R v RKJ

New Zealand Court of Appeal
CA728/2010, CA742/2010
22 November, 20 December 2012
Ellen France, Harrison and French JJ
R v RKJ ***[2012] NZCA 608***

Ellen France J.

Introduction

[1] The appellant, RKJ, was charged with sexual offending against four young children. He also faced two charges of assault, one of which related to a fifth child. Issues were raised prior to trial about his fitness to stand trial. A hearing was held to determine these issues under the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (the Act). It was determined that Mr RKJ, although of low Intelligence Quotient (IQ), was fit to stand trial.[1]

[2] The matter proceeded to trial. By that point, Mr RKJ had been discharged on a count of sexual violation.[2] The day after the trial began, he was discharged on the two assault counts.[3] Mr RKJ was convicted after trial of seven counts of sexual violation by unlawful sexual connection, two counts of inducing an indecent act, and two counts of indecent assault. He was acquitted of one count of sexual violation. The jury could not agree on two of the counts of sexual violation. Mr RKJ was sentenced by the trial Judge, MacKenzie J, to a term of five years imprisonment.[4]

[3] Mr RKJ appeals against his conviction. The conviction appeal focuses on the approach taken in determining his fitness to stand trial and on the accommodations made for him during that process and during the course of the trial. The appellant also says the verdicts on some of the counts were unreasonable.

[4] The Solicitor-General seeks leave to appeal against the sentence on the basis it is manifestly inadequate. The sentence appeal raises issues about the sentencing approach to historic offending. The first set of offending occurred on a single occasion between 1986 to 1988 and the second set over a period of more than two years from 1996 to 1998.

Background

[5] At the time of trial, the appellant was 49 years of age. The reports prepared prior to trial to determine fitness to stand trial indicated he was of low intellectual functioning. His IQ falls within the range of 61–68, which puts him in the group of people considered to have what the report writers called "mild mental retardation".[5]

[6] The offending involved four complainants, who were aged between four and eight years old at the time of the offending. The first of the complainants was the daughter of a family friend. The other complainants were all relatives of the appellant.

[7] The offending against the first complainant, R, occurred between 1986 and 1988. What took place was described by the Judge in the sentencing remarks as follows:

> [2] … The offending … involved a single incident when the victim and her parents had been visiting [Mr RKJ's] parent's home. The victim wanted to go home. It was arranged that [Mr RKJ] would take her home. When [Mr RKJ] got to her house [he] sexually abused her by licking her vagina, making her lick [his] penis then making her masturbate [him] with her hand until [he] ejaculated.

This offending gave rise to counts 1 to 3 in the indictment, namely, sexual violation by unlawful sexual connection (counts 1 and 2) and inducing an indecent act (count 3).

[8] The offending against the other, familial, complainants occurred, as we have noted, over an extended period of time. MacKenzie J described this offending in this way in his sentencing remarks:

> [2] . The other three victims were all children [Mr RKJ was] supposed to look after, after school or kindergarten although the evidence as to care arrangements was not entirely clear. There were two girls and one boy. This offending occurred over a considerable period of time, between 1996 and 1998. With the boy [Mr RKJ] would make the victim put his mouth on [Mr RKJ's] penis then pull [his] penis out of [the victim's] mouth before ejaculating. [Mr RKJ] would also make him masturbate [Mr RKJ] with his hand. [Mr RKJ] also performed oral sex on the victim and masturbated him with [Mr RKJ's] hand. With one of the girls [Mr RKJ] would touch her and put [his] finger into her vagina. With the other girl [he] would also touch her vagina and insert [his] fingers into her vagina also touching her vagina with [his] tongue.

[9] This offending was reflected in counts 5–8, 12 and 14 to 16 in the indictment.[6] All these charges were representative charges. Counts 5–8 involved the boy, H, and comprised, respectively, two counts of sexual violation by unlawful sexual connection, one of inducing a boy under 12 to do an indecent act and an indecent assault. Count 12 was a charge of sexual violation by unlawful sexual connection involving a girl, J. Counts 14–16 involved

another girl, B. They comprised two counts of sexual violation by unlawful sexual connection (counts 14 and 16) and one count of indecent assault (count 15).

