IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 3/18

IN THE MATTER	of an appeal against conviction and sentence under sections 55(1) and 67(2) of the Judicature Act 1980-81
BETWEEN	**ANDREW MARSTERS**
	Appellant
AND	**THE CROWN**
	Respondent

Coram:	Williams P Barker JA White JA
Hearing date:	29 October 2018
Judgment:	2 November 2018
Reasons for Judgment:	9 November 2018
Counsel:	Mr N George for Appellant Ms K Bell and Ms A Herman for Respondent

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REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY WHITE JA

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Introduction

[1] The appellant Andrew Marsters appeals against conviction and sentence on various charges of sexual offending for which he was convicted following a High Court jury trial in March 2018 and was sentenced to 14 years imprisonment by the trial Judge, Potter J.[1]

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[1] *R v Marsters*, 24 March 2018.

[2] The appeal was argued before the Court on 29 October 2018. On 2 November 2018 the Court delivered its judgment:

a) The appeal against conviction was dismissed.

b) The appeal against sentence was allowed and the sentence of 14 years' imprisonment was quashed and a sentence of 10 years' imprisonment was substituted.

c) The name suppression orders in respect of the complainants made in the High Court were continued.

[3] The following are the reasons for the Court's decision.

The jury verdicts

[4] Mr Marsters was convicted on ten charges of doing indecent acts to young children, four relating to a female complainant A (one representative), two to another female complainant B (both representative) and four to a male complainant C. He was found not guilty on a representative charge of sexual intercourse with complainant B and two charges of indecency relating to another male complainant RF.

Appeal again conviction

[5] Mr Marsters' grounds of appeal against his convictions are that Potter J's summing up to the jury was erroneous in law because she:

a) failed to warn or advise the jury about the 18 year delay in the complaint by complainant A;

b) failed to warn or advise the jury about the circumstances of complainant B's complaint including the nature of the police questioning;

c) failed to warn or advise the jury about the dangers of children giving evidence;

d) erred in using the evidence of complainants B and C as corroboration of each other; and

e) otherwise failed to put the defence case adequately.

[6] Before addressing each of these grounds of appeal, it is necessary to describe the background to the complaints against Mr Marsters and the course of his trial in more detail.

[7] The offending against complainant A, who was born in 1993, was alleged to have occurred between 1998-2000 when she was aged between 5 and 7. Her complaints related to incidents on outer islands, one while gathering coconut crabs and the other times at her home. Her evidence was that Mr Marsters, a friend and relative of her family, removed her shorts, licked her all over her body, including her vagina, and digitally penetrated her. She said the abuse occurred about ten times at her home over a period of a couple of years.

[8] Complainant A also gave evidence about an incident which she said occurred when she was aged about 10 or 11 and was asked by her father to fetch a ukulele from a house being looked after by Mr Marsters. She said that when she approached the house he called out to her to come and suck "this" while pointing at his penis. She ran away and received a hiding from her father for forgetting the ukulele.

[9] Complainant A did not come forward with her complaints against Mr Marsters until 2017 when she heard about the other complaints against him. Her evidence was that she was too scared to complain until then. Complainant A was aged 25 at the time of the trial.

[10] The offending against complainant B, who was born in 2010, was alleged to have occurred in 2015 and continued for approximately 18 months. Her complaints related to incidents in the bush near her home on an outer island. Her evidence was that Mr Marsters, a friend and relative of her family too, removed her clothes and licked her vagina and digitally penetrated her. She said the abuse occurred on numerous occasions and only stopped when her grand-aunt came to stay and questioned her about her unusual habit of crossing and squeezing her legs together. She had previously told her Aunty (her mother's younger sister who was aged about 12), but then when her young Aunty told complainant B's mother, complainant B said her Aunty was a liar and received a hiding from her mother. Complainant B was aged 8 at the time of the trial.

[11] The offending against complainant C, who was born in 2005, was alleged to have occurred in 2017 when he was aged 12. He is complainant B's brother. His complaints related to incidents that occurred on four occasions in August 2017 in the same location as complainant B. Complainant C's evidence was that on each of the four occasions Mr Marsters masturbated

the complainant's penis and forced the complainant to taste his own sperm by licking it off Mr Marsters finger. On one occasion Mr Marsters showed the complainant a pornographic video on his phone.

