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

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE DEPONENT, HER FAMILY MEMBERS AND HER BOYFRIEND REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 49/2019
[2021] NZSC 77

BETWEEN	PETER HUGH MCGREGOR ELLIS Appellant
AND	THE QUEEN Respondent

Hearing:	11 November 2020 and 25 March 2021
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ
Counsel:	R A Harrison, S J Gray, B L Irvine and K D W Snelgar for Appellant J R Billington QC and A D H Colley for Respondent
Judgment:	1 July 2021

JUDGMENT OF THE COURT

The respondent's application for leave to adduce the evidence of the deponent in relation to the alleged incident in 1982/1983 and the affidavits of other proposed witnesses in relation to that incident at the hearing of the appellant's appeal against conviction is dismissed.

REASONS
(Given by O'Regan J)

Admissibility of evidence

[1] The respondent seeks leave to adduce evidence at the hearing of the appellant's appeal.[1] The proposed evidence is an affidavit from a deponent to the effect that she was sexually abused by the appellant in 1982 or 1983, and other material that relates to the alleged sexual abuse incident. The name of the proposed deponent is suppressed.[2] We will refer to her as "the deponent".

[2] On 15 June 2021, we delivered a results judgment in which we dismissed the respondent's application.[3] We said we would deliver our reasons later. These are those reasons.

[3] The respondent first sought leave to adduce the deponent's proposed evidence in October 2019, prior to the hearing to consider whether the appellant's appeal should continue despite his death. The application was dismissed at that time.[4] However, this Court said the application could be renewed if the appeal proceeded.[5]

[4] The respondent renewed its application in October 2020. It sought a ruling that the proposed evidence be admitted at the hearing of the appeal. It argued at that time that the proposed evidence was admissible in light of its relevance to the central issue in the appeal (namely, the reliability of the prosecution evidence at the appellant's trial). The respondent pursued that application at the first hearing on 11 November 2020. That hearing was adjourned to give the respondent time to have further inquiries made about the alleged incident.

[5] In its written submissions for the resumed hearing of the application on 25 March 2021, the respondent modified its position. It now seeks only a ruling that

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1 The application invokes r 40(1) of the Supreme Court Rules 2004, which provides that the Court may grant leave for the admission of further evidence on questions of fact. The background to the appeal is set out below at [7]. As explained below at [7](g), the Court has determined that the appellant's appeal should continue despite his death.

2 *Ellis v R* [2020] NZSC 137.

3 *Ellis v R* [2021] NZSC 63.

4 *Ellis v R* [2019] NZSC 122.

5 At [8].

the proposed evidence be admitted *de bene esse* (provisionally), on the basis that a final decision on its admission would be made after the hearing of the substantive appeal. If the proposed evidence was admitted on that basis, the respondent would be able to refer to it in its submissions for the substantive appeal. The respondent argues that the Court could then determine whether the proposed evidence was admissible when the Court had a better understanding of the issues on appeal, having heard full argument on them. As a backup position, the respondent submits that, if the Court considered that a decision on admissibility needs to be made now, then the decision should be that the proposed evidence be admitted.

[6] Counsel for the appellant, Mr Harrison, opposed admission of the proposed evidence, whether provisionally or otherwise.

Background

[7] The background to the appeal is well known, so we summarise it briefly as follows:

(a) The appellant faced trial in 1993 on 28 charges of sexual offending against 13 child complainants. The offending was said to have occurred during the appellant's employment as a caregiver at the Civic Crèche in Christchurch. He was convicted of 16 charges involving seven children. He was acquitted on nine further charges and discharged on three charges during the trial under s 347 of the Crimes Act 1961. He was sentenced to 10 years' imprisonment on 22 June 1993.[6]

(b) The appellant appealed to the Court of Appeal against conviction and sentence. The conviction appeal was dismissed, except in respect of three charges relating to a complainant who recanted her evidence.[7] Those convictions were quashed and verdicts of acquittal directed.[8] The sentence appeal was dismissed.

