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**IN THE YOUTH COURT  
AT WELLINGTON**

**CRI 2016-235-000025  
[2016] NZYC 802**

**THE QUEEN**

v

**[MH]**

Hearing	12 December 2016
Appearances:	Ms Light for the Crown Mr Elliott for the Respondent
Judgment:	13 December 2016

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**RESERVED JUDGMENT OF JUDGE I G MILL  
ON APPLICATION TO CROSS EXAMINE UNDER SECTION 44 OF THE  
EVIDENCE ACT 2006 AND AN APPLICATION TO VACATE  
A "NOT DENIED" PLEA**

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[1] [MH] faces trial on allegations of sexual offending against his [relative] ([LS]). There are presently nine charges, specific and representative, of sexual violation, attempted sexual violation and indecent acts.

[2] At the same trial [SG] faces three charges in relation to another child [CW] of doing an indecent act on her. These are said to have arisen during the same time period and at the same place as the alleged offences by [MH].

[3] Mr Elliott for [MH] seeks leave to cross examine [LS], her mother and [LS's] friend about disclosures made to them regarding [LS's] sexual experience with her [relative] [RP].

[4] Her [relative] [RP] is presently facing trial on more limited charges of indecent behaviour with [LS] following a statement made to the Police by [LS] on 4 May 2016.

[5] [MH] denies all of the offending and the issue at his trial will be whether the offending took place i.e. has [LS] falsely accused him.

[6] In challenging [LS] veracity the defence wish to ask her why she did not make a complaint to the Police about [RP] at the same time she made a complaint against [MH].

[7] [LS] spoke to the Police on 6 April 2016 about [MH] following disclosure to her mother and an evidential interview in respect of [MH's] alleged offences occurred on 11 April.

[8] In support of the application Mr Elliott submits the reasons why a complaint was not made are relevant to the Judge's assessment of [LS's] evidence and will be used in support of a submission that [LS] is lying about [MH] offending, as she and her family had an ulterior motive to have him prosecuted. In the alternative it will be submitted she is transferring [RP's] behaviour to [MH].

[9] It is submitted further that the defence needs to elicit information from [LS's] mother and also [LS's] friend [JC] concerning the complaints made to them by [LS] about [RP's] behaviour.

[10] The application raises issues under s 44 of the Evidence Act 2006 (“the Act”) as the questions relate to the sexual experience of [LS] with someone other than the defendant. This being the case I can only grant permission if I am satisfied the questions are of such direct relevance to the facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it<sup>1</sup>.

[11] The application also raises an issue under s 37 of the Act (veracity rules) as evidence of [LS’s] veracity can only be offered if the evidence is “substantially helpful in assessing” her veracity. The provisions of s 8 (general exclusion) also apply.

#### **Section 44**

[12] The proposed questions could be relevant in the following ways:

- (a) If the complaint against [RP] was false. Given the Supreme Court judgment in *Queen v Best* [2016] NZSC 122 and there being insufficient evidence to support the proposition that it could be false I need not consider that further.
- (b) That [LS] has transferred offending by [RP] to [MH] and so has falsely or mistakenly accused [MH] of offending by another. While expert evidence on this is not always necessary there is no evidence to support that proposition. [LS] knows both the young men and so there can be no issue of mistaken identity and she complained to her mother and her friend about both the young men indecently assaulting her. The fact that she gave separate evidential interviews does not raise the possibility of transference to a level that it needs to be considered.
- (c) [LS] had a motive in not complaining about her [relative] to the Police when she was interviewed on 11 April. The defence position is that given the similarity of the alleged offending, and the presence of both boys in the home when the offending occurred an inference could be drawn that the purpose of her telling the Police on 11 April about [LS]

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<sup>1</sup> Section 44(3) Evidence Act 2006

only was to implicate him and advance an improper motive. It is submitted that the “failure to disclose in the context of the interview lends towards the “mendacity”<sup>2</sup> of the complainant and is an inconsistency which makes it a proper subject for exploration by the defence”.<sup>3</sup>

[13] So the defence submit the Judge will be assisted in assessing [LS’s] credibility by evidence of the “family context” and possible motive for a false complaint being made against [MH] “given he grew up outside of this immediate family and returned [details deleted]”. It is submitted when [MH] moved out to live with [details deleted] there was hostility between he and his father who is also [LS’s] father<sup>4</sup>. So there could be a motive for [MH’s] father and stepmother to make false allegations and there may have been collusion with [LS] on this.

### **The Test**

[14] To be admissible cross examination questions about her complaint against [RP] must be of direct relevance to the facts in issue and be evidence that bears on the credibility of [LS].

[15] [LS] is now 11 years of age and her evidence will be given by way of playing the DVD interview and then by way of CCTV.

[16] It is submitted that there is a somewhat less stringent test indicated in child abuse cases<sup>5</sup>. This is so because there is no risk that cross examination can be used as an opportunity to blacken the character of the complainant.

[17] Accordingly if the defence is able to show a basis for the proposed questioning which is more than speculative and that abuse by another person is relevant to “an issue in the proceeding”, the interests of justice may well require that some questioning

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<sup>2</sup> It is hoped that the use of this word from the judgment of the Supreme Court in *R v Best* is not adopted in submissions too often.

