

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF
A, B AND M PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT
1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA87/2021
[2023] NZCA 205**

BETWEEN M (CA87/2021)
Appellant
AND THE KING
Respondent

Hearing: 2 May 2023
Court: Courtney, Hinton and Churchman JJ
Counsel: E J Forster and H A Neumegen for Appellant
M J Lillico for Respondent
Judgment: 2 June 2023 at 10 am

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is granted.**
 - B The application to adduce further evidence is granted in part.**
 - C The appeal is allowed.**
 - D The conviction is set aside.**
 - E There is no order for a retrial.**
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REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In 1999 M was convicted at trial of indecently assaulting his daughter A when she was aged between seven and eight. Judge Lance KC imposed a sentence of nine months' imprisonment.¹ In 2020, A recanted. She says that she gave evidence which was untrue because she had been questioned at length by her uncle and was confused.

[2] M has filed a notice of appeal against his conviction and applies for an extension of time to appeal.² We grant the extension of time.

Evidence in support of the application

[3] M has applied for leave to adduce fresh evidence for the appeal. The evidence comes from M himself, from A and from one of A's aunts, Ms C.³ There is no objection to the evidence being adduced. We allow the evidence of M and A.

[4] We decline to accept the affidavit of Ms C. Ms C deposes that shortly after the trial, A's sister, B, (also a complainant at the trial) commented to her that A had lied during the trial. B did not provide an affidavit and was not called to give evidence in this Court. Mr Forster, for M, explained that the affidavit was adduced to counter the assertion that A's recantation is a recent fabrication. Clearly, the affidavit is not admissible for that purpose since it contains no evidence of anything A said. It is merely hearsay evidence — proffered without any foundation for its admission — of an opinion expressed by B.

Relevant principles

[5] The principles applying to appeals involving recantation by a complainant are well established and were summarised by this Court in *Hamon v R*.⁴

- (a) The mere fact that a complainant or witness recants does not make his or her trial testimony unreliable or mean there must be a retrial.

¹ *R v [M]* DC Whangārei T 990992, 28 January 2000 [Sentencing notes]. M was also sentenced on charges of driving while disqualified and theft, for which cumulative sentences were imposed and, on a totality basis, a sentence of 12 months' imprisonment was imposed for all the offending.

² The trial proceeded on an indictment and the Court's jurisdiction on appeal is that provided in the Crimes Act 1961: Criminal Procedure Act 2011, s 397.

³ Ms C is not the aunt whose husband questioned A.

⁴ *Hamon v R* [2013] NZCA 540 at [62]. Footnotes omitted.

- (b) The critical inquiry is why the complainant has recanted – whether it is because the earlier evidence was untrue or because other pressures have come to bear upon the complainant. Courts must be alive to human frailties in this area. As was said in *R v Flower*:

Witnesses may have second thoughts for a variety of different reasons. Some become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at that time.

- (c) Where an appeal is brought on the grounds of post-trial recantation, the appeal court has to grapple with “potentially difficult factual issues ... itself to appraise the effect of evidence which had been or was to be given”. This will usually require the court to review the evidence given at trial, and the subsequent affidavits, and any oral evidence before them.
- (d) If the court is satisfied that the recantation is untrue, the appeal will be dismissed. If there is a doubt, a retrial will be required. In the exceptional circumstance that the appellate court concludes the complainant's recantation is true, an acquittal may be entered.

[6] These principles have recently been restated by this Court in several cases.⁵ In *A (CA26/2018) v R* this Court said:⁶

[1] It is not unknown for appeals against conviction to be brought on the basis of a sworn affidavit from the complainant deposing that he or she gave perjured evidence at trial. It may be that the new evidence is true (and the original evidence false). But it may also be that the new evidence is false; the product of inducement or pressure. Appellate courts faced with this situation must look carefully and critically at the reasons given by the complainant for recanting. The relevant principles were set out by this Court in *Hamon v R*. The critical enquiry is *why* the complainant has recanted. As we observed in *Hamon*, the Court must be alive to human frailties post-conviction. ...

