NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA421/2022
[2023] NZCA 602

BETWEEN	A (CA421/2022) Appellant
AND	THE KING Respondent

Hearing:	6 November 2023
Court:	Collins, Brewer and Muir JJ
Counsel:	M G Robinson for Appellant E J Hoskin for Respondent
Judgment:	29 November 2023 at 9.30 am

JUDGMENT OF THE COURT

A The application to adjourn the appeal is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr A appeals three convictions namely, two convictions for rape and one for kidnapping the complainant (V).

[2] There are four grounds of appeal:

(a) Propensity evidence was improperly admitted.

(b) Grice J, the trial Judge, declined to give the jury a direction under s 122 of the Evidence Act 2006. Such a direction would have involved the Judge warning the jury about accepting evidence concerning Mr A's conduct, which was alleged to have occurred more than 10 years before the trial.

(c) Mr A had insufficient time to prepare for the trial.

(d) No medical evidence was adduced which could have helped prove V fabricated her allegations and assisted the jury in understanding Mr A's psychological issues.

[3] After the jury were empanelled, Mr A pleaded guilty to a representative charge of sexual conduct with V, a dependent family member, contrary to s 131(1) of the Crimes Act 1961.[1] There is no appeal in relation to that conviction. The jury acquitted him of three charges of performing an indecent act on V and two charges of sexual violation by unlawful sexual connection, also against V. Mr A was sentenced to a total term of seven years and six months' imprisonment in respect of the four charges for which he was convicted.[2]

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1 *R v A* HC Wellington CRI-2021-035-761, 5 August 2022 [Sentencing notes] at [2].
2 At [128].

Adjournment application

[4] At the hearing, Mr A sought an adjournment of his appeal. Counsel for Mr A, Mr Robinson, told us that a psychologist had informed him that Mr A may satisfy the criteria for a diagnosis of Autism Spectrum Disorder (ASD), but further time was required to have him properly assessed. There were four reasons why we declined the adjournment application:

(a) On 20 October 2023, French J declined an application for an adjournment of Mr A's appeal. That application was based on Mr A anticipating he would be diagnosed with ASD. Nothing has changed since French J declined to adjourn Mr A's appeal.

(b) There is no suggestion Mr A was unfit to stand trial or insane at the time of the offending. Evidence demonstrating that Mr A suffers a degree of ASD was not relevant to the grounds of appeal against conviction. Such evidence might have been relevant to a sentence appeal, but there has been no appeal against the sentence imposed by Grice J.

(c) A psychological report was made available to the High Court pursuant to s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. In that report Dr Lomas said that Mr A did not display signs of psychosis. She also recorded he was willing to participate in a sex offender treatment programme.

(d) Mr A was convicted in June 2022. He was sentenced on 5 August 2022. If an adjournment had been granted it is likely the appeal would not be heard until the second quarter of 2024. It is not in the interests of Mr A or V for his appeal to be left unresolved for close to two years.

Background

[5] In 2006, V became a foster child of Mr A and his wife. At the time, V was three and a half years old. During her teenage years V's relationship with her foster mother deteriorated and at the same time Mr A became obsessed with V. The nature

of Mr A's relationship with V was succinctly described in the following way by Grice J in her sentencing notes:[3]

> [13] Mr A wrote love letters to the victim and text messages, professing his devotion to her and stating he wanted to marry her. Mr A told the victim he wanted to have a baby with her and it was God's will that they were together. Mr A used God and religion to justify the sexual relationship with the victim. The victim had been brought up in the household of Mr A and his wife, which in general was very religious.
>
> [14] The victim returned Mr A's sexual affections. She said she felt she had to go along with the pretence of a relationship because it was the only way she could get her freedom, such as having her phone or hanging out with friends. She said she also did it as she didn't want to offend God and felt that she just had to keep the peace in this way. She felt burdened to continue the relationship and to constantly reassure Mr A of their loving relationship.
>
> [15] When the victim didn't respond to Mr A's affections in kind, he would become needy, insecure, angry and controlling. He would cry and threaten to kill himself if she did not return his affection. Mr A told the victim, on more than one occasion, that if she left him for another man, he would kill her and any partner before killing himself.

First rape

[6] The first rape occurred soon after V had turned 16 years of age. When Mr A and V were alone in their home, he went into her bedroom and made her remove her clothes. He put on a condom and used his weight to pin her down on the bed, Mr A inserted his penis into V's vagina. This caused her to cry out in pain. She told him to stop. He ignored her pleas and put his hand over her mouth to stop her making any noise while he continued to rape her.

Sexual conduct with a dependent person

[7] The representative charge of sexual conduct with a dependent person covered the period from after the first rape to when V turned 18. After the first rape, Mr A and V developed a consensual sexual relationship, which involved them having sex on a regular basis.

