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

IN THE SUPREME COURT OF NEW ZEALAND

SC 2/2014
[2014] NZSC 122

BETWEEN	PAKI HOANI TAIATINI Appellant
AND	THE QUEEN Respondent

Hearing: 19 June 2014

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: T Sutcliffe and N P Chisnall for Appellant
M D Downs and M L Wong for Respondent

Judgment: 5 September 2014

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ and GLAZEBROOK J

(Given by Elias CJ)

[1] The critical issues at the trial of the appellant on six counts of indecent assault and three counts of sexual violation by unlawful sexual connection were whether the complainant had consented and whether the appellant believed on reasonable grounds in her consent.

[2] Evidence was admitted at the trial of opinions by the complainant's mother that the complainant was incapable of lying and by the complainant's boyfriend that she was unlikely to initiate sexual contact. Opinion evidence was also admitted from the mother that the complainant lived in a black and white moral world in which she would never have sexual connection with a married man.

[3] These characteristics of the complainant (inability to tell an untruth, strict observance of a black and white view of the world, and reticence in sexual activity) were linked with evidence that the complainant was thought to have an Asperger's-like syndrome on the autism spectrum. Neither the diagnosis nor its effect on truthfulness and behaviour in sexual matters was the subject of expert evidence. Rather, the suggestion that the complainant may have had Asperger's came in through the evidence of the mother, who also gave evidence about her daughter's inability to tell untruths and her strict moral standards. The mother's nursing qualifications, while they did not qualify her to give these opinions, may have given the opinion evidence some heightened authority with the jury.

[4] The opinions as to the complainant's truthfulness and propensity in matters of sexual behaviour were not admissible. No direction to ignore the evidence was given by the Judge.

[5] The Court of Appeal accepted that the evidence, if included in a brief and the subject of pre-trial challenge, would in all likelihood have been ruled inadmissible because its effect was simply to "bolster the credibility of the complainant".[1] It took the view, however, that the questions from the Crown which had elicited two of the disputed pieces of evidence had been legitimate and the answers had been unexpected.[2] The evidence by the mother that her daughter was not able to lie was, however, a "predictable" response to a question asked in cross-examination.[3] Although the Court of Appeal took the view that "a counsel of perfection" would have seen the Judge warn the jury about the use of such comments,[4] it considered that in circumstances where the Crown made nothing of them in closing and defence

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1 *Taiatini v R* [2013] NZCA 593 (Harrison, Simon France and Dobson JJ) at [17].
2 At [18].
3 At [18].
4 At [19].

counsel did not ask for a direction, the risk of inappropriate bolstering of the complainant's evidence was low[5] and a direction might have given undue prominence to the (illegitimate) support the jury might obtain from the comments.[6] In those circumstances, the Court of Appeal considered that the absence of a direction "did not give rise to any material risk of a miscarriage of justice".[7]

[6] The present appeal is brought by leave from the decision of the Court of Appeal.[8] For the reasons given in what follows, we have come to the conclusion that the admission of the evidence was a miscarriage of justice. What the jury made of the complainant was critical. The three disputed pieces of evidence as to her truthfulness and propensity in sexual matters went to the heart of the case. While in many cases a direction to the jury might be enough to eliminate any unfairness in inadvertent admission of evidence that should properly have been excluded, we have some doubts whether that course would have been sufficient in the present case to overcome the risk that the opinions would be seen to be substantiated by a medical condition which was itself not properly established and in respect of which the mother's opinion ought itself not to have been provided in evidence. In circumstances where no direction was given, we are of the view, in disagreement with the majority opinion of the Court, that there has been a miscarriage of justice.

Background

[7] The incidents which were the basis of the charges occurred over a five-day period at the workplace of both the appellant and the complainant. Although they had worked together for two years and were generally acquainted with each other, the appellant seems to have formed a sudden attachment to the complainant following a party the day before the first incident, when the complainant had become upset when receiving unwanted attention from another man. The appellant had assisted other workmates in comforting the complainant at that time. The next day at work he had sought her out to inquire how she was and first hugged and then kissed her. Matters then escalated over four of the next five days with increasing

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5 At [22].
6 At [21].
7 At [22].
8 *Taiatini v R* [2014] NZSC 26.

intimacies, culminating in the sexual violations. The incidents occurred in various rooms in the workplace while the complainant was carrying out her duties and had been sought out by the appellant.

[8] The appellant said that the complainant was consenting and that he believed her to be consenting. He gave evidence that she had actively participated in some of the sexual contact and had not simply accepted the contact he initiated. The complainant said that she did not consent. Both the appellant and the complainant were in relationships and she regarded his suggestions that they have an affair and could go to a motel as morally wrong.

[9] While the complainant gave evidence at trial of having told the appellant that she did not agree to what he was doing, she also gave evidence that on at least some occasions, especially initial episodes, she had not offered protest to the contact he initiated because she was "petrified" and "confused". There was no suggestion that she took steps to avoid the appellant or remove herself from his company when he sought her out, even though there were others in close proximity (on one occasion they were interrupted when together and stayed together following the interruption) and even though they seem to have spent more than a very brief time together on these occasions (the complainant put one such meeting as having lasted about 30 minutes, although her estimates of time may have been astray). There was no suggestion of any compulsion on the part of the appellant towards the complainant beyond the non-consensual touching and the fact that he would shut the door of the room they were in.

