IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA735/2017
[2019] NZCA 340

BETWEEN	SHAYAL UPASHNA SAMI Appellant
AND	THE QUEEN Respondent

Hearing: 4 April 2019

Court: Williams, Simon France and Toogood JJ

Counsel: J H M Eaton QC and H C Coutts for Appellant
K S Grau and K L Kensington for Respondent

Judgment: 29 July 2019 at 2.00 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence on the appeal is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed. The sentence of five years' imprisonment is quashed and in its place we impose a sentence of four years and six months' imprisonment.

REASONS OF THE COURT

(Given by Simon France J)

[1] The appellant, Ms Sami, was charged with the murder of a one-year-old child in her care. She was convicted of manslaughter and sentenced to five years' imprisonment.[1] Ms Sami appeals both conviction and sentence.

Facts

[2] Ms Sami was at the time an 18-year-old Fijian Indian who had recently come to New Zealand with her husband. At the time of the incident, Ms Sami was five months pregnant.[2] Ms Sami had obtained work caring for the young child while the child's father worked. The caregiving was seven to 10 hours a day, five to six days a week. Ms Sami had previously cared for her two young nephews in Fiji.

[3] On 6 January 2015, while in Ms Sami's care, the child suffered head injuries that were to prove fatal. Ms Sami said she had left the child sleeping on the couch while she was in the kitchen preparing dinner. She heard a thud and went into the lounge to find the child on the floor, plainly unwell. Ms Sami carried the child outside where she was seen in a distressed state by a neighbour who drove them to the hospital. It seems Ms Sami tried mouth to mouth resuscitation in the car on the way. At the hospital CPR was given to the child and an oxygen mask placed on the child's face.

[4] The child had two separate skull fractures, retinal haemorrhaging, and what was described as symmetrical bruising to each side of her face. There was also bruising to her ears, under her chin, and on her forehead.

[5] The Crown case is captured by the opening words of Crown counsel's closing address:

> [The child] died from a violent assault by the defendant on the 6th of January 2015. The defendant grasped her by the face causing multiple bruises to her cheeks, to her forehead and to her ears. The defendant slammed [the child's] head into a hard surface causing the fatal injuries that were later reported. The defendant, the Crown says, simply snapped that day. The evidence for you, the jury, as to how you can be sure that that is what

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1 *R v Sami* [2017] NZHC 3159. The trial commenced 30 October 2017. Sentencing was on 15 December 2017.

2 We note that the evidence varies as to whether Ms Sami was four or five months pregnant. Nothing turns on this matter.

> happened rather than a tragic and extremely rare accident by falling, well that evidence the Crown says is in the photos of [the child's] face. It's here. It's here. It's here and it's here. The multitude of bruises across her face, across her neck and ears, some of which appear to resemble the grasp of an adult hand. There [is] the evidence that [the child] was assaulted that day and there [is] the evidence that her death was not the result of a fall.

[6] The defence was that the Crown could not eliminate the possibility of the fractures being the result of a fall from the couch. It was common ground that if the child rolled off the couch onto the carpeted floor, the forces involved could not cause the head injuries. However, if she had pulled herself upright and then fallen from that height the relevant experts accepted it was a possible cause, albeit it would be a rare outcome given the comparatively low height still involved. However, as noted weight was placed on the facial bruises as a route to eliminating a fall as a reasonable possibility. The unexpected amount of retinal haemorrhaging if a fall were the cause was also relied upon.

[7] The defence suggested medical treatment to the child, in particular the resuscitation efforts, could account for the facial bruising. The experts were divided on this, and the topic is the subject of an application by the appellant to introduce further expert evidence on the appeal.

Grounds of appeal

[8] The primary challenge is to the lack of "essential balance" in the summing-up but there is a prior related point. It has been noted that the incidence of fatal head injuries from this type of low fall (assuming the child was standing) is rare. During evidence some statistics emerged, the most prominent of which was "one in two million" for such outcomes. Mr Eaton QC for the appellant submits this figure is meaningless, was wrongly called in aid by the Crown in its closing, and was not properly dealt with by Dunningham J.

[9] Other complaints about the summing up-include:

(a) an improper reliance by the Crown, not corrected, on common sense and life experience when in truth it was a contest of experts; and

(b) inadequate assistance from the Judge on the expert evidence including the failure to warn of the dangers of a Crown case built solely on expert evidence, inadequate direction on the importance of impartiality and independence with particular focus on one prosecution expert witness, and the need for a more tailored direction on the large amount of evidence.

[10] The defence submits these factors have led to a miscarriage of justice.