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6 *R v Ellis* HC Christchurch T9/93, 22 June 1993 (Williamson J).
7 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ).
8 At 195.

(c) In 1999, the case was referred back to the Court of Appeal under s 406(a) of the Crimes Act, but the appellant's appeal was again dismissed.[9]

(d) In 2000, Sir Thomas Eichelbaum was appointed to conduct a Ministerial Inquiry to evaluate the reliability of the evidence given by the complainants. Sir Thomas concluded that the appellant had not proven that the convictions were unsafe.[10]

(e) In July 2019, this Court granted the appellant an extension of time to apply for leave to appeal to this Court against conviction, and also granted leave.[11] The approved ground was whether a miscarriage of justice occurred in this case.

(f) On 4 September 2019, the appellant died.

(g) On 1 September 2020, this Court issued a results judgment in which it ordered that the appeal was to continue despite the appellant's death and indicated that the reasons for the decision would be given contemporaneously with the Court's judgment on the substantive appeal.[12]

Grounds of appeal

[8] The appellant's substantive appeal is advanced on a number of grounds, but for present purposes, the relevant ground concerns the techniques by which the children were interviewed. The case for the appellant is that there were flaws in the interviewing techniques and also a risk of contamination of evidence because of the interventions of the parents of the children. His counsel will adduce expert evidence to the effect that these flaws and risks of contamination were of such gravity that the evidence of the children should not have been admitted at the appellant's trial.

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9 *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ).

10 Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon Phil Goff* (Ministry of Justice, Wellington, 2001).

11 *Ellis v R* [2019] NZSC 83.

12 *Ellis v R* [2020] NZSC 89.

Alternatively, the appellant will argue that the expert evidence establishes that the flaws in the way the children's evidence was obtained made the evidence insufficiently reliable to establish the appellant's guilt beyond reasonable doubt, so that the outcome of the appellant's trial was a miscarriage of justice.

[9] The respondent initially submitted that the proposed evidence was relevant to the first ground (the flaws in the interviewing techniques meant the children's evidence should not have been admitted). However, it subsequently expanded this submission to argue that the proposed evidence was also relevant to the second.

The proposed evidence

Deponent's EVI 21 February 2019

[10] The principal evidence that the respondent seeks to adduce is a statement by the deponent, in which she says she was sexually abused as a young girl (about four and a half or five years old) by a babysitter, on one occasion in 1982 or 1983. She says the perpetrator was the appellant, who was babysitting at her home at the time. The evidence is in the form of an affidavit dated 10 November 2020, to which is appended the transcript of an evidential video interview (EVI) that took place on 21 February 2019. The deponent confirms in the affidavit that the contents of the EVI transcript are true and accurate. We will call this evidence the 2019 EVI.

[11] It is not necessary for the purposes of the present judgment to describe in detail what the deponent says happened to her. It suffices to say that it involved serious sexual offending which shared some similarities to the conduct founding the charges against the appellant on which he was convicted in 1993.[13] The offending had a traumatic effect on the deponent.

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[13] The similarities identified by the respondent were "oral sex until ejaculation and poking genitalia with objects". However, as the respondent accepted, the appellant was not convicted on any of the charges alleging poking genitalia with objects. That "similarity" must therefore be put to one side. The other similarity identified by the respondent was the use of incentives (lollies) and threats.

[12] The deponent says the appellant babysat on one other occasion but he assured her the abuse would not happen again, and it did not.[14] So, the deponent says, the incident was a "one off".[15]

[13] The deponent says her mother worked as a cleaner at a kindergarten in Christchurch (we will refer to it as "the Kindergarten") where she thinks her mother met the appellant because he also worked (or volunteered) there. The deponent says she met the appellant at the Kindergarten herself before the incident occurred.

[14] The deponent recalls that, when the appellant's trial was taking place, she watched news reports of the trial and felt guilty that she had not reported what happened to her in 1982 or 1983. She says she blamed herself for what the appellant did to the Crèche children.

