

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] D was convicted on three charges of sexual offending against his seven-year-old stepdaughter following a four day trial in the District Court at Whangārei. He was sentenced to seven years' imprisonment.¹ A minimum period of imprisonment (MPI) of three years and six months was also imposed.

[2] D appeals his conviction and sentence. He claims the convictions are founded on a miscarriage of justice. This, he says, arose following the introduction of the edited transcript of a telephone call he made to a mental health helpline after the complainant had disclosed the offending. In particular, he claims:

- (a) the call was protected by medical privilege and should not have been admitted into evidence;
- (b) the Judge and/or trial counsel erred in allowing an edited transcript to go to the jury, thereby excluding from the jury's consideration the proper context in which the call had been made; and
- (c) the Judge erred in denying D the opportunity to advance his full defence when explaining the context of the call.

[3] On his sentence appeal, D claims that the starting point adopted was too high, leading to the imposition of a manifestly excessive final sentence. He also says that an MPI was not necessary in the circumstances.

¹ *R v [D]* [2017] NZDC 28827 [Sentencing notes] at [59].

Background

Alleged offending

[4] D is the complainant's stepfather. He was married to the complainant's mother, and had lived with the complainant since she was aged one. The alleged offending was said to have occurred on a number of occasions in the family home while the complainant was aged seven.

[5] In a pre-recorded evidential interview (EVI) the complainant said D would enter her room and give her "slobbery" kisses. On one occasion he placed his penis against her buttocks. On "a couple" of occasions he penetrated her vagina with his finger. She alleged this conduct occurred at different times. Sometimes it happened when her mother was out. On other occasions it happened at night while her mother was asleep.

[6] The complainant disclosed the offending to her biological father in mid-2016. He complained to the authorities. This led to the recording of the EVI following which three charges were laid:

- (a) one representative charge of sexual violation by unlawful sexual connection;² and
- (b) two charges of sexual conduct with a child (one representative and one specific).³

Pre-trial matters

[7] The trial in question was a retrial. It took place over four days in November 2017 before Judge Harvey.

[8] D's primary defence at both trials was that the complainant had fabricated the allegations against him. The defence's theory of the case was that the complainant

² Crimes Act 1961, ss 128 and 128B. The maximum penalty is 20 years' imprisonment.

³ Section 132(3). The maximum penalty is 10 years' imprisonment.

had transposed concepts and terminology she had become acquainted with after watching videos and movies on an iPad.

[9] The first trial commenced in May 2017. It was stopped during the complainant's cross-examination because the Judge was not satisfied that the complainant had, in fact, viewed the material alleged or that the issue was relevant.

[10] In a ruling delivered on the first day of the retrial the Judge held that the issue of whether the complainant may have transposed concepts from what she had seen on the iPad to her EVI was relevant, and permitted cross-examination on that topic.⁴

The conviction appeal

[11] Although a number of grounds of appeal were advanced they all relate to the admission into evidence of an edited transcript of a mental health helpline call made by D. D made the call shortly after he became aware the complainant had accused him of sexual offending. He knew the police were investigating the matter and he expected criminal charges would be laid. The grounds of appeal focus on different aspects of that central issue. For this reason it is possible to deal with the arguments together.

A preliminary point

[12] The issue of medical privilege, or confidentiality, assumed particular significance on the appeal. Crown counsel sought, and was granted in a minute issued following the hearing, leave to file further case references relevant to the issue of when an appellate court should intervene when it is alleged that trial counsel has failed to object to evidence which should not have been admitted.⁵

[13] In response to this Court's invitation, Mr Carruthers, for the Crown, referred to a number of authorities. These included *R v P*.⁶ There this Court, discussing *R v Horsfall*,⁷ held that if there was a tenable basis for admitting the evidence, the

⁴ *R v [D]* [2017] NZDC 26198 at [12]–[16].

⁵ *D (CA54/2018) v R CA54/2018*, 12 November 2018 (Minute of the Court).

⁶ *R v P* [1996] 3 NZLR 132 (CA).

⁷ *R v Horsfall* [1981] 1 NZLR 116 (CA).

appeal will fail.⁸ In response, Mr Mansfield for D submitted that the less onerous threshold set out in *Horsfall*, namely that the application for exclusion has “a substantial prospect of success”, should apply.⁹ He also made further submissions on the privilege and confidentiality issues, submitting either that we should take judicial notice of any matters otherwise required to be proved in evidence, or that the Court could call for further evidence on these points.

[14] These submissions went well beyond the scope of the material we sought. We also note that the appellant bears the onus to satisfy the appellate court that the appeal should be allowed. As part of that function it is for the appellant to produce whatever evidence it considers necessary to discharge that onus. It is not the responsibility of the court to call for evidence after the hearing to fortify the appellant’s case.