[11] The second ground of appeal is that new evidence has become available since trial. This evidence is from Dr Hood, a forensic pathologist based in New Jersey. The evidence supports the defence case that the facial bruising could have been caused by medical procedures especially during the attempted resuscitation of the child.

[12] Concerning sentence, it is submitted that the starting point of seven years' imprisonment was too high, and insufficient credit for mitigating factors was given.

The summing-up

The improper use of statistics

[13] This appeal ground focuses on four items of statistical information that emerged in the evidence. Three are sourced in the evidence of Dr Christian, who is the expert concerning whom Mr Eaton submits there are impartiality concerns. Dr Christian at various points testified that:

(a) in a recent study of over 2,100 children under four years of age with bruising, "zero" of the 2,100 children had soft tissue bruising to both cheeks as a result of accidental trauma;

(b) a recent study of 42,000 children presenting with head trauma showed only one per cent of those who had fractured skulls had basilar skull fractures such as the child had here; and

(c) it had been estimated that in relation to children involved in falls from less than 1.5 metres, only one in two million results in a fatality.[3]

To these can be added the evidence of Dr Vincent who observed that retinal haemorrhaging occurred in only three per cent of cases involving low falls, and even then not usually displaying this extent of haemorrhaging.

[14] Care is needed with such statistics. They have a general usefulness as a diagnostic tool in that they alert an investigator or analyst to the need to consider other options. But in a trial setting they can be misused. As Mr Eaton suggests, the one in two million chance of a low fall being fatal must not become a one in two million chance that the appellant is not guilty.

[15] To take the present case, and assuming the statistic to be valid, the information on its own does not assist. The jury is not informed of the circumstances of the one theoretical case in two million, and what it might involve; there is no material on what sort of sample produces this statistic and what number of such fatalities there might still actually be. Nor does it mean there cannot be more than one such fatality within a short timeframe. Further, presentation of a statistic like this can be unbalanced because contrary analyses are not presented. What are the comparable odds that a happy,[4] 18-year-old woman, with no history of offending or violence and with a history of being a loving and good child carer, without apparent reason would grab a young child by her face and hit her head twice onto a hard surface. As has been noted elsewhere, if this exercise were done, similar odds pointing to the appellant being not guilty may well emerge.[5] And equally, the likely large statistic that did emerge would not mean it did not happen in this case. Just as the rarity of a low fall causing death does not mean it did not happen here.

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3 This "one in two million" statistic was not explicitly repeated in the summing-up, however Dunningham J noted that the Crown witnesses say that the "remote possibility" of the defence case "is supported by the statistics of fatalities from low level falls which show they are "extremely rare" or very uncommon".

4 The Crown advanced a submission, based on the information outlined in [2], that the appellant may have been stressed by her circumstances, but the evidence on the point is that she was content.

5 Susan Glazebrook, Judge of the Supreme Court of New Zealand "Miscarriage by Expert" (paper presented to the Commonwealth Magistrates' and Judges' Association Triennial Conference, Wellington, 17 September 2015).

[16] It is therefore of some concern that the prosecutor in closing posited the question:

> So just as a general submission to you how do you approach the evidence? You've heard eight days of very complex evidence and you've heard, of course, as I've just said about the possibility, although rare, of a fall like the fall that the defence suggest [the child] might have had leading to fatal injuries. *How do you go about deciding whether those fatal injuries are the one in two million kind of accident that Dr Christian referred to, or, as the Crown says, inflicted*.
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> (Emphasis added.)

It is fair to observe other references within the closing emphasised that the utility of such figures lay solely in identifying the rarity or otherwise of outcomes. And the question itself focuses on the causes of the injury rather than verdict.

[17] Within the summing-up, when addressing the possibility of a fall as the source of the injuries, the Judge summarised the competing cases but did not go beyond that. It is helpful on this aspect to set out the direction on the issue of whether it might have been a fall. The preceding sentence to this extract notes that the Crown experts had concluded it was a remote possibility that a fall, whether from lying, sitting or standing, could cause the injuries. The summing-up continued:

> [61] The Crown witnesses, say that this is supported by the statistics of fatalities from low level falls which show they are "extremely rare" or very uncommon. As Dr Christian's and other doctors' clinical experience that the head injuries seen are not consistent with the injuries that are usually seen as resulting from low level falls.
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> [62] There are, of course, all those academic papers you heard about which record the kind of injuries seen in witnessed cases of low level falls, where we know they are not deliberately inflicted injuries and they rarely lead to the kind of injuries we have seen here.
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> [63] The extremely low incidence of fractures to the particular area of the skull which was damaged in this fall. Dr Christian cited a study of 42,000 children who come to hospital with head trauma. Where those children had fractured their skulls only one per cent had, what she called basular fractures, and only some of those fractures were of the occipital bone which is the one that was damaged here.
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> [64] There is also the fact that Dr Sage and Dr Christian consider there are two separate areas of subdural haemorrhaging, which means there are two points of impact. They are also on different planes of the scalp. This is an important consideration in deciding whether the injuries were sustained from a single fall.

