

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

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY
SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA158/2018
[2018] NZCA 529**

BETWEEN R (CA158/2018)
Appellant
AND THE QUEEN
Respondent

Hearing: 11 October 2018
Court: Kós P, Woolford and Dunningham JJ
Counsel: N P Chisnall and N J Manning for Appellant
J E L Carruthers for Respondent
Judgment: 27 November 2018 at 4.00 pm

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is granted.**
- B The appeal is dismissed.**
- C Order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Woolford J)

Introduction

[1] R was found guilty by a jury of six charges of sexual offending against a former-partner's daughter. Further details are unnecessary. Judge Thomas later sentenced him in the District Court at Auckland to three years and six months' imprisonment.¹

[2] R appeals against conviction on three grounds:

- (a) The prosecutor led evidence from the complainant that she self-harmed, attempted to commit suicide and suffered flashbacks because of the offending. The prosecutor then improperly submitted in closing that the complainant's changes in behaviour were a consequence of the alleged offending. Critically, R says the Judge did not caution the jury against jumping to the conclusion that the described behaviour boosted the complainant's credibility.
- (b) The prosecutor led evidence from the arresting police officer who said that R described the allegations as "lame" and supposedly smiled when the draft summary of facts was read to him.
- (c) The prosecutor led evidence that R was threatening towards the complainant and her mother two weeks after the last offence. There was also reference in the complainant's evidential interview (EVI) that R was abusive towards the complainant's mother.

[3] In respect of each, R says the risk of unfair prejudice outweighed the probative value of the evidence. He submits the matters complained of under the first ground have resulted in a miscarriage of justice. As to the second and third grounds, he

¹ *R v [R]* [2018] NZDC 3878.

accepts these may not justify a retrial when viewed in isolation but contends they nevertheless lend weight to the conclusion he has suffered a miscarriage of justice.

[4] The notice of appeal was filed two days out of time. The Crown did not oppose that modest extension and we grant it accordingly.

Complainant's behavioural changes

The evidence

[5] The transcript of the complainant's EVI is 61 pages in length. The EVI was played to the jury. The only reference to the complainant's behavioural changes is as follows:

[Q] And tell me the first adult that you told about the stuff that happened.

[A] Um [T] probably.

[Q] So tell me more about telling [T].

[A] Um, I was just in a counselling session and she said what happened over the holidays cause um we were talking about things that triggered cutting and she said what happened and it just came out yeah.

[Q] Tell me the stuff that you told her.

[A] Um I said that he came over and tried to do things and she kind of got what I mean and she said if I had told anyone and yeah I can't remember what else I talked about.

[6] The complainant further disclosed that she had been attending counselling for approximately two months prior to the first alleged offence.

[7] Defence counsel (who did not appear on this appeal) did not request prior to the trial that the reference to cutting be deleted, although other material in the EVI had been edited out on the basis that its prejudicial effect outweighed any probative value. There is no allegation of counsel incompetence. Rather, as will be seen below, defence counsel used such material to submit to the jury that the complainant was a troubled young woman who had made up the allegations of sexual misconduct.

[8] After the EVI was played to the jury, the complainant was asked further questions by the prosecutor. There is only one reference to the complainant's behavioural changes. It is as follows:

Q. Between that first occasion—

A. Yeah.

Q. —and second occasion, how were you feeling?

A. Ah, kind of like trapped. Like I couldn't do anything about it. I was always scared.

Q. Why did you feel trapped?

A. Because he was like a dad to me and I didn't understand.

Q. And after that second occasion, how have you been feeling?

A. Um... Gone downhill. Um... I've... Stopped going to school, um, have tried to kill myself, self-harm.

Q. Before everything happened, how was school?

A. It was like my happy place. I just loved going to school. Always there, always in meetings, always leadership, always getting everything done, best grades. But now it's just... Gone down I guess.

[9] Defence counsel then cross-examined the complainant extensively about blacking out, panic attacks, flashbacks, dreams, nightmares, as well as self-harming by cutting herself. For example:

Q. ... would you describe yourself as a person who reacts emotionally and perhaps irrationally—

A. No.

Q. —when serious events happen?

A. No.

Q. You talked before about since this event you've been self-harming by cutting yourself?

A. Yes.

Q. In your EVI interview you mentioned, towards the end there, that you were discussing with somebody events that could, "Trigger cutting." I presume you were talking about self-harm then?

