NOTE: PUBLICATION OF THE NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT (INCLUDING THE RELATIONSHIP OF THE COMPLAINANT TO THE APPELLANT) IS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 114/2010
[2011] NZSC 64

B(SC 114/2010)

v

THE QUEEN

Hearing: 5 May 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: T Sutcliffe and L F Walkington for Appellant
M D Downs and B F Fenton for Crown

Judgment: 9 June 2011

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

[1] Following a trial in the District Court before Judge Burnett and a jury, the appellant was found guilty of sexual offences against his grand-daughter. She was

aged between 11 and 14 at the time of the offending. A subsequent appeal against conviction was dismissed by the Court of Appeal.[1]

[2] The further appeal to this Court turns on evidence given by the complainant that she complained about the offending (a) in March 2008 to her great grandmother (referred to as AB) and (b) in June 2008 to her maternal grandmother (NB). These complaints were described by the complainant in her evidential interview. This was played at trial as her evidence in chief. The first important reference came soon after the interview started and just after she referred to specific offending by the appellant:

> Complainant: ... the next morning my, I told ... [AB] and ... she ... just started crying ... and he was out but then she ... stopped when he got in and she didn't mention anything and then a couple of weeks ago I told [NB] who just passed away and then ... (crying) she told her daughter [the complainant's aunt] ... and she she told my Mum and then I told my Mum what happened and then she told Dad and then he got angry and he came over that morning, [the appellant] came over that morning and Mum and Dad got really angry at him and told him to go away and that's when my other Nana found out that, I told my other Nana and she got really upset and started crying and then she went home with [the appellant] and that's when I went to Auckland, just to get away from it all.

The complainant said that the offending stopped after she complained to AB but that otherwise her complaint to AB led nowhere. The only other significant reference to the complaints came later in the evidential interview:

> Interviewer: Mmm. Okay. And I think you told me who you've told, the first one was [AB], have I got that right?
>
> Complainant: Yeah.
>
> Interviewer: And, and I think you said it was in March that you told [AB], have I kind of got that right or have I got that a bit confused or …
>
> Complainant: Yeah, I think it was in March.
>
> Interviewer: Okay and when did you tell your other Nana?
>
> Complainant: Um in ah just a couple of weeks ago before she passed away.
>
> ...
>
> Complainant: 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 [NB] but, cause it just came out

[1] *B(CA110/10) v R* [2010] NZCA 493.

> and she started crying and she um cause she knew there was a lot of hurt in me, it was just a instinct that she had when she first met me …

[3] As is apparent, the complaint to NB soon came to the attention of the complainant's mother. The mother confronted the appellant with the allegation and she gave evidence at trial of his response. More generally, the complaint to NB set in train the events which resulted in the involvement of the police and to the complainant being evidentially interviewed.

[4] The admissibility of the evidence fell to be determined under s 35(1) and (2) of the Evidence Act 2006:

> **35 Previous consistent statements rule**
>
> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.
>
> (2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.

These provisions and their practical application have been considered in *Rongonui v R*,[2] *Hart v R*[3] and *R v GKB(SC88/10)*.[4]

[5] Despite raising no issue at trial as to the complaint evidence, the appellant challenged its admissibility in the Court of Appeal. In dismissing the appeal, that Court concluded that the defence run by the appellant (that the incidents alleged had never happened) meant that he was making a claim of recent invention with the result that s 35(2) of the Evidence Act was engaged and the evidence was admissible under the principles discussed in *Rongonui* and *Hart.*[5]

[6] The appellant's argument before us differs from that advanced to the Court of Appeal, in two respects:

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2 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.
3 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.
4 *R v GKB (SC88/10)* [2010] NZSC 160, [2011] 2 NZLR 82.
5 *B(CA110/10) v R* [2010] NZCA 493 at [11]–[18].

(a) the challenge in relation to the complaint made to AB was not pursued before us; and

(b) although the appellant continued to challenge the admissibility of the complaint to NB, the associated argument was expanded to include a contention that the detail given in relation to it was prejudicial and went beyond what was necessary to respond to the claim of recent invention.

[7] The change of stance in relation to the complaint to AB means that we need not address its admissibility. We must nonetheless refer briefly to the associated evidence as it is material to the admissibility of the complaint to NB. At trial, AB gave evidence for the defence. She told the jury that she asked the complainant "if she thought [the appellant] would do something like that when he cares so much". According to AB, the complainant "sort of shrugged [her] shoulders and said, 'Well not really'".

[8] Given this context, the evidence of the complainant to NB was admissible:

(a) although there were differences between the evidence of the complainant and AB as to exactly what was said between them, it is clear that AB dismissed the complaint;

(b) the defence contention that the complainant had conceded to AB that her complaint was not true meant that her veracity was under direct attack; and

(c) the complainant's willingness to complain again, this time to NB, despite having got nowhere with AB, showed a persistence which the jury might well have seen as material to that challenge to her veracity and thus to the claim of recent invention.

[9] We accept that some of the detail surrounding the complaint to NB went beyond what was necessary to respond to the allegation of recent invention. This applies to the evidence of the complaint coming to the attention of the complainant's

father and his anger, the upset it caused to the complainant's "other Nana" (all referred to in the first of the extracts), and to NB's reaction to the complaint and her "instinct" (referred to in the second of the extracts).

[10] The appellant's mother's evidence of her confrontation with the appellant over the allegations was admissible. That meant that the fact the complaint had been passed on to her was necessarily before the jury. More generally, the details around the complaint to NB and its consequences were just what might be expected following a complaint of intra-familial sexual abuse. Because the complainant was evidentially interviewed within weeks of the complaint to NB, the jury would necessarily have realised that her allegations had been taken sufficiently seriously to warrant involving the police. And where such allegations are made, members of the complainant's family are likely to be upset and angry. So although the aspects of the evidence to which we have referred were inadmissible, there was no associated prejudice to the appellant and thus no miscarriage of justice.

[11] Accordingly the appeal should be dismissed.

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