> [65] Now the defence says, first, these population studies need to be treated with care. You do not have the details about the circumstances of the fall, or how the falls came to be classified as accidental falls or otherwise. In any event, such studies do not help us deciding exactly what happens in any one particular case. Although rare, fatal injuries have been known to result from falls of less than 1.5 metres and you need to consider the possibility that this is one of those cases.
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> [66] The bio-engineering evidence demonstrates the forces are sufficient in falls of this height to fracture the skull of an infant, and that is whether the infant falls from a sitting or standing position on the couch. Indeed those forces are quite significant with the child's head hitting the floor at between 14 and 21 kilometres per hour if the fall is not broken.

[18] Moving from the skull fractures to retinal haemorrhaging, Dunningham J noted that Dr Vincent said it was only in a low number, perhaps three per cent, where such haemorrhaging would result from a low fall, and within that a far smaller number would cause this extent of haemorrhaging. It was then noted the defence cited other studies that disputed it was so uncommon and submitted examples of short falls where retinal haemorrhaging has resulted. It was submitted to therefore be wrong to conclude that the level of haemorrhaging seen here must indicate deliberate inflicted injury. It was the degree of force that causes the haemorrhaging and the statistics used by the prosecution tell nothing of the source of that force.

[19] Again, on the topic of bruising, the study of 2,000 children was referred to, as was the rarity of the bruising to the ears. It is noted that the defence expert accepted that this particular bruising was hard to explain in the absence of an assault.

[20] Reviewing the closing addresses, and the summing-up, we have concluded the risk of the jury misusing the statistics is not established. The clear overall import is on the rarity of various individual conditions found here being the product of a low fall. In this case there did have to be a coincidence of at least two rare events for the reasonable possibility of a non-assaultive explanation to remain credible. The unlikelihood of this explanation was the use made of the statistics, but within a context where it was acknowledged they did not of themselves mean it could not be such a rare event. The statistics themselves were not dwelt upon.

[21] Nor do we consider the summing-up generally on this topic gives rise to an error. Mr Eaton submitted that the Judge downplayed the criticisms of the defence

expert and failed to instruct the jury on the perils of these figures. The Judge's treatment of the topic of skull fractures was consistent with the treatment of all the main issues — the competing propositions were put evenly and accurately with little gloss or addition from the Court.

[22] There is always scope for different approaches, and some judges may have sought to include more of their own input, but we do not accept the criticism of population based studies was incorrectly put nor has a miscarriage arisen from the failure of the Judge to say more. The evidence itself was not complex nor particularly in dispute. The experts agreed at least that a fall was a theoretical cause of the fractures but was a most unlikely explanation. There was probably more ambivalence over accepting that anything other than an adult hand could have caused the bruising, but again it was acknowledged to be possible. The relevant Crown experts again thought medical intervention to be an unlikely cause, and also an incomplete explanation for all the bruising.

[23] Notwithstanding a lot of expert evidence, the ultimate issue was relatively straight-forward and not particularly influenced by the detail of that evidence. It was not a case where the Judge had to provide extra assistance concerning the expert evidence to ensure a fair trial. It was open to the jury to give weight to defence expert Dr Donald's response when asked about bruising to the child's ears and forehead. He admitted that such bruising was not explained by injury caused by resuscitation. He also accepted that when he prepared his report he had not focussed on the injuries. These concessions may well have been seen by the jury as very significant.

[24] We take the opportunity, however, to emphasise the need for caution in this area. If statistics emerge in evidence, care must be taken to make clear what their alleged relevance to the case is and what the limits of them are. They should not be a headline in any closing address.

The relevance of common sense and life experience

[25] The second issue concerning conviction is what is said to be the Crown's incorrect reliance on common sense and life experience, and the failure of the Judge in summing up to correct this. The mischief, it is submitted, is that the jury may have

relied on their own experience in relation to children and short falls, thereby putting to one side the expert evidence that fatal injuries can occur from such a fall. Mr Eaton put it this way: "[e]xtraordinary events are not ones that can be fairly or reasonably assessed by reference to common sense."