[15] We have not found it necessary to resolve any tension between the respective thresholds in *P* and *Horsfall*. For reasons we address below, our conclusion does not turn on this issue.

The Mental Health Line call

[16] The call was made by D at the urging of concerned friends and family, to an organisation known as the Mental Health Line. It was recorded and a transcript was given to police. The Crown determined to introduce it as part of its case.

[17] In the course of the call D discussed his previous engagement with mental health services and revealed he needed help due to his suicidal thoughts. He discussed his anti-depressive medication, his symptoms and the frequency of his suicidal ideations. He revealed that he had previously attempted to end his life and described the steps he had taken. The discussions then turned to the available interventions and the immediate involvement of the local Crisis Assessment Team (CAT).

[18] For the purposes of the trial, counsel agreed on how the transcript should be edited. References to the call being made to a mental health helpline, details of D’s past and present suicidal ideations, his treatment, medication and past involvement

⁸ *R v P*, above n 6, at 135.

⁹ *R v Horsfall*, above n 7, at 122.

with mental health services were all deleted. It was agreed that the remaining passages of the transcript would be read to the jury. Set out below is what was agreed:

- Calltaker: You're speaking with Tim. How may I help?
- D: Hi Tim. My name is [D] um I need some help urgently.
- Calltaker: With yourself or someone else?
- D: No with myself um.
- Calltaker: Okay.
- D: Yeah.
- Calltaker: Let me just take a few details [D]. Okay what's your date of birth please?
- [Personal details taken]
- ...
- Calltaker: Right can you tell me a little bit about what's going on [inaudible].
- D: I, I. Um I've been accused of some sexual abuse allegations and I just told my partner that I have been checking on her daughter and yeah.
- Calltaker: So who, who has accused you of these things [D]?
- D: Ah her daughter.
- Calltaker: And how old is she?
- D: She's 7, she's currently, it's all, the Police are investigating and everything.
- Calltaker: [Inaudible]
- D: Um.
- Calltaker: Are you separated from your partner now?
- D: Yeah there. What's that?
- Calltaker: Are you separated from your partner now or are you still [inaudible]?
- D: Not at the moment, it's only just come to light this week.
- Calltaker: Right okay. And the Police, so the Police are investigating?
- D: They're starting the process. She's had her interview.

Calltaker: Okay. Right so she's been, you've not been arrested or charged yet but all this ...

D: Not yet.

Calltaker: ... all this is pending okay. Alright.

D: Yeah all, they haven't even talked to me or anything.

Calltaker: Right okay but they've start, they've spoken to her, they got a, got a statement from her?

D: Not from her they haven't spoken, they've spoken to the daughter, that's all ...

Calltaker: The daughter yeah.

D: ... I know. ... At the moment I've just told my partner that I've been checking her daughter.

Calltaker: What do you mean when you say checking her daughter?

D: I, I've been looking at her private parts for signs of sexual abuse. I, I.

Calltaker: You, oh, okay right. Alright um yeah I mean that's probably not the best thing to do in the circumstances [D] [inaudible].

D: I, I didn't know how else to handle it.

Calltaker: No, no, okay okay.

First ground of appeal: Was the Mental Health Line call privileged?

[19] D's first ground of appeal is that the call to the mental health helpline was a privileged communication protected by s 59 of the Evidence Act 2006 (the Act). As such it is submitted the contents of the call are inadmissible.

[20] Section 59 relevantly provides:

59 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

(1) This section—

- (a) applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct; but

...

...

- (2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist that the person believes is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.
- (3) A person has a privilege in a criminal proceeding in respect of information obtained by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

...

[21] Under s 59(1)(a), there are two threshold requirements which need to be considered:

- (a) Did D consult a medical practitioner or clinical psychologist?
- (b) Was the consultation for a condition or behaviour that may manifest itself in criminal conduct?

[22] On the first question, whilst accepting that the calltaker was neither a medical practitioner nor a clinical psychologist, Mr Mansfield submitted that the calltaker was a person acting in a professional capacity to assist the CAT by filtering and referring calls for that team's response. The team included clinical psychologists and the information was conveyed to them for that assessment. Essentially Mr Mansfield's submission on this point was that the calltaker was simply a conduit through which D's communication was transmitted to the clinical psychologists attached to the CAT.

[23] We have not found it necessary to provide a definitive answer to that question, because of our conclusion on the second threshold question. On that question, Mr Mansfield submitted that D was seeking urgent medical assistance. He was suicidal. The sole purpose of making the call was to obtain help from the local CAT so that he could be assessed and treated. Mr Mansfield added D's threat to commit suicide might manifest itself in criminal conduct. He said there were a multiplicity of

offences which someone who is mentally unwell and talking of committing suicide might conceivably commit. He gave examples.