<sup>3</sup> See para 23 defence submissions

<sup>4</sup> See para 28 defence submissions

<sup>5</sup> *R v Morrice* para [31]

of the complainant is permitted. There may be no other way which the defence can be adequately advanced<sup>6</sup>.

[18] The purpose of the proposed questioning in this case appears to fit category (c) in *R v Morrice* as one of three ways in which evidence of sexual experience of a child may be relevant, namely there is a motive for a false complaint. Usually it is argued there is a possibility of fabrication to gain attention or through malice:

“More generally, evidence of previous complaints in cases involving children will be admitted if they are of material assistance in assessing the complainant’s credibility. In *R v Accused* (CA 92/92) [1993] 1 NZLR 553, this Court upheld a trial Judge’s decision to permit cross-examination of a child complainant in relation to a second complaint which bore remarkable similarity to the allegation against the defendant. The Court regarded defence counsel’s assertion of inherent unlikelihood as “perhaps pitched a little high” but saw it as an odd coincidence that two such incidents, the one not the subject of any immediate complaint, should have happened to the same complainant within the space of a few months. The Court said at 556:

As stated earlier, plainly this is one of those cases, common enough at present, where the outcome will depend heavily on the jury’s impression of the complainant’s credibility. Any matter bearing on her credit in a significant way, at any rate where closely connected with the complaint against the accused, is of assistance to the defence and difficult to dismiss as remote or trivial.<sup>7</sup>”

### **Application in this Case**

[19] The reason for [LS] not speaking of the allegations against [RP] when interviewed about [MH] are unknown.

[20] It could be inferred that [LS] had gone to the Police by arrangement through her mother to speak about [MH] given the seriousness of the allegations against him. Her mother had previously dismissed the comments about her [relative] [RP] as the [relative] mucking around with the kids and being silly<sup>8</sup>.

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<sup>6</sup> *R v M* [2000] 18 CRNZ 368 (CA) para [28]

<sup>7</sup> *R v Morrice* para [33]

<sup>8</sup> In her statement to the Police the mother has said “[LS] told me when we spoke in the park below that [RP] would rub himself on her. [RP] is always mucking around with the kids so I assumed he was just being silly.”

[21] [LS] told the interviewer that the sort of things that she had come to talk about were [another close relative] touching her between the legs<sup>9</sup>.

[22] She was not asked about [RP].

[23] It could be further inferred that shortly after this interview it was arranged that she would then make a statement concerning [RP] about the matters she had previously complained of to her mother and her friend.

[24] Given that she had previously complained about [RP's] behaviour to others it could be inferred that she was willing to talk about it earlier had she understood that it was required.

[25] However it still remains unexplained and there is some force in the defence submission that it is unusual that [RP's] alleged indecent assaults by "humping" [LS] over her clothing which arose at the same time as some of the allegations against [MH] were not mentioned by [LS] when she spoke to the Police on the first occasion.

[26] Most of the allegations against [MH] do not involve "humping" but given the behaviour of both young men allegedly occurred around the same time at the same house it is on first impression odd that the complaints to the Police were not made together.

[27] Whereas the allegation of an improper motive on the part of the family against [MH] can be advanced without this evidence, the possibility that [LS] believed that she was at the Police station only to talk about [MH] in the circumstances is relevant to the issue of her credibility.

#### **Decision (s 44)**

[28] Accordingly for these reasons I find that the fact that the complaint against [RP] was not made at the same time given the similarity and the timing of those

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<sup>9</sup> See transcript of interview – pages not numbered

allegations is of such direct relevance to the facts at issue in the proceeding it will be contrary to the interests of justice to exclude it.

[29] There needs however to be some limit on the scope of the questions permitted.

[30] When considering the application under s 44 therefore I rule that [LS] may be asked why she did not talk to the Police about the allegations against [RP] when she spoke to the Police about [MH].

[31] The details of allegations against [RP] shall not be explored beyond her being asked to confirm that the allegations were that [RP] “humped” her by rubbing himself against her over her clothing at the house around the same time [MH] was offending against her. As far as her mother is concerned she may be asked why [LS] did not make a statement in relation to [RP] and why [LS] was later taken to the Police station to make such a statement. In this respect she may be asked about the contents of any complaints to her made by [LS] about [RP]. Then what she did as a result of those complaints.

[32] In this way the defence can more fully and properly explore the issue of whether there was an improper motive in having a complaint made to the Police about [MH] only.

[33] [JC] may also be asked about the content and timing of complaints made to her by [LS] concerning [RP].

[34] Insofar as this evidence is evidence of [LS’s] veracity I find that the “substantial helpfulness” test has been satisfied and the evidence is not otherwise excluded under s 8.

### **Vacating of Non Denial**

[35] As indicated at the trial [MH] is not prevented from denying the charge of indecent acts on a child under 12 by rubbing [LS’s] vagina with his hand.

[36] The entry of a not denied previously is not an admission but merely an indication and accordingly that application is allowed and I record that [MH] denies that charge which will become Charge 13 in the Crown charge list.

I G Mill  
District Court Judge