[26] It is appropriate to cite the two passages from the Crown closing where the use of common sense was discussed:

> I want to say something now about inferences because much of the Crown case relies on inferences. There were only two people present at the Worcester Street flat when [the child] was fatally injured. One of course is no longer with us and the other, the Crown says, is not being truthful to you as to what happened. There were no eye witnesses to the injury and we have to look at other evidence to inform us as to what happened. My friend makes much of this and says the Crown relies solely on the medical evidence, solely on the evidence of people who were not there. Be careful in accepting this submission that the entire Crown case is based around the experts because that is not the case at all. The Crown case is based largely on a healthy dose of common sense and ordinary life experience because the Crown says you, as members of the community, as parents, grandparents, siblings, aunts and uncles, will know how it is that toddlers develop and how it is that toddlers fall. You've heard the evidence of how unlikely it would be that an accident like this might lead to fatal injuries and that might well have resonated with you. It may well be that when you looked at photos of the sofa and heard the injuries sustained by [the child] when you began this case, you were sceptical about the explanation the defendant gave. Well the Crown says in this case the science supports your scepticism. It doesn't make sense in our life experience and it doesn't make sense to the medical experts either.
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> …
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> But it is important, and again Her Honour will remind you when she sums up, that you're the deciders of the facts in this trial and, in particular, the Crown emphasises in a case like this the really important thing for you to bring to your deliberations is your common sense and your life experience. They are invaluable in deciding a case like this based on some very complicated evidence and also some very ordinary evidence that you will all have experience of as just members of a family and members of a community.

[27] Mr Eaton also refers to a further passage:

> I want to say something now about the Crown case and I've said in my opening remarks about the amount of medical evidence you've heard and I've stressed the importance of common sense in your life experience. Here the Crown says the science supports common sense. As I said in my opening remarks when you were provided with the background information of how [the child] died and you were shown those photos of the bruises on her face, on her ear, on her forehead and under her chin, and you were told of the variety of the head trauma she suffered – bilateral fractures, two subdural haemorrhages – I suspect when you looked at the photos of the sofa and of the lounge carpet

> your initial assessment would have been no this is no accident, children don't sustain injuries like that from a fall, and you would have based that on your experiences as family members and that is supported by Dr Townend and Dr Christian, Dr Christian treating thousands of children at the Children's Hospital of Philadelphia. She told us, and it's our life experience too, toddlers fall all the time with no significant injury whatsoever.

[28] It is to be noted that immediately following that passage, and indeed also shortly before it, the Crown stated clearly that it accepted that a short fall could possibly cause the injuries, albeit in the rarest of situations.

[29] In the summing-up the Judge observed:

> [31] Now in approaching this task of assessing the evidence, I am asking you to bring your knowledge and experience of the world, your knowledge and experience of people and of human nature. You are a jury of 11 people from different backgrounds, a mix of men and woman, different ages, different experiences. And what we find is that when members of the jury pool their combined wisdom, and listen to the views of one another, that invariably a jury such as yours is ideally placed to reach a verdict in trials such as this.

[30] We reject this ground of appeal. Juries are constantly told that a trial is not a battle of experts and it is for them to decide the facts and what happened. Their advantage, it is said, is the collective pooling of the experiences of 12 members of the community — indeed, the advantages are those expressed by Dunningham J in the passage just cited.

[31] It is unclear to us what contrary direction might be given — that when it comes to deciding which view of the experts they prefer, the jury should put to one side their life experience of the context in which the injuries occurred? That would be incorrect, and contrary to why the case is submitted to 12 members of the community. The jury have been told not to speculate, to draw only reasonably available inferences, and to measure the expert evidence against a series of listed considerations. Having done that, all that is then left is to place that competing evidence within the context of the whole case and reach a view. The issue here is whether the collective facts excluded as a reasonable possibility that a fall caused the child's death. Where life experience assisted in determining any of the "strands of the rope", the jury is entitled to use it.

[32] Nor do we see error in the Crown closing. The prosecution's trial task was to remove as a reasonable option the possibility that a combination of events, rare in themselves, had come together to cause the injuries. In doing so the Crown could not place the case higher than the evidence allowed — these rare events, namely the low fall causing fatal injuries and resuscitation causing the bruising, could not be dismissed as fanciful, and the Crown did not do that. However, the Crown was entitled to point to the circumstantial evidence, as it does throughout the closing, and ask the jury to bring all that together, in combination with the medical evidence, to produce what it submits is the common sense answer to the charge.