[15] The deponent says she disclosed the incident to her boyfriend when she was about 15 years old and had her first sexual experience.[16] She says the boyfriend told one of the deponent's sisters, who told the deponent's mother. The deponent told her mother she did not remember the incident. She says her mother took her to a police station to make a statement but the statement was lost.[17] She says she has spoken to her sisters over the years about the incident. She recalls also making a statement when she was about 25 years of age.[18]

Deponent's statement 18 November 2020

[16] The respondent also seeks to adduce a later formal statement made by the deponent on 18 November 2020, in which she gave some further details in relation to

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14 The deponent also referred to being dropped off at what she believed was the appellant's place on at least one occasion, but it is not clear whether this was so the appellant could babysit her.

15 The deponent does, however, refer in the 2019 EVI to having flashbacks of naked dancing and being photographed naked. She did not suggest this happened during the one-off incident. In her 2007 complaint to the police (to which we refer below), she told the police she believed there were other incidents, but they were less clear.

16 A police jobsheet dated 27 September 2019 records an interview with a man who was the deponent's boyfriend when she was about 15 years old, and to whom she said she disclosed the sexual abuse. He recalled the deponent and his relationship with her, but had no recollection of the disclosure.

17 As noted below at [18](d), the police have no record of this statement.

18 This is likely to be the 2007 statement referred to below. In a telephone discussion with a police officer in September 2019, the deponent says she spoke to a female detective and signed a statement in around 2007.

the alleged incident.[19] We will call this the 2020 statement. In the 2020 statement, the deponent says when her mother took her to the police station in 1993, she told the police officer who interviewed her everything that happened to her and he wrote it down. She did not, however, name the appellant as she did not know the name of the perpetrator at that time. The deponent also says that she saw a documentary about the appellant in 2007 and instantly recognised him as the person who sexually abused her when she was five years old. This prompted her to go to the police in 2007. She was interviewed by a female detective and made a statement. However, the deponent told the police at that time that she did not want to press charges. She also says she had made a diary note in 2007 recording what the appellant did to her and also recording the claim number for her Accident Compensation Corporation (ACC) claim and the date of her police interview in 2007.

Supporting material

[17] The respondent also seeks to adduce evidence that it says supports the allegations made by the deponent in the 2019 EVI. In particular, they are:

(a) An affidavit by Det Snr Sgt Reeves of the Canterbury Police, reporting on her inquiries on matters relevant to the evidence of the deponent.

(b) An affidavit by the partner of the deponent's aunt, in which he recalls that his ex-wife's mother was head teacher at the Kindergarten and that she worked with the appellant there. He said he did not know what role the appellant had or when he worked there.

(c) An affidavit by the deponent's sister, in which she recalls the deponent recounting that the appellant sexually abused her. She said this was when she (the sister) was about 20 years old, which would mean it occurred in about 1996.

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[19] We have proceeded on the assumption that the respondent seeks to adduce the 2020 statement. We have not however received an application from the respondent to this effect. It seems inevitable that, if the Court admitted the 2019 EVI, it would also have to admit the 2020 statement. Counsel for the appellant, Mr Harrison, addressed the 2020 statement in some detail in his submissions.

(d) Extracts taken from a police file recording the complaint by the deponent to the police in 2007. In the statement made on 12 April 2007, the deponent said that the incident she recalled involved a babysitter. She did not identify the appellant by name, but said he was a high profile offender and was a Civic Crèche worker.

(e) Records of entries in the files of ACC in the course of the deponent's interactions with ACC. These records are discussed further below.

[18] The matters dealt with in the affidavit of Det Snr Sgt Reeves were as follows:

(a) The Kindergarten did not hold employment or student records going back far enough to confirm whether either the deponent's mother or the appellant worked there at any time. A longstanding employee who was confident she would have known if the appellant had worked at the Kindergarten had no knowledge of his having done so.

(b) An inquiry with the deponent's aunt elicited a response that she remembered the deponent's mother worked at the Kindergarten as a cleaner, but could not remember when that occurred. This inquiry also led to the obtaining of the evidence referred to above at [17](b) from the partner of the deponent's aunt.

