

B [NAME SUPPRESSED]

Appellant

5

v

THE QUEEN

Respondent

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Hearing: 5 May 2011
Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
William Young J

Appearances: T Sutcliffe and L F Walkington for the Appellant
M D Downs and B F Fenton for the Respondent

CRIMINAL APPEAL

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MR SUTCLIFFE:

Yes, as the Court pleases, I appear together with Ms Walkington, counsel's name is Sutcliffe.

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ELIAS CJ:

Thank you, Mr Sutcliffe, Ms Walkington.

MR DOWNS:

25 May it please the Court, Downs and Ms Fenton for the Crown.

ELIAS CJ:

Thank you, Mr Downs, Ms Fenton. Yes, Mr Sutcliffe.

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MR SUTCLIFFE:

As the Court pleases. I've had, or counsel have had, useful discussions and, for the purposes of this appeal, Your Honours, it's accepted that in terms of the grounds of appeal that the real focus here is going to be on the second statement of complaint to a grandmother who's identified as "B" in the submissions which counsel have provided. Perhaps if I can commence by narrowing those issues in this way.

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In terms of this case, what we know is that in or around about March 2008 the complainant was at grandmother A's home, I'll refer to her as "A". She, on a morning around about 9 o'clock, when her grandmother came into the room, appeared to be tearful, and she made a complaint to her grandmother then that the appellant had been abusing her over a period of time. What we do know is that, as a result of this advice, A spoke to the appellant, she described subsequently in her evidence his reaction, and then A gave evidence of having a conversation with the complainant. That evidence was going to be called by the defence, and it was part of the defence strategy to use that evidence of A to challenge the veracity of the complaint of the complainant, and the challenge was clearly directly in the form of a challenge that her complaint to A and subsequently in Court was invention. Whilst there was no enquiry either before the trial or during it as to the admissibility of that evidence, pursuant to section 35 of the Evidence Act I accept that it was inevitable that it would become, that the complaint evidence contained in the interview of the complainant, the video interview, would have been admissible to respond to the claim of recent invention, and I say that because, of course, she was directly challenged about what it is that she had said and her response to A, and the purpose of calling A was to suggest that, really, whilst she had said something in the form of a complaint –

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TIPPING J:

Well, you were in, or the appellant was in effect calling the complaint evidence.

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MR SUTCLIFFE:

That's right.

TIPPING J:

Yes, you can hardly say it was...

MR SUTCLIFFE:

5 Yes, I accept that, and so the real inquiry in this case, in my submission, is whether
or not the complaint to B fell into the same category, whether that evidence was
necessary to respond to claim of invention. The submission which I make in respect
of that is that it falls into an entirely different category, and it seems apparent, in the
Crown's submissions, that it is accepted, whilst argued on the one hand that it was
10 clearly part of the defence, that clearly any questioning and all issues raised in
respect of the statement to B took a far lesser focus, in a sense, that there wasn't
much at all. And, indeed, when one considers the substance of the cross-
examination as it's submitted by the Crown in respect of that particular complaint, my
submission there is that the evidence, the cross-examination at least, does not reflect
15 that the, it was clearly part of the defence strategy, or that there was any probative
value or any benefit in the defence having the evidence of B before the Court – sorry,
the evidence that the complainant had made a statement to B, a complaint to B,
there seemed to be no real benefit in the defence case at all. One could see –

ELIAS CJ:

20 I'm sorry, I don't understand that submission. Why is benefit to the defence case
what we should be concerned about here?

MR SUTCLIFFE:

25 Well, it's being suggested that it would have been admissible anyhow, because the
defence wanted it before the Court, it was part of the defence strategy for it to be
there.

YOUNG J:

30 But you're not alleging counsel incompetence?

MR SUTCLIFFE:

No, I'm not alleging counsel incompetence, but...

TIPPING J:

35 Well, are you saying it's relevant to the suggestion that there was an implication that
this evidence was in by agreement?

ELIAS CJ:

Yes.

MR SUTCLIFFE:

It is, yes, it is –

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TIPPING J:

So it really goes to that point.

MR SUTCLIFFE:

10 It is, because that is the point which is taken by the Court of Appeal, that because there was no objection, by implication therefore it must have been there by way of agreement and there must have been a reason why the defence wanted it there. But my submission is on the face of this case, on the facts, and the way the defence was run, there appears to be no discernible benefit to the defence at all.

