NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE SUPREME COURT OF NEW ZEALAND

SC 42/2014
[2015] NZSC 36

BETWEEN	ABRAHAM EPARAIMA KOHAI Appellant
AND	THE QUEEN Respondent

Hearing:	22 October 2014
Court:	McGrath, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	W C Pyke and S K Green for Appellant J M Jelas for Respondent
Judgment:	16 April 2015

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Arnold J)

[1] Like the appeal in *DH (SC 9/2014) v R*,[1] the judgment in which we are delivering contemporaneously, this appeal raises the issue of counter-intuitive evidence. This is evidence given by an expert in order to correct erroneous beliefs or assumptions that fact-finders may hold about how children who have been sexually abused behave. The aim of such evidence is to avoid illegitimate reasoning by fact-finders. Mr Pyke, who argued the appeal in *DH (SC 9/2014)*, also argued the present appeal.

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1 *DH (SC 9/2014) v R* [2015] NZSC 35.

[2] The background is that the appellant was convicted following a jury trial before Judge Wolff on nine of 14 counts of historical sexual offending against three complainants, all of whom were under 12 years of age at the time of the offending. He was acquitted on a number of additional counts. He appealed against his convictions on two grounds – trial counsel incompetence and wrongful admission of evidence from a psychologist, Dr Suzanne Blackwell, addressing counter-intuitive behaviour. The Court of Appeal dismissed his appeal.[2] The appellant was granted leave to appeal to this Court on the question whether the Court of Appeal was correct to dismiss his conviction appeal.[3]

[3] In his written submissions, Mr Pyke identified two matters in relation to the appellant's trial which, he said, had the combined effect of rendering the trial unfair. These were:

(a) The counter-intuitive evidence called by the Crown was over-broad and, in part at least, inadmissible; and

(b) The prosecutor made inappropriate and prejudicial remarks about the appellant in her closing address to the jury, which were not sufficiently addressed by the trial Judge in his summing up.

Mr Pyke also raised two points about the Court of Appeal's decision in his written submissions:

(c) The Court did not deal fairly with the appellant, who gave evidence before it.

(d) The Court considered the various points raised by the appellant in isolation rather than considering them as a whole.

[4] Although he identified the issue, Mr Pyke did not elaborate on the alleged failure of the Court of Appeal to treat the appellant fairly in either his written or oral

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2 *Kohai v R* [2014] NZCA 83 (Harrison, Simon France and Dobson JJ) [*Kohai* (CA)].
3 *Kohai v R* [2014] NZSC 91.

submissions. Accordingly, we take that aspect no further. We will address the remaining issues in turn, after we have set out the factual background.

Background

[5] The Crown case was that the appellant sexually abused two sisters, S1 and S2, on a number of occasions during the period 2001–2003 while he was in a relationship with one of their cousins, Ms AP. The two sisters were regular visitors to the appellant's address during this period. In addition, the Crown alleged that on one occasion in late 2006 the appellant sexually abused a third child, C3, who was a member of his extended family.

[6] S1 was the younger of the two sisters and was the first complainant. The Crown alleged that the appellant sexually abused her between July 2001 and May 2003 when she would have been between six and seven years of age. In relation to S2, the second complainant, the Crown alleged that the appellant had offended against her between 1 January 2002 and 31 December 2003 when she was aged about eight or nine years.

[7] In 2004, S1 told her aunt what had happened, and the aunt advised the police. As a consequence, the police interviewed both S1 and S2:

(a) S1 told the police that when she was six or seven she went to the appellant's house, where the appellant took her to a room with her cousin and indecently assaulted them.

(b) S2 alleged two indecent assaults when the appellant carried her to a room in his house while she was asleep. The physical contact occurred outside her clothes in the breast area of her body. S2 said that, on a later occasion, when a number of other people were present including her brother, the appellant touched her breast area while they were in the living room and all the others were asleep after watching a movie.

[8] For some reason the police did not pursue the sisters' complaints in 2004. However, they did interview S2 again in 2010 and S1 in 2012, following an internal review of files involving allegations of sexual abuse against children.