[10] At the end of the week, the complainant told her boyfriend about the behaviour of the appellant and, at his insistence, she raised it with their employer. The evidence of the complainant and the employer was that she wanted to put the relationship back on a professional basis. Details of the behaviour were not entered into at the meeting held between the three and the matter seems to have been treated in this meeting as an employment issue. That evening, the complainant told her parents about the events. Over the next few days more detail of what had happened was elicited by the parents and the boyfriend. As a result, the complaint to the police was made. The appellant subsequently wrote a letter to the complainant apologising

on the basis that his behaviour was "inappropriate". (At the trial he explained that the inappropriateness arose out of the employment circumstances and the fact that each of them was in an existing relationship.)

The trial

[11] A possible – indeed likely – explanation for the apparent inability of the complainant to extricate herself effectively from the appellant's persistent and escalating attentions lies in the fact that she has a degree of intellectual impairment. The Crown, pre-trial, had flagged its intention to seek expert opinion as to the capacity of the complainant. But that course was not pursued.

[12] At the trial, the Judge was clearly concerned that the jury required some explanation of the way in which the complainant gave her evidence. She had agreed too readily with suggestions put to her, became easily confused about places and dates, and smiled inappropriately (to such an extent that Crown counsel felt it necessary to ask her why she was smiling when being re-examined and defence counsel was later to remark on her smiling throughout her evidence in his closing address to the jury). The Judge seems to have been of the view that some explanation of the level at which the complainant functioned was required and he raised the matter with counsel in chambers during the course of the Crown case.

[13] The Judge pointed out that the complainant's mother had outlined the complainant's intellectual impairment and the effect it had on her functioning in an affidavit filed in support of the defended application to have the complainant give her evidence from behind a screen, and suggested that this evidence could be called. Defence counsel opposed the suggestion and Crown counsel was cautious, explaining that he thought the complainant's personality and capacity was sufficiently covered by the evidence of her employer (who had explained that she lacked initiative but followed instructions carefully) and could be further touched on by the boyfriend (who had yet to give evidence). The Judge however seems to have thought that something more was needed.

[14] The matter was revisited in a further chambers hearing later in the day. Crown counsel by that stage had decided to call the mother as an additional witness

to counter suggestions put to the complainant in cross-examination that the terms of her complaint to the police had been suggested by her parents. He had originally thought that the matter could be dealt with by the boyfriend (whose evidence had not yet been called) but had realised that he was not present at all times when the parents and the complainant had discussed the complaint. The opposition of defence counsel was rejected on this point on the basis that the additional evidence was necessary to respond to the suggestions he had put in cross-examination.

[15] Crown counsel also indicated at the chambers hearing that he had reconsidered the matter the Judge had raised as to evidence of the complainant's conditions. He had come around to thinking that, as the Judge had indicated, the jury might benefit from "extra information about her condition, so they can understand where she's coming from". That might be beyond what could be expected from the boyfriend or the employer and the judge had already "rightly highlighted … that the mother has already given some information prior to trial to the Court about the general state of play for her daughter". Crown counsel therefore sought leave to call the mother, for whom he did not have a brief, "to address … her daughter's condition, undiagnosed as it is".

[16] The application was opposed by defence counsel. He pointed out that there had been a number of adjournments pre-trial so that the Crown could obtain expert evidence on the complainant's condition. The mother was not qualified to give such evidence. And if the issue was that the complainant was suggestible, the jury was able to assess that for itself. It was not a matter for non-expert evidence. He submitted that the affidavit the mother had provided for the purposes of the screen determination was inappropriate for trial purposes, being a general account and for limited purposes. (The Judge, a little surprisingly given that the affidavit was put forward for a different and much more limited purpose in the pre-trial directions hearing with no suggestion that it would be the basis of evidence called at trial, indicated that the proper time to challenge the information contained in the affidavit had been at the pre-trial hearing.)

[17] As the transcript of the chambers hearing in which the ruling was given shows, both counsel were alive to the fact that calling the mother, whose evidence

had not been briefed, presented legal risks. Although the Judge had first expressed the view that the mother's qualifications as a nurse were relevant to the evidence she could give as to her daughter's condition, both counsel correctly identified that she could not properly give opinion evidence on the matter but only evidence of her observations of her daughter's behaviour.

[18] Crown counsel accepted that, all along, defence counsel had been appropriately objecting to "expert evidence, that is opinion evidence about this complainant and about the likelihood of her lying and things like that". He acknowledged that such evidence would be "extremely fraught":

> … if we were going to call a witness to say, "No this woman can't lie" which is actually what some people have told us, that would have to be an appropriately qualified expert and there would have to be independent analysis of that. I'm not going to seek to go there at all, and in fact, I say I can truncate this because I think I can restrict myself, simply [to] number 20, which is first hand observations made by a mother of a child, that may assist the jury in understanding what they saw happen in front of themselves. And so it's really just a question, "You're her mother", some of the back [history], and I don't mean all of the detail, but [the complainant] battled at school, yes.