[33] Finally, we observe many similar issues to those advanced in this appeal were considered in *[AD] v R*.[6] There also a key trial issue was whether a fall may have caused the head injuries. The appeal focused on the acknowledgement by some experts it was possible but unlikely. The recognition by experts that a fall could not be eliminated as the cause was submitted on appeal to mandate an acquittal. This Court observed:

> [24] The jury's inquiry into the question of causation was, as in all areas of the law, of an intensely factual nature. The opinions of medical professionals were admissible because the Judge was satisfied they were likely to be substantially helpful to the jury — the fact-finder. However, we emphasise now, as we shall again, that those opinions were, as the law expressly provides, given to assist the jury in ascertaining a fact that was of consequence in the proceeding — namely, whether [AD] caused [M]'s injuries. Ascertaining that fact was the function of the jury, not of the experts.
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> …
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> [29] We repeat that the expert evidence was directly relevant to but not decisive of whether [M]'s injuries were caused deliberately; it was for the jury to determine on all the evidence judged against its own collective life experiences and evaluative skills whether [AD]'s explanation might possibly raise a reasonable doubt.
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> (Footnotes omitted.)

[34] We endorse these comments which accurately capture the respective roles of witness and a trier of fact. We see no risk here that the jury would have ignored the common evidence of all experts that the possibility a short fall was the cause could not be excluded by the medical evidence.

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6 *[AD] v R* [2014] NZCA 223.

Inadequate assistance from the Judge on certain matters

[35] The next submission under the miscarriage of justice ground of appeal is that the Judge failed to direct the jury adequately in relation to the expert evidence, and in particular failed to adequately warn the jury of the need for special care when a prosecution case relies totally on expert opinion, to give a tailored direction in relation to the assessment of objectivity and independence of expert witnesses, and to warn the jury of the danger in relying on post mortem photographs. The first of these complaints has been addressed in the previous sections on reliance on statistical evidence and the application of common sense, and the last of these complaints will be addressed in the overall balance of the summing-up in the following section. That leaves the complaint about the need for a tailored direction in relation to assessing the objectivity and impartiality of the Crown expert witnesses.

[36] Mr Eaton submits Dr Christian displayed a lack of impartiality and that the summing-up provided inadequate direction on the importance of independence and objectivity, and the care that should be taken with evidence given by an expert who displays this fault. It is accepted that the direction that was given would suffice for normal purposes, but more was needed here.

[37] By way of background Mr Eaton submits that the Crown witnesses formed their initial opinion on a misunderstanding, namely that the appellant had said the child had rolled off the couch. Although they later assessed a standing fall option, Mr Eaton submits the difficulty is that entrenched views were already in place.

[38] Concerning Dr Christian, it is submitted first that she is an expert who effectively only works for the prosecution. Particular focus is placed on an inquiry Dr Christian made shortly after being briefed. Recalling that the appellant's explanation was that she was preparing dinner and heard a thud, Dr Christian asked a police officer whether there was any evidence that the appellant was in the middle of preparing a meal. This is said to be a plain example of the witness turning detective and showing an interest in attacking the appellant's credibility rather than looking only at her area of expertise. It displays, it is submitted, the witness' true colours and hence a stronger direction was needed.

[39] The general instructions to the jury were in this form:

> [26] In assessing the evidence given by expert witnesses and considering the opinions that they have given, you must of course have regard to the qualifications and experience of each of them, but it is important to realise that this is trial by jury and not trial by experts. You have heard from some extremely well-qualified people for both sides in this case and you will need to consider more than just their qualifications and experience in deciding what weight or importance you place on their evidence or their opinions, and indeed, whether you accept their evidence and opinions at all. Some of the things you should consider are:
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> (a) Have they been objective?
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> (b) Have they taken appropriate account of research?
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> (c) Have they confined themselves to their areas of expertise?
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> (d) Have they considered all relevant factors?
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> (e) Are their explanations logical, making it clear to you exactly how and why they reached their conclusions?
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> (f) Do those conclusions strike you as balanced conclusions based on that person's experience, knowledge and the physical evidence in this case?
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> [27] You will also have noted that in giving their expert opinions, the experts have had to base their opinions on certain facts that they have assumed to be correct. Whether you yourselves find those facts to be correct is an entirely different issue. If you find the facts to be different from those that the experts have relied on to give their opinions, or you do not consider there is a factual basis for their opinion, then their opinions are not opinions on the facts relevant to your findings. It is important that you consider that possibility.
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> [28] You should also note that they might be assessing only one aspect of the evidence because that is their area of expertise, for example, retinal haemorrhaging or bio-mechanics. You are still going to have to look at all the evidence in totality before coming to your decision.
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> [29] Now, in closings you heard some quite trenchant criticism of each side's expert witnesses. That is not unexpected given the importance of the expert evidence in this case. However, it is your assessment, not the lawyers, that counts. You should consider those criticisms but reach your own views on whether they are fair criticisms which warrant you putting less weight on that person's evidence as presented in this Courtroom, or not.

