NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT AND PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 2/2021
[2021] NZSC 32

BETWEEN	DOUGLAS ROY ANDREWS Applicant
AND	THE QUEEN Respondent

Court:	William Young, Ellen France and Williams JJ
Counsel:	L L Heah for Applicant F R J Sinclair for Respondent
Judgment:	7 April 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was convicted after trial of sexual offending in relation to a young girl, C. The applicant appealed unsuccessfully to the Court of Appeal against conviction on the more serious of the charges, namely, three charges of sexual

violation. An appeal by the Solicitor-General against sentence was successful.[1] The sentence imposed in the District Court of nine years and six months' imprisonment on a representative charge of rape[2] was set aside and a sentence of 11 years and six months' imprisonment was substituted. The applicant now seeks leave to appeal to this Court against conviction and sentence.

Background

[2] C was aged between four and six years over the period in which the alleged offending occurred between 1 April 2015 and 9 August 2016. The applicant, some 23 years older than C, befriended her family. He was a regular visitor to the family home and, because of C's mother's hours of work, he was often left alone with C and her siblings.

[3] The first four charges alleged indecent acts on a child under 12 and related to allegations that the applicant made C touch his penis and masturbate him, and that he touched her vagina or the area surrounding it. The fifth charge was an allegation of digital penetration. Charge 6 was a representative charge of rape. For this charge, the Crown relied on an incident referred to in C's evidential video interview in which she described being driven by the applicant to a location to collect wood. She said the applicant stopped the vehicle and "just did it on the ground". The Crown also relied on an event occurring in early August 2016 when C's brother, B, then aged 14, found the applicant and C lying on B's bed. B's evidence was that he saw the applicant pull up C's pants and that he could see C's vagina. B reported what he had seen to his mother. The final charge, charge 7, related to a specific incident of an alleged rape in 2016 when C and her older brother stayed overnight at the applicant's home.

[4] The bedroom incident led to both C and B being interviewed for the purposes of evidential videos on 10 August 2016. Charges were laid and the matter proceeded to trial.

---

1 *Andrews v R* [2020] NZCA 599 (Cooper, Peters and Whata JJ) [CA judgment (conviction and sentence appeal)].

2 *R v Andrews* [2019] NZDC 17825 (Judge Maze).

[5] The evidence called at trial was the subject of a number of pre-trial rulings. One of these related to the admissibility of evidence of an earlier incident when C, then aged three, was found to be lying under the babysitter's 12-year-old son while both were naked from the waist down. When interviewed by police, the 12-year-old boy said that he had an idea to do things, "sexual things", but his mother had come into the room before he did anything.

[6] The District Court's ruling that evidence about this earlier incident could be called[3] was overturned following a successful appeal by the Crown to the Court of Appeal.[4] The Court considered that the threshold for the admissibility of such evidence relating to the complainant's sexual experience with a person other than the defendant in s 44 of the Evidence Act 2006 was not met.[5] The Crown also succeeded in overturning a pre-trial ruling[6] allowing the defence to adduce expert evidence about interviewing techniques and children's memory.[7] The Court did not consider the evidence was substantially helpful in terms of s 25 of the Evidence Act.

[7] In the post-conviction appeal to the Court of Appeal, the conviction was challenged on two grounds. The first was that the verdicts on charges 5 to 7 were unreasonable as there was no reliable evidence on which the jury could reasonably conclude that digital or penile penetration had occurred. On the second ground, the applicant said charge 6 should not have been brought on a representative basis and that this had given rise to a miscarriage of justice.[8] The Court of Appeal rejected both grounds of appeal.[9]

---

3 *R v Andrews* [2018] NZDC 9939 (Judge Maze). The District Court found the evidence could be called as there was expert evidence to the effect that it was plausible that at least part of C's reports were false because she had misattributed previous abuse by someone else to the applicant.

4 *R v Andrews* [2018] NZCA 421 (Winkelmann, Brown and Clifford JJ) [CA judgment (admissibility of earlier incident)].