[19] The reference in this quote to "number 20" (to which Crown counsel indicated he intended to restrict the evidence to be called from the mother), was a reference to paragraph 20 of the affidavit the mother had sworn in support of the Crown application to have the complainant screened from the appellant when she gave her evidence. The affidavit included the information that the mother had been advised that the complainant "comes under the autism umbrella and more specifically suffers from Asperger's syndrome". That information was not in paragraph 20, which read:

> 20. The following are some of the challenges [the complainant] faces in her every day life as an adult:
>
> (a) [She] reads and writes to the level of a 10-year-old.
>
> (b) [She] does not know the difference between 24 hours and one week.
>
> (c) [She] cannot be expected to receive anymore than three instructions at any one time and be able to follow these instructions.

(d) [She] if asked could not tell you what 2 + 2 equals unless prompted.

(e) [She] still avoids contact with persons she does not know intimately. She has a minimal circle of friends and keeps these contacts to an absolute minimum.

(f) In contrast with the above [she] has a phenomenal memory on subjects she has an interest in, such as sport and music.

[20] As indicated, Crown counsel in the first chambers hearing had accepted that evidence of the complainant's incapacity to lie (which he acknowledged was a view that had been expressed) could not be given by the mother. It was similarly known to the Crown (because it appeared in the Crown summary of facts as well as in the affidavit) that the parents attributed their daughter's impairment to "Asperger's syndrome", although there was no expert foundation for that diagnosis and it was not opinion the mother was qualified to give.

[21] The Judge evidently thought the risk of such inadmissible evidence coming out would be avoided if the mother's evidence was confined to the matters of observation to which she had deposed in paragraph 20 of her affidavit, as was discussed in the rather discursive chambers hearing. He ruled that she could give evidence of her own observations of her daughter's development and functioning, as had appeared in the affidavit in support.

[22] In fact, the evidence given by the boyfriend and the mother went beyond what was envisaged.

[23] In answer to a question in re-examination as to whether the complainant had indicated to him whether she had wanted to have an "affair" with the appellant, the boyfriend answered "there was no way [the complainant] would ever do that, no". Since it was obvious that the boyfriend was expressing an opinion as to how the complainant would behave, it was unfortunate that Crown counsel asked the witness to explain what he meant. In response, he answered:

> … she's just never, never really thinks about stuff like that, I mean, anything to do with a sexual nature, between me and her even, is always initiated by me, it's never by her.

[24] In her evidence, the mother indicated that she was a "clinical nurse specialist" and had a Masters degree. She worked in a major hospital. She gave the general evidence referred to in paragraph 20 of her affidavit, as had been discussed, explaining the delayed development of the complainant when a child and that she had never been able to obtain any qualifications or sit exams at school. She assessed the complainant as having the reading skills of perhaps a ten year old and as having difficulty following more than three instructions at any time. The mother explained that the complainant has difficulties with numbers and with time and space but has an excellent memory, especially for things that interest her. She is not trusting of others and needs to feel safe. When asked in evidence in chief whether her daughter's condition had ever been formally diagnosed, she said that, although she had sought input from a paediatrician when she was young, "that was before the … before Asperger's or autism spectrum was fully understood". Although it was not further stressed, the jury in this statement were effectively told that the mother, at least, considered that the complainant was on the autism spectrum and had Asperger's syndrome. The nursing qualifications she had explained may well have given that assessment some credibility.

[25] When the mother was cross-examined as to whether she had told her daughter she accepted her account that she hadn't been consenting to the sexual contact with the appellant, she answered in terms of her daughter's truthfulness:

> You see, [the complainant] has, she hasn't got the ability to fabricate things, um, she just tells the truth, she just tells it as it is and, and I've known, you know, that's, that's just the way she is.

This was evidence that Crown counsel had acknowledged could not properly be put before the jury.

[26] In re-examination, when asked how the questions of consent and not wanting the contact had arisen in the conversation she had with her daughter, the mother answered:

> … you know the fact that [the appellant] was married, you know, she lives in a very black and white world what, what is right and what is wrong and doing anything with a married man is, is just not, not what she would, not what she would do, you know, it's, it's just against all her morals she just

> lives in a black and white world, what is right is right and what is wrong is wrong.

Miscarriage of justice

[27] The Judge's willingness to allow the Crown to call the mother to give evidence of her daughter's condition risked inadmissible evidence being elicited. Given the fact that the purpose of this evidence was to give the jury background about the level at which the complainant functioned, defence counsel and the first instinct of Crown counsel seem to us to have been right. The mother's evidence added little to what the jury had been able to observe and, given the known views as to the complainant's inability to lie, calling her unbriefed may have been unwise. Her nursing qualifications and the reference to the limits of the complainant's intellectual capacity added to the damage. Her opinions as to the complainant's veracity and propensity were both inadmissible, as Crown counsel accepted at the chambers hearing they would be. They also came at a stage in the trial when the defence had opened on the defence of consent as well as reasonable belief in consent, and had already cross-examined the complainant on a basis that was not readily reconcilable with the evidence which suggested strict and literal truthfulness and a black and white sense of morality were part of her condition. It may have been in response to the inadmissible evidence, unforeseen at the time of opening, that the defence in closing shifted to emphasise reasonable belief in consent as the defence.