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3 Sentencing notes, above n 1.

Second rape and kidnapping

[8] The kidnapping and second rape occurred in mid-2021 when V was 18 years old. V wanted to end the sexual relationship. Mr A responded by threatening to take his own life by going into the bush with the aim of dying through exposure.

[9] The following weekend Mr A again asked V to have sex with him and to marry him. She refused. He then dragged her into a bedroom, smashed her phone and detained her by binding her hands with his belt. V attempted to escape, but Mr A caught her and dragged her back into the bedroom where he demanded that V marry him and consent to have his baby. Fearing for her life, V agreed to have sex with Mr A. He then removed her underwear and proceeded to rape her.

Other alleged offending

[10] For completeness we record that the charges Mr A was acquitted of included allegations he committed sexual offending against V when she was 12–16 years of age. Those charges alleged instances of inappropriate touching of V, digital penetration and that Mr A exposed himself to her.

Propensity evidence

[11] The propensity witness, P, lived next-door to Mr A and his family when she was about 12 years old. She told the police Mr A became obsessed about her. She described Mr A as being "touchy, feely" towards her when he initiated play fights and held her hips and hands when helping her do some woodwork.

[12] When P was approximately 13 years old and living in a different suburb, Mr A drove her home after she had had dinner with Mr A and his family. On the way home Mr A put his hand on her leg and told her that God had come to him in a dream. He said that God had told him that his wife was going to die and that P would become his wife and become mother to his children.

[13] Soon thereafter Mr A left a box of chocolates in P's family letterbox for her. The package was addressed using a nickname that Mr A used for P.

[14] P told her family what had happened. They reported it to the police who told Mr A to leave P alone. She believed that soon thereafter Mr A hacked her Facebook account and sent threatening messages to her boyfriend from her account.

[15] P told the police that Mr A came to a supermarket where she worked part-time and that Mr A hugged her, said he was sorry and asked for forgiveness. P also told the police that Mr A would often come to the supermarket where P worked.

[16] Prior to trial, Mr A challenged the admissibility of P's evidence. In a judgment delivered on 22 March 2022, approximately two months before the commencement of the trial, Simon France J ruled P's evidence was admissible. In doing so, the Judge observed:[4]

> [19] There is little doubt the witness' evidence, if accepted by the jury, can support the propensity claim advanced by the Crown. From a physical viewpoint there is the touching of the witness in the shed and then in the car. From an obsession viewpoint there is a pattern alleged of initiating contact, maintaining an unusual and inappropriate focus on the young girl through vehicles such as Facebook, and later it is alleged both continuing to seek contact when told not to, and struggling with the idea of leaving the witness alone. And then, strikingly, the alleged comment about marrying her and having children, all made to a 13-year-old girl. If accepted this occurred, it will provide legitimate support to the complainant's claims that he said these things to her, his daughter.

First ground of appeal

[17] The first ground of appeal alleges a miscarriage of justice occurred through P being allowed to give propensity evidence. Mr Robinson submitted that P's evidence at trial was significantly different from that which was considered by Simon France J when he made his propensity ruling and that had the true extent of P's evidence been appreciated before the trial, the High Court would have excluded P's propensity evidence.

[18] There are three reasons why the first ground of appeal fails to gain traction.

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4 *R v [A]* [2022] NZHC 478.

(a) There was little difference between P's pre-trial statement and her evidence

[19] Most of the evidence which P gave at trial was consistent with the evidence that was before Simon France J when he ruled P's evidence was admissible. In particular, the following key parts of P's evidence at trial were the same as the evidence that was considered by Simon France J:

(a) P's evidence that Mr A touched her thigh while being driven home from his house in his car.

(b) P's evidence that Mr A told her about the dream in which God had said his wife would die and that she would marry Mr A and become the mother of his children.

[20] There were two instances in which the evidence before Simon France J was not repeated by P when she gave evidence at trial:

(a) When P spoke to the police, she said Mr A touched her hips when she was doing some woodwork. In fact, P explicitly denied this happened when she gave her evidence at trial.

(b) The trial evidence differed from the pre-trial evidence on the frequency of Mr A's visits to the supermarket where P worked. In her statement to the police P said this happened "often" and "like clockwork for weeks" whereas at trial, P agreed Mr A went to the supermarket only three or four times.

[21] There were other minor changes between P's pre-trial evidence and the evidence she gave at trial, namely:

(a) Her evidence at trial about Mr A initiating play fights was less specific than the evidence considered by Simon France J.

(b) P's trial evidence was more specific than the pre-trial evidence about the Facebook posts and comments attributed to Mr A.

(c) The trial evidence was more specific about private messages sent by Mr A to P.