5 This Court dismissed an application for leave to appeal pre-trial: *Andrews v R* [2018] NZSC 128 (Glazebrook, O'Regan and Ellen France JJ).

6 *R v Andrews* [2018] NZDC 4112 (Judge Maze).

7 *R v Andrews* [2019] NZCA 151 (Gilbert, Wylie and Thomas JJ) [CA judgment (expert evidence)].

8 The applicant argued the trial Judge's directions were not clear on unanimity.

9 CA judgment (conviction and sentence appeal), above n 1, at [10]–[79].

[8] In allowing the sentence appeal, the Court accepted the Solicitor-General's submission that the trial Judge was wrong to regard the case as falling within band 2, not band 3, of *R v AM (CA27/2009)*.[10]

The proposed appeal against conviction

[9] The grounds of the proposed appeal in relation to conviction can be dealt with under three headings.

The exclusion of evidence relating to the earlier incident

[10] The first of the grounds relates to the exclusion of the evidence of the earlier incident involving C and the 12-year-old boy. The submission is that the exclusion of this evidence has led to a miscarriage of justice because it effectively deprived the applicant of the only reasonable defence open to him on the most serious charge. This was because, without this evidence, there was no plausible alternative source for C's sexual knowledge. The applicant would also challenge the Court of Appeal's assessment of the factual differences between the earlier incident and the incidents C described involving the applicant. Further, the applicant says there was a basis for the submission that transference has occurred in that the earlier incident may have provided a plausible alternative source for C's account.[11] It is also submitted that the admissibility of this evidence gives rise to points of law of public importance, such as the threshold to be applied in determining admissibility under s 44 of the Evidence Act, particularly where transference is advanced. The applicant suggests there is an inconsistency apparent in Court of Appeal decisions on this issue.

Expert evidence relating to C's evidential video interview and issues of child memory

[11] The second proposed ground of appeal relates to the exclusion of the evidence of Dr Rachel Zajac, a psychologist, about C's evidential video interview and issues of child memory versus adult memory. Essentially, the applicant makes two submissions. First, the jury's assessment of the meaning and reliability of C's evidence in her evidential video interview was hampered as a result of not being aware of expert

---

10 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

11 The applicant says the expert evidence supports this proposition.

evidence about the potential for suggestibility in repeated open questions and about the difficulty for children in using one object as a symbol for another object (referred to as representational insight).[12] The submission is that, absent support from an expert, defence counsel's submissions at trial which covered the same ground carried little weight with the jury. Second, on the issue of child memory, the applicant says that while the potential suggestibility of a six-year-old may be self-evident, the cognitive and social factors that make a child's memories less complete and accurate than adults' is not common knowledge. The proposed expert evidence would therefore have been of substantial help to the jury.

The representative nature of charge 6

[12] Under this head, the applicant says that a number of "distinctly identifiable" incidents are potentially covered by charge 6 and that these incidents should have been the subject of separate charges. The argument is that the defence was prejudiced as a result of the representative nature of the charge and that the trial Judge's directions did not cure that prejudice. A miscarriage of justice accordingly arises as there is a risk the jurors might have agreed a rape took place during the relevant period without being unanimous as to the particular incident of rape.

The proposed appeal against sentence

[13] The argument the applicant wishes to make on sentence is that the Court of Appeal wrongly usurped the right of the trial Judge to adopt any reasonable view of the facts as disclosed by the evidence and that this has led to a miscarriage of justice. The applicant says the Judge's assessment of the scale of the offending and the applicant's culpability was open to her, and she should not have been bound by a rigid adherence to the bands and the number of factors discussed in *AM*.

---

[12] The issue of representational insight arises from a passage in the evidential video interview in which C said that the applicant "sometimes … does like poke me up there and it hurt me" and that he did so with his finger. The interviewer then made an analogy with her ear telling C how there is an outside and inside part of the vagina just like there is an outside and inside part of the ear. She then asked C where she felt she was poked. C responded that it felt like "over here and it feels like sharp" and then that it was "[l]ike when I poke my eye it feels really sore".