[12] At the trial before Potter J in March 2018, the evidence-in-chief of the three complainants was given by agreement by way of pre-recorded DVD and they were cross-examined by Mr George, counsel for Mr Marsters. Evidence for the prosecution was also given by the parents of B and C, the young aunty and their grand aunty, a teacher, a nurse and a doctor (Dr Mafi) who had examined complainant B, and Dr Seymour, a former professor of Psychology at Auckland University.

[13] Dr Mafi, who had examined complainant B, explained that while her hymen was still intact this was not inconsistent with digital penetration. Dr Seymour gave independent expert evidence about children's responses to sexual abuse and the reasons why they may not tell anybody about the abuse when it occurs.

[14] The appellant Mr Marsters gave evidence in his defence, admitting his relationship with the complainants' families, but denying all their allegations. As Mr George, counsel for Mr Marsters accepted, the principal issue for the jury was credibility.

[15] Both Mr George and Crown Counsel, Ms Mills, addressed the jury comprehensively and Potter J summed up immediately after Mr George's address. In his address, Mr George raised all the matters the subject of the grounds of appeal, but now challenges the adequacy of the summing-up. It is convenient to address grounds (b) to (e) before ground (a).

Ground (b) – failure to warn or advise the jury about the circumstances of complainant B's complaint including the nature of the police questioning

[16] The particular matters Mr George submitted warranted warning or advice were:

a) Complainant B's denial to her mother after her disclosure to her young Aunty;

b) The nature and extent of the questioning by her grand-aunt; and

c) The nature and extent of the questioning by the Police which led to the DVD recording and written transcript. Mr George described the questioning as

"intensive", repetitious, and an "interrogation" which was oppressive and unfair for a young child.

[17] Mr George submitted that the manner in which the grand-aunt and the Police obtained details of the complaints was "less than voluntary and worth consideration by the jury if properly directed."

[18] As Ms Bell for the Crown pointed out, the evidence before the jury on these matters was extensive and disclosed in detail the narrative of complainant B's complaint. Complainant B, her mother, young aunty, her grand-aunt and the Police who took her statement, which was recorded, all gave evidence and were cross-examined by Mr George. Two of complainant B's interviews were played for the jury. Professor Seymour also gave relevant expert evidence about the suggestibility of children, delay, incremental disclosures and false allegation and coaching.

[19] In these circumstances we agree with Ms Bell that the question whether complainant B's complaint was a product of coaching was a matter of fact for the jury to decide. There was no legal requirement for the trial Judge to give any special direction.

[20] The trial Judge correctly advised the jury in her summing-up that the evidence of her young aunt, grand-aunt and mother was not evidence of what in fact happened, but might assist in judging the consistency of complainant B's evidence and her credibility.

[21] For these reasons the second ground of appeal is not established.

Ground (c) – failure to warn or advise the jury about the dangers of children giving evidence

[22] Mr George submitted that the trial Judge should have cautioned the jury about the dangers of the evidence of children. He did not, however, cite any authority in support of this proposition.

[23] It is true that, unlike the position in New Zealand where s 125(2) of the Evidence Act 2006 expressly provides that no special caution is required in respect of the evidence of children, there is no equivalent provision in the Cook Islands Evidence Act 1986-87. But the

absence of such an express provision here does not mean there is an obligation imposed on trial Judges to give any special caution.

[24] At common law and under Cook Islands law there is no competency issue around the calling of a child witness.[2] There is no authority supporting the proposition that the evidence of children cannot be relied on.

[25] For these reasons, the third ground of appeal is not established.

Ground (d) – erred in using the evidence of complainants B and C as corroboration of each other

[26] Mr George submitted that the trial Judge erred in law in the following passage in her summing up to the jury:

> "If you accept the evidence of [complainants B and C] about how the accused would lead them or tell them to go into the bush and to a particular log in a coconut grove which they each separately described and identified the photographs where they said the sexual acts took place. You may infer that there is an element, a pattern, or a plan in the way in which the accused went about the sexual offending with those two young people. You may conclude that the inference that you draw supports the evidence that each of [the complainants] gave. It is just an example and it is entirely a matter for you."

[27] In support of this submission, Mr George relied on section 20B of the Cook Islands Evidence Act 1986-87 which provides:

> 20B. Corroboration in sexual cases – (1) Where any person is tried for an offence against any of sections 141 to 157 (inclusive) of the Crimes Act 1969 or for any other offence of a sexual nature, no corroboration of a complainant's evidence shall be necessary for the accused to be convicted; and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.
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> (2) If, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required.