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YOUNG J:

Well, wasn't the defence case that – well, the defence called the great-grandmother.

MR SUTCLIFFE:

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Yes.

YOUNG J:

Presumably that wasn't a spur-of-the-moment decision, or do we not know, we don't know?

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MR SUTCLIFFE:

No, it does not appear to have been a spur-of-the-moment decision.

YOUNG J:

30 Right. That evidence couldn't have been given unless the complainant had given her evidence about what happened.

MR SUTCLIFFE:

35 She would have had to have been, as she was, directly challenged about what she told the grandmother in her evidence-in-chief, in cross-examination, which she was.

YOUNG J:

So, what's the problem?

MR SUTCLIFFE:

I'm not addressing the question of grandmother A –

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YOUNG J:

Yes.

MR SUTCLIFFE:

10 – I'm addressing now the real issue, which I say is –

YOUNG J:

Oh, I see, well, yes, but once –

15 **MR SUTCLIFFE:**

– grandmother B.

YOUNG J:

But once it's an issue...

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TIPPING J:

Well, it's the extent, isn't it, to the extent that it is necessary to respond. You say that this wasn't – the first one was necessary to respond but –

25 **MR SUTCLIFFE:**

Yes.

TIPPING J:

– the second one went beyond the necessary extent of response –

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MR SUTCLIFFE:

That's correct.

TIPPING J:

35 – I would have imagined that's what the proposition is. Whether I agree with that's another matter –

MR SUTCLIFFE:

Yes.

TIPPING J:

5 – but that's the proposition.

ELIAS CJ:

10 But isn't the case you have to meet, though, that one of the ways in which the complaint to A was used was to suggest that the complainant didn't persevere when challenged?

MR SUTCLIFFE:

15 I've noted that argument, which is in the Crown's submissions, and the argument itself seems to come down to this, that the evidence is relevant, the Crown say, and admissible, that is the statement, the complaint to B, because what it indicated was a determination to have somebody believe what it is that she had said previously but had been disbelieved by A. That's how the Crown effectively put the point here, that this evidence was otherwise admissible.

20 My submission is that that is simply dressing up in different language the submission that if she says it repetitively until she is believed therefore it gains more probative value as the statements increase in number, and that can't be right, that there must be a more probative value beyond the fact of mere repetition, which is what this Court has said.

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TIPPING J:

30 But this case demonstrates a rather unusual feature, I suggest, Mr Sutcliffe, in that, at least in my experience, it is very unusual that the person complained to evinces a lack of acceptance of the complaint, if you like, and that this is where I think it dovetails with the point the Chief Justice was putting to you that that marks it out as a most unusual situation.

35 Now the Crown says that it was necessary to respond, if you like, in the context of the disbelief by showing that she did persevere, to borrow the same language, on another occasion. That may not be a very good way of putting it and –

MR SUTCLIFFE:

Well, no, I understand the argument.

TIPPING J:

5 But do you accept or not that the lack of acceptance, if you like, of the complaint, is a particularly unusual feature?

MR SUTCLIFFE:

10 Not necessarily an unusual feature. People make – children may make complaints in many situations where they're not believed, and the fact that they're not believed in and of itself isn't probative, of anything.

TIPPING J:

15 Well, no, the fact isn't, but does it not give rise to a situation where it can well be said that it was necessary to respond to the recent fabrication by putting that she did persevere, to use the same language, because she didn't just flag it away, if you like?

MR SUTCLIFFE:

20 If there were certain – if there were – I imagine if there were circumstances where in the light of perhaps inducements or even threats, where in the light of that a complainant nevertheless persevered in circumstances which were quite unique, perhaps trying to think of those types of circumstances where they may abscond or something where it's, it gives it some context where it might be seen to give it some probative weight, then yes, I would accept that.

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ELIAS CJ:

30 Isn't the probative weight that A's evidence is that she was unconvincing? When probed by A she sort of caved in, and A, doesn't – I haven't looked at the evidence of A, so it may be that we need to go to that, but isn't what was taken from that, that she sort of said, "Oh, well, I didn't really mean it." That was the impression that A conveys about her complaint. So it was one where the fact that she persevered was extremely important, because it counters that suggestion that the complaint itself to A was unconvincing.