A. I can't remember.

- Q. You were seeing the school counsellor well before this incident, weren't you, about exactly the same thing?
- A. No, it wasn't about exactly the same thing.
- Q. About cutting yourself?
- A. It was about cutting but it had nothing to do with this.
- Q. And you wouldn't call that an emotional and irrational reaction?
- A. No.
- Q. ... you strike me as being a very intelligent young woman.
- A. Yes.
- Q. Would you agree that you're a troubled young woman?
- A. No. I have problems but I don't make things up.

[10] In his opening address to the jury, defence counsel had also described the complainant as "in many ways ... a troubled young lady".

[11] R gave evidence in his defence. He was questioned at some length by his own counsel about his knowledge of the complainant self-harming by cutting herself and said he was aware of it from around mid 2016, well before the first alleged offence on 27 December 2016. He then suggested that his former partner may have put the complainant up to lying about what happened because she was angry at him.

[12] The complainant's mother also gave evidence. As to her daughter's behavioural changes, she said:

- A. I found out on 8th of February. I was... I received a phone call from the school counsellor and they told me I needed to go to the school, because [R] had done something to [the complainant].
- Q. Okay. Before that phone call from the school—
- A. Yeah.
- Q. —did you know anything had happened?
- A. No. I had no idea that what had happened to [the complainant] or what happened to [the complainant] and... yeah, I had no idea. But her behaviour was very challenging, too, so I was not sure what's going on.

Q. When you say her behaviour was challenging—

A. Yeah.

Q. —when was her behaviour challenging?

A. It was from, ah, December. Her behaviour was... she was very quiet, she was locked in the room, she will always stay in the room, she will not come out, she will not talk to me, she will not engage with me as... we had a good relationship together, but she was withdrawing herself from everyone and she was not going to school anymore and all that. And one time she did mention, because it was school holidays, she did say, “I can’t wait to go to school and see my counsellor.”

[13] And in cross-examination:

Q. Would you agree that in some ways [the complainant] is a troubled young lady?

A. No she’s not.

Q. What about this cutting thing?

A. [Inaudible].

Q. You wouldn’t think that’s—

A. I’m aware that the cutting thing has started after the incident, after December. She’s been cutting.

Q. But it was going on a long time before that though, wasn’t it?

A. No, I’m not aware of that.

Q. She was seeing the counsellor about this as early as October last year, wasn’t she?

A. I don’t know and I can’t remember. I don’t know.

Closing arguments

[14] In her closing address, the prosecutor acknowledged the emotional problems the complainant had before the alleged offending but submitted to the jury that she had taken a turn for the worse. She said:

Before these events you heard the complainant was doing really well in school. She may have been having some emotional problems, as teenagers often do, perhaps more than most, which makes her particularly vulnerable, but it wasn’t until the events on the 27th of December and 25th of January that she really took a turn for the worst. She has clearly been affected by these events greatly. And you’ve heard from her mum how she hasn’t really been

going to school since this happened. She spoke of flashbacks, panic attacks and nightmares since these events happened. And she recalled how even the smell of his cologne brings her back to when these things happened.

The Crown says that she has experienced these emotional responses because of the sexual assaults that were inflicted upon her by a man she thought of as her father. She isn't lying. She isn't mistaken. She wasn't dreaming. She was honest. She was reliable. It happened.

[15] Defence counsel then referred extensively to the complainant's emotional state in his closing address. He submitted that the complaints of sexual misconduct had originated in the troubles the complainant was having at school and in internet relationships. Defence counsel said:

Something is wrong, during the period of cross-examining [the complainant] it was put to her that she was a young lady who acted in emotional irrational ways, the stressors, and she denied that. But have a think about the rest of the evidence you've heard. Prior to Christmas she was seeing the school counsellor, we know that. Why? Well one of the reasons at least was that she was inflicting self-harm on herself by cutting herself, cutting her arms, or hands. Why would she do that? We don't know but I would suggest to you ladies and gentlemen that that sort of behaviour is emotional, and it's irrational. If she's the sort of person that behaves in such an emotional and irrational way can you be sure that this is not an emotional, and irrational response to something?