[40] Thereafter, as noted, the evidence of any expert was raised, if at all, in relation to a particular topic.

[41] We do not consider more was needed. Dr Christian was cross-examined by Mr Eaton about the question described above. She explained it was just part of obtaining the case history and could see no other significance in it. The evidence on this topic obviously did not cause the Judge concern such that the Judge felt it necessary to direct specifically on the matter. Based on the written record, we see no reason to take a different view or assess the lack of direction as an error. We accept it was an odd question to ask but Dr Christian explained herself and the matter was there before the jury, having been addressed further by counsel in closing. We also observe that to balance matters similar criticisms would have been required in relation to Dr Donald who spoke of his initial report being intentionally "provocative" and in that report appeared willing to ignore evidence of bruising not explained by his theory. Again, we consider these issues were before the jury and the Judge was not required to further rehearse them or give specific warnings.

The balance of the summing-up

[42] We do not accept the summing-up was unbalanced or inadequately put the defence case. It is fair to say the summing-up proffered no support, express or implicit, for the defence arguments but it identified them clearly. It is possible to take different views about the strength of the respective cases, and we consider the Judge fairly put both sides. To the extent the submission of "unbalanced" suggests the summing-up favours the prosecution, we do not read it that way.

The application to adduce further evidence

[43] The presence and pattern of the facial bruises was undoubtedly a key component of the Crown case. The bruises had, to experienced pathologists, the look of marks made by an adult hand or hands gripping the young child's face. As noted the alternative explanation that emerged was that the placing of a mask on the child when first admitted to hospital or the resuscitation process generally may have been the cause.

[44] The doctor in charge of this process, Dr Richards, stated:

> 17. After I had intubated the child and handed over the care to the Paediatric Anaesthetist, I noticed some marks on the left hand side

> of the child's face which were in a U shaped or V shaped pattern. I hadn't noticed that when the child came in, however I was standing at the child's head end the whole time, and I didn't even realise it was a female child to start with because she had a nappy on.
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> 18. Several of the nurses also noted the bruising. I was not sure whether the bruising may have been caused in part by me holding the oxygen mask onto the child's face, but I did not exert undue pressure, and I think that would be unlikely.
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> 19. Only a small amount of pressure is needed to hold the oxygen mask on the patient. Unless the patient had a bleeding disorder it would be very unlikely that we could cause bruising by doing that.
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> 20. The other procedure I performed was to intubate the patient. I didn't need to tilt her head much in order to intubate her.
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> 21. The process I use is to use my right hand to hold her forehead; put a laryngoscope into the mouth, suction and then have a look and insert the tube into the trachea.
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> 22. I would not need to touch the side of the patients face when intubating.
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> 23. I had an assistant passing me equipment but I was the only person touching her head.
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> 24. The U shaped mark I observed on the side of her face was a brownish blue colour and approximately a centimetre in width. It was consistent with somebody holding her face from a frontal position and the U shape matching the line of a person's right hand running from the fore finger through to the thumb.

[45] Using a mannequin in court, the doctor had shown how the masking occurs, and the lightness of the pressure. It can be noted that in paragraph 19 of this extract the doctor refers to the unlikelihood of the mask causing the bruising unless the patient had a bleeding disorder. Other evidence at trial suggests that the child did have such a disorder because of the head injury, thereby making her more susceptible to bruising. However, a specialist, Dr Townend, explained this condition corrected itself quickly. Further, if the blood disorder was to be seen as an explanation for the facial bruises, one would expect equivalent bruising where other pressure had been applied, such as the chest compression. The uncontested evidence was that chest compressions were administered for 15 minutes before the child's heart resumed beating. Such compressions are generally administered continuously at a rate of 100–120 per minute suggesting at least 1500 compressions to the child's sternum. There was no sign of bruising at that site.

[46] The fresh evidence sought to be admitted on appeal consists of two affidavits from Dr Hood, a forensic pathologist based in the United States of America. The Crown sought a reply from Dr Sage to the original affidavit, and Dr Hood responded to that with a second affidavit. His evidence addresses the topics of the skull fractures, the retinal haemorrhaging and the facial bruising. However, it was the last of these topics on which Mr Eaton placed most reliance in support of admissibility and its helpfulness to the appeal.