[28] Whether the way the evidence emerged was understandable, whether the evidence was emphasised in the Crown's closing, and whether defence counsel asked for a direction or not, do not seem to us the critical questions for an appellate court. The important questions are the harm caused by the admittedly inadmissible evidence and the absence of any direction to address it.

[29] The opinion evidence impacted on the critical issues at the trial. It was lent some apparent authority by the professional background of the mother and the suggested diagnosis. Neither the opinions nor the diagnosis were admissible evidence from the mother. That evidence was supported by the evidence of the boyfriend, which was propensity evidence to similar end – that the complainant was incapable of acting as the appellant suggested. While the inadmissible opinion

evidence given by the boyfriend may not have been so harmful on its own, it supported the opinions expressed by the mother and enhanced their weight. The admission of inadmissible evidence impacting directly on the critical issues for trial is prejudicial in itself. In addition, the shift in emphasis in the defence closing to reasonable belief in consent rather than equal reliance on consent as well, suggests that the admission of the evidence caused difficulties for the defence case and the way in which it was run. And while Crown counsel did not find it necessary to refer to the inadmissible evidence in his closing to the jury, defence counsel seems to have felt obliged to do so (acknowledging the mother's evidence that the complainant could not lie), indicating his perception of the prejudice it caused the defence.

[30] The opinion evidence, if challenged pre-trial, would not have been admitted, as the Court of Appeal effectively acknowledged. At the very least, the jury should have been warned that they had heard opinions expressed by those close to the complainant that were not expert opinions and which they were not qualified to express. The jury should have been told that they should ignore the opinions altogether in coming to their own view as to whether the complainant was reliable and truthful in the evidence she gave. The jury should have been told that although they had heard a suggestion that the complainant suffered from Asperger's, there was no such diagnosis of her by anyone qualified to express an opinion and that the opinion should be ignored as unhelpful and irrelevant to their task.

[31] As already indicated, we have some doubts whether a direction would have cured the prejudice to the fair trial in the admission of the evidence. The defences of consent and reasonable belief in consent were based on the complainant's behaviour as described by the appellant. There was potential substantiation in her own evidence which indicated her confusion and inability to say what she felt at the time and to find the words to make her position clear. The opinions that the complainant was by her condition and nature incapable of behaving in that way directly impacted upon the defence case and buttressed that of the Crown. So we think it is doubtful that a direction would have overcome the prejudice. But in the absence of any direction, we think it clear there has been a miscarriage of justice. We would allow the appeal.

McGRATH, WILLIAM YOUNG and ARNOLD JJ

(Given by William Young J)

The appeal

[32] Following his trial before Judge Weir in the District Court at Rotorua, the appellant was found guilty on six counts of indecent assault and three counts of sexual violation by unlawful sexual connection. His appeal against conviction was dismissed by the Court of Appeal.[9] He now appeals to this Court on the basis that on three occasions, Crown witnesses gave evidence which was inadmissible and that the associated prejudice to the appellant was not addressed by the trial Judge.

Background

[33] The complainant is a woman in her thirties who lives with her parents. It was common ground, although not strictly proved, that she suffers from an Asperger's-like condition and is also intellectually disabled. She does, however, function reasonably well in the community. She attended secondary school for five years (albeit that she never sat any examinations), has a driver's licence and was employed at the same workplace as the appellant. The charges related to events which occurred over a five day period between Sunday 26 June and Thursday 30 June 2011 and was preceded by an incident at a party on Saturday 25 June which was hosted by one of her work colleagues.

[34] The complainant had attempted to drive to the party but got lost and returned home. Her father then drove to the party and she followed in her own car. Her father went in with her but left shortly afterwards. The guests included a number of people who worked with the complainant, including the appellant. During the party, the partner of the hostess became drunk and acted towards the complainant in a way that she regarded as over-familiar. She became very upset and tearful. After receiving some comfort and support from some of those at the party, the complainant went home.

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9 *Taiatini v R* [2013] NZCA 593 (Harrison, Simon France and Dobson JJ).

[35] On the following day, Sunday 26 June, the complainant went to work. There was some discussion at work about the party and the fact that the complainant had become upset. The appellant approached her and asked how she was. On her evidence he then put his arms around her and tried to kiss her. She resisted his advances. On her evidence, over the following four days there were further incidents in which the appellant hugged and kissed her, touched and sucked her breasts, touched her genitalia over her clothes and put his fingers in her vagina. Her reactions to all of this, as she described in evidence, would have made it clear to the appellant that she was not consenting, albeit that they were comparatively muted.

[36] The last incident occurred on Thursday 30 June. That night, she told her boyfriend (M) some of what had happened. They had a further discussion the following morning (that is, the Friday) and, as a result of what he told to her to do, the complainant spoke to her supervisor that day. On that night (that is, the Friday night) the complainant's mother learnt about what had happened from the complainant. She told her husband and there were further discussions with the complainant. It was decided that there should be a complaint to the police. The appellant subsequently wrote a letter to the complainant in which he apologised for his inappropriate actions.