[9] In her second interview in 2010, S2 said that she told Ms AP about the earlier offending in 2004. She described how the appellant touched her breast area and simulated sex many times in different houses. She related frequent acts of digital penetration and incomplete penile penetration of her vagina. She said that the appellant had raped her on a number of occasions, perhaps up to ten occasions. She told her cousin about this when she was nine and another cousin sometime later.

[10] In her second interview in 2012, S1 expanded on what she had said eight years earlier, in particular by alleging that the appellant had raped her.

[11] At trial the jury:

(a) acquitted the appellant on three counts in relation to S1, including one of rape,[4] but convicted him on one count of indecent assault; and

(b) found the appellant guilty of seven counts in relation to S2, including rape by penile penetration and unlawful connection, indecent assault and inducing a sexual act.

[12] C3's mother and the appellant had been in a relationship some years earlier, which produced one child, C3's older half-sister. C3, who did not know S1 and S2, disclosed the offending against her after the appellant's arrest on charges relating to S1 and S2. At trial, the appellant was convicted of doing an indecent act in respect of C3 in late 2006 by rubbing her vagina through her clothes.

[13] The appellant's defence was that all the complaints were false. His counsel challenged the evidence of S1 and S2 as being unreliable and deliberately fabricated. In relation to C3 he emphasised the long delay before she reported the offending, submitting that this meant her evidence was unreliable.

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[4] The charges on which the appellant was acquitted were charges arising out of S1's second interview.

The counter-intuitive evidence

[14] Dr Blackwell's evidence (including evidence in chief and cross-examination) occupies a little over 15 pages of the notes of evidence.[5] Having described her background and expertise (around two and a half pages) Dr Blackwell explained the nature of the evidence she was about to give. She began by saying that she was not seeking to give evidence about this particular case or to comment on whether what the complainants were alleging was or was not true. She described her evidence as "educative expert evidence" designed to "correct any misunderstandings that might be held about the behaviour of children who have been sexually abused". She then covered the following topics:

(a) Delayed or non-reporting of sexual abuse: Dr Blackwell said that a common assumption was that a child or teenager who was sexually abused would immediately tell someone. However, research showed that many victims of sexual abuse either did not report it or delayed reporting it for many years. Dr Blackwell referred to a study on the behaviour of children whose sexual abuse was confirmed by the presence of gonorrhoea, none of whom had reported their abuse prior to diagnosis.

(b) Incremental reporting of sexual abuse: research indicated that even if children report sexual abuse, they often give an incomplete account of what happened. It may take some time for the full account to emerge.

(c) Denial of sexual abuse: research indicates that some children who have been sexually abused will deny it when asked directly, or minimise the extent of what occurred.

(d) Dead end reporting: children sometimes tell a same-age friend or an adult about sexual abuse against them, but the matter is not taken further at the time.

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5 We note that no objection was taken to Dr Blackwell's evidence at trial.

(e) Reasons for delayed reporting of sexual offending: Dr Blackwell identified a number of reasons why children delay reporting sexual abuse, such as the abuser being close to the child.

(f) Sexual offending while others are in close proximity: Dr Blackwell said that while sexual abuse often occurs in secret, it also happens in close proximity to others.

(g) Continued contact with abusers: Dr Blackwell said that some children who have suffered sexual abuse do not actively avoid contact with their abuser, or hate him or her. This is because sexual abuse is often committed by someone to whom the child is emotionally attached or with whom the child cannot avoid contact (such as a close relative or friend) or because the offender and children alike may normalise the abuse.

[15] Dr Blackwell concluded her evidence with the following summary:

> In summary the evidence that I have given today does not prove or disprove that sexual offending has occurred in this case. My evidence has been intended to provide information about the behaviour of children in adolescence who have been sexually abused. As I said before, reading of the literature and my own experience has indicated that reporting of childhood sexual offending is most commonly delayed. However, timing of a complaint does not assist us in determining credibility of that complaint because false complaints may be immediate or delayed and true complaints may be immediate or delayed. We know that some children may not disclose all … of the offending against them in one interview and may require more than one opportunity to give a complete statement to police. Whether a child may fully report sexual abuse may depend on a number of variables, including the questions that were asked of them, their rapport or comfort with the interviewer, whether there was opportunity for them to add additional detail and the child's perception of the consequences for reporting all of the details. Some children may deny having been offended against when asked directly by parents or others and factors related to that include whether they've previously reported the event to someone, the age of the child, gender, relationship of the perpetrator to the child and the perceived supportiveness of the child's parent or caregiver. Some children will tell someone about offending but with no action from the people, person that they've told and this had been referred to as dead-end reporting of sexual – of child sexual abuse and I've also told you that rates of reporting to police are very low. There are a number of reasons for non-reporting and for delay in reporting of true complaints and these include the relationship between the child and the perpetrator, the relationship between the child's parent and caregiver and the perpetrator, the availability of protective competent adults

