors will begin forming an impression or consolidating a previous impression as they view the video. For this reason it may be desirable for jurors to have the benefit of the demeanour direction in their minds as they are watching. On the other hand, we also see merit in jurors having the direction in mind when they retire to consider their verdicts after the video has been replayed.

[28] However, that decision necessarily depends on the particular case. Here, the evidence fell within a very narrow compass. It was essentially a contest between the complainant and J. The jurors had viewed the evidential video interview less than 24 hours after the Judge summed up and could be expected to have had his direction on demeanour still clearly in their minds when the video was replayed. We therefore do not consider it was an error by the Judge to give the demeanour direction after the evidential video interview had been replayed and the other evidence re-read. No risk of miscarriage of justice arose as a result.

[29] This ground of appeal fails also.

Result

[30] The appeal is dismissed.

[31] To protect the complainant, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Crown Solicitor, Auckland for Appellant