(c) The deponent had said in the 2019 EVI that she thought she or one of her sisters was interviewed by the police as part of the Civic Crèche investigation, but Det Snr Sgt Reeves found no evidence in the records of that investigation to support the deponent's account.

(d) In the 2019 EVI, the deponent said that she made a statement to the police between 1992 and 1994. Det Snr Sgt Reeves found no record of this interview.

(e) The address given by the deponent in the 2019 EVI as the place at which she said the incident occurred was confirmed as having been the deponent's family home at the relevant time.

(f) The deponent made a claim with ACC in February 2006.[20] She received counselling but discontinued this in November 2006. She commenced counselling again in April 2007 and had various interactions with ACC counsellors up until 2019.

(g) In the 2020 statement, the deponent said she had been told that the appellant's mother worked at the Royal George Tavern in Christchurch, where the deponent's parents used to drink. The Royal George Tavern no longer exists and the inquiry as to whether the deponent's account was correct led nowhere.

[19] Extracts from the deponent's ACC records obtained by the police were before the court. In a February 2006 counselling session, the deponent described the incident and says the perpetrator was an uncle. In an interview in April 2007, she told the counsellor that she saw a television programme about the appellant's case and this triggered her memory, leading her to recommence counselling. In a May 2007 interview, she told the counsellor the perpetrator was a babysitter, not an uncle.[21] Later entries record the deponent's account of the incident in varying terms, but in none does she identify the perpetrator as the appellant, although the focus of the accounts was on the deponent's condition, not on who the perpetrator was.

Allegation not put to the appellant

[20] Although the deponent's EVI took place in February 2019, nearly seven months before the appellant died, the allegations made by the deponent were not disclosed to the appellant or his counsel prior to the appellant's death. This means the appellant did not get the opportunity to respond to the allegations made against him

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[20] There is an indication in the ACC records for the deponent that she had received counselling in 2002, but it is unclear whether she made an ACC claim at that time.

[21] In the 2019 EVI, the deponent says the appellant told her and her sisters to call him "uncle Peter" at the time of the incident.

by the deponent. Mr Harrison was critical of this. He said the appellant had a very good memory and was lucid until just before his death, so it is likely he would have recalled where he was working at the time of the incident and other details, such as where his mother worked at various times.[22] It is clear that an issue of fairness arises, but it is not necessary for us to engage with the reasons why the matter was not raised before the appellant's death.

Evidence in support of the appellant's opposition to the respondent's application

[21] Mr Harrison filed a number of affidavits challenging the key aspect of the proposed evidence, being the deponent's statement that the appellant was the perpetrator in relation to the 1982/1983 incident as well as a number of peripheral matters contained in the deponent's account.

[22] The appellant's two brothers and sister deposed that their mother never worked as a barmaid or in any other capacity at any bar.[23] They also deposed that their mother resided in Twizel until 1986, which means she could not have been working at the Royal George Tavern in Christchurch in 1982 or 1983. In both cases, the siblings' accounts contradict aspects of the proposed evidence. All of the appellant's siblings confirmed that the appellant had a good memory and was lucid until just before his death. So, he would have been able to recall where he was working in 1982 and 1983 if the allegations had been put to him before his death. A former colleague of the appellant at the Civic Crèche deposed that she understood that the appellant had never worked in childcare or been formally involved in any environment that included children before his employment at the Civic Crèche. Mr Harrison pointed out that if the appellant had, in fact, worked at another childcare facility before he worked at the Civic Crèche, it is likely this would have been drawn to the attention of the police at the time of the investigation of the allegations against the appellant, given the widespread publicity at the time.

[23] Mr Harrison also sought to adduce an affidavit from Professor Rachel Zajac of the University of Otago, containing expert evidence about memory. In that affidavit,

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[22] Mr Harrison's submission is supported by the affidavit evidence from the appellant's siblings noted below at [22].

[23] The appellant's mother is still alive but suffers from dementia so is unable to give evidence.

