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BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA141/2018
[2024] NZCA 115**

BETWEEN CHRISTOPHER MARTIN BRADLEY
Applicant
AND THE KING
Respondent

Court: Katz, Wylie and Whata JJ

Counsel: N Levy KC for Applicant
P D Marshall and W J Harvey for Respondent

Judgment: 17 April 2024 at 10.00 am
(On the papers)

JUDGMENT OF THE COURT

The application for recall is declined.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Following a jury trial in December 2017, Mr Bradley was found guilty of five representative charges of rape against two girls over a three-and-a-half-year period.

The victims were aged between five and nine at the time of the offending. Mr Bradley was sentenced to 15 years' imprisonment.¹

[2] Mr Bradley appealed his conviction and sentence to this Court.² Following the dismissal of his appeal, he sought leave to appeal his conviction to the Supreme Court, raising five potential grounds of appeal. Leave was declined.³

[3] One of the five proposed grounds of appeal was that Mr Bradley may have impaired communication skills that were not previously recognised, and that this could have impacted the outcomes of both his trial and his appeal. This was the first time Mr Bradley had raised this issue. The Supreme Court expressed the view that:

[20] ... if the applicant wishes to pursue this aspect, he will need to go back to the Court of Appeal with evidence as to his abilities to respond verbally and seek a recall of that Court's judgment. We reserve leave to seek to appeal to this Court again if that application is unsuccessful.

[4] Mr Bradley subsequently filed a recall application in this Court, supported by two expert reports regarding his communication skills.⁴

Background

Mr Bradley's appeal to this Court

[5] Mr Bradley's conviction appeal raised five grounds of appeal. Two of those grounds were based on trial counsel error, namely that:

- (a) trial counsel had not briefed or called certain witnesses who may have been able to give evidence helpful to the defence;
- (b) trial counsel had made seven other errors that, in combination, had deprived Mr Bradley of a fair trial.

¹ *R v Bradley* [2018] NZDC 4082 at [13].

² *Bradley v R* [2020] NZCA 10 [Court of Appeal judgment].

³ *Bradley v R* [2020] NZSC 147 [Supreme Court judgment].

⁴ An original panel member, Wild J, has since retired. The recall application proceeds with the addition of Wylie J, pursuant to s 333 of the Criminal Procedure Act 2011.

[6] Both Mr Bradley and trial counsel, Mr Ruane, gave evidence at the appeal hearing and were cross-examined. This Court found Mr Ruane to be an honest witness but made an adverse credibility finding against Mr Bradley. The Court stated that where there was a conflict between the evidence of Mr Bradley and that of Mr Ruane “we accept Mr Ruane’s evidence and discredit that of Mr Bradley”.⁵ Three specific examples were given to support the adverse credibility finding against Mr Bradley:⁶

- (a) First, in the lead up to trial, Mr Bradley’s stated to his counsel in writing on at least two occasions that the reason his semen was on the electric blankets on the victims’ beds was because he and his wife had engaged in sexual activities on those beds. The difficulty with this explanation was that the location of the semen stains on the electric blankets (60 cm and 70 cm from the headboard respectively and towards the middle of each blanket) was more consistent with Mr Bradley having sexual intercourse with a child, rather than an adult woman. At trial, Mr Bradley offered a different explanation as to how his semen came to be on the electric blankets. He said that he and his wife had stripped the beds while spring cleaning and then had sexual intercourse on the bedding when it was on the floor. The jury presumably rejected that explanation. On appeal, Mr Bradley was questioned about the inconsistencies and, in one exchange, it was put to him that his story had changed at trial, to which he responded “I put it out there at trial. It is what it is”. This Court found that this “was the response of a man who had been exposed as a liar”.⁷
- (b) Second, Mr Bradley argued on appeal that trial counsel was not adequately prepared and had not properly briefed Mr Bradley should he elect to give evidence. Specifically, Mr Bradley’s evidence was that Mr Ruane had cancelled a pre-trial meeting on 1 December 2017. Mr Bradley supported his recollection of that specific date with reference to a serious injury he had at that time. Mr Ruane, however,

⁵ Court of Appeal judgment, above n 2, at [20].

⁶ At [21]–[26].

⁷ At [23].

was able to produce records which demonstrated that the allegation he had cancelled that meeting was untrue.