35 **MR SUTCLIFFE:**

Whether A found it unconvincing is a matter of –

ELIAS CJ:

Well, doesn't she – perhaps you should take us to that evidence.

MR SUTCLIFFE:

Yes.

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ELIAS CJ:

But doesn't she almost suggest that the complainant withdrew it?

MR SUTCLIFFE:

10 Yes, she does, to be fair.

ELIAS CJ:

Yes.

15 **MR SUTCLIFFE:**

She indicates that the girl shrugged her shoulders –

ELIAS CJ:

Yes.

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MR SUTCLIFFE:

– and didn't pursue the matter further.

TIPPING J:

25 That's what I meant by "flagged it away", rather colloquially.

BLANCHARD J:

Which, in itself, might suggest invention, and the second complaint goes to counter that.

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MR SUTCLIFFE:

Well, clearly, what was being suggested was that the statement to A was invention, that's quite clear. It wasn't put in those terms –

35 **BLANCHARD J:**

Yes.

MR SUTCLIFFE:

– but that was clearly what the defence case was at trial. And I do note that the
5 Court has accepted the proposition, I believe it's in *Hart v R* [2010] NZSC 91, [2011]
1 NZLR 1, I think His Honour Justice Tipping made the point that the fact that the
prior consistent statement is post-the challenge doesn't necessarily make it
inadmissible if it's probative. And, taking Your Honour's point that therefore a
statement, a subsequent statement some months later, to be as a response to A's
10 challenge that it was invention, I'm not sure that in these circumstances that that
would follow because, again, it's merely the repetition of –

YOUNG J:

One of the things that troubles me here is that the interview was – the complaint was
15 sometime in late June, was it?

MR SUTCLIFFE:

The complaint was made in about mid to late June 2008.

20 **YOUNG J:**

And the girl was interviewed in July?

MR SUTCLIFFE:

Early July, I believe it's the 12th, I'm not too sure.
25

YOUNG J:

So the jury know that by July she's making this complaint?

MR SUTCLIFFE:

30 That's correct.

YOUNG J:

They must have inferred that the interview didn't come out of the blue, that something
must have been said by her. What's the prejudice?
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MR SUTCLIFFE:

Well, the prejudice is probably more present in what else was said, the commentary surrounding the –

YOUNG J:

5 How it came to get to the police, she told mum and she told dad –

MR SUTCLIFFE:

Yes.

10 **YOUNG J:**

– and dad was really cross but –

MR SUTCLIFFE:

15 And, in my submission, that is probably the strongest part of the appellant's case, is that surrounding the complaint to B there was, in effect, a commentary as to who then was told and what their responses were to the appellant.

TIPPING J:

It was an over-garnished complaint.

20

MR SUTCLIFFE:

Sorry?

TIPPING J:

25 It was over-garnished, if you like.

MR SUTCLIFFE:

Yes.

30 **TIPPING J:**

It was surrounded by too much prejudicial collateral.

MR SUTCLIFFE:

That's what my submission is.

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TIPPING J:

Okay, well, I think that is probably the appellant's best point.

MR SUTCLIFFE:

Yes.

ELIAS CJ:

5 Would it be possible for you to take us to both the evidence of A and also the evidence that you say is prejudicial because it goes further than simply being –

MR SUTCLIFFE:

Yes, I'll do that.

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ELIAS CJ:

– the fact of complaint. Do when it suits you, but I'd like you to do it at some stage.

MR SUTCLIFFE:

15 Well, I think it's probably appropriate that I go to that now, because I've made the point and it's –

ELIAS CJ:

Yes.

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MR SUTCLIFFE:

– I suppose in a sense cutting to the chase, to use a better term.

YOUNG J:

25 It's at page 156, isn't it?

MR SUTCLIFFE:

Thank you very much.

30 **YOUNG J:**

Starts at the bottom of that page.

ELIAS CJ:

156 – oh, at the bottom, yes, thank you.

35

YOUNG J:

At the bottom, yes.

MR SUTCLIFFE:

5 If I can just please confer with my learned friend? The – so, if I can just clarify what
Your Honour wanted? You wanted the evidence of A?