Professor Zajac says she sees many "red flags and risk factors for memory error" in the deponent's account.[24] The purpose of this affidavit was to cast doubt on the reliability of the deponent's statement that the appellant was the perpetrator in relation to the incident.

[24] The respondent made submissions about the admissibility or otherwise of expert evidence on memory but did not engage in any meaningful way with the issue of admissibility of Professor Zajac's evidence in relation to the present application.

[25] It has not been necessary for us to engage with the issue of the admissibility of Professor Zajac's evidence because we have reached our conclusion on the admissibility of the proposed evidence on a basis that did not require us to take into account Professor Zajac's evidence.

Test for admissibility

[26] The respondent cites the English case, *R v Hanratty*, as an example of a case where the Crown has been given leave to adduce fresh evidence in a criminal appeal where the evidence is relevant to the safety of the appellant's conviction.[25] In that case, the Crown was given leave to adduce DNA evidence in a posthumous appeal that conclusively proved that Mr Hanratty had committed the offence in question. The England and Wales Court of Appeal said:[26]

> … it is clear that the overriding consideration for this Court in deciding whether fresh evidence should be admitted on the hearing of an appeal is whether the evidence will assist the Court to achieve justice. Justice can equally be achieved by upholding a conviction if it is safe or setting it aside if it is unsafe.

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24 Professor Zajac's evidence does not deal with the 2020 statement.

25 *R v Hanratty (dec'd)* [2002] EWCA Crim 1141, [2002] 2 Cr App R 30.

26 At [94]. The principles underlying *Hanratty* were endorsed in *Singh v R* [2014] NZCA 306 at [50]–[51].

[27] There is no general principle precluding the Crown from seeking to adduce new evidence in a criminal appeal.[27] The determination of whether it is in the interests of justice to admit such evidence is no different in principle from the test applied in relation to the admission of evidence adduced by a defendant appealing against conviction.

[28] The respondent made alternative submissions on the test for admissibility of evidence offered in an appellate court where the evidence is adduced to support the safety of the conviction under challenge. At the 11 November 2020 hearing, it argued the conventional test for admission of fresh evidence in an appeal, as articulated in *Lundy v R*, applied.[28] However, at the 25 March 2021 hearing, it argued for an alternative position, namely that the test for admission was simply relevance.

Lundy v R

[29] In *Lundy*, the Privy Council observed that the nature of the "overriding" test governing the admission of evidence on appeal is that the new evidence should be admitted if the "the interests of justice require it".[29] Their Lordships set out the test in these terms (in relation to evidence to be adduced by a criminal appellant in an appeal against conviction):[30]

> [120] The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the Court is satisfied at that stage that, if admitted, it would have no effect on the

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27 The power to admit evidence in s 389 of the Crimes Act 1961 (the present appeal is dealt with under the Crimes Act despite its repeal by the Criminal Procedure Act 2011: see s 397 of the latter) does not differentiate between admission of evidence for an appellant or respondent. For example, the England and Wales Court of Appeal in *Hanratty*, above n 25, drew on the decision in *R v Hakala* [2002] EWCA Crim 730 at [11] per Judge LJ, who remarked that "fresh evidence adduced by the appellant, or indeed the Crown, may serve to confirm rather than undermine the safety of the conviction". It is now well established in England and Wales that the prosecution may seek leave to adduce further evidence on appeal where the interests of justice require it: see for example Mark Lucraft (ed) *Archbold: Criminal Pleading, Evidence and Practice 2021* (Sweet & Maxwell, London, 2021) at [7-208], referring to *Gilfoyle* [1996] 1 Cr App R 302 (CA), *Craven* [2001] 2 Cr App R 12 (CA) and *R v Fitzgerald* [2006] EWCA Crim 1655. For a New Zealand example, see *Singh*, above n 26.

28 *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 at [119]–[120].

29 At [119].

30 See also *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25]; *R v Bain* [2004] 1 NZLR 638 (CA) at [18]–[27]; and *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34].

