



**Supreme Court of New Zealand  
Te Kōti Mana Nui**

**16 April 2015**

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**DH v R**

**(SC 9/2014) [2015] NZSC 35**

**and**

**KOHAI v R**

**(SC 42/2014) [2015] NZSC 36**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)**

These appeals concerned the use of expert evidence by the prosecution in two sexual offending trials, specifically the use of “counter-intuitive evidence” to correct potentially erroneous beliefs a jury might hold about the behaviour of a complainant in a case involving sexual offending.

In *DH*, the Crown case at trial was that the appellant had indecently assaulted or sexually violated the complainant, his daughter, on multiple occasions over a five-year period from late 2002 to the middle of 2007. The complainant said the offending began when she was 11 years old and continued until she was 15. She first reported this to the police in April 2010. The jury was unable to agree at the first trial. *DH* was convicted of 16 grounds of sexual abuse at the second trial. His appeal against conviction to the Court of Appeal was dismissed.

Dr Suzanne Blackwell, a psychologist, gave expert evidence at the second trial on counter-intuitive behaviour of some victims of sexual abuse. She had not given evidence at the first trial. Dr Blackwell’s

evidence addressed a number of matters, including analysis of delays in disclosure of sexual abuse, reasons for delayed reporting, retractions of allegations of sexual abuse, and continuing contact between victims and perpetrators.

In *Kohai*, the appellant was convicted following a jury trial on nine of 14 counts of sexual offending against three complainants, all of whom were under 12 years of age at the time of the offending. Dr Blackwell also gave expert evidence on counter-intuitive behaviour at Mr Kohai's trial. Dr Blackwell's evidence addressed several matters, including delayed reporting or non-reporting of sexual abuse, incremental disclosure of details of sexual abuse, denial of sexual abuse and continued contact with abusers. Mr Kohai appealed against his convictions to the Court of Appeal on two grounds: trial counsel incompetence, and that the evidence of Dr Blackwell was partly inadmissible. His appeal was also dismissed by the Court of Appeal.

The Supreme Court granted leave to appeal to both DH and Mr Kohai on the question of whether the Court of Appeal was correct to dismiss the conviction appeals. The two appeals were heard together.

In *DH*, the appellant argued that there was a miscarriage of justice under s 385(1)(c) of the Crimes Act 1961. The admissibility of counter-intuitive evidence was not challenged. Rather, DH argued that the scope of the evidence was excessive, being greater than justified by the matters at issue in the trial and this meant that the jury heard evidence on topics which were not live issues at the trial. However, counsel for DH also criticised Dr Blackwell for addressing matters which were specific to the complainant's allegations, which he said could have been construed by the jury as directly supportive of the complainant's version of events and prejudicial. Nine aspects of Dr Blackwell's evidence were challenged. DH also submitted that certain remarks made by the trial Judge in his directions to the jury and summing up were inadequate and caused prejudice contributing to the miscarriage.

In *Kohai*, the appellant submitted that the scope of Dr Blackwell's evidence was too broad and that parts were inadmissible, and that this resulted in prejudice that contributed to a miscarriage of justice. Mr Kohai submitted that Dr Blackwell needed to qualify her evidence by discussing the limitations of the studies on which her evidence was based, including by recognising that some of the studies could have involved false complaints. He said that specific aspects of the evidence were irrelevant and prejudicial. Mr Kohai also contended that the prosecutor made 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.

The Court has unanimously dismissed both appeals.

In both appeals, the Supreme Court has accepted that counter-intuitive evidence is generally admissible if the fact-finder is likely to obtain "substantial help" from it in understanding other evidence or facts in

issue. The Court has found that counter-intuitive evidence can be substantially helpful because it corrects erroneous assumptions about the likely conduct of victims of abuse and allows a fact-finder to assess a case free from the influence of such assumptions. Counter-intuitive evidence should be generic, rather than directed to whether a specific complainant is being truthful, and relevant to live issues.

In *DH*, the Supreme Court has found Dr Blackwell's evidence was admissible and did not raise any issues that gave rise to a miscarriage of justice. The evidence given was in terms that was not diagnostic of sexual abuse and addressed matters that were live issues at trial. The Court found that in future the overall presentation of the evidence could be improved, but this did not render it inadmissible in this case. Similarly, although certain remarks in the jury direction were unnecessary, the Court found that they had not given rise to a miscarriage of justice.

In *Kohai*, the Court has found that the evidence of Dr Blackwell did not cause prejudice leading to a miscarriage of justice. The Court was satisfied that it would have been clear to the jury what the purpose and scope of Dr Blackwell's evidence was, in light of what Dr Blackwell said and the directions the trial Judge gave the jury about the evidence. The Court has found that none of the specific aspects of the evidence the appellant has taken issue with were irrelevant or prejudicial.

On the allegedly prejudicial comments of the prosecutor, the Court accepted that some of the prosecutor's comments were inappropriate and should not have been made. However, the Court was satisfied that the trial Judge's caution was sufficient to meet any potential prejudice and the trial did not miscarry as a result.

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