[24] In support of that submission Mr Mansfield relied on the decision of this Court in *R v Parkinson* which he said stood for the proposition that the immediate cause of resort need not be a condition which might manifest itself in criminal conduct, if in doing so it would be artificial to separate the immediate cause from the underlying cause of that symptom.¹⁰

[25] In *Parkinson* this Court found a generous interpretation of s 59(1)(a) is required.¹¹ The evidence revealed that Mr Parkinson's suicidal ideation and depression could not be uncoupled from his longstanding paedophilia and alcohol abuse which were "significant contributing causes" of those symptoms and were recognised as requiring treatment.¹² There was evidence both of Mr Parkinson's long history of mental illness and a sexual orientation towards young children. One clinician identified sexuality issues as a particular factor increasing his risk of self-harm. As the Court put it:

[37] While the immediate treatment priority was to address Mr Parkinson's extremely low mood and risk of self-harm, the medical records show the need for Mr Parkinson to receive treatment for his paedophilia and alcoholism was recognised. ...

[26] This led the Court to conclude Mr Parkinson's paedophilia could not be disregarded as irrelevant and was an operative condition or behaviour for which he was being examined for the purpose of treatment.¹³

[27] We regard *Parkinson* as distinguishable. When the full, unedited, transcript of the mental health helpline call is considered it is clear that the condition for which D was seeking help was his suicidal ideation. There is no evidence of a link between his suicidal thoughts and a sexual attraction to young children. His suicidal ideation arose from stress linked to the complainant's disclosure, the police investigation and the

¹⁰ *R v Parkinson* [2017] NZCA 600.

¹¹ At [34].

¹² At [34].

¹³ At [37].

imminent likelihood of criminal charges being laid. It was the allegations rather than a tendency to be sexually attracted to children which caused D's suicidal thoughts.

[28] For these reasons we are satisfied that s 59 is not engaged.

Was the content of the call nevertheless confidential information?

[29] Although it was not raised as a ground of appeal, s 69 of the Act assumed significance during the hearing after Mr Carruthers raised it in his submissions for the Crown. Section 69 confers on judges an overriding discretion to prohibit disclosure of confidential information or a confidential communication in a proceeding. This may be done if the public interest in disclosure is outweighed by the public interest in either preventing harm to the relationship served by the confidentiality or in maintaining activities that contribute to or rely on the free flow of information.

[30] We accept that the transcript of D's call is confidential information.¹⁴ We also accept there are significant reasons to limit disclosure of information of this sort in the public interest given its inherently personal nature, the associated risk of harm to D and the potential that others who may seek similar assistance will be hesitant to do so if they know the courts are willing to order disclosure.

[31] However, the context and content of the disclosure is relevant. The policy reasons behind the preservation of confidentiality include the tenet that some communications require a level of confidence that the communication will not be disclosed. This principle is designed to promote the frank exchange of information in a therapeutic context. Section 69(3) sets out the seven considerations the judge must have regard to in deciding whether to give a direction:

- (3) When considering whether to give a direction under this section, the Judge must have regard to—
 - (a) the likely extent of harm that may result from the disclosure of the communication or information; and

¹⁴ As this Court found in *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181 at [38], medical and psychiatric information about a person is capable of being confidential information under the Act.

- (b) the nature of the communication or information and its likely importance in the proceeding; and
- (c) the nature of the proceeding; and
- (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
- (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
- (f) the sensitivity of the evidence, having regard to—
 - (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
 - (ii) the extent to which the information has already been disclosed to other persons; and
- (g) society’s interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

[32] In terms of s 69(3)(b) and (c), there is a clear public interest in disclosing that limited part of the transcript for the purposes of assisting in the proof of serious criminal offending. As this Court observed in *X (CA553/2009)*:

[79] The short point here is that the weight of appellate authority in this country and elsewhere favours the appropriateness of the disclosure of criminality, notwithstanding the confidentiality of information in particular circumstances.

[33] The evidence amounted to what was, on the Crown case, an admission. We regard it as reasonably strong evidence, offered as it was by D without prompting. However, its significance should not be overstated: the Crown did not refer to it in its closing submissions. In terms of s 69(3)(d), the Crown had no other means of offering evidence of a disclosure of criminality.

[34] With regard to s 69(3)(a), D’s disclosure that he had been looking at the complainant’s genitalia was not an admission captured by the policy of s 69. It followed an earlier, spontaneous and unsolicited admission he had been “checking” the complainant. It was volunteered. It was unconnected with any information relating to D’s mental health presentation or his suicidal ideation. It could have had no relevance to any therapeutic interventions. It follows that only limited harm could have arisen from disclosure of that information.