[10] In addition to the complainants, the Crown called evidence from other family members. As we shall discuss, there was a significant focus in the evidence on the baby-sitting and other care arrangements for the complainants. The Crown also relied on evidence of what it said were two admissions by Mr RKJ. The first of these was based on the evidence of R's mother. She said that R told her on the night of the offending what Mr RKJ had done to her. R's mother went on to say that she told Mr RKJ the next day that R had told her. She said that, "after a while" Mr RKJ said "sorry".

[11] The second of the admissions relied on by the Crown is based on the evidence of Mr RKJ's mother. She gave evidence of asking Mr RKJ why he had done what he did. She said he responded by saying that "It happened a long time ago, [H and B] should get over it".

[12] The defence at trial was that none of the offending took place. The appellant's video interview with police in which he denied the offending was played. The appellant did not give evidence himself but he called evidence from his aunt about the child-care arrangements. The defence emphasised the discrepancies between the evidence of the three complainants, H, J and B, focusing particularly on H's evidence about when the offending occurred (weekdays after he was picked up from kindergarten) and the differing accounts as to the child-care arrangements for these three children.

Issues on the conviction appeal

[13] We can conveniently deal with the issues on the conviction appeal under the following headings:

(a) Did Gendall J have jurisdiction to decide the question of fitness to stand trial?

(b) What was the impact of the absence of cross-examination on the s 9 decision?

(c) Did any of the process issues affect the s 14 decision?

(d) Were appropriate special arrangements or accommodations made for Mr RKJ either prior to trial and during the trial?

(e) Were the verdicts unreasonable?

[14] We first give an overview of the process followed under ss 9 and 14 in this case, and then deal with each of the above issues in turn.

The ss 9 and 14 procedures

[15] The majority of the issues on the conviction appeal relate to the decisions made under ss 9 and 14 of the Act. In terms of s 9, a court may not make a finding about fitness to stand trial unless satisfied on the balance of probabilities, "that the evidence against the defendant is sufficient to establish that the defendant caused the act … that forms the basis" of the relevant offence. Section 14, which we shall discuss in more detail later, sets out the steps to be taken in determining whether the defendant is unfit to stand trial. It is helpful at this point to set out the chronology of events leading up to the decisions under ss 9 and 14.

[16] In terms of the record before us the first point of reference on the question of fitness to stand trial was the production of a report dated 30 November 2009 by Dr Shailesh Kumar, a consultant psychiatrist. Dr Kumar noted that Mr RKJ had been remanded for a psychiatric assessment as envisaged by s 38 of the Act. Dr Kumar said the report had been prepared at the request of a High Court judge in order to address fitness to stand trial. Dr Kumar's conclusion was that Mr RKJ was fit to stand trial.

[17] The defence obtained a report dated 31 February 2010 from Dr Duncan Thomson, a clinical psychologist. His opinion was that the appellant had insufficient understanding to enter an informed plea, but Dr Thomson suggested that if Mr RKJ were given the "correct remedial support" he could begin to understand the court process to a level where he would be able to understand the consequences of a plea.[7]

[18] The next step to note is a minute of Ronald Young J of 19 April 2010, issued following a call-over.[8] Ronald Young J stated that Mr Blathwayt, senior counsel at trial for Mr RKJ, had given notice that there was an issue as to

fitness to plead. Ronald Young J referred to this Court's decision in *McKay v R* and said it followed that the procedure under subpart 1 of the Act, dealing with findings of unfitness to stand trial, had to be followed.[9] The s 9 inquiry as to the defendant's involvement in the offence was identified as the first step. The Judge recorded that Mr Blathwayt did not have full instructions on the s 9 inquiry. In particular, the degree of defence challenge to the deposition evidence was unclear. Ronald Young J continued:

> [7] The degree of challenge and therefore the extent of the evidence required at the s 9 hearing will be relevant in assessing what time will be required. If the accused wishes to challenge the evidence at depositions and gives notice he requires the witnesses to be available for cross-examination, then it is likely the hearing will take beyond one day.
>
> [8] If, however, for this purpose only the accused is content to accept that the Judge can assess the s 9 question based on the deposition evidence, and any further evidence the Crown may wish to file by written statement, then [the] hearing is likely to be completed within one day. It is also likely the Court will be able to deal with the s 347 application and the s 344A application on that day.