ELIAS CJ:

Well –

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MR SUTCLIFFE:

Or did you want the –

ELIAS CJ:

15 – is a reference to the transcript which –

MR SUTCLIFFE:

That's the transcript –

20 **ELIAS CJ:**

– was her evidence in the Court, wasn't it?

MR SUTCLIFFE:

You want – Your Honour would like to be referred to the evidence of A?

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ELIAS CJ:

You are saying that this evidence should have been excluded also in the victim's
statement –

30 **YOUNG J:**

Well, this is the evidence –

ELIAS CJ:

– the complainant's statement –

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YOUNG J:

– you want excluded, isn't it?

ELIAS CJ:

Yes.

YOUNG J:

5 It's what appears at 156 and 157.

ELIAS CJ:

Yes.

10 **MR SUTCLIFFE:**

Yes the – I'm not arguing, I'm not contending for the excision of the evidence of the complaint to A –

ELIAS CJ:

15 No –

MR SUTCLIFFE:

– I've conceded that.

20 **ELIAS CJ:**

– and I understand that. It's the complaint to B?

MR SUTCLIFFE:

That's correct –

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AUDIO SKIPPED 10:20:51 TO 10:23:27

MR SUTCLIFFE:

... which I'll refer Your Honours too.

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TIPPING J:

But in the primary passage, at the bottom of 156, you would prefer the full stop to be after "anything" but as a fall-back you would want it after "other nana"?

35 **MR SUTCLIFFE:**

Yes, and then what, yes, because what then follows is frankly irrelevant and quite prejudicial and I'll say, perhaps at this point, why and I can reinforce it with my other

submission. I mean, clearly you've got a grandfather and a granddaughter and my submission is that a jury faced with this added commentary which we see on page 157, particularly as it relates to the response of the parents towards the grandfather when the child tells them, it tends to – and view it with –

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ELIAS CJ:

A flavour.

MR SUTCLIFFE:

10 – flavour and –

ELIAS CJ:

But –

15 **MR SUTCLIFFE:**

– suggest that –

YOUNG J:

But isn't it exactly what you'd expect would happen?

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ELIAS CJ:

Yes.

YOUNG J:

25 She tells her nana. The jury know that within a week or two she's being interviewed evidentially. They must know that something has happened in between –

AUDIO SKIPPED 10:24:54 TO 10:25:18

30 **ELIAS CJ:**

... and B has died, hasn't she, so she's not giving evidence, but it's quite clear that there's a split in the family, and what's the prejudice at trial about that?

MR SUTCLIFFE:

35 Well, if you put it into context, and this is –

ELIAS CJ:

5 I'm sorry, have we got a break again? I'm sorry, our recording system has broken down, which means unfortunately we have to take a short adjournment and they'll reboot the system so that we can record it. Thank you.

COURT ADJOURNS: 10.25 AM

COURT RESUMES: 10.35 AM

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MR SUTCLIFFE:

If I might pick up on the point, Your Honour, which Your Honour raised earlier on, and this is the question as to well, what really is the prejudice? Isn't the response to be angry at being told these things a natural one which a jury will simply accept as being a natural reaction without there being any untoward prejudice towards the accused? It may, it may not. It may not necessarily be the immediate reaction of every family when they're told something like this, particularly where the person being accused is the grandfather in the family. There may be disbelief. There may be shock, but it may not necessarily result in the outburst of anger which is described here, but – and this is the point I want to make, and I know it's not a point which – it's a point which was raised on the appeal and in my submission it's relevant to Your Honours' assessment as to the effect of this added commentary about the anger of the family, and that can be found at page 66 of the case on appeal, and this is the evidence of the complainant's mother, Ms G.

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Now her evidence in this regard commences actually at page 65, line 25, where essentially she's describing the day on which she confronted her father about this complaint, but more particularly I direct Your Honours' attention to page 66 and the answer, which is about line 7, and there she says she went to where her father was standing and spoke to him. But what's important in the context, in my submission, of this submission, is his response, "He just stood there and said nothing happened, that I, I had forgiven him for what he'd done in the past."

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ELIAS CJ:

35 Had that all come out from the trial? There's no objection to that evidence, which seems to be much more –

BLANCHARD J:

Well, that was another ground –

ELIAS CJ:

Oh, yes.