[35] As we have accepted, disclosure of the full transcript would have carried some risk of harm to D, and the risk of deterring others from seeking similar assistance. But as noted, the references to suicide or mental health were edited out. Section 69(3)(e) is relevant in this regard. As the majority in *X (CA553/2009)* went on to observe, s 69 does not prohibit the court from giving directions as to how the information is actually to be disclosed.¹⁵ While considerations of open justice must be given proper weight it is open to the court to limit any harm which may result from the disclosure by way of direction, including directions as to appropriate editing. That is what happened in this case. Trial counsel, Mr Fairley, negotiated with the Crown to remove references to the identity of the particular helpline, D's mental health history and treatment, and his disclosure of suicidal thoughts.

[36] On this point we find ourselves in a similar position to that of the Court in *X (CA553/2009)*. There is no evidence before us of the likely extent of harm which may result in terms of s 69(2)(a) and (b) if disclosure of the communication or information is ordered. Hammond J in *R v Lory (Ruling 8)* was critical of the argument "so often voiced" that disclosure will deter both patients and therapists from undertaking treatment and thereby increase the risk of violence or harm to which society is exposed.¹⁶

... it may be as well to point out the substantial deficiencies in the argument. The first is empirical. It is far from clear that there is evidence that therapy or counselling will be imperilled if patients know that therapists have the duty to reveal, for instance, their plans of violence. And even if therapy were thereby imperilled, is it clear that more violence would result? Further, a certain scepticism is required with respect to the trust patients place in confidentiality regarding their most extreme statements. Indeed in his closing argument to the jury in the case before me, Mr Wilson suggested to the jury that some of his clients' actions in this case really amounted to a cry for help.

[37] In the absence of evidence to the contrary we are inclined to a similar sense of scepticism. In our view it would not be difficult to marshal evidence on the point if it existed. Mr Mansfield did not attempt to do this, and was not able to indicate the provenance such evidence might take. We are not prepared to speculate.

¹⁵ At [84].

¹⁶ *R v Lory (Ruling 8)* [1997] 1 NZLR 44 at [50]–[51].

[38] In any event, we are satisfied that a judge weighing up the competing considerations listed in s 69(3) would conclude that appropriate editing of the transcript would mitigate most of the harm likely to arise from disclosure of the communication, while ensuring important evidence was available for the jury's consideration. It follows that in our view had an application been made to the Judge to exclude the transcript in its entirety, it would not have had a substantial prospect of success.

[39] For those reasons, justice did not miscarry through the disclosure of the mental health helpline transcript.

Second ground of appeal: Should the full transcript have gone to the jury?

[40] Mr Mansfield submitted that the transcript should not have been edited. He contended that in the form as presented the transcript only added to the prejudice against D, and risked being misconstrued by the jury and thus misused. Furthermore, as a consequence, D was required to provide an explanation for why he examined his stepdaughter's genitalia. Mr Mansfield said the explanation permitted to go to the jury was wrongly limited by the Judge or mismanaged by Mr Fairley; these issues adding to the broader assessment of miscarriage of justice.

[41] Mr Mansfield's submission is that, if the transcript had not been edited, the proper context of D's admission relative to the complainant would have been explained. Had the jury known D was suicidal at the time it would have exercised greater caution before placing weight on the admissions. Absent the jury being able to consider the whole of the conversation with the calltaker the jury may have wrongly inferred the admissions were considered and informed. Any perceived illegitimate prejudice arising from D's suicidal thoughts was capable of being sufficiently mitigated by a judicial direction.

[42] This ground of appeal requires the examination of two issues: whether counsel's decision to put an edited transcript to the jury was reasonable in the circumstances, and whether that course gave rise to an irregularity in the trial which prejudiced D's prospects of acquittal.

[43] Mr Fairley has sworn an affidavit, in which he deposed to his pre-trial dealings with D. No notice to cross-examine Mr Fairley on this appeal was given. Mr Fairley said that D was fully involved in discussions around trial tactics. Before the trial started D confirmed his instructions that only he would give evidence; no one else would be called. Mr Fairley, together with his junior, gave careful consideration to the question of the admissibility of D's admissions in the Mental Health Line call. They considered s 59 but not, apparently, s 69 of the Act. They concluded the admissions were admissible.

[44] Mr Fairley then turned his mind to the question of whether the whole of the transcript should be admitted or whether it should be edited. Mr Fairley is a seasoned criminal defence lawyer of nearly 40 years' experience. He is based in Whangārei and mostly practises in that region. He was strongly of the view that it would not be in D's best interest for a Whangārei jury to hear, "in any shape or form about the mental health aspects of the call". In his affidavit, Mr Fairley said he formed the view that even with a well-intentioned direction, a Whangārei jury might not be able to "put aside the mental health aspect and the legitimate reason because of [D's] mental health difficulties this man may have lapsed".