[37] The appellant's defence at trial was that the complainant consented to the sexual activity that occurred, or that he had reasonable grounds for believing that she did consent. His narrative of the events as given by him in evidence at trial was broadly along the same lines as that of the complainant, save that on his evidence she was an active and consenting party who, at least to some extent, had taken the sexual initiative. On his account what occurred was in the nature of the commencement of an affair.

What happened at trial

[38] The prosecutor applied successfully for an order that the complainant give evidence from behind a screen. In support of this application, reliance was placed on an affidavit from the complainant's mother. In this affidavit, the mother said that:

> A formal diagnosis has never been made of [the complainant], although informally I have been advised [the complainant] comes under the Autism umbrella and more specifically suffers from Aspergers Syndrome.

The mother provided considerable detail as to the complainant's development, education, employment history, intellectual ability and general behaviour. The mother is a registered nurse and works as a clinical nurse specialist. She did not, however, purport to provide a personal diagnosis of the complainant's condition. Rather, in describing the complainant's history, capabilities, character and behaviour, she spoke from personal experience as her mother.

[39] It appears that the prosecutor gave consideration to calling expert evidence as to aspects of the complainant's condition which might be relevant to how she would present when giving evidence and, possibly, as to her character. The prosecutor was aware that some of those who were close to the complainant were of the view that she could not lie. In the end, the prosecutor decided not to seek a report from an expert and also decided not to call the mother to give evidence.

[40] The trial commenced with opening addresses by the prosecutor and defence counsel. In the course of his opening, defence counsel said:

> The defence position is this; the accused truly believed there was an attraction between himself and the complainant and vice versa. Over the next four days, he thought that they were building on that attraction. However on the Thursday they both came to their senses and you have already heard how the complainant had a boyfriend of some years, the accused had a partner and, from the defence perspective, this attempt to have an affair stopped on the Thursday. They both agreed it could go no further. But the defence position is [the complainant] then got an attack of the guilts and you will hear that she had conversation with her boyfriend and we have already heard from what my friend told you in this opening, about how the boyfriend was concerned about her different state of mind in the preceding days. You will hear that she said, "You know I love you" and it is the defence position that because of the pressure put on her by her boyfriend and her parents, the complainant decided to say, "This is not a building affair, but this was a situation where I was an unwilling participant."

[41] In the course of her evidence, the complainant was cross-examined about her interactions with her boyfriend and parents before she went to the police:

> Q. Isn't it the position that [M] and your parents told you to say that the accused had done these things to you against your will?

A. Yes. That's correct.

Q. They told you to say that didn't they?

A. No, they didn't, no. No, well what had happened is that I told [M] – I told [M] that – what had actually happened, I told him the full story and I got really upset. I was still very upset telling him and I had to tell him the whole – the whole thing and that's when I – that's when I …

…

Q. … Now, what I'm putting to you … is that not you describing what happened. What you are describing is what someone has told you must have happened.

A. No, that's – that's – that's not really true. That's – that's not true.

Q. Isn't that the truth that [M] and your parents said you've got to tell the police that he forced you into the room, that he forced you to do these things and you didn't want to do these things?

A. Yeah, but, I – the thing is I only – I only told [M]. I hadn't – hadn't told my parents. I hadn't told my parents so my parents didn't know, only [M] knew so –

Q. When you went to see the police, your parents knew didn't they?

A. Yes.

Q. And this interview was conducted after you had spoken to your parents and after you'd spoken to [M], wasn't it?

A. Yes. That's correct.

…

Q. And later on you spoke to your parents?

A. Yes.

Q. And they[,] like [M], became very upset didn't they?

A. Yes they did.

Q. And they, they said to you things like, "Well you can't have been agreeing to this could you have"?

A. That, that's not true. I just said, 'cos they came home, they, my parents work very late … so they, I only told them on the Friday. I didn't tell them, I didn't tell anyone on the Thursday except for [M] 'cos [M] needed to know, what's been going on.

Q. But your parents made it clear to you that they didn't think for one moment that you would have been consenting?

A. No, no.

[42] When M gave evidence, defence counsel cross-examined him on the complainant's use of the word "affair" to describe what had happened between her and the appellant. He then wound up his cross-examination in this way:

> Q When you said that she had to go and see her boss, did you tell her to make sure that she told her boss that she didn't want these things to happen?
>
> A Yeah, yep, yep.

In the course of re-examination, there was the following exchange:

> Q. Did she indicate whether she wanted to have an affair or not?
>
> A. Um, there was no way [the complainant] would ever do that, no.
>
> Q. What do you mean by that?
>
> A. *Um, she's just never, never really thinks about stuff like that, I mean, anything to do with a sexual nature, between me and her even, is always initiated by me, it's, it's never by her.*
>
> Q. Right, well I'll pause you there, because I don't intend to pry.
>
> A. No[.]
>
> Q. And we probably strayed a little bit off the line.
>
> A. Yep.

The passage italicised is the first of the passages of evidence about which the appellant now complains.

[43] The prosecutor had not initially intended to lead evidence from the complainant's mother but concerns over the way in which the complainant had given evidence resulted in the prosecutor seeking permission from the Judge to call her. Over the opposition of defence counsel, Judge Weir granted the application, contemplating that the evidence to be adduced would be confined to a description of the complainant's disabilities and a response to the allegation that the mother had put pressure on the complainant to allege lack of consent.