[19] Counsel was asked to attend to this question. Mr Blathwayt duly filed a memorandum on 23 April 2010 seeking cross-examination. The Crown responded by memorandum of 18 May 2010 submitting the s 9 inquiry should be conducted on the basis of the evidence presented for the purposes of the preliminary hearing. The basis for the submission appears to be that s 185C of the *Summary Proceedings Act 1957* applied. That section provides for a complainant to give evidence in the form of a written statement unless the Court orders otherwise on the ground that it is necessary to hear the witness to determine whether there is sufficient evidence to commit the defendant for trial. In addition the Crown prosecutor noted, with reference to *Te Moni,* that consent was not an issue.[10]

[20] The Crown memorandum was followed by submissions filed on behalf of Mr RKJ dated 18 June 2010 in which Mr Blathwayt effectively abandoned the application for cross-examination. In these submissions Mr Blathwayt said: "[c]ounsel acknowledges that [cross-examination] is not possible in terms of [Te Moni]".

[21] The next step we should record is that on 21 June 2010, Miller J heard evidence from Dr Thomson in relation to Mr RKJ's October 2009 application for a stay. The stay application was based on delay. Miller J adjourned that matter on the basis that the application for stay was bound up with the question of fitness to stand trial, and the latter had not been adequately addressed in the various reports.[11] The gap identified by Miller J was that none of the experts had specifically addressed Mr RKJ's memory function.

[22] The next day, on 22 June 2010, Miller J granted the defence application for a discharge under s 347 relating to one of the counts of sexual violation.[12]

[23] On 23 June 2010 Miller J directed two experts to examine Mr RKJ further.[13] There was another report of 16 July 2010 from Dr Thomson. Dr Thomson said there was a "strong case" that Mr RKJ may not be fit to stand trial but that he could not state that "unequivocally". There was also a further report from Dr Kumar dated 27 July 2010, in which Dr Kumar concluded that Mr RKJ was fit to stand trial despite his low intellectual functioning.

[24] In Miller J's absence, on 3 August 2010, Simon France J directed the disclosure of Dr Thomson's report to Ms Renate Bellve-Wack, a registered clinical psychologist who was to provide a further report.[14] Ms Bellve-Wack's report was dated 12 August 2010. Ms Bellve-Wack concluded that Mr RKJ had sufficient cognitive abilities and skills to plead, instruct his lawyer, and participate meaningfully.

[25] On 19 August 2010, Gendall J heard two applications. The first of the applications related to fitness to stand trial and the other was Mr RKJ's application for a stay. The Judge then delivered an oral judgment,[15] which was followed by a further reasons judgment on 26 August 2010.[16]

[26] Gendall J said he was following a three-stage process. The first stage was the consideration of s 9. The Judge was satisfied on the basis of the evidence for committal that the s 9 test was met. The second and third stages related to s 14. On that, the Judge said he had the report of three health assessors, Drs Kumar and Thomson and Ms Bellve-Wack. Gendall J said that he had reached the "clear conclusion" on the balance of probabilities that Mr RKJ, while suffering from some mental impairment, was fit to stand trial.[17] The Judge also rejected the defence application for a stay.

[27] The trial commenced on 23 August 2010.

Jurisdiction for Gendall J to determine s 9 issue

[28] The appellant says Miller J was seized of the question of Mr RKJ's fitness to stand trial. There was no conferral of jurisdiction on Gendall J, who effectively took over consideration of the issue when Miller J was away. In the circumstances, where all the appellant knows is that Miller J was "away", the submission is that Gendall J had no jurisdiction to deal with the issue.[18]

[29] We see nothing in this point. Miller J heard from Dr Thomson on 21 June 2010. The focus of the evidence was on the correlation between intellectual functioning and memory.

[30] Miller J appears to have envisaged he would continue to deal with the stay application but, obviously, he was unavailable. In the result, the hearing effectively started again when the matter came before Gendall J. The Judge heard the relevant evidence. The hearing before Gendall J involved evidence-in-chief and cross-examination of all three health assessors, Drs Kumar and Thomson and Ms Bellve-Wack. There is nothing to suggest that the expert evidence Gendall J heard was truncated or in some way affected by the earlier hearing before Miller J. Gendall J had jurisdiction to hear and to decide the question before him.