> safety of the conviction. If the evidence is credible but not fresh, the Court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[30] This test needs to be adapted to the present circumstances, where the evidence is to be adduced by the respondent in a criminal appeal and it is adduced for the purpose of supporting a proposition that is advanced to persuade the Court that the conviction under challenge is safe. But there is no reason why the three central ideas of the *Lundy* test should not still apply, that is, that the evidence must be fresh, credible and cogent in relation to an issue in the appeal.

Proposed alternative test: relevance

[31] The alternative test proposed by the respondent, which its counsel, Mr Billington QC, identified as the respondent's preferred position at the 25 March 2021 hearing, is simply relevance. He argued that test could be summarised as whether the Court believes it will be materially "assisted by receiving this evidence in the appeal". He argued the Court would be materially assisted in this case, because the proposed evidence may assist the Court's evaluation of the memory evidence that has been given and will be given at the substantive appeal hearing by expert witnesses for both the appellant and the respondent. In answer to a question from the bench, Mr Billington accepted the Court must first decide whether the evidence clears the reliability threshold and then determine its relevance.

[32] Mr Billington argued this test was appropriate in this case because although sitting as an appellate court, this Court will, in effect, be the final trier of fact. We do not accept that is the case. The Court will be engaged in determining whether a miscarriage of justice occurred at the appellant's trial. That is a quintessentially appellate task. The fact that the appellant is now deceased and, therefore, it will not be open to the Court to order a retrial, does not alter the Court's essentially appellate function.

Our approach

[33] We do not think there is any reason to depart from the well-established test for the admission of fresh evidence in a criminal appeal, as articulated in *Lundy* (adapted to reflect the present context). We will proceed on that basis. That said, we do not think the outcome in the present case would be any different under the respondent's proposed test.

[34] There is no dispute that the proposed evidence is fresh. So, the admissibility assessment requires consideration of reliability and cogency in relation to the major issue in the appeal. We will consider reliability first.

Application to this case

Reliability

[35] As the deponent was not cross-examined, there is no proper basis to call into question her credibility or cast doubt on the fact that an incident of the kind she describes happened. For present purposes, however, the key element of the deponent's proposed evidence is her statement that the perpetrator of the 1982/1983 incident was the appellant. The deponent's evidence can be relevant to the appeal only if that aspect of her evidence is sufficiently credible and reliable that this Court can rely on it.

[36] The deponent's evidence relates to an incident said to have occurred nearly 40 years ago, when she was a very young child. As in any case where a long time has elapsed between the date of the incident and the disclosure, the delay makes it difficult to verify details associated with the incident that could corroborate or cast doubt on the deponent's account. Examples include whether the deponent's mother and/or the appellant worked at the Kindergarten, whether the appellant ever babysat for the deponent's family, whether the appellant had worked in a childcare facility before he worked at the Civic Crèche[31] and whether the appellant's mother worked at the Royal George Tavern.

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[31] If the appellant had worked at another childcare facility before he worked at the Civic Crèche, it could be expected that this would have led to further inquiries by the police in 1992–1993.

[37] That difficulty is compounded in this case by the fact that the allegations were not put to the appellant before he died. It can be expected that, had the appellant been informed of the allegations, he could have given important information in relation to issues such as whether he babysat for the deponent's family and whether he worked at the Kindergarten. Mr Billington sought to downplay the significance of this, but we see it as potentially important. We cannot rule out the possibility that he may, for example, have been able to conclusively establish that he did not work at the Kindergarten, did not know the deponent's mother and could not have babysat for the deponent's family. He did not get the opportunity to do this. This raises obvious issues of fairness, but also affects the reliability assessment because of the unresolved nature of these factors.

[38] One other detail gives us cause for caution about the deponent's statement that the appellant was the perpetrator. The deponent's account of realising for the first time in 2007 that the appellant was the person who sexually abused her is inconsistent with her recollection in the 2019 EVI that she felt guilty on seeing reports of the appellant's case because she had not made a complaint.[32] She could only have felt that guilt if she had been aware at that time (1993) that the appellant was the perpetrator. It also raises a concern that this may have triggered an incorrect recollection. It is also inconsistent with her sister's recollection of a disclosure by the deponent in about 1996 of abuse by the appellant.[33] More generally, there is an issue as to whether the effluxion of time and the publicity surrounding the appellant (whether at the time of the original trial or in 2007) may have led the deponent to mistake the appellant for the perpetrator.