Background

A's original allegations

[7] A and B are the children of M and his former wife, Ms J. The couple had two other children — sons S and T. In addition, Ms J had an older child, TM. T⁷ and TM lived with Ms J's sister and brother-in-law, Mr and Mrs P, and their son, PP.

⁵ *C (CA491/2018) v R* [2019] NZCA 434 at [14]; *T (CA670/2016) v R* [2018] NZCA 102 at [43]; and *Rameka v R* [2019] NZCA 105 at [49].

⁶ *A (CA26/2018) v R* [2018] NZCA 428. Footnotes omitted.

⁷ Mr and Mrs P adopted T.

[8] In April 1998 M was in prison and Ms J was caring for A, B and S. However, she was not coping. Mr and Mrs P took over the care of the children around Easter that year. The allegations against M were made a month or so later, in May 1998.

[9] A number of incidents occurred during the time A and B and S were staying with his family.⁸ One was that T and PP's teachers had told Mr P about uncharacteristic misbehaviour by them and, in addition, "a problem out of control of [S] and [B] poking the boys in the bum". The children were also doing this to other members of the family, to the point that it became unacceptable. Mr P had to physically keep the family separate because it was "a frequent and ongoing problem, it sort of got to the stage [where] the family [was] dysfunctional I had to keep people separate and eat at different [times]".

[10] Matters came to a head on 20 May 1998 when PP told Mr P that B had told him about M poking her in the bum. Before school on 20 May 1998, Mr P "had occasion to growl at [S] for poking [T] in the tero"⁹ and he "also received a complaint from [T] that [B] had also allegedly poked him in the tero".¹⁰ Then:

I gathered [B] and all the children together and asked [B] what was the story.

[B] replied that [M] had done it in the mornings when they were in bed at home.

She said that he would hit her and put his finger up her bum.

[11] Mr P contacted the Children, Young Persons and their Families Service. That evening, Mr and Mrs P spoke to B and asked her to explain, using soft toys, what had happened. B told Mr and Mrs P that:

He would put his finger in her bum and push it in and out several times.

[12] Mr P said that on 25 May 1998, T complained that A had "done something" — the complaint was that A had poked T with a bottle around his bottom. This concerned Mr P, and he spoke with A and recorded their conversation in notes as follows:¹¹

⁸ This account is drawn from Mr P's evidence at trial.

⁹ Anus in te reo.

¹⁰ This description comes from Mr Payne's deposition taken on 5 May 1999.

¹¹ These notes were produced in evidence before this Court.

A [M] poked me in the bum with his finger. When I wanted a different channel he would poke me. He would take me into the bedroom with the clothes in – with Nana’s wardrobe and poke me.

Mr P How would he poke you?

A He would lie me on my stomach, smack me on the bum, and poke me. Lie me on the stomach on the bed and then do it.

Mr P What do you mean, then do it?

A He would poke me in the bum like that.

[A] poked her finger in her hand.

A Right into the bottom.

[13] A, B and S were moved to live with another family member after this.

The evidential interviews

[14] On 10 June 1998 A, then aged eight, gave an evidential interview. Her account was consistent with Mr P’s record of what she had said to him.

[15] The same day B, who was aged five, also gave an evidential interview. She said that when she was three years old, M had poked her in the bum and this happened once in the lounge and once in “[TM’s] room” and it happened over her clothes. She also said that her mother saw and said to her “don’t go by Dad again ‘cause he might abuse you again”.

The case at trial

[16] M stood trial in District Court at Whangārei on 2 November 1999 on charges of unlawful sexual connection in respect of both girls (counts 1 and 3 respectively) and, in the alternative, indecent assault (counts 2 and 4).

[17] The evidential interviews were played to the jury before the girls were cross-examined. By then A was aged nine. In cross-examination, she said:¹²

... I was holding a bottle and [T] walked into it

¹² The cross-examination transcript contained several shortened words and grammatical errors which have been corrected in this quote for readability.

By accident, was it? Yes

...