[45] In our view Mr Fairley had sound reasons for believing disclosing D's mental health issues would not have helped his case, and may have led the jury into speculation. Among other things, this evidence may have led the jury to reason, impermissibly, that D's suicidal ideation was consistent with guilt.

[46] In any event, where errors in making "less fundamental trial decisions" are alleged, a miscarriage of justice will generally only arise if the decision was not one a competent lawyer would have made and if what occurred may have affected the outcome.¹⁷ In our view it cannot be said that this was an unreasonable or unprincipled trial tactic; one a competent lawyer would not have made. While other counsel in the same circumstances might have come to a different decision, that is not the test.

[47] We are also satisfied there was no error on the Judge's part in allowing the edited transcript to go to the jury by agreement. For reasons we have set out and

¹⁷ *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [77].

expand upon below, admission of the edited transcript did not give rise to an unfair trial, and the edited transcript was not evidence which was otherwise inadmissible at law.

[48] The first issue is whether the decision to adduce an edited version of the transcript unfairly limited D's ability to explain the call's provenance as well as his reasons for examining the complainant's genitalia.

[49] While we are satisfied that counsel's agreement to put an edited transcript to the jury was reasonable in the circumstances, it did limit the ability of the defence to address the jury on the weight it might attach to the admission of inappropriate conduct by reference to the context in which it was made. As noted, Mr Mansfield submitted that the jury needed to know that this was a crisis call to a mental health helpline rather than some other voluntary reporting service, perhaps in relation to sexual abuse.

[50] The difficulty is illustrated by D's explanation given earlier in his evidence-in-chief:

Q. We have heard evidence that you made a call to the Help Line on 30 May 2016, you heard that?

A. Yes I did.

Q. Do you accept that was you on that call?

A. Yes I do.

Q. Why did you make the call?

A. Because I needed help.

Q. Why?

A. Because my family was concerned about me.

Q. But you're talking here about sexual allegations?

A. Yes I am.

Q. You say here on the first page you've been accused of some sexual abuse allegations. Do you remember that?

A. Yes I do.

[51] Whether this produced an irregularity which gives rise to a real risk the outcome of the trial was affected is properly considered in the light of the third ground, to which we now turn.

Third ground of appeal: Should D have been able to give evidence implicating the complainant's father?

[52] This ground of appeal relates to the Judge's directions which limited D's ability to give evidence tending to implicate the complainant's father. Alternatively, Mr Mansfield submitted Mr Fairley erred in failing to apply for leave under s 44 of the Act to cross-examine the complainant and her father. This concerned the suspicions which D and his wife shared that the complainant had been sexually abused by her biological father. In either case, he submitted the result was that D was unfairly constrained in his ability to give a rational and comprehensive explanation for what he did. As such he was left unable to respond properly to what the Crown asserted was an admission. This unfairness gave rise to a miscarriage of justice.

[53] Mr Mansfield submitted the evidential foundation for the concern about the complainant's father is found in three Child Youth and Family (CYFS) reports from July 2011, November 2013 and June 2016 respectively detailing:

- (a) that the complainant's brother had seen his father's penis and the complainant, aged two or three at the time, had started taking her pants down in front of her brother;
- (b) the complainant's brother walked in on his father watching pornography; and
- (c) D's daughter from a previous relationship said that the complainant's brother had been pulling D's daughter's pants down and trying to kiss her genitalia.

[54] On the first day of the trial the Judge ruled:¹⁸

Although the Crown objects to the extent of that evidence on the basis that it is hearsay and therefore inadmissible, I do not see how I can stop the defendant from giving evidence about what he did and why. At the same time, it is not fair for the complainant's father to be asked questions that indicate that he may have been responsible for abusing [her], because there is no such allegation, there is no such evidence before me and that would be grossly improper. In my view, Mr Fairley should not ask any questions of [the complainant's] father about any allegations against him. If the defendant gives the evidence that we expect him to give, Mr Smith will of course be able to cross-examine him.

The fact that the Defendant may have examined [the complainant] because of something he was told is relevant to explain his actions. As is, what he was told is not being led for the truth of its contents it is not hearsay.

[55] It is clear from Mr Fairley's affidavit that he accepted the Judge's ruling that the defence case could not challenge the complainant's father on these points. It is also clear that D agreed he would not blame the complainant's father. Mr Fairley instead intended to lead evidence from D that he had "checked" the complainant's "private parts" on the instructions of his wife due to these concerns.