She spoke about in her evidence that when she was speaking to the counsellor they discussed events that trigger cutting, well again we don't know what they are. But we do know that there are events in her life we can infer, there are events in her life which are emotional and irrational responses to something.

You've heard the evidence about this internet romance with [C]. Now clearly that was affecting her deeply. Well we've all probably had experience of knowing somebody who gets carried away with these internet romances, and she was a young lady who perhaps lacked the maturity to be able to cope better with this sort of situation. But she had a deep attachment to this [C], and it was troubling her, troubling her to the extent that she wanted to talk to R about it.

...

When I say something's wrong I'm being very serious, but I want to just carry that just one step further, and ask you to consider this. If something is dramatically wrong are the events that she's described the cause or are they a symptom? Are they something that's coming out of whatever it is that's wrong with this young lady? If the responses are she inflicts self-harm. If the responses to whatever it is are making accusations like this we don't know. But I would suggest to you if you think about it carefully this is unlikely to be the cause.

Now it's been emphasised to you that since she's gone back, or since the school year started she's not returned to school, and yet she describes school

in her evidence as being the place that she felt safe and happier. If she has had an experience which has caused her troubles why would she avoid the very place where she feels safe and happy, unless the experience she's got, the experience she's had is a symptom of something more deeply underlying.

Summing up

[16] The Judge did not, in his summing-up to the jury, specifically caution the jury against jumping to the conclusion that the complainant's behavioural changes boosted her credibility. However, he stressed the presumption of innocence and the fact that R did not have to point to any alternative scenario or explanation. He said:

[5] The starting point is the presumption of innocence. You must treat the defendant as innocent until the Crown has proved that he is guilty. The onus of proof or the burden of proof or the job of doing all the proving is on the Crown. It stays on the Crown from the beginning of the trial right through to the very end. The presumption of innocence means that the defendant did not have to give or call evidence and he does not have to establish his innocence. The fact that he did give evidence doesn't change any of that at all.

[6] Now, while all of that sounds simple enough, you must always be acutely aware of it and let me give you an example. Both counsel spoke a lot about [the complainant's] possible motives to lie or simply make totally mistaken allegations. We've heard a number of possible theories that have been advanced by the defence. That she has confused dreams with reality. That she has a selective memory. That she might have been influenced by the various professionals she's been in contact with such as counsellors or therapists or police officers. That she was troubled and self-harming even before any of these incidents were alleged to have happened, and that perhaps this is another emotional and irrational response to whatever it was that was driving her to self-harm before any of this happened. That her mother was upset that the defendant had married someone else. These sorts of suggestions are perfectly legitimate. They are designed to demonstrate that there may be other possible scenarios that the Crown has to exclude as a reasonable possibility.

[7] The critical point is this. The defendant does not have to point to any alternative scenario or explanation. If he suggests one, he does not have to satisfy you that that is what happened. It is the Crown that has to prove that [the complainant's] allegations are true. The defendant does not have to prove anything.

[17] The Judge also gave a standard sympathy and prejudice direction.

Discussion

[18] The relevant principles are these:

- (a) Evidence of a complainant's behavioural changes after an alleged incident may be admissible as evidence that something out of the ordinary happened in her or his life.²
- (b) The risk of unfair prejudice in admitting such evidence will usually be that the jury will speculate improperly about the connection between the alleged offending and the behavioural changes, and conclude without a proper basis that it supported the complainant's account, bolstering her or his credibility.³
- (c) Expert evidence may be required if the behavioural evidence relates to things outside the normal experience of the jury (for example, bedwetting or sexualised behaviour).⁴ That evidence may be necessary so that the jury does not speculate in the manner described above.
- (d) Evidence of behavioural changes may also be of contextual relevance, for example, to explain why the complainant adopted a particular course of conduct including a complainant self-harming.⁵

[19] We make three observations.

[20] First, even if we considered the evidence now challenged on appeal was inadmissible, we would not have found there was a risk of a miscarriage of justice. This is because of the defence strategy at trial. Defence counsel did not object to the admission of the evidence. Rather, it was targeted in cross-examination and formed an integral part of the defence. R wanted the jury to find the complainant was a troubled young lady who had self-harmed by cutting herself before the alleged offending. The Judge summarised the defence position as follows:

² *Henderson v R* [2007] NZCA 524 at [58].

³ *A (CA664/2008) v R* [2009] NZCA 250 at [39].