Cross-examination and reasons for s 9 decision

[31] The appellant's case is that there could and should have been cross-examination at the s 9 hearing. Mr Ellis says that the case proceeded however on the understanding that the effect of *R v Te Moni* meant that there could be no cross-examination. The appellant says that was wrong. The appellant also argues that the reasons provided for Gendall J's s 9 determination were inadequate.

The law

[32] Section 9 provides that the court must be satisfied of the defendant's involvement in the offence. The section reads as follows:

> A court may not make a finding as to whether a defendant is unfit to stand trial unless the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.

[33] The relevant statutory provisions give the court a measure of discretion about the procedure to be adopted when conducting a s 9 hearing and that extends to the issue of whether cross-examination should or should not be allowed.

[34] The decision of this Court in *Ruka v R* established that there was no blanket prohibition on allowing cross-examination of complainants in sexual offending and that it was wrong to interpret *Te Moni* as so providing.[19]

[35] Equally however, *Ruka* is not authority for the proposition that there is an absolute right to cross-examine. The Court talked about the need to consider oral evidence applications with care and caution before declining them but did not say they must always be granted. The Court clearly contemplated that there would be circumstances where they might not be. Other general observations in the judgment, for example about the right in s 25(f) of the *New Zealand Bill of Rights Act 1990* to examine prosecution witnesses, must also be seen in context. The outcome of *Ruka* turned on its facts and the issues which, as the Court acknowledged, included issues of collusion and contamination.

[36] Accordingly, we proceed on the basis that there would have been a discretion to permit cross-examination in this case, although no absolute right. Indeed, the appellant did not argue there was an absolute right.

Application of the principles to this case

[37] Applying these principles, it could be said that there was an error, either by counsel in not pursuing the application for cross-examination, or by the Judge in not correcting counsel's mis-statement of the law.[20] In either case, the question for us is whether what occurred has led to a miscarriage.[21] We do not consider that it has. That

is because there is nothing identified that would have been the subject of cross-examination in terms of any s 9 matters. When asked what cross-examination may have covered, Mr Ellis submitted only that the appellant may have been able to enhance the defence by effectively having a full "dress rehearsal". It is not suggested cross-examination may have established collusion or contamination.

[38] Mr Downs' submission about the test for when cross-examination is appropriate is of some relevance here. He suggested that there were two possibilities. The first, an interests of justice test, and the second, whether cross-examination was necessary by reference only to whether the physical ingredients could be established to the civil standard. Mr Downs suggested that the latter rather than the former was the preferable test. We do not need to resolve that issue here. However, it may well be questionable whether cross-examination is permissible beyond what is necessary to meet the question under s 9. But, in any event, the balance would favour not allowing the appellant that strategic advantage in this case because of the undesirability of cross-examining the complainants twice in a situation where the statute indicates a reticence about allowing that course.[22]

[39] It is also relevant to this consideration that there was independent support for three of the four complainants' evidence in the form of the admissions relied on by the Crown. The position is accordingly quite different from that confronting the Court in *Ruka v R*. There is further support for the conclusion that no miscarriage has resulted in the fact that we now know beyond reasonable doubt that the physical ingredients were established. As this Court said in *Te Moni,* the purpose of s 9 is to prevent the possibility of a person found unfit to stand trial "being subjected to detention or similar measures in circumstances where he or she has not, in fact, committed an offence".[23] We now know, based on the jury's findings, that there was in fact a case to answer.

[40] The other ground of appeal in relation to s 9 is a challenge to the adequacy of the Judge's reasons. This Court in *R v Te Moni* stated:[24]

> [35] If the Judge had made a s 9 finding, we would have expected that it would be recorded in a judgment. An accused person who is the subject of a s 9 finding has a right of appeal under s 16 of the … Act. A Judge who makes a s 9 finding should give sufficient reasons for the decision to allow the accused person to assess the chances of success in an appeal and for the appellate court to fairly consider the appeal.

[41] The appellant focuses on this passage from Gendall J's oral judgment:[25]

> [5] … Given there has been a committal for trial … no dismissal of any counts (apart from Count 4 …) and based upon my assessment of the deposition evidence as it stands at the moment, I am satisfied on the balance of probabilities [that s 9 is met].