Which part of [T] did the bottle touch? His bum

So you were holding the bottle and [T] accidentally banged into the bottle with his bum? Yes

Did [Mr P] see that? I don't know

That's when he asked you to tell him what had happened was it? Yes

That's when you said to him that your dad had poked you in the bum? Yes

Was [Mr P] angry about what had happened with [T]? I think so

You think he was, can you remember, what made you think he was angry? No

Maybe it was just the way he looked at you was it? Yes

...

Your dad says that he didn't poke you in the bum, and I'm wondering do you think he might have made a mistake about that? Yes

I'm wondering if maybe you just blame dad because he wasn't there? No

It wasn't that reason, I'm wondering if maybe you blame dad because [Mr P] was angry? No

[18] In re-examination, A reiterated her earlier evidence that M had poked her "in the bum".

[19] B, now aged six, said in evidence that when M had "poked [her] bottom" she had clothes on and that he had not touched her "in that area", referring to the anus.

[20] Mr P gave the evidence outlined earlier.

[21] The trial Judge discharged M on count 3 — unlawful sexual connection in relation to B — pursuant to s 347 of the Crimes Act 1961 on the basis that the evidence did not establish penetration. The jury was unable to agree on the charges of unlawful sexual connection in relation to A (count 1) and indecent assault in relation to B (count 4). It found M guilty on the charge of indecent assault of A (count 2), which was a representative count that alleged the same conduct over a period of about a year.

[22] The Judge’s sentencing notes are striking for his obvious unease at the verdict.¹³

[5] This whole trial troubled me [M] for a number of reasons, and I think [Crown counsel] is correct when he makes the submission that the problems the Jury had in the two counts that were hung was whether or not the Crown had proved penetration, but there was clear evidence that you had offended at least insofar as [A] is concerned in the way I have indicated. You have maintained a denial from then through to now, and I must say, having heard the evidence myself, there were aspects of it which caused me concern, but in the end the Jury found you guilty.

[6] My concerns were somewhat heightened when I saw your record of previous convictions. They are numerous, but there is not one involving any sexual offending. ...

A recants

[23] A’s recantation is recorded in a letter written in October 2020, a police statement made in November 2021 and an affidavit sworn in February 2023 in support of M’s appeal, on which A was cross-examined.

[24] The circumstances at the time A first recanted were as follows. According to M, he had always sought to clear his name but had difficulty finding a lawyer to assist him in that. B had always felt strongly about the issue and had been working to obtain all the relevant court papers. By A’s account, B was very angry about the conviction and blamed Mr and Mrs P. A, however, had “blocked ... it out”. This may be because she was busy with her own life — she and her partner had eight children together and she had been imprisoned for offences that were not specified before us.

[25] By 2020, M’s conviction was posing a particular problem for M because his partner, Q, was seeking day-to-day care of one of her granddaughters. M’s conviction was an obvious barrier to this.

[26] A and M lived in different cities in the North Island. Just before the Covid-19 pandemic in early 2020, A and her partner separated. A and the children went to stay with M for a few months. While she was there, there were discussions with M about trying to clear his name. Although A did not recall discussions about the effect of M’s

¹³ Sentencing notes, above n 1.

conviction on Q's efforts to have care of her granddaughter, it seems very likely that the discussions about overturning M's conviction arose in that context.¹⁴ In any event, when M asked her to support him A agreed straight away because "it was just the right thing to do".

[27] On 13 October 2020, A wrote a letter "To whom it may concern" and delivered it to M's lawyer. It said:

I am writing this letter to clear my father [M] of the false allegations I made against him as a child. It has effected (sic) my life greatly knowing that what I said was untrue. ... It started when ... my sister [B] and brother [S] went to live with my mum's sister and her husband, [Mr and Mrs P]. I don't remember how it exactly came about but suddenly we were being questioned over and over again by my Uncle [Mr P] about my dad touching us ... He would ask us so much that it felt that's what I had to say. At one stage he even used teddy bears to demonstrate the sexual assaults I had apparently suffered. I was scared and confused [that is] why I went along with the lies that were repeatedly told to me. ...