[44] In her evidence in chief, the mother gave evidence generally in accordance with her affidavit. She stated that the complainant had never achieved any qualifications at school, that she had a reading and writing age of about a 10 year old, that she had no understanding of numeracy and very little understanding of time and distance. She explained that she was reserved in her dealings with others, that she was not particularly trusting of people, but that she had a phenomenal memory. Towards the end of her evidence in chief, the mother indicated that she (the mother) worked as a clinical nurse specialist and has a masters degree.

[45] The complainant's mother did not give a technical description of the nature of the complainant's mental condition. The closest she came was in the following exchange in her evidence in chief:

> Q. Has she ever undergone a formal diagnosis process?
>
> A. Um, no, no she hasn't, ah, she did – I did seek input from, ah, paediatrician when she was younger, that was before the, um, before Asperger's or autism spectrum was fully understood …

[46] In cross-examination, there was the following exchange:

> Q. When your daughter was talking to you about these events, did you indicate to her that you accepted what she was telling you, that she wouldn't have consented to what was happening?
>
> A. *You see, um, [the complainant] has, she hasn't got the ability to fabricate things, um, she just tells the truth, she just tells it as it is and, and I've known, you know, that's, that's just the way she is.*

The answer we have italicised is the second piece of evidence about which the appellant complains.

[47] Shortly after that exchange, re-examination commenced. The first question asked in re-examination and the complainant's mother's answer to it were:

> Q. Just one question, … right near the end there, my learned friend had a question for you about [the complainant] … not consenting, not wanting these things to happen, how did that come into the conversation?
>
> A. *Um, [the complainant], you know the fact that [Mr Taiatini] was married, you know, she lives in a very black and white world what,*

> *what is right and what is wrong and doing anything with a married man is, is just not, not what she would, not what she would do, you know, it's, it's just against all her morals she just lives in a black and white world what is right is right and what is wrong is wrong.*

The italicised answer is the third piece of evidence about which there is complaint.

[48] The appellant gave evidence and asserted that the complainant had consented to all sexual contact and had initiated some of it.

[49] The complainant gave evidence for approximately a day. As a result, the jury was well-placed to assess her as a person, an exercise which was no doubt contributed to by the evidence from her mother and M. There was also evidence from the complainant's supervisor, which confirmed that the complainant lacked initiative and was very rigid in her thinking, particularly about rules. The overall picture of the complainant which emerged is of a person who, while able to present and interact with other people reasonably well, is significantly compromised by her intellectual limitations, and, perhaps as a result, is guarded, not trusting in her dealings with others, generally lacking in initiative and very much a stickler for proper behaviour.

[50] In his closing address, the prosecutor made only passing reference to the disputed evidence:

> … you can dismiss the accused's evidence outright, and in brief you can do that because it's inconsistent. It's inconsistent with what the complainant had to say, classic he said, she said, you might think, *but it's inconsistent with what her mother had to say about the nature of the complainant. You had this idea that she was the initiator of some conduct, that she was an eager participant, that she was into this. Well, that's inconsistent with what her boyfriend had to say about the nature of the woman.* And this idea of her showing initiative per se is completely inconsistent with what her own manager had to say about her. Unless you told her to do something specially she wasn't going to do it. Her mother said she's shy. You probably formed your own views about her nature from her presentation in the day and a bit that you saw her. Is that the same woman that you hear the accused described to you? Well, the Crown says it's not.
>
> And when you're hearing people like … the manager, say, "Look, no, she didn't have initiative, she wasn't …" you know, " … this popular mover and shaker of the workplace," but it sounds like the accused was.
>
> …

Finally, there's this idea that, "Look she's an agreeable person," and I've covered this, ladies and gentlemen. There's this idea that her parents and [M] would have been upset. She would have picked up on this and she would have decided to say it was not consensual to try and keep them happy. *You've heard a little bit about her moral character in terms of how she rolls*, … .

[51] In his closing address, counsel for the appellant said:

I realise her mother said she can't lie, but people can either deliberately or otherwise unintentionally twist things to conform with what they genuinely believed happened. They convince themselves that's what occurred. [The complainant], I submit to you, is no exception. She doesn't want to upset people. To some extent, she will take the path of least resistance; those were, I think, the words of her mother.

You heard about how she does not like to cause scenes from [the manager], from [M], and her mother. Is it not a real possibility, if not a probability that [the complainant], although she may have not have wanted the accused['s] attentions, was unable or unwilling to get that message across? And that, in my submission members of the jury, is where this really comes down to. That she was simply unable to get that message across. But that's not a reflection on the accused, not a reflection on her, it's simply the reality of the situation.

I'm not saying she is deliberately lying, but because of who she is she can get things confused. She finds it hard to get out the words to say no. It's my submission to you that her recollection of events may not be accurate or may have been influenced by others, either directly or indirectly, and I'm not suggesting that it was done deliberately or with any sinister motive. Again, that's not a criticism of [the complainant], it is just a matter of who she is.