> in whom a child may confide and fear, threats and feeling[s] of shame and embarrassment. We know that some sexually abused children can come to hate their abusers while others may continue to maintain a relationship with them, despite the offending that's been committed. And finally sexual offending can occur in every possible environment, sometimes with others close by but unaware of the offending.

[16] Defence counsel then cross-examined Dr Blackwell. The following exchange occurred on the topic of false complaints:

> Q … there seems to be an absence from your evidence of the fact that there are in fact, with some regularity, false complaints, do you accept that?
>
> A I'm here to talk about the behaviour of children who have been sexually abused.
>
> Q Yes well behaviour –
>
> A Not about false complaints.
>
> Q That also involves an issue of false complaints doesn't it?
>
> A No, I'm here to talk about children who have been sexually abused.
>
> Q But there are false complaints aren't there?
>
> A I'm sure there are.

Counsel directed Dr Blackwell's attention to an article from an American journal. After a short exchange, Dr Blackwell asked to see the Judge. Following that, counsel did not pursue the topic of false complaints.

The challenge to the counter-intuitive evidence

[17] In his submissions, Mr Pyke contended that the scope of Dr Blackwell's evidence was too broad and that it was, in part, inadmissible. This, he argued, resulted in prejudice that contributed to a miscarriage of justice.[6] Mr Pyke made what he described as a "broad-based critique" of Dr Blackwell's evidence, submitting that Dr Blackwell was not entitled to refuse to answer questions on false complaints and needed to qualify her evidence, including by recognising that some of the studies she referred to may have involved false complaints. Mr Pyke also addressed a number of specific aspects of Dr Blackwell's evidence, namely

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6 As in *DH*, above n 1, Mr Pyke did not mount a general challenge to the admissibility of counter-intuitive evidence.

incremental disclosure, denial when asked by significant adults, children with gonorrhoea, dead end reporting, delay in reporting as a result of fear of reprisals and continued contact with the abuser. We will address each in turn.

[18] Before we do so, however, we make two preliminary points.

(a) First, we discuss the general admissibility of counter-intuitive evidence in *DH*.[7] We will not repeat that discussion here. It is sufficient to note that such evidence will be admissible if the fact-finder is likely to obtain "substantial help" from it in understanding other evidence or ascertaining a fact in issue.[8] Counter-intuitive evidence can be substantially helpful because it corrects erroneous assumptions about the likely conduct of victims of sexual abuse and allows fact-finders to assess a complainant's credibility free from the influence of these assumptions. Such evidence is generic in nature, and says nothing about whether a particular complainant is or is not telling the truth. The evidence must be relevant to a live issue in the case, so that evidence dealing with features not present in the particular case will not be substantially helpful.

(b) Second, Mr Pyke argued that the solution to the problems he raised was to limit the scope of counter-intuitive evidence. This raises the issues, discussed in *DH*, of how detailed counter-intuitive evidence should be[9] and whether there are other ways in which the important messages that counter-intuitive evidence contains can be delivered to a jury.[10] Again, we will not repeat that discussion here, beyond reiterating the Court's concern at the length of Dr Blackwell's counter-intuitive evidence. As we say in *DH*,[11] counsel should attempt before trial, with the assistance of the judge if necessary, to ensure that any counter-intuitive evidence is given as briefly and

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7 *DH*, above n 1, at [29]–[30].
8 Evidence Act 2006, s 25(1).
9 *DH*, above n 1, at [99]–[103].
10 At [104]–[113].
11 At [103].