- (c) Third, in support of his assertion that trial counsel was ill-prepared for the trial, Mr Bradley deposed that:⁸

... Part way through the trial Mr Ruane was so late that the trial was almost called off.

In response, Mr Ruane exhibited the Court taker's log of the trial, which showed the court starting promptly each morning.

[7] In concluding that Mr Ruane's evidence should be preferred, this Court observed that it was generally supported by the contemporaneous documents. Further, Mr Ruane's ready acceptance of errors or oversights, or that he might have done some things differently in hindsight, enhanced his credibility as a witness.⁹ Overall Mr Ruane was found to have acted "in a competent and thoroughly professional way".¹⁰

The application for leave to appeal to the Supreme Court

[8] Mr Bradley sought leave to appeal to the Supreme Court.¹¹ Five proposed grounds of appeal were advanced. Leave was declined in relation to four grounds on the basis that they turned on the particular facts of the case and did not give rise to any question of general or public importance. Nor did anything raised by Mr Bradley in relation to those proposed grounds "suggest the appearance of a miscarriage of justice in the Court of Appeal's assessment of the issues".¹²

[9] As noted above at [2], leave was also declined in relation to the fifth proposed ground, which raised the possibility that Mr Bradley may have impaired communication skills. The Supreme Court suggested that if Mr Bradley wished to

⁸ At [26].

⁹ At [30].

¹⁰ At [106].

¹¹ Supreme Court judgment, above n 3.

¹² At [18].

pursue this ground further, the appropriate course would be to seek a recall of this Court’s judgment, with appropriate supporting evidence.¹³

Recall applications — legal principles

[10] The general rule is that a judgment, once delivered, must stand for better or worse, subject to appeal.¹⁴ Recall of a judgment may be appropriate where some procedural or substantive error has occurred which would result in a miscarriage of justice if it were not addressed by recalling the judgment.¹⁵ There are three categories of exceptional circumstance that may justify a judgment being recalled.¹⁶ Here, the relevant ground is whether “for some other very special reason justice requires that the judgment be recalled”.¹⁷

[11] In *Jolley v R*, the Supreme Court explained that this ground is intended to be “a simple and flexible” test, which recognises that exercise of the recall jurisdiction is “an exceptional step”, but one that is available to “ensure the court remains able to respond to the wide variety of circumstances... in order to avoid injustice”.¹⁸

The new evidence

[12] The application for recall relies on expert reports from a speech language therapist, Emily King, and a psychologist, Martina Bruwer.

Ms King’s report

[13] Ms King is a qualified speech language therapist and an experienced court-appointed communication assistant. She confirmed in her report that she had read the code of conduct for expert witnesses and agreed to comply with it.¹⁹ Ms King

¹³ At [20].

¹⁴ *S (SC39/2017) v R* [2022] NZSC 7 at [3].

¹⁵ At [3], citing *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [27].

¹⁶ *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

¹⁷ At 633.

¹⁸ *Jolley v R* [2022] NZSC 150, [2022] 1 NZLR 595 at [14]–[15], quoting *Uhrle v R*, above n 15, at [29].

¹⁹ High Court Rules 2016, sch 4.

noted that she had been asked to complete an assessment of Mr Bradley's communication skills:

... specifically in relation to the impact any degree of communication difficulty may have had on his ability to participate in being cross examined.

[14] Various limitations are set out in Ms King's report, including that she was unable to provide an opinion on the reliability or accuracy of Mr Bradley's evidence, or the potential impact of anxiety or any other mental health issues on Mr Bradley's ability to participate effectively in cross-examination. Ms King also noted the unavailability of "standardised, norm-referenced language assessments for adults" and that, as a result:

... I did not have access to a language assessment which could provide norm or criterion-referenced data on Mr Bradley's communication skills. This meant I could not gather assessment data that would give a direct comparison between his language skills and other adults.

[15] Subject to these qualifications, Mr Bradley's communication skills "were assessed using a range of assessment activities as well as observational data from discussions within the assessment sessions".