5

BLANCHARD J:

– proposed ground of appeal and we declined leave on that on the basis that it didn't go anywhere in the context of the trial as a whole.

10 **MR SUTCLIFFE:**

Now that was a ground of appeal in the Court of Appeal, and Your Honour's indication is quite right, it's relatively alarming in the context of a case of this nature, but putting to one side that that's not a ground of appeal, when you mix that with the anger that is referred to then clearly in context what you've got is a jury hearing that when the family spoke to him, when they confronted him, there was anger and more importantly you've got this overlapping commentary that his response was well, you, that the mother had forgiven him for what he had done. Now, in the context of that, that could only be referring to some, at least one interpretation is clear.

20 **ELIAS CJ:**

But I thought you said that that's the point on which you haven't got leave to appeal?

MR SUTCLIFFE:

Well, I haven't, but if I'm responding to Your Honour's query as to well, what effect –

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ELIAS CJ:

No, but we're talking about the effect of knowing about the complaint to the grandmother and what embellished matters at that stage. Isn't the problem that you've got is that if the evidence of A stands on its own, that the impression is given that the family didn't believe her?

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MR SUTCLIFFE:

Well, that's – A didn't believe her.

35 **ELIAS CJ:**

Well, doesn't that need to be balanced?

MR SUTCLIFFE:

By the fact that other family members did?

ELIAS CJ:

Yes.

5

BLANCHARD J:

Or at least by the fact that she persisted.

TIPPING J:

10 I think that's the key.

ELIAS CJ:

Well, that is the key, yes.

15 **TIPPING J:**

Yes, it doesn't really matter what they believe –

ELIAS CJ:

No.

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TIPPING J:

– it's that she wasn't going to lie down, if you like, lightly.

MR SUTCLIFFE:

25 Yes. Even if that point is conceded, it still doesn't answer the difficulty that's faced by the embellishment around the fact of making that complaint again.

YOUNG J:

What embellishment are you referring to?

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MR SUTCLIFFE:

I'm referring to what we've been discussing, and that is that there's the reaction of other family members to the appellant when they are told of the complaint. Now, my submission here is that that is not probative, but it is highly prejudicial. Your Honours have queried, well, isn't that just a normal reaction? Well, it may be, it may not be, it depends on the family, I suppose, and the dynamics. But when you put that alongside of the other evidence that was given, which I've referred to at page 66,

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from the witness, Ms G, that the appellant is alleged to have said to her, "I had forgiven him for what he'd done in the past," which, in the context of this case, could only –

5 **YOUNG J:**

I think this is just a reiteration of a point that you've been refused leave on.

MR SUTCLIFFE:

10 Well, no, it's not, with respect, it's putting into context – I've been asked to respond to, well, why is it, in this case, more prejudicial, why should it be seen as standing out as prejudicial in this case when that is otherwise a natural reaction? Well, my submission is, well, perhaps it, in some situations it may not be, but in this case it is, because of what else was said in the evidence.

15 **YOUNG J:**

But this is – what was said at 66 is a rather different sort of evidence, it's the evidence, to the extent to which it should have been given it would be justified on the basis of, it's the evidence of what the defendant said when first taxed with the offending. Now, it really hasn't got much to do with the complaint, although it's linked
20 with it sequentially in a narrative sense.

MR SUTCLIFFE:

Well, it does have something to do with the complaint when –

25 **YOUNG J:**

It's linked sequentially, because that's why she puts the proposition.

MR SUTCLIFFE:

30 Well, it is, yes, it is linked sequentially, but that particular statement there –

YOUNG J:

And would you challenge the evidence she gave subject to the exclusion of, "I had forgiven him for what he'd done on the past"?

35 **MR SUTCLIFFE:**

Can I – sorry, I didn't quite understand that.

YOUNG J:

Well, say the words that, "I had forgiven him for what he'd done in the past," had not been referred to in evidence, would you take any objection to this evidence that was
5 given?

MR SUTCLIFFE:

No, absolutely not, and that's the point.

10 **YOUNG J:**

Okay, well, just pause there. How could the mother have given that evidence without it being obvious to the jury that the complaint from the complainant had got to her ears?