⁴ At [29].

⁵ *R (CA129/2017) v R* [2018] NZCA 235 at [31].

That she was troubled and self-harming even before any of these incidents were alleged to have happened and that perhaps this [the complaints of sexual offending] is another emotional or irrational response to whatever it was that was driving her to self-harm before any of this happened.

[21] Second, we consider the evidence in this case was admissible. In our view, it is reasonable to expect a jury to understand that a complainant may have flashbacks, panic attacks and nightmares and that the smell of cologne may bring back memories of sexual offending. A jury does not need expert evidence on these matters. They are ordinary and understandable reactions. This is not a situation such as bedwetting where a jury might not appreciate whether that behaviour can be linked to the offending. It would be artificial to say that such evidence should not be led. The absence of such ordinary reactions in the event of renewed contact may also be probative and could be relied upon by the defence.

[22] In her closing address, the prosecutor referred to the complainant's emotional responses as having been caused by the offending. She was, however, careful not to refer to or link the complainant's self-harm by cutting and attempted suicide to the offending. In fact, she said nothing about the self-harm and attempted suicide. She only referred to "flashbacks, panic attacks and nightmares" since the events happened and noted how even the smell of his cologne brought her back to when these things happened.

[23] Third, even though the prosecutor did not do so in closing, we acknowledge the evidence implied links between the self-harming behaviour and the offending. In her EVI, the complainant referred to events that triggered cutting. Then when questioned by the prosecutor, she referred to trying to kill herself and self-harming after the offending.

[24] The evidence, however, also established the complainant engaged in self-harming behaviour before the offending. It was made clear through cross-examination by defence counsel that the complainant had been seeing a counsellor and had self-harmed by cutting herself before the first alleged offence, although she did say she had "gone downhill" since the offending. The strength of any causative implication was therefore limited.

[25] Defence counsel also did not seek a direction that the jury should not jump to the conclusion that the self-harm by cutting and attempted suicide boosted the complainant's credibility. Ideally, such a direction would have been given. The issue of a possible direction on dreams and memory was raised, but the Judge saw no reason to do so because they were matters within the ordinary experience of jurors.⁶

[26] In the circumstances of this case, however, we do not consider the omission of a direction as to the self-harm and the complaint's credibility gave rise to a risk of a miscarriage of justice. This is because of the defence adopted by R and because the prosecutor did not seek to use the evidence for that purpose and because that conduct also preceded the alleged offending. The prosecutor, responsibly, avoided reference to self-harming or suicidal behaviour.

[27] Any remaining risk of unfair prejudice would have been adequately mitigated by the Judge's prejudice and sympathy directions, and general directions on the presumption of innocence, where he specifically addressed how the defence sought to use the evidence in question.

R's response to allegations

The evidence

[28] When R was arrested, he spoke with a lawyer and advised the police that he would not be making a statement. Detective Constable Libby nonetheless gave evidence of the following exchange with R:

Q. Did he indicate whether he understood his rights?

A. Yes, he did.

Q. And did he subsequently speak with a lawyer?

A. Yes, he did.

Q. What happened after he spoke with a lawyer?

A. Following that conversation, he indicated that he would not be making a statement.

⁶ *R v [R]* DC Auckland CRI-2017-090-1898, 7 December 2017 at [14]–[15].

- Q. Did anything else happen?
- A. He indicated that he would like to be made aware of the allegations, which was done so by reading a pre-drafted summary of facts.
- Q. So in the summary of facts, just for the jury's benefit, that contain the details of what the complainant had said happened on those two occasions?
- A. Yes that's correct.
- Q. Including the dates for those two occasions?
- A. That's correct, yes.
- Q. So after you read him that document, what happened?
- A. He smiled and said, "This is so lame".

[29] R did not address his alleged reaction in his evidence-in-chief. However, it was covered in cross-examination:

- Q. And your first reaction was to smile and say, "This is so lame"?
- A. I didn't smile. It's just one of those thing when — you don't — you haven't done it and somebody says it in front of you, you just get that thing. Different people react differently. So I acted my way and I said, "That's not right, that's lame."
- Q. So you didn't smile?
- A. No.
- Q. So Detective Constable Thomas Libby is also wrong?
- A. He's — I wouldn't say that he's wrong, but he must have seen my face maybe look like smiling, but I didn't get to smile or anything. I reacted the way. Every people has their way to react on certain things.
- Q. Do you think it's a normal reaction for someone, when they've been like a father figure to a girl and accused of sexually assaulting her to say, "This is so lame"?
- A. It sound like bit of a — like — some silly game or something to me, to be open. So —
- Q. A, "Silly game"?
- A. Yeah, somebody's — what is, what is this? I, I saw her — I only see her as daughter, she sees me as father. Who would do this kind of allegation and why?