> clearly as possible.[12] It may be that in some cases all that is required is something in the nature of a summary such as that set out at [15] above.[13] Consideration should also be given to whether there are other ways in which the possibility of erroneous reasoning by the jury can be addressed, through an agreed statement of the essential propositions, for example.

[19] We turn now to the various criticisms made by Mr Pyke of Dr Blackwell's evidence.

Broad-based critique

[20] The most significant aspect of Mr Pyke's broad-based critique was a challenge to the empirical basis for Dr Blackwell's evidence. We have addressed that aspect at [31]–[41] of the *DH* appeal and will not repeat that discussion. It is sufficient to say that we do not accept that the points raised by Mr Pyke mean that the appellant's trial miscarried.

[21] There was a further dimension to the critique in the present case, however, arising out of Dr Blackwell's refusal to engage with defence counsel in relation to false complaints. Mr Pyke submitted that Dr Blackwell was not entitled to refuse to answer questions about false complaints in the context of questions about the research underlying her evidence. As we noted earlier, when defence counsel attempted to cross-examine Dr Blackwell about an article dealing with false accusations of sexual abuse, she asked to see the Judge. There is no record of what was said, but Judge Wolff gave a ruling in which he said that he considered the safest course was a have a voir dire to enable counsel to put his questions to Dr Blackwell and then to make a decision as to admissibility on that basis.[14] However, defence

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12 We note that in the present case Judge Wolff gave a pre-trial ruling in which he clarified which parts of Dr Blackwell's brief of evidence would be led and which parts were included simply to assist counsel; *R v Kohai* DC Tauranga CRI-2011-021-000450, 29 October 2012 (Judge Wolff) (Pre-trial Ruling). In relation to those parts of the brief which were to be led, defence counsel was to identify any aspects that he considered objectionable before Dr Blackwell gave her evidence.

13 *DH*, above n 1, at [112]–[113].

14 *R v Kohai* DC Tauranga CRI-2011-021-000450, 31 October 2012 (ruling 2).

counsel then indicated that he did not wish to pursue the matter, apparently following a discussion with Dr Blackwell.

[22] It is not clear from the material available to us why Dr Blackwell was unwilling to answer questions about false reporting, beyond acknowledging that it occurred. While some of the studies Dr Blackwell relied upon could not have involved instances of false reporting,[15] it is possible that others may have. But we do not accept that Dr Blackwell's unwillingness to discuss false reporting created any risk of a miscarriage of justice. Although we are not aware of the full extent and nature of research into false complaints, it seems unlikely that Dr Blackwell could have done much more than acknowledge that false complaints do occur and that factors such as delay in reporting are not diagnostic of sexual abuse but may occur where there are false complaints.[16] She could not, of course, have said anything about whether or not this case involved false complaints. Defence counsel sought to use Dr Blackwell's unwillingness to discuss false reporting to advantage, describing her in his closing address as the Crown's "spin doctor". Defence counsel made it clear to the jury that the defence was that the complaints were false.

[23] As part of his general critique of Dr Blackwell's evidence, Mr Pyke also submitted that Dr Blackwell's evidence gives the impression, when read as a whole, that the "vast majority" of cases where the factors which she discusses exist are cases of actual sexual abuse. In effect, Mr Pyke was arguing that there was a risk, given the way the evidence was presented, that the jury would use it in a diagnostic fashion, rather than simply as evidence designed to dispel myths and so remove a potential impediment to accurate fact-finding.

[24] However, Dr Blackwell was at pains at the outset of her substantive evidence to make the point that she was not expressing any view about whether the complainants' allegations were true or untrue. She said that she had not interviewed either the complainants or the appellant and that her evidence "does not prove or disprove anything". When Dr Blackwell was asked in the course of her evidence-in-

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15 We note that two of the studies that Dr Blackwell relied upon could not have involved false complaints about sexual abuse as, in one case, the children involved had gonorrhoea and in the other, the abuser had video-taped his abuse of the children.

16 As she did – see below at [24].

chief to summarise what the research and her experience indicated about delayed reporting, she replied:

> Well experience and research tells us, that reporting is most commonly delayed, but whether it is delayed or immediate does not assist us in determining the credibility of any complaint. Because just as immediate complaints may be true or untrue, delayed complaints may be true or untrue.