Our assessment

[14] We deal first with the ground based on the exclusion of the evidence of the earlier incident. The effect of s 44 of the Evidence Act is that a judge must not grant permission for evidence to be given relating directly or indirectly to the sexual experience of a complainant with any person other than the defendant, unless satisfied that the evidence is of such direct relevance to the facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it.

[15] In the pre-trial appeal dealing with this evidence, the Court of Appeal acknowledged that the "major protective purpose of s 44" that is, to avoid character blackening, would not be compromised in this case given C's age.[13] However, the Court considered that although it was proposed that the evidence in issue would be given by the 12-year-old boy's mother (the babysitter), the other protective purpose of s 44, namely, avoiding re-traumatisation, was still relevant.[14] The Court determined that the evidence was not so directly relevant to the allegations against the applicant as to meet the s 44 threshold. In doing so, the Court emphasised, amongst other matters, the material differences between the earlier one-off incident involving a 12-year-old boy the complainant did not know well[15] and the current wide-ranging and prolonged allegations involving an adult with whom C was well acquainted.[16]

[16] This issue was not raised in the conviction appeal so the proposed appeal would have this Court re-visit the pre-trial appeal assessment. Given the way that the Court of Appeal approached the matter, we see the correctness of the assessment as turning on the particular facts rather than on any broader questions about the s 44 threshold and transference. No question of general or public importance accordingly arises.[17] Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice in the assessment of the material factual differences undertaken by the Court.[18]

---

13 CA judgment (admissibility of earlier incident), above n 4, at [28] citing *TPN v R* [2010] NZCA 291 at [18].
14 At [28].
15 The applicant challenges the inference drawn by the Court that C "barely knew" the boy on the basis that his mother had babysat C and her siblings over some months.
16 At [29].
17 Senior Courts Act 2016, s 74(2)(a).
18 Section 74(2)(b).

[17] Turning then to the exclusion of the evidence about the evidential video interview, Dr Zajac accepted that various best practice interviewing techniques were used during the interview. But, relevantly, she raised "some concern" about links between repeated questioning and suggestibility, and representational insight. The Court in the conviction appeal reviewed these aspects in the context of considering the applicant's submission that the verdicts on charges 5 to 7 were unreasonable because of the lack of reliability and clarity in the answers in the evidential video interview.

[18] The Court agreed with the conclusion in the pre-trial judgment on this aspect that, having viewed the interview, the jury would be "well placed to form their own assessment of what effect the repeated questioning had, in the light of counsel's submissions".[19] Further, the Court was not satisfied that the questioning was such that the jury could not have found the answers reliable. The Court noted that "C was young and there were signs in the transcript, as might be expected, that she found the interview process uncomfortable", but although there was "some repetition of questions, that was done to elicit further information" and the interviewer "made a genuine attempt to ascertain what C could recall".[20] Further, the proposition that the answers were not reliable because of the questioning "was squarely before the jury".[21]

[19] The Court reached the same view in relation to the complaints about the drawing of an analogy by the interviewer between the inside and outside of an ear and a vagina. This had been addressed by defence counsel in closing and the issues raised were matters for the jury.[22] Nor did the Court consider the analogy was inappropriate given C's age, particularly where C had used her own analogy in describing how she felt when referring to a poke in her eye. Again, the Court expressed agreement with the decision in the pre-trial appeal on this aspect.[23]

[20] There is no challenge to the test applied in relation to this evidence. Rather, the proposed appeal on this issue would require this Court to reconsider the Court of

---

19 CA judgment (conviction and sentence appeal), above n 1, at [26].
20 At [27].
21 At [32]. The interviewer was cross-examined by defence counsel. The issue was addressed in defence counsel's closing address and the case for the defence in this respect was summarised in the trial Judge's summing up: see at [28]–[31].
22 At [34].
23 At [35].

