IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2012
[2012] NZSC 22

B

v

THE QUEEN

Court: Blanchard, Tipping and Chambers JJ

Counsel: G J King for Applicant
D J Boldt for Crown

Judgment: 3 April 2012

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of sexual offending against three complainants, all of whom were his natural children. The Court of Appeal dismissed his appeal against conviction and sentence.[1]

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1 *B (CA196/2010) v R* [2011] NZCA 654.

[2] Mr King, for the applicant, seeks to advance only one matter in this Court. It concerns the admissibility of the evidence of Dr Barry Parsonson, whom the defence intended to call as an expert witness. Judge Farish ruled his evidence inadmissible, a view with which the Court of Appeal agreed, although for different reasons.

[3] Prior to trial, the Crown advised they proposed to call as an expert witness Dr Mark Earthrowl, a consultant forensic psychiatrist and the clinical head of the Canterbury Regional Forensic Psychiatric Service. Dr Earthrowl was to give evidence designed to explain "counter intuitive" behaviour sometimes displayed by victims of sexual abuse. The applicant's counsel briefed Dr Parsonson to answer Dr Earthrowl's evidence. The Crown objected to Dr Parsonson's proposed evidence, which they said was inadmissible in terms of s 25 of the Evidence Act 2006. Judge Farish accepted the Crown's submission and ruled the evidence inadmissible primarily on the basis Dr Parsonson was not an expert. Even if he was, she took the view his proposed evidence was not substantially helpful as he did not add materially to what Dr Earthrowl was going to say.

[4] The Court of Appeal disagreed with Judge Farish as to Dr Parsonson's expertise. But they held there was no miscarriage of justice because there was no significant difference between the evidence of Dr Earthrowl and the proposed evidence of Dr Parsonson.[2] For that reason, the Court said, Dr Parsonson's evidence was "not likely to be substantially helpful to the jury".[3]

[5] Mr King submits the Court of Appeal erred in its conclusion that Dr Parsonson's proposed evidence was effectively just "a repetition" of Dr Earthrowl's. In particular, he referred to a distinction between a 2008 study to which Dr Earthrowl referred, which suggested that around 25 per cent of children failed to disclose their abuse when first interviewed, with a 1996 study referred to by Dr Parsonson, which suggested a figure of 13 per cent. The complainants in this case did not disclose the abuse when first interviewed. Mr King's submission was that it would have been substantially helpful for the jury when assessing which of the complainants' interviews were probative to know that the likelihood that all three

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2 At [43].
3 At [42].

children would not disclose abuse until their second, third or fourth interview "was almost half of that presented by the Crown expert".

[6] We accept that Mr King's submission concerning the admissibility of Dr Parsonson's proposed evidence is distinctly arguable. Trial judges should not rule defence opinion evidence inadmissible simply on the ground that it is largely repetitive of Crown expert testimony. Even if proposed defence expert evidence is substantially similar to proposed Crown expert evidence, the defence should generally be permitted to call their evidence if the judge considers the corresponding Crown evidence is substantially helpful. The Crown after all would be less than happy if their proposed expert evidence were rejected on the basis that the defence undertook to call substantially similar expert evidence. Fair trial considerations, and in particular "the right of the defendant to offer an effective defence",[4] may require in many cases both sides to be able to call their experts.

[7] But we are satisfied that in this case no substantial miscarriage of justice arose from the absence of Dr Parsonson's evidence. This was a very strong Crown case. Dr Parsonson's evidence was so similar to Dr Earthrowl's that it would have added very little to the jury's understanding of abuse victims' behaviour. We are reinforced in our view by the fact that even Mr King accepts that "Dr Earthrowl was properly commended for being an exemplary expert witness". Further, defence counsel at trial (not Mr King) could have put to Dr Earthrowl the 1996 study, but chose not to. He was content to run the defence on the more general proposition that non-disclosure at an early interview was unusual.

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4 Evidence Act, s 8(2).