Finally, when the prosecutor asked her to summarise her evidence, Dr Blackwell began by saying that her evidence "does not prove or disprove that sexual offending has occurred in this case".

[25] Prosecuting counsel reinforced this point in closing to the jury, as follows:

> On behalf of the Crown it is my responsibility to explain that Dr Blackwell's evidence is not directed to the specific facts of this case or to whether you should accept the [complainants'] evidence as being the truth. Dr Blackwell, as she told you, has neither examined the complainants nor considered the detail of this case and even if she had done both of those things she could still not tell you about whether the offending had actually occurred for that is not her role but your role as the jury. Dr Blackwell was here to explain, in general terms, how complainants can react in relation to sexual offending in order that you may approach your determination of the facts unaffected by [stereotypical] thinking or common misconception. But, again, the doctor's evidence cannot help in determining whether the complainants' evidence is correct, that role is yours alone as the jury.

[26] The Judge also reinforced this in his summing up when he said:[17]

> The psychologist that gave evidence explained to you that she was saying nothing about the individuals involved in this case; any of the three complainants or the accused. And that the purpose of her evidence was simply to educate you and highlight to you that there are some misconceptions that are abroad … as to how children react when they have been abused. Her evidence was directed to that issue alone and to explain to you that there is scientific support for the proposition that there can be rational reasons why a child does not complain, or delays complaint, or complaints come out over a period, or complaints are not made to people that you might otherwise expect them to be made to.

The Judge went on to say that the evidence was general evidence, designed to assist the jury, and that it said "nothing about this case directly".[18]

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[17] *R v Kohai* DC Tauranga CRI-2011-021-000450, 1 November 2012 (Summing up of Judge Wolff) [District Court summing up] at 7.

[18] At 7.

[27] Mr Pyke submitted that such judicial directions were not sufficient to cure the prejudice arising from Dr Blackwell's evidence or to prevent the jury from engaging in false reasoning. However, against the background just outlined we do not accept that there was any risk that the jury would have engaged in illegitimate reasoning such as: "because (a) delayed reporting (for example) is often seen in cases of child sexual abuse and (b) there was delayed reporting here, therefore (c) this must be a case of child sexual abuse". Rather, we think that it would have been clear to the jury what the purpose and scope of Dr Blackwell's evidence was.

Incremental disclosure

[28] Both S1 and S2 made incremental disclosures of the sexual abuse they said they had suffered. Both made initial disclosures in 2004 and made further disclosures later in 2012 and 2010 respectively. Mr Pyke made two points about Dr Blackwell's evidence on incremental disclosure:

(a) First, he said that the reasons for the complainants' incremental disclosure were before the jury, so that the evidence was unnecessary.

(b) Second, he said that her evidence was based on one "very large" Canadian study, with no reference to the actual size of the study or to supporting studies, so that the picture presented was incomplete. He also submitted that there was no indication of how reliable the information provided to the study's researchers was.

[29] As to the first point, Mr Pyke made a similar submission in *DH*. There he argued that Dr Blackwell's evidence about delay was unnecessary as the complainant in that case had explained the reasons for her delay in reporting. The Court rejected that argument and held that the fact that a complainant has provided an explanation for delay does not mean that delay ceases to be a live issue, particularly when defence counsel relies on the complainant's delay in reporting the alleged abuse as a basis for treating the complainant's allegations as untrue.[19] As in *DH*, we consider that Dr Blackwell's evidence on incremental reporting was substantially helpful.

[19] *DH*, above n 1, at [46]–[49].

The jury may well have been under a misapprehension that a child who has been abused would report the offending in full as soon as possible. Dr Blackwell's evidence concerning incremental reporting sought to remove that misapprehension. It did not, however, purport to say anything about the incremental reporting by S1 and S2 and whether their complaints were fabricated or true. Against the background that counsel for the appellant had pointed to the differences between the versions of events that S1 and S2 gave in their first and second interviews as being indicative of their dishonesty, the members of the jury had to consider whether they accepted the explanations given by S1 and S2 for the differences, and were able to do so free of any misconceptions.