[16] In a formal assessment of Mr Bradley's ability to retain and understand verbal information (verbal memory) he was unable to provide correct responses to any of the eight questions asked of him in relation to a paragraph that was read out to him. Ms King noted, however, that if Mr Bradley had a specific issue with verbal memory "it would be expected that he would find it difficult to retain the content of lengthier questions" in general discussions during the assessment sessions. That was not the case. While Mr Bradley had difficulty responding to some questions in the assessment sessions, this did not appear to be specifically due to the length of the question asked. Ms King gave examples of two lengthy questions that Mr Bradley did not have any difficulty responding to. Ms King concluded that:

The information gathered makes it difficult to determine whether Mr Bradley has specific difficulties with verbal memory. However, it is clear that when in a more formal assessment situation, his ability to respond accurately is significantly impeded.

[17] Mr Bradley's understanding of more complex vocabulary was assessed by asking him to explain the meaning of the words: justify, convinced and relevant. Ms King had planned to include more words, but Mr Bradley appeared to find this activity so difficult that it was discontinued. Ms King observed, however, that Mr Bradley used a range of vocabulary in his own talking, including words such as "offensive", "credible", "stagnant" and "negotiate" which she stated are "at a similar level of complexity to the vocabulary items tested".

[18] Turning to expressive language, Ms King found that in conversations during the assessment sessions Mr Bradley was able to generally express himself well, when discussing topics that were familiar and personal to him. However, at times, even though he spoke a lot, his explanations were not always easy to understand. His ability to offer ideas and thoughts on less familiar or personal topics (such as vaccination) was poorer than when talking about his own experiences but improved with prompting. For example, his responses to questions included a range of vocabulary such as "I think the objective of the vaccination is to decrease hospitalisations". Mr Bradley responded appropriately to a number of questions, which Ms King said suggests that he had understood the question and had the expressive language skills to respond. She stated, however, that there were also times he did not respond to the question asked or responded in an unexpected way.

[19] Overall, Ms King's view was that her assessment suggested Mr Bradley has "a level" or "a degree" of communication difficulty and that "this affects his ability to retain verbal information and understand what has been said". Further:

His communication difficulty has an impact on his ability to understand and respond to questions, the specific communication skills required under cross examination. This was noted in the assessment session in a range of activities and discussions.

[20] On a more positive note, Ms King also stated that:

Mr Bradley also has communication strengths. He is able to explain and describe personal experiences and topics familiar to him, in depth, using a range of vocabulary.

[21] Ms King concluded that:

... a communication assistant may be of assistance to the Court in providing recommendations specifically on ways to word questions and special measures that can enable Mr Bradley to comprehend and respond to questions.

[22] Ms King observed that the reasons for the differences between Mr Bradley's performance in a formal testing situation and in general discussion are difficult to determine. However, given the marked difference between Mr Bradley's performance in "specific assessment tasks", where he performed "very poorly" and his significantly better performance in the more informal conversations that took place during the assessment sessions, Ms King's view was that Mr Bradley's poor performance in the formal assessments cannot be explained by "poor language skills alone". Ms King hypothesised that the difference in performance might be because Mr Bradley was more anxious when undertaking a formal assessment. As noted above, however, this is an area that Ms King acknowledged is outside her expertise. She therefore suggested that "[a]n assessment by a psychologist may be of assistance".

[23] Given this context, it is somewhat unfortunate that the psychologist who was then engaged, Ms Bruwer, does not appear to have been asked to provide an opinion on this particular issue. One explanation for the differences observed by Ms King could, of course, be that Mr Bradley performs more poorly in communication tasks when under stress or anxious. An alternative explanation might be that Mr Bradley was incentivised to (and did) deliberately under-perform on the formal assessment tasks, in order to obtain evidence that he hoped would support his sole remaining possible ground of appeal. Unfortunately, we have no expert evidence to assist us with the issue. We therefore proceed on the basis that the reason for the differences in Mr Bradley's communication abilities in different contexts is simply not known at this stage.

[24] Ms King also undertook a review of the notes of evidence of Mr Bradley's evidence at trial and raised some specific areas of concern about this. We address these at [40] below.

Ms Bruwer's report

[25] Ms Bruwer's report is brief (three pages, with two pages of appendices) and limited in scope. It is based on the administration of a single test, the "Woodcock-Johnson IV – Tests of Oral Language" as well as Ms Bruwer's somewhat limited observations of Mr Bradley during the assessment. Ms Bruwer's report does not refer to the code of conduct for expert witnesses.