[47] Concerning bruising, Dr Hood comments first on the concept of resuscitation efforts being the cause. It will be recalled Dr Sage, perhaps New Zealand's most experienced pathologist, and Dr Christian had both said they had never seen resuscitation cause this type of bruising. However, they accepted the possibility. By contrast Dr Hood would say bruising is frequently seen as a product of manipulation during resuscitation efforts, and he had seen them produced by the application and removal of tape. Dr Hood further said that such bruising, especially in the case of patients with pre-terminal coagulopathy (the blood disorder caused by the head injuries), is so common that "most forensic pathologists accept it as sufficiently well established" as to not need published work to demonstrate it. However, at least one text had noted it,[7] and one article had published images.[8]

[48] The second aspect of Dr Hood's opinion was that he considered if the appellant had caused the bruising it would have been more prominent earlier than it seemingly emerged.

[49] Dr Sage accepted the point concerning tape, but said it left abrasions rather than bruising. Dr Hood in his reply accepted this was more commonly so. Likewise, Dr Sage analysed the article entry which discussed facial injuries resulting from resuscitation and considered it also appeared to be addressing abrasions rather than bruising, and certainly not the present pattern of bruising. Dr Hood accepted this was so. Dr Sage repeated his evidence that it was the placement of all the bruising and

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7 Werner Spitz, Daniel Spitz and Russel Fisher (eds) *Spitz and Fisher's Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation* (3rd ed, Charles C Thomas Publisher, Springfield (IL), 1993).

8 JA Kaplan and RM Fossum "Patterns of facial resuscitation injury in infancy" (1994) 15(3) *The American Journal of Forensic Medicine and Pathology* 187.

the pattern that underlay his evidence. None of Dr Hood's evidence, originally or in reply, addressed that.

[50] The starting point for the admissibility of fresh evidence on appeal is *Lundy v R*.[9] Mr Eaton cites the following passage which we accept sets out the approach:

> [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 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.

[51] The shift effected by *Lundy* is to place more weight on cogency with less emphasis accorded to freshness. It is apparent, however, that if the evidence is not fresh, it needs to point to a risk of miscarriage in order to merit admission.

[52] We turn first to cogency under which we consider the merit of the evidence in itself and in the context of the trial. In regard to this latter point, it is not clear the extent to which Dr Hood's evidence is informed by the trial evidence. Two aspects illustrate this. First, in relation to the head injuries, Dr Hood notes many of the reports proceed on the premise that the fall option is the young child rolling off the couch. There is no reference by Dr Hood to the extensive trial focus on this, and the opinions based on a standing fall. Second, Dr Hood neither comments on the significance of the pattern of the bruising, nor how resuscitation would explain all the bruising. These aspects considerably undermine the cogency of the evidence.

[53] Dr Hood's description of what commonly causes bruising seems to contemplate facial manipulation. Again, there is no identification by Dr Hood of any evidence to suggest that has occurred in this case. It may be the evidence is there, but

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9 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

it is not apparent in the passage cited earlier from Dr Richards,[10] and we have not otherwise been directed to any relevant material. It is another example where the generality of the proposed evidence, without any referencing to the actual trial evidence, significantly undermines its utility.

[54] On the point of bruising being more common than Drs Sage or Christian acknowledged, the evidence takes one nowhere. Dr Hood says he has seen it and it is so common no-one bothers to record it in the literature. By contrast Drs Sage and Christian say they have not seen it, and no one doubts Dr Sage's opportunity to have seen it over what has been a long career. The evidence of Drs Sage and Christian would not change in the face of this "new evidence" — they acknowledged it possible but personally had not seen it.[11] Dr Hood would seem to offer just another contrary view, similar to that provided by Dr Donald, namely that it does happen.

[55] We accordingly consider the evidence does not satisfy the first inquiry of cogency. In the context of the trial it is at best just another opinion on matters well canvassed. Further, as it presently stands it does not actually address the trial evidence. This means it does not address the specifics of the bruising in a way that makes it helpful evidence. For completeness, we observe on the other topics it is also at best just another opinion, and on the fractures appears to misunderstand the scope of the contrary evidence. To the extent it asserts the fractures could be caused by a standing low fall, this was a common position accepted at trial.

[56] Given this conclusion it is unnecessary to go into detail about freshness. We understand the appellant to accept it is not fresh albeit there is an explanation for why it was not called, which was that the defence had briefed another overseas expert who, once here, conducted himself in a way that caused the defence to lose confidence in the witness to the extent he was not called. This circumstance could be the basis for a generous conclusion of freshness but for the fact that the evidence that witness was going to give on the bruising was not the same at all as Dr Hood's. That witness had a completely different theory about the possible cause, a theory not advanced at

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10 Above at [44].