[30] In relation to Mr Pyke's second point, Dr Blackwell gave a brief summary of the results from the Canadian study in her oral evidence. She said that the extent to which children disclose sexual abuse depends on a number of variables and gave examples of those. She did not go into the study in detail and it is difficult to see what the point of that would have been. She had, after all, provided a brief of evidence, which was available to counsel prior to trial. It referenced the material that she relied upon. Had there been any issues about the underlying research, counsel could have taken them up at trial. It was understandable that he did not, as limited use was made of the material.

Denial when asked by significant adults

[31] Mr Pyke submitted that that Dr Blackwell's evidence on this topic was unwarranted as the issue did not arise in the present cases. The Court of Appeal accepted this, but did not consider that there was any prejudice as a consequence.[20]

[32] Ms Jelas argued that the evidence was in fact relevant. She noted that when interviewed in 2004 S1 had said that, after the appellant had sexually abused her when she and her cousin were doing an errand for her mother, they began crying and ran back to her mother's house. Noticing that the girls had bloodshot eyes, S1's mother asked why their eyes were bloodshot and whether something had happened. Both denied that anything had happened and said that they were just playing a game.

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[20] *Kohai* (CA), above n 2, at [38].

Later, however, when her aunty asked her specifically whether anyone had been touching her body, S1 responded that the appellant had. S1's explanation for her failure to tell her mother initially was that the appellant had threatened to kill her if she told anyone and she was afraid that he would harm her and her family. The position in relation to S2 was similar, in the sense that she denied further abuse when asked by the interviewer in 2004 but disclosed such abuse during the 2010 interview, although the reason she gave for her initial failure to disclose was that it was "disgusting".

[33] We accept Ms Jelas's submissions on this point. Dr Blackwell gave a number of reasons why abused children may not disclose sexual abuse when they have an opportunity to do so, including embarrassment, physical fear, worry about a family breakup and concern about getting into trouble. Defence counsel did attempt to make something of the fact that there was late and partial disclosure by both S1 and S2 in his closing. We consider that Dr Blackwell's evidence on this topic was substantially helpful.

Children with gonorrhoea

[34] In the course of her evidence, Dr Blackwell referred to a study of children who had contracted gonorrhoea. Mr Pyke said that this evidence was irrelevant and prejudicial as it "tended to suggest an undertone of a sexually transmitted disease being a factor in this case". The Court of Appeal accepted that the evidence was irrelevant, but held that it had no prejudicial effect, as it was peripheral in nature and would not have had an adverse effect on the jury's deliberations.[21]

[35] Dr Blackwell referred to the study of children with gonorrhoea in the context of discussing the failure by children who had undoubtedly been sexually abused to disclose the abuse, either at all or fully. The gonorrhoea study and another study which involved children whose abuser had videotaped the abuse were useful because there was objective evidence establishing the children had been abused but had failed to disclose the abuse. The only relevance of the fact that the children had gonorrhoea was that it established that they had been sexually abused.

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[21] At [41](b).

[36] We do not accept that the evidence was either irrelevant or prejudicial. Dr Blackwell was simply explaining the basis for her conclusions. There is a legitimate issue as to the length of Dr Blackwell's evidence: whether simply identifying relevant conclusions rather than also describing supporting research material might be sufficient, at least in some instances.[22] But we fail to see how this evidence could have illegitimately prejudiced the jury against the appellant, especially when part of the Judge's summary of the defence case is taken into account. The relevant part of the Judge's summary was:[23]

> The Crown expert accepts that false complaints can be made. Her evidence was restricted to giving you detail about people where it had been scientifically established – both the gonorrhoea test and the video test and so on, where there had been actual occurrences. So you cannot be sure, in this case, that there is not a false complaint and that the Crown's expert evidence does not assist you here, because the first step is that you have got to be sure that it is not a false complaint and you cannot be sure of that here.

Dead end reporting

[37] Mr Pyke complained the Dr Blackwell's evidence about dead end reporting was irrelevant as S1 and S2 did report the abuse to others in 2004 and were interviewed by the police. Ms Jelas agreed that the evidence was redundant but submitted that it in no way prejudiced the appellant, as the Court of Appeal held.[24]

[38] We accept that the evidence was irrelevant to the delay prior to the offending being reported to the police in 2004. But there was then a substantial delay until 2010–2012, which apparently resulted from the police not pursuing the information they received in 2004 in a timely way. As far as S1 and S2 were concerned, the police inaction was an instance of dead end reporting and may well explain why they did not make any further complaints until approached by the police in 2010 and 2012. Accordingly, this evidence has some relevance and meets the substantial helpfulness test.