[26] Mr Bradley performed very poorly on the Woodcock-Johnson test. The results indicated significant impairment in Mr Bradley's oral language abilities across all six factors measured, with scores showing extremely limited proficiency, as follows:

Oral Language: Extremely limited comprehension knowledge, with ability equivalent to that of a 3–10-year-old.

Broad Oral Language: extremely limited lexical knowledge, listening ability, syntactic knowledge, and auditory memory span, with ability equivalent to that of a 3–5-year-old.

Oral Expression: extremely limited language development, and syntactic knowledge, with ability equivalent to that of a 3–4-year-old.

Listening Comprehension: extremely limited listening ability and verbal comprehension, with ability equivalent to that of a 2–11-year-old.

Phonetic Coding: extremely limited auditory processing, including both analysis and synthesis of phonological awareness, with ability equivalent to that of a 1–3-year-old.

Speed of Lexical Access: extremely limited efficiency and timeliness of retrieving words from long-term memory, with ability equivalent to that of a 2–5-year-old.

[27] Ms Bruwer observed that "[w]hile language difficulties were not immediately obvious, it soon became apparent that Mr Bradley had challenges around correctly comprehending and expressing concepts and names". For example, when asked to identify a cow, he pointed to a picture of a cat. When asked to describe a kangaroo, he went on to describe a four-legged creature that climbed trees and was found here in New Zealand. The assessor asked him to draw the creature and he drew a possum. Ms Bruwer concluded that these two examples, along with the results from the

assessment, suggest that Mr Bradley has sustained damage to the language centres of his brain. Ms Bruwer concluded:

Based on the results from the test and from observations while conducting the assessment, it is concluded that Mr Bradley is not capable of accurately representing himself in court or as part of a cross-examination. There is a strong likelihood that he will misunderstand questions posed to him or use the incorrect words when giving a response. With results indicating oral language abilities equivalent to that of someone younger than 10 years old, it is highly recommended that he utilises professional representation.

The grounds for recall

[28] The recall application is based on the new evidence summarised above. The specific grounds relied on are that:

- (a) This Court made adverse credibility findings on the basis of Mr Bradley's cross-examination in this Court. Mr Bradley's (previously unrecognised) verbal difficulties may have impacted the outcome of the "trial counsel error" grounds of appeal, as trial counsel's evidence was preferred to that of Mr Bradley.
- (b) The new evidence raises a new ground of conviction appeal, namely that:

... for there to be a fair trial, Mr Bradley required communication assistance, to be able to participate effectively by giving evidence and in his cross-examination at trial. Mr Bradley's communication difficulties may also have contributed to how his evidence was able to be briefed for trial, and whether as led at trial, it represented the best evidence he could give.

[29] The Crown opposes the recall application. It submits that the reports presented by Mr Bradley do not establish grounds that justify the exceptional step in recalling this Court's decision. The Court's credibility findings were not founded on the way in

which Mr Bradley gave evidence, but rather the contradictions between his claims and trial counsel's careful and detailed evidence.

Did Mr Bradley's verbal communication difficulties potentially contribute to the adverse credibility finding made in this Court?

[30] Both experts have identified deficiencies in Mr Bradley's language skills, particularly in formal testing situations. His verbal abilities in real life conversation, however, appear to have been markedly better than the outcome of the formal tests would suggest. Neither expert reviewed Mr Bradley's evidence in this Court to assess whether his verbal skills in that environment correlate more closely with the abilities he has shown in formal tests, or with his general conversational abilities.

[31] We have carefully reviewed this Court's notes of evidence. They support the conclusion that Mr Bradley's performance as a witness in this Court aligns much more closely with the level of verbal skills he appears to have demonstrated in general conversation with the experts, rather than the (poor) skills he demonstrated in formal testing scenarios. The notes of evidence, and the recollections of two of our panel, indicate that Mr Bradley was engaged, focused and articulate. His answers suggest that he understood the questions asked and was able to formulate and deliver relevant (and sometimes fairly complex) responses. The following passage from Mr Bradley's cross-examination provides an accurate sense of the level of verbal communication skills that Mr Bradley demonstrated at the appeal hearing:

Q. You are no stranger though to dealing with lawyers, and instructing them for proceedings, are you?

A. That's correct.

Q. And you know that you can give instructions to Mr Ruane to do something?

A. My knowledge of dealing with lawyers is that I give them an instruction, information, they are lawyers, they are professionals in their field, I am not going to challenge that. If a lawyer chooses to ignore the instructions I will bring it to their attention again especially if it is vitally important. If it is not, then I would leave it in the best judgment of the lawyer that they think it isn't worth following or pursuing.