[56] D began to develop his explanation in evidence-in-chief. The Judge interrupted. In the absence of the jury he undertook a voir dire. D said that in 2013 he and his wife became concerned because the complainant had spoken about watching "blue movies" at her father's address. They were also concerned about her inappropriate language and behaviour which included exposing herself to her brother. As a consequence D's wife reported her concerns to the authorities. Mr Fairley wished to adduce this evidence to suggest that someone else had been abusing the complainant and the prime suspect was her father. He submitted that the evidence was relevant. It explained why D checked the complainant's genitalia; both for evidence of thrush (apparently a chronic condition the complainant had suffered from since she was an infant) as well as sexual abuse.

¹⁸ *R v [D]*, above n 4, at [18]–[19].

[57] The Judge directed that Mr Fairley was not to pursue this line of questioning. The relevant part of his decision follows:¹⁹

Whether or not [the complainant] has been abused by someone else is completely irrelevant to this trial. Even if she has been abused by someone else, we are dealing with a case where [the complainant] says that this defendant has abused her. That is the issue that this jury has to determine. ...

... I am not prepared to permit this defendant to give chapter and verse about what he says his concerns were. It was never put to [the complainant] that the defendant examined her private parts but ultimately that really is not going to matter a great deal. It was not put to her that she was exposing her vagina to [her brother] and I am not now going to allow this defendant to give that evidence. I am not going to permit evidence about blue movies with the father. I am not going to permit the evidence of [the complainant] coming back from the father using inappropriate language and I am not going to allow evidence to be given about a report to the Police. All of that evidence is designed to point the finger at someone else. It breaches s 44 and it is not relevant. I have already ruled that the defendant is permitted to explain why he examined [the complainant's] privates. Given that his wife has not been called to give evidence I am going to allow him to say that he was concerned because of what his wife had told him and that the only reason he examined [the complainant's] privates was to ensure there was nothing wrong. It does not go beyond that.

[58] Section 44(1) of the Act provides:

In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

Section 44(3) prohibits a judge from granting permission unless satisfied the evidence or question is of such direct relevance to facts in issue in the proceeding it would be contrary to the interests of justice to exclude it. Section 44A sets out the requirements for an application to cross-examine.

[59] We accept that at least some of the proposed questions would have required the Judge's leave under s 44. However, we do not agree that Mr Fairley erred in not applying for leave to cross-examine the complainant on the question of whether her father had sexually abused her. D's defence was that the complainant had fabricated the allegations by transposing information she had picked up from movies and video clips. The issue was not whether, in fact, the complainant had been sexually abused

¹⁹ *R v [D]* [2017] NZDC 26389 at [8]–[9].

by her father but rather what D and his wife suspected or understood had been happening at his address which led them to check the complainant's genitalia. The possibility of abuse by the complainant's father was only relevant to the extent it explained D's apparent admission of "checking". In order to explain that admission it was not necessary for Mr Fairley to cross-examine the complainant (or her father) about whether there had, in fact, been abuse perpetrated by the father. All that needed to be explained was that D believed or suspected there may have been abuse.

[60] This was the position the Judge reached in his ruling on the first day of trial. He determined D could give evidence about "what he did and why", but that the complainant's father could not be asked questions indicating he may have been responsible for abusing the complainant.²⁰ To the extent this evidence was captured by s 44, the ruling amounted to a dispensation of the formal procedural requirements of s 44A.

[61] Furthermore, we do not consider there was an evidential foundation to cross-examine on these matters. Nothing in the CYFS reports was capable of giving rise to any concern of this nature. D's wife did not give evidence.

[62] That leaves the question of whether the Judge's ruling on the limits of D's evidence gave rise to a miscarriage of justice. D's proposed evidence related to concerns about the complainant watching inappropriate videos at her father's house, her language, sexualised conduct and the fact that D's wife had reported her concerns. It is difficult to see how these details might have provided a logical foundation for a belief the complainant was being sexually abused by her father, let alone materially added to the grounds D claimed justified his actions in examining the complainant's genitalia. Viewed in that fashion D's stated belief would have been speculative.

[63] On any analysis, D's suspicion of sexual abuse on the part of the father appears wholly unfounded. To have permitted this evidence to come before the jury would have opened D up to cross-examination by the Crown. Inevitably the Crown would have explored the various reasons he claimed justified his suspicions. They would have been seen as weak and self-serving. It is noteworthy that when Mr Fairley met

²⁰ *R v [D]*, above n 4, at [18].

D some six months before the trial to discuss tactics he “effectively cross-examined” him to test his responses on the issue of examining his stepdaughter. He said he was not impressed. Neither it seems was D’s wife who described her husband in an email afterwards as “a little rattled” and “not clearly explain[ing] the real context of the scenario” when Mr Fairley was testing him.