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[2] Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA71.3(a)].

[28] Subsection (1) makes it clear there is no requirement for corroboration in sexual cases and therefore no requirement for any warning to the jury relating to the absence of corroboration. Section 121 of the New Zealand Evidence Act 2006 is to similar effect. In this case Potter J directed the jury accordingly.

[29] At the same time, subsection (2) recognises the Judge may decide to comment on the absence of corroboration and that if the Judge decides to exercise the discretion to comment no particular form of words is required. There is no equivalent provision in New Zealand.

[30] The important point here is that there is nothing in section 20B preventing the Judge from directing the jury to use the evidence of complainants B and C as corroboration of each other in the way she did in the passage criticised by Mr George. The Judge emphasised that whether the jury decided to draw the inference was entirely a matter for them.

[31] She also made it clear that the jury had to determine whether the matters the subject of the complaints had occurred when considering each charge separately. The different verdicts reached by the jury confirmed they did so.

[32] For these reasons, the fourth ground of appeal is not established.

Ground (e) – erred in failing to put the defence case adequately

[33] Mr George submitted that the trial Judge failed to put the following matters, which were of particular significance to the defence, to the jury:

a) Mr Marsters' evidence about the boats that went to the outer island gathering coconut crabs when the first incident relating to complainant A occurred.

b) The medical evidence of Dr Mafi about complainant B's intact hymen.

c) The absence of any pornographic material on Mr Marsters' phone which contradicted the evidence of complainant C.

[34] On examination none of these matters warranted specific mention by the Judge because:

a) Whether complainant A went to the outer island to gather coconut crabs in a boat belonging to her family or to Mr Marsters had no particular bearing on her complaint of sexual abuse and, in any event, was not put to complainant A.

b) The medical evidence of Dr Mafi about complainant B's intact hymen made it clear digital penetration could still have occurred.

c) The evidence from the Police about Mr Marsters' phone established they did not have the technical equipment to perform an in-depth analysis of the phone.

[35] For these reasons, the fifth ground of appeal is not established.

Ground (a) – Failure to warn jury about delay in respect of complainant A

[36] There is no dispute that Potter J referred to complainant A's delay in making her complaint when summarising the defence case, but the Judge did not provide any formal direction to the jury about any need for caution in relying on her evidence after a period of 18 years. While there was no application by Mr George to the Judge for a direction of this nature, he submits this error on the part of the Judge is sufficiently serious to lead to a miscarriage of justice in this case.

[37] Unlike the position in New Zealand where section 122(2)(c) of the Evidence Act 2006 requires consideration to be given to a reliability warning about accepting evidence about the conduct of a defendant if the conduct is alleged to have occurred more than 10 years previously,[3] there is no equivalent provision in the Cook Islands.

[38] Here the common law applies. The correct approach is conveniently explained by the English Court of Appeal in *R v PS*:[4]

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[3] *CT v R*, [2014] NZSC 155, [2015] 1 NZLR 465 at [50] and *L v R* [2015] NZSC 53, [2015] 1 NZLR 658, and Elisabeth McDonald and others *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV122.01].

[4] *R v PS* [2013] EWCA Crim 992, [2013] All ER(D) 97 at [35].

> As it seems to us, the direction to the jury on delay, given the facts of this case, should have included the following elements:
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> i) delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before, and this was particularly so in this case when the defence is essentially a simple denial (the defendant was saying that he had not acted as alleged);
>
> ii) the longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence is no longer available – indeed, it may be unclear what has been lost;
>
> iii) when considering the central question whether the prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and
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> iv) a summary of the main elements of prejudice that were identified during the trial.

[39] Adopting this approach, in our view the 18 year delay between the events described by complainant A and the trial did require the trial Judge to warn the jury to be cautious about accepting her evidence.

[40] The question, however, is whether this error on the part of the Judge led to a miscarriage of justice. Under section 69(1) of the Judicature Act 1980-81:

> "The Court may notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[41] It is accepted that the correct approach to the interpretation and application of this provision is provided by the New Zealand Supreme Court decision in *Matenga v R*:[5]

> "...[H]aving identified a true miscarriage, that is, something which has gone wrong and which was capable of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may actually, that is, in reality, have occurred. The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence

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[5] *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 at [31]. See also *Wiley v R* [2016] 3 NZLR 1.