Q. Right. So this issue with change of venue obviously didn't feature as important for you?

- A. The change of venue initially is very important because the children, the family, had a lot of affiliation with the ... area. I had business in the ... area. There was a lot of controversy over that. This was brought to Mr Ruane's attention and I would have thought the prosecution would have given that serious consideration also. The transfer to ... was important because there was more on neutral ground for a fairer representation.
- Q. The issue of Judge Alone jury trial obviously wasn't important to you either?
- A. The Judge Alone jury trial was a very important thing. As the information come forward it appeared to me that there was a lot of technicality with the information. I felt more comfortable and more confident of getting a fairer trial if I had a Judge Alone situation.

[32] As this brief passage illustrates, Mr Bradley presented as an intelligent and articulate witness, who gave answers that were responsive to the questions asked. Further, he used a number of words and phrases throughout his evidence that suggested at least an average (and quite likely an above average) degree of verbal skill, including the use of phrases such as "a fleeting period of time", "duly notified", "I don't have the dates in reference before me", "I have no knowledge of such", "you have to be quite strong in your directive to really get your point across" and "I needed the professionalism of a judge to really get to the truth of this".

[33] Our review of the notes of evidence align with Ms King's observation that Mr Bradley's communication strengths include being "able to explain and describe personal experiences and topics familiar to him, in depth, using a range of vocabulary". He did not display any of the issues that apparently emerged in more formal assessment situations. In particular, there is nothing in the notes of evidence to support Ms Bruwer's findings, based on her administration of the Woodcock-Johnson IV Test, that Mr Bradley has "[e]xtremely limited comprehension knowledge, with ability equivalent to that of a 3–10-year-old" or oral expression skills equivalent to those of a 3–4-year-old. At the risk of stating the obvious, a 3–4-year-old (or even a 10-year-old) would not have been able to express themselves in cross-examination as Mr Bradley did (as set out in the quoted passage at [31] above).

[34] Further, two of the three reasons this Court gave for finding Mr Bradley to be lacking in credibility (as summarised at [6]–[7] above) could not realistically have been impacted by any verbal communication difficulties in this Court. The second

and third reasons related to substantive allegations made in Mr Bradley's appeal affidavit that were contradicted by contemporaneous documents.

[35] The remaining reason (the first reason) largely relates to the inconsistencies between Mr Bradley's pre-trial statements to Mr Ruane regarding how his semen came to be on the victim's electric blankets and his evidence at trial. It was put to Mr Bradley that his story had changed at trial to which he responded "I put it out there at the trial. It is what it is". There is nothing in that response that suggests that Mr Bradley did not understand the proposition that was being put to him. On the contrary, when Mr Bradley's evidence in this Court is reviewed in totality, it is clear that he did offer an explanation for the inconsistency, namely that his initial instructions to Mr Ruane were "put together very quickly". Under cross-examination, he firmly maintained the position that the evidence he gave on the issue at trial was correct, and his pre-trial statements to Mr Ruane were incorrect. There is nothing to suggest that he did not understand the questions he was being asked, or their significance. His answers were clear, firm and on point. There is no suggestion, even now, that Mr Bradley may be able to provide a different or better explanation for the inconsistency with the help of a communications assistant (or indeed counsel).

[36] The first ground of recall is, in essence, that if this Court had been aware of Mr Bradley's verbal communication difficulties, it might not have made adverse credibility findings against him. For the reasons outlined, however, even accepting (for present purposes) that Mr Bradley has what Ms King described as "a degree" or "a level" of communication difficulty, we are not persuaded that it is reasonably arguable that any such difficulties could have materially influenced this Court's credibility assessment. The first ground of recall has accordingly not been established.

Did Mr Bradley's communication difficulties arguably result in him being unable to participate effectively at trial?

