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

IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2016
[2016] NZSC 103

BETWEEN	H (SC 49/2016) Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: J H M Eaton QC for Applicant
A J Ewing for Respondent

Judgment: 15 August 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

The proposed appeal

[1] The applicant was found guilty of sexual offending in relation to his daughter. The offending covered a four year period (1998–2001) when she was between 10 and 13 and came to light in 2009 in the context of proceedings against the applicant in relation to sexual offending against another relative (P). The applicant was eventually (after four trials) acquitted in relation to the alleged offending against P but she gave evidence as a propensity witness at the applicant's trial in relation to the offending against his daughter.

[2] The applicant's appeal against conviction and sentence was dismissed by the Court of Appeal.[1] His application for leave to appeal to this Court in respect of conviction proposed four grounds of appeal. None of these were advanced in the Court of Appeal.

No section 122 warning

[3] The first proposed ground of appeal is that a warning under s 122 of the Evidence Act 2006 was not given in respect of the evidence of either the daughter or P. By the time of the applicant's trial, all allegations in respect of his daughter related to events which had occurred more than 10 years previously and the allegations of P related to events which had occurred some three decades earlier. The applicant's counsel did not invite the judge to give a warning and the argument thus falls to be addressed under s 122(1) and (2)(e) but not (3).

[4] The defence case in relation to both the daughter and P was that they had fabricated their allegations. Details of time and place do not appear to have been critical. In the case of the daughter, the allegations were made (in 2009) within 10 years of some of the offending and just outside that period in respect of the rest. While s 122(2)(e) is applicable to the evidence of a propensity witness, the need for such a warning in respect of such evidence is rather less than in the case of a complainant's evidence.

Unconventional summing up on standard of proof

[5] The second proposed ground of appeal relates to the way in which the Judge summed up on the standard of proof. The judge concluded his remarks on the standard of proof with an example from ordinary life (crossing a road). The transcript of what he said seems a little scrambled. But what we think he must have said is that one should not step onto a road if there is a chance of being run-over. The context for this is provided in the respondent's submissions. In effect what he seems to have been saying is that the jury should not take a chance of being wrong.

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1 *H (CA533/2014) v R* [2015] NZCA 124 (Stevens, Asher and Williams JJ).

Inadequate distinction between a particular count of rape and a representative count

[6] The third proposed ground of appeal is concerned with the inter-relationship between a particular counts of rape (count two and three) and a representative count (count four). The applicant was found guilty on one particular count of rape, said to be "the first time" (count 2), not guilty on the other (count 3) and guilty on a representative count of rape (count 4). The complaint is that the judge did not make it sufficiently clear that they could only convict on count 4 if satisfied that an offence of rape was committed in the relevant period other than the rape which was the subject of count 2.

[7] We accept that it is arguable that this point may not have been made by the Judge with the precision which was appropriate. On the other hand, the distinction between counts 2 and 4 was clear from the indictment, the prosecutor's closing address and a chronology provided to the jury by the judge. That there was such a distinction was at least implicit in the judge's summing up.

A reference to "Once Were Warriors"

[8] The fourth proposed ground of appeal arises out a reference by the Judge in his summing up to "Once Were Warriors". He referred to this film while making comments to the effect that the members of the jury came from different backgrounds and that this might affect the way they would see the case. His mention of the film was unsurprising as it had been mentioned in evidence. The daughter's first complaint about her father was made just after she had seen "Once Were Warriors" and she said that it had brought back bad memories. She said that she had recorded her father's abuse of her in a diary (as had the victim in "Once Were Warriors") which she had later destroyed. In his closing address, defence counsel had suggested that the complainant had fabricated her allegations (including as to the diary) after watching the film, in effect contending that she had used the plot of the film as a template for her allegations.

Evaluation

[9] The case does not any question of public or general importance. This leaves for consideration the miscarriage of justice ground.

[10] On the appeal to the Court of Appeal, no issue was taken with the four aspects of the trial now under challenge. Presumably this was because counsel (not Mr Eaton QC) who appeared for the applicant at trial and in the Court of Appeal was not troubled by them. That the points were not raised in the Court of Appeal also means that we do not have the advantage of the Court of Appeal's views on them. All in all, we see no appearance of a miscarriage of justice.

Solicitors:
Kearney & Co, Christchurch for Applicant
Crown Law Office, Wellington for Respondent