> to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused.
>
> ..."

[42] We have reviewed all the admissible evidence in this case and have concluded the guilty verdicts were inevitable. On the basis that the jury determined the principal issue of credibility in favour of the complainants rather than Mr Marsters, we are satisfied the guilty verdicts were the only reasonably possible verdicts available. The absence of a warning to the jury about accepting the evidence of complainant A after the 18 year delay does not affect this conclusion because there was other evidence supporting complainant B.[6]

[43] Our conclusion that there was no miscarriage of justice is reinforced by Mr Marsters' change of heart at sentencing. In the course of his submissions for Mr Marsters on sentencing, Mr George said:

> "The accused expresses deep remorse and regrets about all the events that he is found guilty of. He expresses profound apologies to the extended ... family ..."
>
> "The defendant also accepts his wrongs and imperfections. Throughout his offendings he said that common sense discipline and restraint abandoned him. He says that these were tragic mistakes. The offending made no sense and he has remorse for all the victims."

[44] It is well-established that post-conviction admissions of guilt (for example, as part of the sentencing process) may lead the Court to conclude that no miscarriage of justice has occurred: *R v Vaituliao*, *M(CA428/09) v R* and *Gilfedder v R.*[7] A case-by-case assessment is required having regard to the grounds of appeal and the circumstances, including the position the defendant adopted at trial and the nature of the admissions made.

[45] In this case, as Potter J recognised, the position Mr Marsters adopted at trial which involved denying the charges against him and challenging the credibility of the complainants was irreconcilable with the admissions made by his counsel on sentencing. The admissions

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[6] In New Zealand few appeals have succeeded on the ground of a failure to give this warning because the Courts decided it did not result in a miscarriage of justice: eg. *K (CA665/2014) v R* [2015] NZCA 566 at [62] and McDonald *Mahoney on Evidence: Act & Analysis*, above n3, at [EV122.01].

[7] *R v Vaituliao* [2007] NZCA 525; *M(CA428/09) v R* [2010] NZCA 127; *Gilfedder v R* [2013] NZCA 426; and Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (online ed, Thomson Reuters) at [CPA 232.14A]

undermined the basis for Mr Marsters' appeal against conviction. They therefore support our conclusion there was no miscarriage of justice.

[46] The first ground of appeal is therefore not established and, as none of the grounds of appeal has succeeded, the appeal against conviction is dismissed.

Appeal against sentence

[47] Mr Marsters also appeals against his sentence of 14 years' imprisonment on the ground it was manifestly excessive. In support of his appeal, Mr George submits:

a) The severity of the sentence in respect of three complainants is a record in the Cook Islands and the equivalent of a murder sentence.

b) While there is no Sentencing Act in the Cook Islands, it is not appropriate to adopt the New Zealand Sentencing Act 2002 because that is prohibited by the Cook Islands' Constitution.

c) In contrast to the position in New Zealand, the maximum penalties for rape and sex related offences in the Cook Islands have not been increased since 1969, the year of the Crimes Act here.

d) The approach adopted by the New Zealand Court of Appeal in *R v AM,*[8] while helpfully requiring a consistent, reasoned and structured approach, is not directly applicable because it relates to different offences.

e) Potter J should have taken more cognizance of the local conditions in applying the totality principle and fixed a three year term of imprisonment for each complainant making a total of nine years to be served cumulatively.

f) Potter J should also have added a midpoint minimum period of imprisonment (MPI) to allow Mr Marsters who suffers from a serious diabetic condition to seek parole.

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[8] *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

g) In the absence of an MPI, the 14 year term of imprisonment faced by Mr Marsters, a first offender with no previous convictions at the age of 49, places it in the category of a cruel and unusual punishment prohibited by article 65(1)(b) of the Constitution.