[37] Counsel for Mr Bradley submits that, in light of the expert evidence now available, a fair trial required that Mr Bradley be provided with communication assistance to enable him to participate effectively.

[38] We note at the outset that the trial was presided over by a highly experienced District Court Judge (Judge Maze); trial counsel (Mr Ruane) is a very senior and experienced criminal barrister; and appeal counsel in this Court (Ms Toohey) is also a very senior barrister, with extensive criminal law experience. None of them, however, appear to have had any concerns regarding Mr Bradley's communication skills or ability to participate effectively in his trial or appeal, prior to his application for leave to appeal to the Supreme Court. Nor did the prosecutors at trial, or Crown counsel on appeal, raise any issues of concern.

[39] It is nevertheless possible, of course, that Mr Bradley may have had hidden communication difficulties that materially impacted his ability to participate effectively in his trial. Indeed, Ms King has undertaken a comprehensive review of the notes of evidence of Mr Bradley's evidence at trial, and concluded that:

... there are multiple examples in the notes of evidence that illustrate Mr Bradley's difficulties understanding a question and/or providing a response contingent with the question asked. In my view, his difficulty responding to questions when giving evidence is at least in part due to his communication difficulties.

[40] Given the concern raised by Ms King, we have reviewed the notes of Mr Bradley's evidence at trial to help ascertain whether it is reasonably arguable that Mr Bradley's communication skills were so deficient that his fair trial rights were affected. As noted above, the experts (and in particular Ms King, who engaged with Mr Bradley more extensively than Ms Bruwer) found that Mr Bradley's communication skills were variable and dependent on context. There is no evidence why this is so. It cannot therefore simply be assumed that the level of Mr Bradley's communication skills at trial would have correlated with his performance when undertaking formal assessments. Rather, it is necessary to review the notes of evidence to form at least a preliminary view as to the extent to which Mr Bradley's performance as a witness at trial may have been impacted by communication difficulties.

[41] The examples Ms King provides of apparent communication difficulties at trial are not extensive, in the context of evidence spanning 67 pages of transcript. They fall into the following categories:

- (a) counsel re-wording or repeating questions in an attempt to assist Mr Bradley to understand and respond to a question;
- (b) the Judge intervening to clarify, or elicit the required information;
- (c) Mr Bradley giving responses to questions that did not answer the question asked; and
- (d) Mr Bradley giving responses to questions where the content of his responses was difficult to understand or did not make sense.

[42] Our first observation is that such issues are very common in criminal trials and can be attributable to a range of factors, including: poor listening skills; anxiety in an unfamiliar setting; complex or badly worded questions; having English as a second language; or deliberate evasion. Here, the five examples Ms King gives in respect of [41(a)] and [41(b)] above are responses to questions regarding the assessment of child support payments, an issue that many witnesses would likely have difficulty addressing. Further, as is often the case in the heat of trial, counsel's questions were at times not expressed as clearly as they should have been. There is nothing in the relevant exchanges, however, that appears to be outside of the range of normal responses one would expect from a witness at trial. It is also apparent from an overall review of Mr Bradley's evidence regarding childcare arrangements and child support payments that he was able to explain these concepts, and the specific arrangements at issue, without undue difficulty (including the implications of a 2015 change in legislation and what a 5/9 fortnightly shared care arrangement involved).

[43] Of the five examples given to illustrate the points made in [41(c)] and [41(d)] above, only two relate to evidence that is potentially material to the core trial issues.

They relate to Mr Bradley's semen stains being found on the victims' electric blankets.

The relevant exchanges are as follows:

Q. So you didn't notice when you reassembled the bed a wet spot or anything like that on either of the electric blankets?

A. I'm not doing the DNA test on it. It's life, it, just as it unfolds.

...

Q. On both of the electric blankets when you reassembled the bed?

A. I don't recall. Um, I certainly know that fluids and things were passed and so on, um, where exactly they went is what we were on.

[44] The answer (while somewhat cryptic, and possibly evasive) does not suggest that Mr Bradley misunderstood the question. Mr Bradley simply appears to simply be responding along the lines that he didn't notice any wet spot or stain on the blanket when he remade the bed — he was not doing a forensic test on the blanket and the fact he didn't notice the wet spot was just life and nothing out of the ordinary.

