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 NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAME OF THE SCHOOL PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE OCCUPATION AND SPORT OF THE APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 101/2023
[2023] NZSC 161

BETWEEN	CONNOR SEAN CLAYTON NEVIN Applicant
AND	THE KING Respondent

Court: Glazebrook and Kós JJ

Counsel: I M Brookie for Applicant
J M Pridgeon for Respondent

Judgment: 7 December 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] In July 2022, the applicant, Mr Nevin,[1] was convicted of three charges of sexual violation by unlawful sexual connection, two charges of sexual conduct with a young person and one charge of common assault. All offences concerned the same complainant. Mr Nevin was sentenced to six years and six months' imprisonment by Judge Northwood, the trial Judge.[2]

[2] Mr Nevin's appeal against conviction and sentence was dismissed by the Court of Appeal on 22 August 2023.[3]

[3] Mr Nevin seeks leave to appeal against the Court of Appeal judgment relating to conviction on three grounds which he says either singly or in combination led to a miscarriage of justice:

(a) inadmissible opinion evidence from the complainant's mother;

(b) use of counter-intuitive evidence; and

(c) motive to lie.

[4] He also seeks leave to appeal against the Court of Appeal judgment on sentence. Mr Nevin argues that it is not correct that he took no issue with there being five aggravating factors and that the cases the Court of Appeal relied on are distinguishable.

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1 Mr Nevin's application for leave to appeal a High Court decision refusing to overturn the District Court's decision dismissing his application for permanent name suppression was dismissed in *Nevin v R* [2023] NZSC 160.

2 *R v Nevin* [2022] NZDC 23920. The sentence was composed of six years and six months' imprisonment on the sexual violation charges, and concurrent sentences of three years' imprisonment for the sexual conduct charges and six months' imprisonment for the assault charge.

3 *N (CA28/2023) v R* [2023] NZCA 378 (Collins, Lang and Woolford JJ) [CA judgment].

Court of Appeal decision

Opinion evidence

[5] This issue arose in the context of evidence given by the complainant's mother about a telephone call she made to Mr Nevin after the complainant had disclosed the alleged offending.[4] Her testimony included comments about Mr Nevin's reaction, and in particular, a delay before he responded to the allegations.

[6] It was submitted by the applicant in the Court of Appeal that the jury should have been instructed to disregard certain answers given by the complainant's mother in cross-examination as they constituted inadmissible opinion evidence.

[7] The Court of Appeal noted that there is a distinction between expressions of opinion and evidence that conveys a witness's observations about a defendant's demeanour.[5] The Court held that one of the answers in cross-examination may have been an expression of opinion,[6] but Mr Nevin's trial counsel was able to address the possible opinion evidence effectively by the submission that Mr Nevin did not have an answer readily available because he was in shock at the allegations, and that he was in shock because he was innocent.[7]

[8] The Court of Appeal did not consider there to be a risk that the outcome of the trial was affected by the evidence or the absence of further directions from the trial Judge.[8] Trial counsel was very experienced and did not ask for further directions, probably because he had already dealt with the issue.[9]

Counter-intuitive evidence

[9] A statement of agreed facts[10] had been provided to the jury dealing with "counter-intuitive evidence". The statement concluded with the rider:[11]

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4 At [15]–[17].
5 At [18]–[19]. See also Evidence Act 2006, s 24.
6 At [27(c)].
7 At [27(d)].
8 At [29].
9 At [28].
10 Evidence Act, s 9.
11 CA judgment, above n 3, at [35].

> This Notice does not prove or disprove that sexual offending has occurred in this case. This evidence is about the behaviour of children who have been sexually abused, the behaviour of those with whom they interact, and the dynamics of sexual abuse of children.

[10] The applicant argued in the Court of Appeal that the Crown in the closing address had wrongly used the evidence as "diagnostic"[12] and that this meant that there had been a miscarriage of justice.

[11] The Court rejected that submission for the following reasons.[13] It said that the final paragraph of the s 9 statement made it clear the legitimate use of the evidence and this was also stressed by the prosecutor, defence counsel and the trial Judge. Further, the prosecutor's references to the evidence were in the context of a comprehensive closing address where the Crown relied on 14 matters. When properly analysed, all but possibly one of the references to the counter-intuitive evidence were not diagnostic but a legitimate use of that evidence. In any event the remarks were more than counterbalanced by the trial Judge's directions. There was no need for further direction.

Motive to lie

[12] The applicant submitted that the Crown had impermissibly advanced the view that the complainant had no reason to lie in order to boost the complainant's credibility, and that this also effectively placed an onus on the applicant to produce a plausible reason why the complainant may have lied.[14]

[13] The Court of Appeal rejected the latter submission. Both the prosecutor and the trial Judge made it clear there was no onus on the applicant to explain why the complainant may have lied.[15]

[14] The Court also rejected the submission that the prosecutor's submission involved an impermissible boosting of the complainant's credibility saying:[16]

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12 See *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30(b)].
13 CA judgment, above n 3, at [43]–[51].
14 At [54].
15 At [59]–[60].
16 At [61].

> Prosecutors are entitled to ask jurors why a complainant would lie, particularly in a case where the defence has put in issue the possibility that a complainant was motivated to fabricate his or her allegations.

[15] Possible motives for the complainant to lie were advanced by the defence in cross-examination and in closing.[17]

Reasonable belief in consent

[16] The fourth ground of appeal, relating to the sixth charge and directions on reasonable belief in consent, was also rejected.[18] This ground is not pursued in the application to this Court.

Sentence

[17] The sentence appeal in the Court of Appeal was based on the contention that the starting point of seven years was too high based on comparable cases, and therefore that the end sentence was manifestly excessive.[19]

[18] The Court agreed with the trial Judge that there were five aggravating factors:[20]

(a) There was a high degree of breach of trust that arose through the way Mr Nevin gained the trust of the complainant and their family.

(b) The complainant had a moderately high degree of vulnerability. The age disparity between Mr Nevin and the complainant, combined with the complainant's young age, produced a power imbalance which the applicant took full advantage of.

(c) The offending involved a moderate degree of seriousness and included three instances of sexual violation.

(d) The offending had caused harm to the complainant.

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17 At [57]–[58].
18 At [65]–[77].
19 At [78].
20 At [87].

(e) Mr Nevin clearly engaged in careful planning and premeditation.

[19] The Court held that the starting point of seven years was well within the available range, once it had been determined by the trial Judge that the offending fell within the mid-range of band two of *R v AM (CA27/2009)*.[21]

Our assessment

[20] The applicant, in his proposed appeal against conviction, essentially raises the same issues as he raised in the Court of Appeal. These issues relate to the application of settled law to the particular circumstances of his case. This means that the proposed appeal does not appear to raise any issues of general or public importance.[22] Further, nothing raised by the applicant suggests that the Court of Appeal's analysis on any of the three proposed grounds of appeal may have been wrong. We see no appearance therefore of a miscarriage of justice.[23]

[21] We do not consider the Court of Appeal erred in dismissing the appeal against sentence, given that the sentencing Judge applied the guideline judgment of *R v AM*.

Result

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

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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21 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
22 Senior Courts Act 2016, s 74(2)(a).
23 Section 74(2)(b).