11 Dr Sage's position at a retrial is perhaps not certain. His concession was based on articles put to him at trial he had not previously seen nor had a chance to consider in any depth. His evidence on the appeal suggests he now doubts they stand for the proposition relied upon.

all now. Nor do we accept the significance of the bruising as a trial issue became more obvious at trial. It was there from the outset and indeed the discarded defence witness was briefed to address it.

[57] For these reasons we decline leave to adduce further evidence on the appeal.

[58] Before leaving the topic of bruising we observe it was not wholly a contest of experts. The child's father had seen a mark on the child's cheek the evening prior which he put down to an insect bite but had been intending to raise the topic with the appellant. The witness who drove the appellant and the child to the hospital said he saw "darker spots" on the face prior to the child being handed over into hospital care. This was of course challenged but the evidence was there to provide support to the conclusions of the prosecution experts.

[59] None of the grounds of appeal having succeeded, we dismiss the conviction appeal.

Sentence appeal

[60] Based on the authority of *R v Pene* the Judge took a starting point of seven years' imprisonment.[12] This was reduced by two years to reflect age, previous good character and restrictive bail conditions.[13] No further discount was given for the difficulty jail would present, or the likelihood of deportation upon release.

[61] At the time of the offence the appellant was five months pregnant. She had a baby girl while on bail awaiting trial. The Court is advised the child is now in Fiji with her husband's parents. Her husband has remained in New Zealand to support her during the sentence.

[62] *R v Pene* involved a case where a foster mother had hit a baby hard on the head three or four times in the night and also shaken the child.[14] The charge was manslaughter.[15] The matter came before this Court as a Solicitor-General appeal

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12 *R v Sami,* above n 1, at [25], citing *R v Pene* [2010] NZCA 387.
13 At [32].
14 *R v Pene*, above n 12, at [1].
15 At [2].

which challenged a starting point of four years' imprisonment. The Court reviewed a number of cases and identified a range of five to seven years' imprisonment.[16]

[63] We have considered the appellant's submissions but cannot agree a starting point below the top of the range was available. The jury verdict necessarily involves the rejection of a fall and the acceptance of inflicted injury. On the evidence no other picture can emerge than that suggested by the medical evidence — the face gripped by the appellant's hand and the head hit into a hard surface. Manslaughter was a merciful verdict.

[64] Faced with this Dunningham J concluded the jury had decided there was no intent to inflict serious injury and the injury was the product of a momentary loss of control.[17] On appeal we are not in a position to differ but again note the appellant has received the benefit of a very slim doubt. What can be said is that there was an extraordinary degree of recklessness given the nature of the violence and the complete vulnerability of the child. It is difficult to imagine that anyone could not appreciate the risks involved in hitting the child's head in this way onto a hard surface. In what was a case very close to murder we consider seven years is by no means excessive.

[65] We turn then to the discounts with the primary focus of the appeal being on the lack of discrete credit for the impact jail will have, and the inevitability of deportation. It is noted that the appellant is separated from her young child, in a foreign country, is still only a young person who has English as a second language.

[66] The impact of these factors was recently discussed in *Gao v R*, in the context of drug offending.[18] It is recognised these are factors that can impact and are capable of recognition in the appropriate case. A difference here from the drug context is the absence of a general deterrence concern. Drug importation is routinely effected through the use of foreign nationals as "mules". This makes it difficult to significantly alter what are meant to be deterrent sentences on the basis that the offender is a foreign

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16 At [11].
17 *R v Sami*, above n 1, at [25].
18 *Gao v R* [2018] NZCA 69 at [18]–[24].

national. By contrast, here there is little obvious need for personal deterrence, and general concerns about child abuse are sufficiently reflected in the starting point.

[67] We consider Ms Sami did present a distinctive combination of factors that merited recognition — the fact of separation from a very young child, the fact that English is not her first language, her youth and her family being in Fiji. We recognise she is not without support in New Zealand, and that perhaps it was to be her permanent home, but this package of factors leads us to consider further credit was appropriate.

[68] In the circumstances we reduce the sentence by a further six months, leaving a final sentence of four years and six months' imprisonment. Anything less would be inadequate to reflect the nature of the offence.

Conclusion

[69] The application to adduce further evidence on the appeal is declined.

[70] The appeal against conviction is dismissed.

[71] The appeal against sentence is allowed. The sentence of five years' imprisonment is quashed and in its place we impose a sentence of four years and six months' imprisonment.

Solicitors:
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