[45] As for the second answer, it also appears to us to be appropriately responsive to questioning about whether Mr Bradley noticed stains on the electric blankets when he remade the beds. He is asserting that fluids were passed (during sexual activity with his wife) and where "they went is what we were on". In other words — we were on the electric blankets on the floor, and that is therefore where the fluids went. Further, when these two examples are viewed in the context of Mr Bradley's overall evidence on this critical topic, it is apparent that he was able to give a clear and cohesive narrative as to precisely how his semen came to be on the victims' electric blankets that aligned with the defence theory of the case. There is nothing to suggest he failed to properly comprehend this line of questioning or its significance to the Crown case.

[46] From a review of the notes of evidence at trial, Mr Bradley presents as an articulate and intelligent witness. Overall, his responses to questioning were relevant and appropriate. To the extent that the Judge may have intervened to clarify certain matters, this does not appear to have occurred with any greater frequency than would usually be the case in a criminal trial. Mr Bradley did not appear to have any significant issues with comprehending the questions put to him or providing relevant

responses. The level of verbal skills he demonstrated at trial was at least average, and quite possibly above average. For example, he used the following words appropriately and in context: monetary, disturbances, formulate, explanation, accompany, menagerie, circuit, unprompted, impressed, contributed, telepathic, characteristics, particular incident, console, sputum, sinister, invoked, reprimanded, compounding, mass evacuation, harass, and aerated. Many of his responses at trial were lengthy and detailed. He clearly understood, and was able to verbalise, his understanding of some fairly complex topics.

[47] Mr Bradley's performance as a witness at trial, and the level of communication skills he demonstrated, therefore rests uneasily with his apparent inability to explain to Ms King the meaning of words such as "justify", "convinced" or "relevant"; his failure to provide correct responses to *any* of the eight comprehension questions asked in relation to a paragraph that was read out to him; and his purported inability to be able to identify a picture of a cow or describe a kangaroo. There is nothing in the notes of evidence at trial (or on appeal) that suggests this level of comprehension or communication difficulty, or indeed any significant communication difficulty at all.

[48] The expert reports, in particular Ms King's report demonstrate that Mr Bradley performed poorly in formal testing situations, but significantly better in "real life" communication scenarios. Our analysis of his performance as a witness both at trial and on appeal suggests that his ability to communicate in those contexts correlated much more closely with his general conversational abilities. There is nothing in the notes of evidence of either hearing that supports the proposition that, in those contexts, Mr Bradley demonstrated the communication skills of a child under the age of 10 (and in some respects of a child under the age of five) as Ms Bruwer's testing would suggest. Rather, an analysis of the notes of evidence is consistent with Ms King's observation that Mr Bradley is able to explain and describe personal experiences and topics familiar to him, in depth, using a range of vocabulary. His answers to questions were relevant and responsive to the questions asked, and he was able to present a detailed and cohesive narrative in support of his defence. There is no evidence before us (for example, by way of an affidavit from Mr Bradley) identifying any further material evidence that Mr Bradley now believes he could have given at trial, if he had been provided with communications assistance.

[49] In conclusion, we accept for present purposes that Mr Bradley may well have “a degree” of impairment in relation to his verbal communication abilities (as Ms King described it). Sadly, that is not uncommon in criminal trials. The issue here, however, is whether it is reasonably arguable that any impairment was of a sufficient degree of severity to impact on the fairness of Mr Bradley’s trial or appeal. We have not been persuaded that it is, for the reasons we have outlined above.

[50] Ultimately, Mr Bradley faced a very strong Crown case. Both the trial and appeal processes involved careful consideration of a wide range of evidence, including forensic evidence and the evidence of multiple witnesses. Mr Bradley was represented by competent legal counsel. He gave evidence in his own defence strongly denying the allegations of sexual abuse and providing a clear and cohesive narrative in response to compelling forensic evidence regarding his semen being identified on both the victims’ electric blankets. His evidence at trial was articulate and his answers were largely on point and responsive to the questions asked. The new evidence regarding Mr Bradley’s communication impairments, when viewed in the context of the trial as a whole, falls significantly short of potentially undermining the jury’s findings of guilt or demonstrating that a miscarriage of justice may have occurred. Mr Bradley has not therefore established a “very special reason” warranting the exceptional step of recalling the judgment.

Result

[51] The application for recall is declined.