[64] Indeed, as Mr Carruthers submitted, any claims by D that the complainant’s father was engaging in inappropriate sexual conduct would likely have invoked incredulity on the part of the jury. Thus the manner in which D’s concerns were, in fact, presented to the jury at trial actually operated to D’s advantage.

[65] Two further points deserve mention. Even if D had been permitted to give this evidence it seems to us unlikely that it would have dislodged the stark unusualness of his admission he was checking the complainant’s genitalia for evidence of sexual abuse. It would have been open to the jury to regard that conduct with suspicion.

[66] Secondly, when D’s evidence on this point is read in full, it is apparent that he was able to provide a reasonable explanation, capable of belief, justifying his action without explicit reference to the complainant’s father:

- Q. On page 1 you say, when you’re talking about the sexual abuse allegation, “I have just told my partner that I’ve been checking on her daughter and yeah ...” what did you mean by that?
- A. I mean that I have been checking, I’ve checked on [the complainant’s] private part.
- Q. When was that check?
- A. It was in the months long before any abuse allegation came towards me.
- Q. From time to time before there was any suggestion of an abuse allegation against you did your wife and yourself used to check [the complainant’s] private parts?
- A. Yes, that’s correct.
- Q. Were concerns raised with you by your wife in that regard?
- A. Can you please explain?

- Q. Had your wife raised concerns in that regard with you?
- A. Yes she had.
- Q. Historically?
- A. Yes.
- Q. Is that why you and she used to check?
- A. Yes.
- Q. If you could please turn to page 2 with the third to last question and answer commencing, "Call taken. What do you mean when you say you were checking her daughter?"
- ... What did you mean when you said, "I've been looking at her private parts for signs of sexual abuse."
- A. I was looking at her private parts for signs of sexual abuse, I was looking for redness and irritation which I later learnt was attributed to thrush.
- Q. Why in particular, I'm not interested in the when at the moment, just historically had you looked for those signs before? The redness and the soreness et cetera?
- A. Since approximately 2011.
- Q. Had you looked for those signs together with your wife?
- A. Yes. Or my wife on her own.
- Q. Was that an isolated looking or a pattern of looking over the past historically?
- A. A pattern of looking.
- Q. In the past had you and your wife together always looked for these things?
- A. Either together or my wife alone.
- Q. You seem to be saying in this call that you alone looked, is that correct?
- A. Yes, that is correct.
- Q. Could you explain why?
- A. I took it upon myself to look in the absence of my wife because she was otherwise busy.
- Q. What do you mean by "otherwise busy"?
- A. She was at work or yeah, I was looking after [the complainant].

...

Q. How many times have you done it?

A. Once.

[67] We consider the evidence D was able to give permitted him to respond to the Crown's submission that his comment to the calltaker amounted to an admission of sexual abuse. He was able to explain that he and his wife regularly examined the complainant's genitalia together and that he did so only once without her.

[68] We are therefore not satisfied that the way in which D was permitted to give evidence in response to the helpline call gave rise to a miscarriage of justice. It did not compromise his essential defence or prevent him from advancing his theory of the case. Any restrictions imposed by the Judge did not materially affect his ability to explain the alleged admission which did not, in any event, appear to be a central plank of the Crown's case given that no mention was made of it in the Crown's closing submissions.

[69] For these reasons we are satisfied the conviction appeal should be dismissed.

Sentence appeal

[70] The appeal against sentence proceeds on two grounds: that the starting point was unjustifiably high, and an MPI was not required. We address each argument in turn.

Was the starting point unjustifiably high?

[71] The Judge adopted a starting point of eight years' imprisonment.²¹ He did so having identified five aggravating factors: vulnerability, which he commented was "at the higher end of the scale";²² breach of trust, which he commented was "appalling" and "at a high level";²³ premeditation, present to a moderate to high degree;²⁴ harm,

²¹ Sentencing notes, above n 1, at [45].

²² At [36].

²³ At [37].

²⁴ At [38].

present to a moderate to high degree;²⁵ and scale of offending, present to a moderate degree.²⁶

[72] The Judge placed the offending within the top of Band 2 for unlawful sexual connection offending, or at the lower end of Band 3.²⁷ There were two aggravating factors present to a high degree, and three factors present to at least a moderate degree.

[73] Mr Mansfield submitted the Judge placed excessive emphasis on the number of aggravating factors, and failed to identify the significant overlap between them. In particular, Mr Mansfield submitted breach of trust and vulnerability were related, both arising by virtue of the relationship between the complainant and D. He also submitted the scale of offending and level of premeditation overlap. He added the offending could not really be seen as premeditated, in the sense that D tended to offend when the opportunity presented itself rather than contriving opportunities to offend.