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22 See above at [18](b).
23 District Court summing up, above n 17, at 19.
24 *Kohai* (CA), above n 2, at [41](c).

Delay in reporting from fear of reprisals

[39] Mr Pyke accepted the relevance of Dr Blackwell's evidence that delay in reporting can result from fear of reprisals from the perpetrator but said that it should have been "pared down" to match the issues in this case. As an example, Mr Pyke pointed to the fact that Dr Blackwell had said that delayed reporting can result from threats to pets or parents, neither of which were raised in this case.

[40] There is no substance to this complaint. The question of delay in reporting was a live issue in this case. Dr Blackwell's evidence referred to research which found that abused children delayed reporting their abuse for a variety of reasons, examples of which she gave. Ultimately, it was the jurors' task to consider whether the delay in this case indicated, as the defence suggested, that the abuse had never occurred, or whether they accepted the explanations given by S1 and S2 for the delay. Had Dr Blackwell's evidence on delay dealt only with delay on account of threats of the kind involved in this case, it may have been asserted that she was tailoring her evidence too closely to the facts of the particular case, thereby running the risk that the jury would use her evidence in a diagnostic fashion.

Continued contact with abuser

[41] Mr Pyke submitted that Dr Blackwell's evidence about the continued contact with, and attachment to, their abuser that some abused children display was irrelevant and prejudicial. The abuse of S1 and S2 was alleged to have occurred during the period 2001–2003; the appellant's relationship with the complainants' cousin, Ms AP, ended in May 2002; yet the complainants did not report the abuse until 2004. Accordingly, Mr Pyke said, continued attachment to the appellant (whether directly or through Ms AP) could not have been an explanation for the complainants' delay in reporting. However, the appellant and Ms AP were in a relationship for part of the period of the offending. As the Court of Appeal pointed out,[25] the appellant was close to the complainants in a familial sense even though his relationship with Ms AP ultimately came to an end. But even if Dr Blackwell's evidence on this point had been wholly irrelevant, and so not substantially helpful, we do not see how it could have caused the appellant's trial to miscarry, particularly

[25] At [41](e).

as Dr Blackwell emphasised that her evidence did not go to whether or not the complainants were telling the truth, as did the prosecutor and the Judge.[26]

Prosecutor's conduct

[42] Mr Pyke raised a point, not raised before the Court of Appeal, about the prosecutor's closing address to the jury. Early in her closing, prosecuting counsel said:

> The first thing is that you know about the accused's taste in girls. At the time he offended against [S2] and [S1] he was publicly in a relationship with a girl who was a teenager, 15 or 16 years old [Ms AP]. You have heard he was well over double in his age. In fact he was a day older than her [Ms AP's] mother. It is a matter entirely for you but you may conclude that much younger girls is what he had a taste for.

Later she said:

> So that's four matters that perhaps might lay a foundations for your deliberations. Firstly, you have heard he has had a taste for young girls; secondly, you have heard about his controlling and violent personality which let him do what he did and letting him get away with it for so long; thirdly, you now that the family life that [S1], and [S2] in particular, had, was lacking support, they were easy to prey on; and fourthly, you have three complaints all saying the same thing.

[43] Mr Pyke objected to the two references to the appellant's "taste for young girls", which, he said, were prejudicial to the appellant. He also drew attention to the references to the appellant's "controlling and violent personality". Mr Pyke noted that there were a number of references in the evidence to the appellant using physical violence against Ms AP when they were a couple. He also drew attention to the fact that one of the witnesses had referred to the appellant "coming up on charges" and possibly being in prison. Mr Pyke said that all this evidence was irrelevant and prejudicial.