…

In her mind she was thinking, "I don't want this to happen. I was protesting to myself." But it's not what she was saying to the accused. In my submission, that ties in with her personality, in my submission. The path of least resistance. She was protesting but it was an internal protest. She wasn't coming out and saying, "No, get out of there," "No, I'm going to tell my mother" or "No, I'm gonna tell [the manager]." But she's come along now and said that she was saying no because that's genuinely what she believes. People have said to her, "You must say you didn't consent."

Now I'm not saying for one moment that they are trying to put words into her mouth, but they have – know her, her parents, [M], they don't believe that she would have consented. And what they are simply saying is, "You must say you didn't consent," and she is reflecting on that and that's what she's saying, but she's going further and saying, "Well I actually said no" rather than this internal protesting that she was doing. And it's that need to say she was not consenting that's been fixed in her mind.

[52] The Judge did not address the disputed evidence in his summing up.

The approach of the Court of Appeal

[53] The Court discussed the disputed evidence in this way:

> [17] The practical response to such evidence when it arises in a trial depends very much on the context in which it was adduced. If either of the statements … complained about from the mother's cross-examination and re-examination had been included in a brief and had been the subject of pre-trial challenge, there would most likely have been a ruling that it was evidence intended to bolster the credibility of the complainant and, as such, would be inadmissible.
>
> [18] However, that is not how the evidence arose. The complainant's mother was drawn into commenting on whether the complainant should be believed by a question in cross-examination to which she gave a predictable answer. The question in re-examination was a legitimate one, with the witness's answer apparently being unexpected. The same point applies to the boyfriend's answer in re-examination.
>
> [19] A counsel of perfection would be to observe that such comments were worthy of a cautionary direction from the Judge. Alternatively, the trial Judge might have indicated to Crown counsel in the absence of the jury that reliance on those answers would be inappropriate in the Crown closing. An appropriate direction may have been along the following lines:
>
> > [The mother's] evidence included observations about the complainant to the effect that she could not tell a lie, and that she would not have a sexual relationship with a married man. Also, the complainant's boyfriend said in re-examination, in effect, that the complainant would never initiate such sexual activity because it is not in her nature. If you found either of those to be truthful witnesses, you might be more inclined to believe the complainant's version of what happened, because of those comments from either her mother or her boyfriend. I caution you against doing that. You should come to your own view on whether you find the complainant a truthful and reliable witness and in doing so you should not be influenced by what other witnesses have said about her truthfulness or reliability.
>
> [20] In fact, the Crown made nothing of these three passages in closing and it appears that the defence did not request the Judge to address them. It is therefore understandable that there was not a direction, beyond the Judge stating that the jury would have to consider the complainant and make its own assessment of her as a person.
>
> [21] … Reflecting in the present case on the direction that could possibly have been given to the jury, we acknowledge [counsel for the Crown's] submission that the risk of the mother's comments in cross-examination and re-examination inappropriately bolstering the complainant's credibility, was a relatively low level concern. So, too, with the comment by her boyfriend. The risk was that undue prominence might have been given to them in juror's minds, if the Judge pointed out the potential support for the complainant's credibility that could be taken from them.
>
> [22] In circumstances where the Crown made nothing of it, and the defence did not request that it be addressed, we are satisfied that the absence

of any further direction on the point did not give rise to any material risk of a miscarriage of justice.

An evaluation

Some general comments

[54] The defence theory that M and the complainant's parents had put into the complainant's head the idea that the sexual activity was non-consensual was not developed in great detail. It was not argued that M and the parents set out to induce the complainant to lie. Rather, it was suggested that when they talked to the complainant, they were so emphatic that she had not consented as to put pressure on her to assert the absence of consent first to her supervisor and later to the police.

[55] This line of defence made it inevitable that M and the complainant's mother had to be cross-examined on their interactions with the complainant. As well, given that the defence amounted to an allegation of recent invention, what the complainant said to M and her mother was directly admissible under s 35 of the Evidence Act 2006.

[56] In the result both M and the complainant's mother had to be, and were, examined on the proposition that each had put pressure on the complainant to say that she had not been a willing participant. A witness to whom such a proposition is put can be expected not only to deny the proposition but also to explain why it is wrong. Such an explanation may be legitimately given directly in response to the cross-examiner's questions or, alternatively may be elicited in re-examination.

[57] In at least a general sense all the disputed evidence was responsive to the defence theory:

(a) The mother's assertion that the complainant could not lie bears on the complainant's veracity, a point to which we will revert shortly. But from the mother's point of view, what she perceived to be the complainant's inability to lie was by way of explanation as to why she did not put pressure on the complainant to tell a story which did not

conform to the truth and, perhaps, as to why such pressure would have been unavailing.

(b) The mother's assertion that the complainant lived in a black and white world and would not engage in sexual activity with a married man bears on the complainant's propensity to engage in sexual activity with the appellant. But again, looking at the assertion from the view point of the mother, the fact that it was obvious to her that the complainant would not have consented provided another reason why there was no occasion for her to put pressure on the complainant to assert lack of consent.

(c) The position is essentially the same in relation to M's evidence as to the complainant's lack of sexual initiative. The answer M gave (to what was a completely open-ended question from the prosecutor) was directly responsive to the suggestion that the complainant may have wished to have an affair and, more generally, responsive to the defence theory as to pressure.

