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OF COMPLAINANT(S) PROHIBITED BY S 139 OF THE CRIMINAL
JUSTICE ACT 1985.**

IN THE SUPREME COURT OF NEW ZEALAND

**SC 42/2015
[2015] NZSC 90**

BETWEEN P
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: I M Brookie for the Applicant
 A Markham and T P Westaway for the Respondent

Judgment: 24 June 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Following a trial in the High Court at Whangarei in June 2013, the applicant was convicted of five counts of sexual offending against three young relatives. On 27 March 2015 the Court of Appeal dismissed his appeal against conviction but allowed his appeal against sentence.¹

[2] This application for leave to appeal is brought in relation to two aspects of the case:

¹ *P (CA672/2013) v R* [2015] NZCA 96 (Stevens, Asher and Williams JJ).

- (a) improper use by the trial prosecutor of the counter-intuitive evidence;
and
- (b) improper questioning of the applicant and improper submissions to the jury regarding motive to lie.

Court of Appeal decision

[3] The Court of Appeal rejected the contention that the prosecutor repeatedly asked the jury to use the counter-intuitive evidence given by Dr Ahmad, a clinical psychologist, as a diagnostic tool in order to boost the complainants' credibility.²

[4] The Court held that the jury can have been under no misapprehension as to the limited purpose of Dr Ahmad's evidence. The prosecutor made that clear in his opening address.³ Dr Ahmad herself made it clear that she was not commenting on particular witnesses, that the method or timing of disclosure did not indicate "credibility either way" and that her evidence could not be used to determine whether the disclosure was true or not.⁴ The Judge also gave a direction to the jury, which the Court described as a model of its kind, explaining the limited purpose of the evidence.⁵

[5] The Court noted that counter-intuitive evidence must be related to a live issue in the case.⁶ It accepted the Crown's submission that to prohibit reference to the expert evidence in relation to particular issues risks the expert evidence being improperly divorced from the trial evidence.⁷ The Court was satisfied that in each of the challenged passages the reference to the counter-intuitive evidence was general in nature and that it was not suggested that Dr Ahmad had herself made any link to

² The impugned passages are set out at [12]–[16] of the Court of Appeal judgment.

³ At [19]. We note also in the prosecutor's general introduction in closing to the evidence of Dr Ahmad he said that it showed delay is not unusual: "It doesn't give them a tick but it doesn't give them a cross, the fact that so they didn't complain at the night [sic]?" see at [12].

⁴ At [20]–[21].

⁵ At [22]–[23].

⁶ At [28], referring to *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 at [59](d).

⁷ At [29].

the evidence of the complainants.⁸ The Court was satisfied that no specific direction related to the Crown closing on the counter-intuitive evidence was required.⁹

[6] On the issue of the questioning on the motive to lie,¹⁰ the Court held that the prosecutor was entitled to explore with Mr P whether he was aware of any suggestion of collusion. When the topic of motive to lie arose, caution was required and some of the prosecutor's questions were close to the line. However, they did not amount to reversing the onus of proof.¹¹ Further motive to lie was not a special feature of the Crown closing. Importantly, the issue of motive to lie was dealt with by defence counsel in closing and her remarks were endorsed by the Judge.¹² The Judge said:¹³

[Defence counsel] reminded you that the accused does not have to prove why the complainants may have lied or why they came forward. That was not for the defence.

Our assessment

[7] The Court of Appeal applied settled law to the particular circumstances of Mr P's case. No issue of general or public importance arises. Further, nothing raised by Mr P leads us to the view that the Court of Appeal's approach was erroneous or that there may be a risk of a miscarriage of justice.

Result

[8] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁸ At [30]–[31].

⁹ At [25][26].

¹⁰ The questioning is set out at [37]–[38].

¹¹ At [49]–[50].

¹² At [51]–[52].

¹³ The whole passage is set out at [46].