15 **MR SUTCLIFFE:**

Yes, I think that we're perhaps at cross purposes. Assuming for the moment – I'm not disputing the fact that the mother spoke to him about it and that he responded. The point I'm making here is that those words, which I've pointed out as being somewhat difficult, but I'm accepting that that's, the matter has been dealt with and
20 wasn't seen as a ground for appeal either in the previous Court or here. The point I'm making is that when you have a jury who's faced with the evidence, "I made a complaint to grandmother B. As a result of that complaint, others were told and, in particular, my parents, and then when my grandfather, the appellant, came around, they confronted him and there was, they were angry with him, at him," and –

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TIPPING J:

But this has really not got much to do with the previous consistent statement by the complainant.

30 **MR SUTCLIFFE:**

Well, no, it doesn't. And, in addition, I mean, and you say, well, "How was that prejudicial, in the context of these proceedings?" well, it's prejudicial because it shows an anger towards him which may, in the mind of a jury, infer, "Well, these guys, they believe that there's something going on here," and then you have in
35 addition to –

BLANCHARD J:

Well, it must have been obvious that, to the jury, that somebody had accepted her story and somebody had taken it to the police.

5

MR SUTCLIFFE:

Yes, but when you add into that mix the evidence of Ms G that he said to her that she had effectively forgiven him for doing what he'd done in the past –

10 **BLANCHARD J:**

Well –

MR SUTCLIFFE:

– they could only be suggestive that –

15

BLANCHARD J:

– you haven't got leave to argue about that portion because the Court below held, and the view was taken on the leave application, that it was insignificant in the case, and what Justice Young is putting to you is that the rest of the statement, if that hadn't appeared, was entirely appropriate, it was evidence of what he said when he was confronted with the complaint.

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MR SUTCLIFFE:

I accept that. But the point I'm making, and I'm responding to the question, well, why would this be more prejudicial than any other, for any other, why would it –

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TIPPING J:

I think this garnish is on a different plate, Mr Sutcliffe. Perhaps I'm being a little elliptical or unduly metaphorical.

30

MR SUTCLIFFE:

Well, I appreciate what you're saying, but when you ask the question, "Well, why is this more prejudicial?" the – I'm talking about what she's, the embellishment –

35 **TIPPING J:**

I can fully understand the first point –

MR SUTCLIFFE:

Yes.

5 **TIPPING J:**

– that it was just sort of vicariously repeated and repeated and repeated and so on, but what one makes of that is another matter. But I think this is, as I agree with my brother Young, it's a step aside, it's a different issue really. It's whether or not it was prejudicial in a context which you haven't got leave on, and I don't think the two can
10 really be linked in the way you're suggesting they can.

MR SUTCLIFFE:

But, with respect, the jury gets to hear that evidence.

15 **TIPPING J:**

I know.

BLANCHARD J:

Look, you haven't got leave on this point –
20

MR SUTCLIFFE:

Yes. Well, I –

BLANCHARD J:

25 – Mr Sutcliffe.

MR SUTCLIFFE:

I think I've taken that point as far as I can.

30 **TIPPING J:**

Well, you're fair enough to raise it, because I can understand, it's sort of collateral garnish.

MR SUTCLIFFE:

35 Yes. Perhaps we can move on to the next portion of the evidence, which relates, to use a shorthand for garnish, it's page 178. By way of just – there is a further

passage in page 172 to 73, but that is merely the interviewer effectively going over the –

TIPPING J:

It was rehearsing, was it?

5

MR SUTCLIFFE:

Rehearsing what has previously been said but without the garnish, so to speak. And page 178 is the next passage of relevance. And again, there's something of a rehash of what has previously been said. But at page 170 – in the middle of that
10 page, there's this statement, "I think it was on a Friday, it was about one or two in the morning and, um, I was really tired, but I told my nana, but, because it just came out, and she started crying and she, um, because she knew there was a lot of hurt in me, it was just instinct that she had when she first met me." The Crown submission in respect of that is that, in essence, that was evidence that the complainant was
15 suggesting that B had observed something and had asked her and she had told her. My submission is it's not clear whether or not that is in fact the case, or whether or not what Nana B has said afterwards is something which she said after she has been told, but either way my submission is that that is in addition garnish which in and of itself is not probative of anything but that it is prejudicial because it speaks of an
20 absent person's view of the matter and belief as to what has occurred, and in that sense my submission is that that evidence is, was improperly before the Court and it could not have been said to have been in response to a claim of recent invention.