[48] In sentencing Mr Marsters to 14 years' imprisonment, Potter J took into account the following factors:

a) The nature of the offending against complainants A, B and C in respect of which the jury had found Mr Marsters guilty;

b) The position of trust he held within the families of the complainants and the betrayal of that trust;

c) The victim impact statements which the Judge said made "horrifying reading";

d) The probation report which indicated Mr Marsters was calm and co-operative, but displayed no remorse and maintained his innocence;

e) Mr George's submission describing a change of heart by Mr Marsters which was difficult to reconcile with the probation report;

f) Mr Marsters' age (49) and the fact that he had no previous convictions, though as the offending against complainant A went back to 1998 he could not be regarded as a person of historic good character;

g) The presence of aggravating factors relating to the offending: the physical acts themselves which were serious, the significant breach of trust, the age disparity, the repetitive nature of the offending, the element of pre-meditation, the hidden location in the bush and the planning;

h) The absence of any mitigating factors;

i) The principles of sentencing: accountability, responsibility, denunciation, deterrence and the least punitive sentence for Mr Marsters; and

j) The absence of any directly relevant authorities in the Cook Islands.

[49] Taking these factors into account, Potter J took 6 years as the starting point for complainants A and B and in each case added a year for the aggravating factors to give 7 years' imprisonment. In respect of complainant C, the Judge took a starting point of 5 years increased to 6 years' imprisonment for the aggravating factors.

[50] In each case the sentences for the separate offending for the individual complainants were to be concurrent.

[51] Then, after noting that the cumulative sentence was 20 years' imprisonment, the Judge stood back and applied the totality principle to ensure the final sentence imposed was not wholly out of proportion to the gravity of the overall offending. She concluded a considerable rebate was necessary to avoid disproportionality and reached an overall sentence of 14 years' imprisonment.

[52] Finally, the Judge checked her sentence by looking at a different approach which involved taking the offending relating to complainant A as the most serious, noting the sentence of seven years' imprisonment for her and adding to that sentence because of the aggravation of the further offending against complainants B and C three to four years in each case resulting in an overall sentence of 13 to 15 years which confirmed the overall sentence of 14 years was appropriate and just.

[53] Ms Bell for the Crown supported the approach to sentencing followed by the Judge and the final sentence imposed. At the same time Ms Bell agreed with Mr George that caution was required in applying New Zealand sentencing cases to Cook Islands' cases involving different offences and maximum penalties. She submitted, however, that while *R v AM* involved different offences, so that the three bands in that case were not directly relevant, the culpability assessment factors identified in that case provided a useful guide to sentencing for sexual offending of the nature that occurred in this case in the Cook Islands.

[54] We agree with Ms Bell's submission. This means we also agree with Potter J's approach in this case which in essence recognised the culpability assessment factors identified in *R v AM.*[9]

[55] We also agree with Potter J's recognition of the need to stand back and apply the well established principle of totality.[10] The key principles when sentencing for multiple offending are:

a) With multiple offences the sentence must reflect the totality of the offending;

b) In respect of multiple offences, the Court will not insist that the total sentence be arrived at in any particular way;

c) The total sentence must represent the overall criminality of the offending and the offender.

[56] Applying this approach in this case, however, we consider the following factors required greater recognition:

a) The maximum penalty for the offences of indecent assault in the Cook Islands under sections 146(1)(b) and 152(1)(b) of the Crimes Act is 10 years' imprisonment.

b) While the offending was undoubtedly serious and involved multiple incidents of abuse of young children, it is possible to imagine even more serious cases extending over longer periods.

c) Mr Marsters was acquitted of the most serious charge of sexual intercourse with complainant B.

d) The age and health of Mr Marsters should be taken into account in assessing his criminality and likelihood of reoffending.

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[9] *R v AM*, above n 8, at [34] to [64].

[10] *R v Xie* [2007] 2 NZLR 240 (CA) at [17].

[57] Recognising these factors, we have concluded the final sentence imposed by Potter J was manifestly excessive and should be 10 years' rather than 14 years' imprisonment. The four sentences in respect of the four charges relating to complainant A are to be 3 years' imprisonment to be served concurrently (counts 1, 2, 3 and 4); the two sentences in respect of the two charges relating to complainant B are to be 4 years' imprisonment to be served concurrently (counts 5 and 7); and the four sentences in respect of the four charges relating to complainant C are to be 3 years to be served concurrently (counts 8, 9, 10 and 11).

[58] The appeal against sentence is therefore allowed to that extent.

[59] For completeness, we note there is no provision in the Cook Islands for an MPI as in New Zealand.

Result

[60] For the reasons we have given:

a) The appeal against conviction was dismissed.

b) The appeal against sentence was allowed and the sentence of 14 years' imprisonment was quashed and a sentence of 10 years' imprisonment was substituted.

c) The name suppression orders in respect of the complainants made in the High Court were continued.

Douglas White JA.

White JA