[58] It is also worth noting that, despite the points just made, the disputed evidence was not entirely unhelpful from the point of view of the defence. Looked at in the round, it was strongly indicative of M and the mother having fixed views as to the improbability of the complainant having consented. The more fixed those views, the more plausible the theory that their discussions with the complainant proceeded on the footing that she did not consent – something which may have put implicit pressure on the complainant to assert lack of consent. This is very much the way defence counsel put the case in closing.

M's evidence as to lack of sexual initiative

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

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) 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.

The evidence given by M as to the complainant never taking the initiative in relation to sex falls within the s 44(1) prohibition and the permission of the Judge was not obtained.

[60] Section 44 is for the protection of complainants. Where such evidence has been called accidentally (as it was here), it is at least open to question whether s 44 can be relied on by an appellant as a ground for challenging a conviction. It is for instance clear that an appellant may not challenge a conviction on the basis that a prosecution witness gave evidence in breach of the privilege against self-incrimination.[10]

[61] In any event, this aspect of the case is of limited moment. There was a wealth of evidence before the jury which pointed to the complainant generally never taking the initiative and being untrusting of people and reserved in her dealings with others. It will be recalled that at the party the Saturday before the offending, the complainant had become extremely upset in respect of the incident in which a man had been over-familiar with her. As will be apparent from the passage earlier cited from the closing address of defence counsel, by the end of the case the defence was primarily based on a reasonable belief in consent rather than that the complainant had taken the sexual initiative.

The mother's evidence that the complainant cannot lie

[62] On the argument of counsel for the appellant, this was evidence of the complainant's veracity – that is "the disposition of [the complainant] to refrain from lying"[11] – which was inadmissible as it was not substantially helpful and thus did not meet the admissibility threshold under s 37(1) which provides:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.

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10 *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322 at [28]–[30].

11 See the definition of "veracity" in s 37(5) of the Evidence Act.

[63] We are of the view that the evidence was not admissible as to the complainant's veracity as it was not substantially helpful. The assertion that the complainant "just tells the truth" is too general and conclusory. To be substantially helpful, far more detail would have been required. There was also no substantial foundation for the opinion that "she hasn't got the ability to fabricate things". If the inability to fabricate was said to be a function of the complainant being autistic, independent expert evidence would have been required.[12] If, instead, it was hoped that veracity could be demonstrated by the invariable past behaviour of the complainant, far more detailed evidence of that past behaviour would have been required than was actually given. And even if such evidence was available, there might still have been an issue as to whether it met the substantial helpfulness test. As to this, we consider that trial Judges should be cautious before concluding that the substantial helpfulness test has been satisfied in the case of evidence of veracity from a close relative of the witness.

[64] Once again, however, we see the disputed evidence as being of limited moment. The principal thrust of the defence advanced in closing was reasonable belief in consent rather than actual consent as suggested in the opening statement. The case was not put to the jury on the basis that the complainant was a liar. Before us, counsel for the appellant suggested that it was the mother's evidence on this point which practically required counsel for the defence to close to the jury in the way in which he did and that this represented a substantial change of tack from the way in which he had described the case in his opening statement. This argument, however, is not consistent with the way in which the defence case was conducted. The appellant gave evidence of what, if his evidence was correct, was consensual sexual activity and on his evidence, the complainant's account of the events was untrue. So to this point in the trial there was no change of tack. The prosecutor cross-examined the appellant effectively on his claims of consensual sexual activity (making use of the letter of apology and without relying on the evidence of the mother as to the complainant's inability to lie) and in light of that cross-examination, the rather softer tone adopted by defence counsel in closing is understandable.

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[12] Such evidence was called in *R v VJS* [2006] EWCA Crim 2389.

The mother's evidence that the complainant would not have an affair with a married man

[65] The comment made by the mother about the complainant living in a "black and white world" and that, for this reason, she would not engage in sexual activity with a married man was said to amount to illegitimate propensity evidence for the purposes of s 40 of the Evidence Act.

[66] The evidence was not adduced for the purpose of establishing the propensity of the complainant to engage in sexual activity with a married man. The problem with the evidence does not lie in the propensity rules (which operate restrictively only in relation to defendants) but rather in the probable infringement of s 44 of the Evidence Act.

[67] Again, however, there is not much of moment in the complaint. By the end of the case, the focus of the defence was on reasonable belief in consent rather than consent. As well, we are far from convinced that an accidental breach of s 44 (assuming there was one) can be legitimately the subject of complaint by the defence.

Drawing the threads together – was there a miscarriage of justice?

[68] It may have been better if the Judge had cautioned the jury against putting any weight on the disputed evidence. But such a caution can carry the risk of unnecessarily emphasising its subject matter. And, as well, by the time the Judge came to sum up, the primary focus of the defence case was no longer on the propositions that the complainant was lying (thus rendering irrelevant the inability to lie comment) or had actually consented to sexual activity (thus rendering irrelevant the evidence as to her lack of sexual initiative and likely attitude to having sex with a married man).

[69] In those circumstances, we are of the view that there was no miscarriage of justice.

Disposition

[70] The appeal is dismissed.

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