Summing up

[30] In his summing-up to the jury, the Judge commented on the evidence as follows:

[17] You heard about the defendant's reaction to the allegations when he was spoken to by Detective Libby. He said words to the effect that, "This is so lame." Detective Libby said that he smiled. The defendant disputes that. It's routine to give an accused person the opportunity to comment on allegations that have been made against them. An accused person does not have to say anything at all in relation to those allegations. Here the defendant did make a comment and [chose] to make a comment, although he didn't make that comment on oath or was cross-examined on it. Treat that comment as evidence like any other piece of evidence. You decide what weight you give it. You can view it as favourable to him or not favourable to him. It's all up to you.

[18] He made no further statement to the police. He didn't have to. He was told that and that's part of the rights that any person has and is told about. He took legal advice at the time. It was his absolute right to not say anything further to the police. You cannot hold that against him in any way.

Discussion

[31] R argues the evidence should not have been adduced, the questioning of him was improper and the Judge's directions were insufficient. On appeal, R's counsel referred to the following comment this Court's decision in *R v E (CA308/06)*:⁷

While evidence of arrest itself may be seen as background, the evidence that no statement was made amounts to evidence that there was no relevant evidence and, as such, was of no utility whatsoever. Such evidence should not be led unless there is good reason to do so. For example, there may be cases where an accused wishes the evidence of the caution and subsequent silence to be led to explain why he or she did not make a statement at that point.

[32] However, in the present case, R did make a statement. This is not a question of evidence that no statement was made.

[33] Again, we note defence counsel did not seek to have Detective Constable Libby's evidence ruled inadmissible. In any event, we consider the evidence was of marginal relevance, as evidence of R's initial reaction to the allegations. We agree with the Crown that it also had some value from

⁷ *R v E (CA308/06)* [2008] NZCA 404, [2008] 3 NZLR 145 at [89].

the defence's perspective. The tenor of the comment was that R did not accept the allegations at all. He used the word "lame" as meaning ridiculous.

[34] The prosecutor's cross-examination of R about the comment was also ineffective — it led nowhere. Neither the prosecutor nor defence counsel referred to the comment in their closing addresses. The Judge, however, gave a standard direction about it. In all the circumstances, the evidence was not wrongly led. It certainly did not create a risk of miscarriage of justice.

Contact with R subsequent to offending

Evidence

[35] In her EVI, the complainant referred to R abusing her mother. That part was edited out prior to trial. But the complainant's mother touched on this subject in her evidence:

Q. After you found out about these allegations, did you have any further contact with [R]?

A. When I found out, I'd been receiving multiple texts and calls from [R]. And I told him not to text me or call me anymore. And on 10th of February, he came to my house, knocking the door and the knocking got very loudly. So I told him to go away, I could see him from the clear glass we have, the door, I told him to go and he wouldn't go. And he kept on knocking the door and he said, "If you don't open the door" he'll smash the door. So I got scared and [the complainant] was with me, so we went and locked [ourselves] in [the complainant's] room and then I called the police. And I also called my landlord, if she can go downstairs and tell him to leave, but he said no he wouldn't leave, and then I had to call the police.

Q. Okay. I'm just going to pause you there. So was that the last time that you had contact with him?

A. Yes. That was the last time I've ever seen him.

[36] When questioned by his own counsel about this incident, R said he had been trespassed from the property by the police.

Discussion

[37] We are of the view that the evidence from the complainant's mother of contact with R two weeks after the last alleged offence was of marginal relevance. It could be seen as the actions of an innocent man who wanted to remonstrate with the complainant's mother about the ridiculous allegations made by her daughter. There is no risk of a miscarriage of justice.

Result

[38] The application for an extension of time to appeal is granted.

[39] The appeal is dismissed.

[40] In order to avoid identification of the complainant by association, 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 Law Office, Wellington for Respondent