[22] We accept there are some changes between the evidence considered by Simon France J and the evidence given by P at trial. The changes were, however, minor and, as we explain at [23], may well have assisted Mr A.

(b) There was no miscarriage of justice

[23] P's propensity evidence supported V's allegations of Mr A having offended against V when she was a similar age to P. No miscarriage of justice arose because Mr A was acquitted in relation to all charges that alleged offending against V before she was 16 years old.

(c) The propensity evidence was admissible

[24] Most importantly, the propensity evidence was plainly admissible. It clearly demonstrated that Mr A had a tendency to engage in highly inappropriate and obsessive behaviour towards young girls. As Simon France J observed, there was a striking similarity between Mr A's comments to P about God telling him that she would become his wife and mother to his children and the comments he made to V on this topic. This evidence by itself was highly probative of the Crown's theory that Mr A became obsessed with V and used God and religion to justify sexually exploiting her.

Second ground of appeal

[25] The second ground of appeal alleged a miscarriage of justice arose because Grice J failed to consider giving a warning under s 122(2)(e) of the Evidence Act about the conduct of Mr A, which was alleged to have occurred more than 10 years previously.

[26] A warning under s 122 is not mandatory. As the Supreme Court has recently explained, trial judges are required to manage s 122(2)(e) issues with some care, if they emerge on the facts.[5] In this case:

(a) Section 122(2)(e) did not apply to V's evidence, which concerned events that occurred less than 10 years before the trial.

(b) In relation to P's evidence, Mr Robinson conceded before us that s 122(2)(e) likely did not apply. He said the evidence "was on the cusp so that you could argue it started within the ten year period" but "it wasn't clearly over the line" where s 122(2)(e) was engaged. He noted that P's earliest evidence concerned Facebook posts in August 2012, and the trial occurred in May 2022, so the ten-year threshold was not triggered.

(c) Following her summing up and after the jury had begun their deliberations, Grice J discussed s 122(2)(e) with counsel. Mr Robinson, who was trial counsel, explained to us that following that discussion with the Judge, he elected not to formally apply to have Grice J recall the jury and give them a s 122(2)(e) direction.

[27] Although the way the Judge dealt with the s 122(2)(e) question was less formal than would normally be desirable,[6] we are satisfied no miscarriage of justice arose. Given Mr Robinson's acknowledgement that P's evidence was not more than 10 years old at the time of the trial, the lack of a s 122(2)(e) direction cannot have occasioned a miscarriage of justice because s 122(2)(e) was not in fact engaged.

[28] Further, giving the jury a direction under s 122(2)(e) about P's evidence is unlikely to have assisted Mr A. As Ms Hoskin, counsel for the Crown, pointed out, the jury may well have inferred that the Judge thought it was necessary to warn them about the accuracy of P's evidence but that no such warning was required in relation

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5 *R (SC 78/2018) v R* [2023] NZSC 132 at [4]–[5] and [49]–[50] per Winkelmann CJ, O'Regan and Williams JJ.

6 At [50] per Winkelmann CJ, O'Regan and Williams JJ.

to V, thus inadvertently bolstering V's evidence. A s 122(2)(e) direction about P's evidence may well have worked against Mr A's interests.

[29] The second ground of appeal therefore fails.

Third ground of appeal

[30] Mr A was charged in 2021 for offending which was said to have occurred between 2015 and 2021. His trial commenced 10 months later. He nevertheless claims that he had "insufficient time to prepare his case".

[31] Mr A has not attempted to impugn Mr Robinson's conduct of his trial. He does not allege Mr Robinson failed to follow his instructions, or that Mr A was somehow ill-advised or that he was inadequately prepared to give the evidence he gave over three days of the trial. Instead, Mr A's argument appears to be that if he had had more time he would have called medical experts to support his theory that V had suffered from developmental trauma disorder and chaotic attachment disorder, and that he himself had "disassociated resulting in the fracturing of aspects of his memory following [a] break-down".

[32] Absent any allegation of trial counsel error, there is no basis for alleging a miscarriage of justice occurred through not having sufficient time to prepare for trial.

[33] In any event, at a callover of Mr A's case on 18 May 2022, Grice J recorded that Mr A told her in a "articulate and considered" response that he wanted his trial to proceed as scheduled and that although he had recently received hard copies of documents derived from his laptop and mobile phone records, he assured the Court "he had the time and capacity to go through and analyse" all the material and he "would be ready for trial".

[34] There is therefore no merit in the third ground of appeal.

Fourth ground of appeal

[35] No indication has been given to us about what medical evidence Mr A would have wished to call at his trial to impugn the reliability of V or to assist the jury in understanding his evidence.

[36] Absent any indication as to what the evidence in question might be, the fourth ground of appeal fails.

Result

[37] The application to adjourn the appeal is declined.

[38] The appeal against conviction is dismissed.

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