[74] Overall, Mr Mansfield submitted when this view is taken of the aggravating factors, the offending was properly placed in the middle of Band 2, with a starting point of no more than six years' imprisonment being appropriate.

[75] Band 2 offending straddles starting points of between four and 10 years' imprisonment. It is appropriate for cases which involve two or three factors increasing culpability to a moderate degree.²⁸ Starting points in Band 3 will comprise nine to 18 years. That band is appropriate for cases which involve two or more factors increasing culpability to a high degree, or where there are more than three factors present to a moderate degree.²⁹

[76] The starting point of eight years indicates the Judge considered D's offending sat in the more serious half of Band 2 offending. Thus the object of Mr Mansfield's criticism, that is the Judge's observation there were five aggravating factors engaged to at least a moderate degree, did not materialise in an excessive starting point.

²⁵ At [40]–[42].

²⁶ At [42].

²⁷ As set out in *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

²⁸ At [117].

²⁹ At [120].

Overall, the Judge concluded this was moderately serious offending of its type, a conclusion we endorse. The age disparity between the complainant and D was a clear basis for concluding vulnerability was engaged to a high degree. And it was available to the Judge to independently find there was a very serious breach of trust, given that D had cared for the complainant since she was age one.

[77] Those factors alone would have justified a starting point in the higher end of Band 2. Coupled with the fact this was not a single discrete instance of unlawful sexual connection, the eight-year starting point cannot be criticised.

Should an MPI have been imposed?

[78] The second ground of appeal against sentence is that the Judge erred in imposing an MPI of three and a half years, or 50 per cent, on the end sentence of seven years' imprisonment.

[79] In imposing an MPI the Judge made the following comments:³⁰

[49] Sadly, this type of sexual abuse is common. It is a scourge within our community and it does incalculable damage to the victims.

[50] In cases of this nature minimum terms of imprisonment are always inevitably imposed.

[51] It is done simply to demonstrate that society will not countenance this type of behaviour. It is because of that trend, that your counsel in effect does not make any submissions in relation to a minimum term of imprisonment because a counsel with his experience knows that it is inevitable.

[52] Without a minimum term of imprisonment I consider that you would not be properly held accountable for the harm that you have done to [the complainant] and the community, and neither would it be sufficient to denounce the behaviour.

[53] Further until you are prepared to accept your offending and submit to psychological assistance I am of the view that you will remain a danger to the community generally but in particular to young children.

[80] In determining whether to impose an MPI, the court must consider whether serving one-third of the nominal sentence is insufficient for any of the four purposes listed in s 86 of the Sentencing Act 2002: holding the offender accountable,

³⁰ Sentencing notes, above n 1, at [49]–[53].

denouncing their conduct, deterring them and others, and protecting the community.³¹ In this case, the Judge found all of the purposes were engaged.

[81] This Court in *R v AM (CA27/2009)* found it is routine for MPIs of about 50 per cent to be imposed in cases involving multiple counts of sexual offending against children,³² citing an earlier decision of this Court in *R v Gordon*.³³ In that case this Court reviewed the imposition of MPIs in cases involving multiple counts of sexual offending against children.³⁴

[82] A number of the cases referred to in *Gordon* involved the imposition of an MPI for offending against one child victim.³⁵ All related to offending over a period of years. By contrast, D's offending, albeit involving multiple incidents, occurred over a seven-month period. MPIs for offending of this sort are not inevitable.

[83] As Mr Mansfield emphasised, D's lack of prior convictions and familial support reinforce the probation officer's conclusion he poses a low risk of reoffending. We do not consider an MPI greater than the nominal statutory amount of one-third of the sentence is required to protect the public. Nor do we consider an MPI is necessary to hold D accountable, deter others, or denounce his conduct. The nominal one-third minimum period will see D in prison for at least two years and three months, at which point it will be at the Parole Board's discretion whether he is an appropriate candidate for release. Given the nature of his offending, and his personal circumstances, that is sufficient to meet the relevant purposes of sentencing listed in s 86.

Result

[84] The appeal against conviction is dismissed.

[85] The appeal against sentence is allowed. The order that D serve an MPI is quashed.

³¹ Sentencing Act 2002, s 86(2). See also *R v Taueki* [2005] 3 NZLR 372 (CA) at [55].

³² *R v AM (CA27/2009)*, above n 27, at [156].

³³ *R v Gordon* [2009] NZCA 145.

³⁴ At [20]–[43].

³⁵ *R v M (CA3/04)* CA3/04, 23 August 2004; *R v V (CA57/04)* CA57/04, 14 July 2004; and *R v T (CA674/07)* [2008] NZCA 157.

[86] To protect the identity of the complainant, we made 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:
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