[39] We conclude that, in relation to the crucial aspect of the proposed evidence—the statement that the appellant was the perpetrator—there is cause for caution about the reliability of the deponent's account. We put it no higher than that. We do not, indeed cannot, say the deponent's allegations as to the appellant being the perpetrator are wrong. We say rather that, whatever their cause, the inconsistencies in her narrative and the possibility she was mistaken are matters of real concern. The fact that the allegation cannot be put to the appellant compounds that concern.

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32 See above at [14].
33 See above at [17](c).

Cogency

[40] The respondent argues that the proposed evidence is relevant because of the similarities between what the deponent says the appellant did to her and the accounts given by the children at the appellant's trial. On this basis, the respondent submits the proposed evidence is cogent in relation to three matters at issue in the substantive appeal:

(a) assessing the quality of the Crèche children's evidence at the appellant's trial;

(b) determining the reliability of the Crèche children's evidence; and

(c) the application of the proviso to s 385(1) of the Crimes Act.[34]

[41] We begin with the argument based on the similarities between the deponent's account and those of the Crèche children. The respondent argues that the deponent's account is evidence from an independent witness, unconnected to the impugned Civic Crèche investigation, whose allegations demonstrate some similarities to the evidence of the Crèche children. The respondent says that the appellant was a caregiver who was able to be alone with both the deponent (as her babysitter) and with the Crèche children (as a staff member). The deponent and the Crèche children describe incidents of sexual abuse of young children. Both the deponent and the Crèche children describe incentives being offered (lollies) and threats being made if the abuse was disclosed.

[42] Overall, the respondent says the proposed evidence buttresses the evidence of the Crèche children given that it would otherwise be a remarkable coincidence if the appellant was falsely accused both by the Crèche children and a person who is unconnected to them. It argues the probative value of the evidence outweighs the risk that it may unfairly prejudice the appellant.

[43] We agree that the evidence, if accepted, would support the proposition that the appellant had a sexual interest in young children in his care. However, as noted earlier,

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[34] This formed part of the respondent's argument for the 11 November 2020 hearing but was pursued only faintly and as an afterthought at the 25 March 2021 hearing.

the degree of similarity between the deponent's account of the 1982/1983 incident and the accounts of the children in respect of whom the appellant was convicted is not as stark as the respondent suggests.[35]

[44] We now turn to address the respondent's claims regarding the relevance or cogency of the proposed evidence to the three matters identified above at [40]. The respondent's submissions were made in answer to the case the appellant has indicated he will put forward in the substantive hearing. For the purposes of this application, the relevant argument is that the way in which the Crèche children were questioned and the potential contamination of their evidence through the interactions with their parents compromised the reliability of their accounts. The appellant will argue that the children's evidence ought not to have been admitted. Alternatively, the appellant will argue a miscarriage of justice occurred at the appellant's trial because the children's evidence came with such concerns about reliability that it could not properly be the basis for a finding of guilt beyond reasonable doubt.

[45] We deal first with the appeal ground that the children's evidence should not have been admitted. If this Court accepted that the questioning techniques and potential contamination were such that evidence obtained by such means was not of high enough quality to be relied on, it is hard to see how the Court could nevertheless determine the children's evidence was sufficiently reliable to have been admitted because of the availability of the evidence of the deponent, given our real concerns about the reliability of her account. We do not therefore see the proposed evidence as helpful to the Court in assessing the quality, and therefore the admissibility, of the children's evidence.

[46] We now turn to consider the relevance of the proposed evidence in the event that the Court accepts the appellant's expert evidence and concludes that, although admissible, the children's evidence came with such concerns about reliability that the appellant's conviction may be unsafe.

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35 See above at n 13.