Appeal's factual assessment. The applicant's submissions do not give rise to any appearance of a miscarriage of justice in that factual assessment.

[21] We reach the same conclusion in respect of the evidence about memory issues affecting children. The Court considering the pre-trial appeal on this issue was concerned the proposed evidence would cut across the approach reflected in reg 49(b) of the Evidence Regulations 2007, under which any judicial warning on the evidence of children under the age of six years may be qualified by a direction that the warning does not mean a child witness is any more or less reliable than an adult.[24] The applicant says this raises a question of public importance about the interrelationship between reg 49(b) and s 125(2) of the Evidence Act, which provides that the judge must not warn the jury about the need for care in scrutinising a child's evidence unless there is expert evidence supporting making such a direction.

[22] We do not consider that argument has sufficient prospects of success to warrant the grant of leave. In the circumstances, the Court of Appeal could make something of the policy considerations underlying reg 49(b), even though, as the applicant notes, reg 49(b) was not directly applicable as C was six at the time of the interview. In any event, the Court also took the view that the evidence fell "within the jury's sphere of competence" and did not provide substantial help in ascertaining any fact of consequence in terms of s 25 of the Evidence Act.[25] We see no appearance of a miscarriage of justice in that assessment.

[23] In relation to the third proposed ground of appeal against conviction, the Crown accepts, as it did in the Court of Appeal, that charge 6 should not have been brought as a representative charge. The Crown maintains, however, that no miscarriage of justice has resulted.[26] The Court of Appeal, in dismissing the conviction appeal on this point, agreed the charge should not have been brought on a

---

24 CA judgment (expert evidence), above n 7, at [69].

25 At [70].

26 At the end of the Crown case, there was agreement that the charge list should be amended. What occurred is set out in the CA judgment (conviction and sentence appeal), above n 1, at [57]–[64] and that process appears to be the context in which charge 6 emerged in its final form. The Court of Appeal said the fact no issue had been taken by defence counsel at the time was inconsistent with any suggestion of prejudice: at [74].

representative basis, but concluded that this error had not resulted in any prejudice to the applicant. The Court said:[27]

> The facts that distinguished the two specific incidents were established. It is very difficult to see how [the applicant] would have been in any better position if separate charges had been laid. The Crown case on each incident would still stand or fall on C's evidence. To the extent that the incident in B's bedroom was bolstered by the statement made by B, he was available for cross-examination at the trial and was indeed questioned by [defence counsel]. But there could have been no suggestion that, if charged separately, different relevant evidence could have been called.

[24] Finally, the Court addressed the adequacy of the Judge's summing up. The Court concluded that the directions were adequate when their "overall content" was considered. The Court referred in this context to various aspects of the directions including the particular references to the approach to representative charges and the direction to the jury that they "must all be satisfied beyond reasonable doubt as to the incident concerned in a representative charge".[28] Given the directions, the Court was not satisfied that a real risk the jury were not unanimous on any single incident within charge 6 had been established. The Court also took the view that the Judge's directions were "quite clear" that the jury had to be satisfied beyond reasonable doubt about the issue of penetration.[29]

[25] The Court's approach to this aspect turns on its assessment of the particular features of the applicant's trial. No question of general or public importance arises. Nor does anything raised by the applicant give rise to any appearance of a miscarriage of justice in the Court's assessment of these matters.

[26] Finally, on sentence, the Court of Appeal considered that three aggravating factors, vulnerability, scale and premeditation, along with a breach of trust meant the offending was appropriately placed into band 3. Given that this was a Solicitor-General's appeal, the Court took the lowest possible starting point for band 3 offending (12 years), from which there was a discount of six months for good character.

---

27 At [71].
28 At [77].
29 At [78].

[27] The proposed sentence appeal does not raise any question of general principle. The Court noted the statement in *AM* that a "mechanistic" approach was not appropriate.[30] There is nothing in the Court's assessment that gives rise to the appearance of a miscarriage.

Result

[28] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[30] At [94], citing *AM*, above n 10, at [36].