[28] When lockdown was announced A returned to her home with the children so that her family could be together. However, there appear to have been difficulties with that situation and A was finding it difficult to cope. M came and picked up two of A's daughters and took them back to live with him and Q. In July 2020, without A's knowledge, M applied for day-to-day care and guardianship of the two children on the basis that A and her partner were using drugs and that there was violence in the home. We do not know the outcome of that application, though we note that the children are still living with M and Q.

[29] By 2021, A had moved to Auckland to sort out her life. None of her children were (or are) living with her. On 10 November 2021 she made a statement to the police, in which she said:

I confirm that I definitely want to retract my evidence. I want to retract it in full – the whole thing.

My father never – at any time – sexually violated me. He has never inserted his finger into my anus.

I retract my statement because it was wrong.

¹⁴ In February 2021, after A returned home, Oranga Tamariki advised that Q would not be considered suitable for the day-to-day care of her granddaughter because of M's conviction.

I provided the evidence, which was used to convict my father, when I was a young child.

At the time, my siblings and I were living with [Mr and Mrs P]. [Mrs P] was my mother's sister. [Mr P] had previously been a Policeman and was a pastor ... when we were living with them.

[Mr and Mrs P] didn't like my father. He was a criminal and I think they felt that he was responsible for my mother using drugs.

I felt coerced by [Mr and Mrs P] into making my statement to Police. [Mr P] sat me and my sister [B] down for days questioning us.

[Mr P's] questioning was very intense. I feel like I was manipulated and brainwashed. At the time I felt scared and confused.

...

[B] has always been mentally stronger than me. She denied the allegations when my father went to court in 1999. My father wasn't convicted for any of the allegations involving [B].

I have included my father in my children's lives. My father currently has two of my children in his care.

My father has gone through a lot because of the wrongful conviction and I want him to not have this stigma any longer.

[30] A's affidavit sworn on 17 February 2023, includes the following statements:

1. I am writing this affidavit to clear my father [M] of the false allegations I made against him as a child.
2. It has affected my life greatly knowing what I said was untrue.
- ...
4. It started with me, and my sister [B] and brother [S] went to live with my mum's sister and her husband, [Mr and Mrs P].
5. I do not remember how it exactly came about but suddenly we were being questioned over and over again by [Mr P] about my dad touching us etc. He would ask us so much, that it felt that it is what I had to say, and at one stage he even used teddy bears to demonstrate the sexual assaults I had apparently suffered.
6. I was scared and confused and that is why I went along with the lies that were being repeatedly told to me.
7. It has been a huge part of my life I have wished to forget.
8. I am so sorry for not being strong enough to tell the truth and for putting my dad through that while knowing he would never do that to me.

[31] A gave evidence before this Court under subpoena. However, she did not show any sign of hostility either towards M or in relation to the proceedings. She was openly critical of her father for having applied for the care of her children without her knowledge. She expressed the view that M may have been motivated by the financial advantage of having care of the children. She said more than once that she thought he should return them to her. Nevertheless, A was also explicit that she did not consider that there was any risk to her children in living with her father. Nor did she regard her father's actions in obtaining care of the children as justifying her maintaining a lie.

[32] It was apparent from A's evidence under cross-examination that A has been significantly influenced by the effect of M's conviction on B. She explained that the conviction has long been a cause of anxiety and anger for B, who sees Mr and Mrs P as responsible for the situation. The following evidence captures A's position:

Q You appreciate you can help your dad, and that's a different thing from saying something that happened 23 years ago didn't happen, do you get that?

A Yeah I do. I think my dad, I love you dad, but I think my dad's a dick, do you know what I mean. Our relationship, we have a lot of argues. Maybe resentment or anger, I don't know, towards each other, so I am not doing this just to help him, I'm doing it because it's the right thing to do, it's the truth, it needs to be done. So I am not trying to help him in any which way by just saying this.

Q Why did you do it – if it's the truth why did you do it in 2020, two decades after it all happened, while you were living with him?

A To be honest, because I blocked a lot of that out, do you know what I mean, there was trauma, I'm only dealing with it now and my sister was real lost, I did it for my sister really, my sister was real lost looking into all of this stuff. And I didn't know how to help her.