[47] This case is a far cry from the *Hanratty* case, where the evidence admitted on appeal conclusively proved Mr Hanratty's guilt.[36] The most that can be said in this case is that the proposed evidence, if accepted, would provide some support for the accounts of the children at the trial. That would be based on the proposition that the deponent's evidence has been obtained from her as an adult, with none of the concerns applying to the way the children's evidence was obtained. But, as already noted, the elapsed time between the 1982/1983 incident and the 2019 EVI creates its own reliability concerns, exacerbated by the fact that the appellant did not get a chance to respond to the allegations made by the deponent. The proposed evidence may have been relevant to the issue of the reliability of the children's accounts if it were, itself, clearly reliable and could not be discounted or undermined by the appellant's response to it. But, given the issues as to reliability and the fact that the appellant has not had a chance to respond to it, we see it as insufficiently helpful to justify its admission.

[48] Finally, we turn to the proviso to s 385(1) of the Crimes Act.[37] We are unclear as to whether the respondent still advances this argument, but we deal with it for completeness. The proviso allows an appellate court to dismiss an appeal against conviction where it has found that an error of law occurred at the trial or that there was a miscarriage of justice if it considers that no substantial miscarriage of justice actually occurred. In essence, to invoke the proviso, the Court must be satisfied that the appellant was guilty and that the trial was not unfair. The respondent did not articulate a developed argument in relation to this in either its written submissions or its oral submissions at the 25 March 2021 hearing. The argument would have to be that the Court could determine that either there was an error of law in admitting all or some of the evidence of the Crèche children or that a miscarriage of justice otherwise occurred at the appellant's trial, but that the Court can itself be sure of guilt based, in part, on the proposed evidence of the deponent and therefore should apply the proviso and dismiss the appeal.[38] There are obvious difficulties with that argument, and in the absence of any developed submission as to how the proviso could be invoked in the

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36 See above at [26].

37 The proviso contained in s 385(1) of the Crimes Act has been repealed and replaced, but, as noted earlier, the present appeal is dealt with under the Crimes Act provisions: Criminal Procedure Act, s 397.

38 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145; and *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [23]–[36].

circumstances of this case, we do not consider that the proposed evidence should be admitted on the basis that it could be relevant in relation to an as yet unarticulated argument about the application of the proviso.

Conclusion

[49] As is apparent from the above analysis, we have concerns about the reliability of the key aspect of the proposed evidence (the deponent's statement that the appellant was the perpetrator) and are not convinced that the proposed evidence is cogent in relation to the grounds of appeal identified by the respondent.[39]

[50] The unfairness to the appellant in admitting and having regard to the proposed evidence in circumstances where the allegations could have been, but were not, put to him means that concerns about the reliability of the key aspect of the proposed evidence that could have been addressed were not. Even putting to one side the impact of the allegations not being put to the appellant on the assessment of the reliability and relevance of the proposed evidence, there is a simple question of fairness in admitting the proposed evidence in circumstances where the appellant did not have the chance to respond to the allegations, creating a risk that this would unfairly prejudice his appeal.

[51] Admitting the proposed evidence could also have the impact of substantially increasing the scope of the appeal in circumstances where there is unlikely to be any real benefit to the Court in the assessment of the grounds of appeal. Mr Harrison made it clear that if the proposed evidence were to be admitted, even if only provisionally, there would need to be full disclosure of the ACC records relating to the deponent and the deponent would be called for cross-examination.

[52] We reiterate that our decision focuses only on the integrity of our inquiry in this appeal. We do not and cannot have any view about whether the deponent's allegations are in fact correct. We see nothing to be gained in deferring our decision until the hearing of the appeal. That would prolong the proceeding and would potentially require the deponent to be cross-examined unnecessarily, in circumstances

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[39] See above at [8].

where we see very little prospect that our assessment of the admissibility of the proposed evidence would be any different.

[53] We therefore determine that a ruling on the admissibility of the proposed evidence should be made now. The ruling is that the proposed evidence is inadmissible at the hearing of the appeal.

Solicitors:
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