The other matters which are relevant to this appeal relate to the argument which I've
25 proposed that it was incumbent upon the trial Judge to at least make an enquiry as to the relevance of the evidence which, on the face of it, otherwise transgressed section 35(2). I am grateful to my learned friend for the research and extensive argument which he's set out in his submissions about that but I want to address it in this way.

30

Firstly, the cases which my learned friend refers to are predominantly pre-Evidence Act cases. The one – the case of –

TIPPING J:

35 I'm sorry, I don't quite understand where this is leading. The fact that the Judge may not have considered it surely is of no moment if it turns out actually to be admissible.

MR SUTCLIFFE:

Well, that's – I'm actually proceeding on the basis that it wasn't.

TIPPING J:

Well, in that case, equally the fact that the Judge didn't consider it can't turn it round.

5 It's my fault, Mr Sutcliffe, but I don't quite understand where this submission takes you. You seem to be focusing on the fact the Judge didn't direct her mind to this issue. Am I right? Or –

MR SUTCLIFFE:

10 Yes.

TIPPING J:

– didn't give a ruling on it.

15 **MR SUTCLIFFE:**

That's correct.

TIPPING J:

20 But the end result surely depends on whether it is or is not admissible, in this, ultimately in this Court's view. What the Judge below did or didn't do or think or rule surely is neither here nor there. It would just be her good luck if it turns out to be admissible and your client's bad luck, if you understand what I'm saying.

MR SUTCLIFFE:

25 I do, I do, I take the point. Well, I won't trouble with it.

TIPPING J:

Well, I just – I don't want to ride you off it but I just don't see where it will get you.

30 **MR SUTCLIFFE:**

Well, the argument, of course, has been that there's clearly been an agreement here, or a tacit agreement or acquiescence.

TIPPING J:

35 Well, that point doesn't arise if it was admissible anyway.

MR SUTCLIFFE:

But if it was inadmissible –

TIPPING J:

If it was inadmissible.

5

MR SUTCLIFFE:

– yet there has been some form of agreement that it should go in –

TIPPING J:

10 Well, then isn't it ultimately for us to decide if we get to the point whether there was effectively an agreement?

MR SUTCLIFFE:

15 But even if there was an agreement that that evidence was in, if its prejudicial effect outweighed its probative value.

TIPPING J:

Well, again, if that's our view, it would be out again.

20 **MR SUTCLIFFE:**

Yes, right.

TIPPING J:

25 But the fact that the Judge below doesn't, or trial Judge doesn't address her mind to it, I don't see how that can help you per se.

MR SUTCLIFFE:

30 I take your point. The next matter, which is the final point really, and that is the – in the event that it was determined on appeal that this evidence was wrongly admitted and that it could've had an impact on the way the jury decided this matter for verdict, whether or not the proviso applies, and my submission is that the admission of such evidence wouldn't, in the context of this case at least, be inconsequential and that it was clearly something that was capable of affecting the outcome of the trial, and this is not one of those cases where the Court could exercise its discretion easily under
35 section 385 because what you really have here is a classic case of his word against hers or vice versa, and it's a question of being in a position to assess the credibility and reliability of the witnesses. This is not a case where there's forensic material

available which would directly link an accused to a particular crime and therefore this Court could decide quite easily that there was evidence beyond reasonable doubt here, and I'm referring in essence to the reasoning in *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145, in that sense. My submission is that if the grounds are made out
5 here, the proviso simply has no effect.

Those are my submissions.

ELIAS CJ:

10 Thank you, Mr Sutcliffe. Mr Downs, you've heard the exchanges. Do you want to add to your submissions or are there points of emphasis you'd like to make?

MR DOWNS:

15 I think not, unless the Court specifically wished me to deal with any particular topic or issue.

ELIAS CJ:

No.

20 **MR DOWNS:**

May it please the Court.

ELIAS CJ:

25 Thank you, Mr Downs, and thank you for your submissions. Well, we will take time to consider our decision in this matter, and thank you for the argument addressed to us.

COURT ADJOURNS:10.57 AM