[44] Ms Jelas accepted that the prosecutor was wrong to submit that the appellant had a taste for young girls and to refer to his relationship with Ms AP as an example of that. We agree. While it is not entirely clear what age Ms AP was when her relationship with the appellant began, at worst she was 15 going on 16, although she

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[26] See above at [24]–[26].

may well have been 16. But whatever the case, the relationship between the appellant and Ms AP was a consensual one and had no relevance to the sexual abuse allegations in relation to the three complainants, who were much younger than Ms AP at the time of the offending. We consider that the prosecutor's remarks were unjustified and inflammatory. They fell below the standards required of prosecuting counsel and should not have been made. As this Court emphasised in *R v Stewart (Eric)*,[27] prosecuting counsel is entitled to be firm – even forceful – in what is after all an adversary process. But a prosecutor must present the Crown case in a way that is dispassionate and analytical and may not make intemperate, inflammatory or emotive remarks about an accused.

[45] As to the evidence of the appellant's controlling and violent nature, Ms Jelas said that this was relevant. Both S1 and S2 had direct knowledge of the appellant's violence towards Ms AP (in her initial video interview, S2 referred to the appellant giving Ms AP "hidings"), and this meant that they gave credence to the appellant's threats of harm if they disclosed his offending.

[46] Furthermore, the Judge warned the jury in relation to the evidence of the appellant's violence. He instructed the jury that it did not add anything "to the likelihood or otherwise of whether he has committed the type of offence that is alleged in this case".[28] He later referred to the possibility of prejudice against the appellant because of the things he was said to have done and told the jury that it would be wrong for them to allow that to affect their decision. The Judge told the jury that they had to be objective.[29]

[47] We consider that the evidence of the nature of the appellant's personality was relevant, for the reason given by Ms Jelas. If the jury accepted that the appellant had a violent personality, that was relevant to S1's explanation that she did not immediately report his abuse of her because she was afraid of what he might do to her or others.

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27 *R v Stewart (Eric)* [2009] NZSC 53, [2009] 3 NZLR 425 at [19]–[22].
28 District Court summing up, above n 17, at 8.
29 At 11.

[48] Finally, as Mr Pyke said, evidence that the appellant had faced charges and might have been in prison "popped out" while a Crown witness was giving her evidence. No further mention was made of this – all concerned seem to have ignored it.

[49] Where potentially prejudicial material is mentioned in passing by a witness, a decision must be made whether to instruct the jury to disregard it (which draws the jury's attention to the material) or simply to ignore it, on the basis that, from the jury's perspective, it is likely to be lost in the "noise" of the trial. Obviously, the degree of potential prejudice will be an important factor in this decision. Here, the reference was fleeting and non-specific and would have had little or no impact. It is understandable that defence counsel did not raise the matter with the Judge, and that the Judge did not feel it necessary to say anything of his own motion. Ignoring the reference was the sensible course.

[50] We have accepted Mr Pyke's submission that the prosecutor's comments about the appellant having a "taste for young girls" were inappropriate and should not have been made. Such rhetoric has no place in a prosecutor's address to a jury. We do not accept, however, that the trial miscarried as a result. As noted, the Judge cautioned the jury not to be influenced by prejudice, or by sympathy for the complainants. Mr Pyke said that the Judge's caution should have been couched in stronger and more specific terms. While the Judge's caution could have been stronger and couched in more specific terms, we consider that what he said was sufficient to meet any potential prejudice. We think the jury would have seen the difference between a consensual relationship with a young woman of 15 or 16 and sexual offending against young children.

Overall assessment

[51] One of the criticisms that Mr Pyke made of the Court of Appeal was that it focussed on the particular points of complaint in isolation and did not stand back and make an overall assessment, taking account of the combined effect of any acknowledged deficiencies. We accept that there are occasions on which defects in a trial which, taken individually, would not justify setting aside a guilty verdict, may

justify that course when their combined effect is taken into account. We are satisfied, however, that this is not such a case.

[52] We have accepted that Dr Blackwell's evidence should have been shorter, that some (relatively minor) aspects of her evidence went beyond what might have been strictly relevant to the circumstances of this particular case and that the prosecutor was wrong to talk about the appellant's "taste for young girls". Considering the impact of these matters in combination on the fairness of the trial, we are satisfied that they had little potential for any adverse effect. In short, on an overall perspective, we are satisfied that the trial was not unfair.

Decision

[53] The appeal is dismissed.

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