Mr P's evidence and the coaching allegation

[33] A's claim that Mr P coached her and B was not pursued. As a result, it is unnecessary to consider the evidence adduced by the Crown from a clinical psychologist, Dr Suzanne Blackwell, to counter that allegation.

[34] Mr P's evidence essentially confirmed the circumstances in which he had talked to A and the notes that he made of that conversation. Although it was put to Mr P that he did not like M, there was no serious suggestion that Mr P had acted

improperly in any way. There is only one aspect of Mr P's evidence that we wish to record. That is our general impression of Mr P as a very imposing figure in terms of height, demeanour and gravitas. It is reasonable to expect that his appearance before us was similar to the way he would have appeared in 1998, questioning eight year-old A. There is no question that a young child would be awed by him.

Appeal

[35] As a child, A gave a clear account of being indecently assaulted. There was evidence to corroborate her account in the form of Mr P's observation of sexualised behaviour and of a psychologist as to the fact that her behaviour was consistent with that of a sexually abused child. As an adult, however, A vigorously asserts that her account was a lie.

[36] We approach A's recantation mindful of the many reasons that complainants recant. Brooding on the repercussions of the complaint can create an internal imperative to retract the complaint. Pressures from family members, even inadvertent, may lead a complainant to rationalise the complaint as the product of confusion or lies. On the other hand, a recantation might be true, even when these factors are in play.

[37] A impressed us as resilient, candid and forthright. She was open and unapologetic about the ambivalent relationship she has with M, especially her unhappiness with his retaining care of her children. She was open about her concern regarding B, who has not coped as well with the trauma of their childhood. She was open about her strong desire for her own family to remain intact and her regret that it has not (for different reasons). A was also candid about the fact that she has a criminal record and that she needed to leave her children and move to Auckland in order to "figure all this out". However, throughout her acknowledgements of these aspects of her life, she repeatedly and explicitly said that she was motivated to tell the truth — essentially because it was the truth.

[38] Mr Lillico, for the Crown, submitted that A's explanation for lying at trial was implausible (especially after the allegation of coaching was abandoned). He emphasised the fact that when A first recanted she was living with M. He invited us to see the recantation as motivated by the difficulties M was facing in relation to Q's

granddaughter. We agree that M almost certainly asked A to provide the letter to his lawyer, and the fact that A was living with him at the time, in a strained emotional state, contributed to the timing of her recantation. However, that does not explain why, more than a year later, A made a statement to the police recanting her trial testimony and why, more than another year after that, she provided an affidavit in support of M's appeal and then gave fulsome evidence before us, albeit under subpoena.

[39] In addition, even if A was influenced by M when she initially recanted, maintaining the recantation has meant acting against her own interests in terms of having him relinquish her children. This is a matter that she plainly feels strongly about and yet having the conviction set aside will only put M in a stronger position to keep the children. We are certain that A appreciates that fact. For these reasons, we accept that A is not motivated by this aspect of her relationship with M.

[40] It seems to us that the more likely driver in A's decision to recant is her sister, B — something she said explicitly in cross-examination. It appears that A and B have dealt with the trauma of their childhood differently. An important aspect to consider in cases of recantation, especially those involving sexual offending, is the risk that children realise later the effect that making allegations of sexual abuse has on the family and seek to reverse those effects or make amends. We suspect that A has come to the conclusion that, in dealing with this aspect of her childhood (which, unlike B, she has put to one side for most of her adult life) and supporting M in his appeal, she will be helping her sister.

[41] A wish to help her sister does not, however, mean that A's recantation is untrue. We have concluded that A was a truthful witness before us. It is not now possible to identify why she might have given false evidence as a child. All we can say is that she impresses us as truthful now.

[42] As the conviction depended on A's evidence it must necessarily be set aside.

Result

[43] The application for an extension of time to appeal is granted.

[44] The application to adduce further evidence of M and A is allowed. The application to adduce the evidence of Ms C is declined.

[45] The appeal against conviction is allowed and the conviction is set aside. In the circumstances we do not order a retrial.

Solicitors:
Crown Law Office, Wellington for Respondent