[42] Mr Ellis says that the reasons given were inadequate. As matters have developed, this issue is linked to the question about cross-examination. Mr Ellis' position is that the failure to cross-examine means the appellant was doomed not to be given any reasons as there was nothing to reason on. It follows from our conclusion that cross-examination was unnecessary that there was not much more that the Judge could say. We note that Mr Blathwayt in his memorandum of 18 June 2010 to the Judge abandoning the application for cross-examination raised issues about the reliability of the evidence of the adults about the babysitting arrangements. It seems that initially the Crown case linked the opportunities for the appellant to offend with the timing of the treatment for cancer of S who often looked after the children. However, in Mr Blathwayt's memorandum of 18 June 2010, he said it had become clear that her treatment took place well after Mr RKJ had left the town in which the offending took place to live in another part of the country.[26] The Judge did not specifically address those issues and it would have been preferable had he done so. However, for the reasons we have just given any omission in this respect is not material.

Lawfulness of the s 14 process

[43] There are two challenges to the processes adopted. First, it is said that the process prior to the s 14 decision was so flawed that the Judge could not properly get to the s 14 stage. Secondly, Mr Ellis says that, contrary to s 14(2), no opportunity was given to call evidence after the finding of mental impairment was made.

[44] The first of these grounds is disposed of by our conclusion that the earlier part of the process was not flawed and certainly not in any way giving rise to a miscarriage.

[45] As to the second ground, s 14 deals with the process for determining whether a defendant is fit to stand trial. The section reads as follows:

> (1) If the court records a finding of the kind specified in s 13(4), the court must receive the evidence of 2 health assessors as to whether the defendant is mentally impaired.
>
> (2) If the court is satisfied on the evidence given under subs (1) that the defendant is mentally impaired, the court must record a finding to that effect and—
>
> (a) give each party an opportunity to be heard and to present evidence as to whether the defendant is unfit to stand trial; and
>
> (b) find whether or not the defendant is unfit to stand trial; and
>
> (c) record the finding made under para (b).
>
> (3) The standard of proof required for a finding under subs (2) is the balance of probabilities.
>
> (4) If the court records a finding under subs (2) that the defendant is fit to stand trial, the court must commence or continue the hearing or trial, or commit the defendant for trial, as the case may require.

[46] The background to this part of the appeal seems to relate to an observation by this Court in *McKay v R*. The Court stated that s 14 envisaged six steps. The first of these is as follows:[27]

> *Step 1.* It will be rare, at this stage of the process, for the court already to have two health assessors' reports. So the first step is to obtain them.

[47] As it happens, in this case, the High Court did already have two health assessors' reports. However, that cannot cause any problem in terms of the s 14 process. The point is rather that these reports are a necessary prerequisite. If the appellant's submission is that fresh reports had to be obtained, we disagree. They must be appropriately current, but there is no reason one or both cannot pre-date the s 9 inquiry.

[48] Steps three and four as set out in *McKay* reflect s 14(2). The Court notes in terms of step three that each side must be given the opportunity to present evidence as to whether the defendant is mentally impaired and/or as to whether he or she is unfit to stand trial. Step four is described as follows: "The court must give each side the opportunity to make submissions (s 14(2)(a))".[28] Each side was given the opportunity to present evidence and make submissions on the issues of mental impairment and fitness to stand trial, and did so. It is not now suggested further evidence was available or indeed that Mr RKJ has any other evidence he wants to call. There is no challenge to the decision declaring Mr RKJ fit for trial in itself. There is nothing in this point.

Accommodations for the appellant

[49] Two aspects of the extent of accommodations made for Mr RKJ are said to give rise to a miscarriage of justice. First, the appellant says accommodations should have been made for him during the pre-trial stages at least from the point in time when Dr Thomson's first report was available. As we have noted, Dr Thomson suggested Mr RKJ could begin to understand the court process to a level to appreciate the ramifications of a plea if given "correct remedial" support. Dr Thomson also suggested that it would be necessary for each step to be carefully explained to Mr RKJ and for him to be asked to repeat back his understanding of what he had been told. Secondly, it is said procedures during the trial mis-fired. That is because, although Mr RKJ was permitted to sit next to counsel for much of the trial, that course was not permitted when some of the complainants gave evidence. At that point, he was placed in the dock. There is also a broader submission that the dock is an anachronism.[29]

The position pre-trial

[50] The background to this part of the appeal arises from Gendall J's conclusion that Mr RKJ was fit to stand trial. In this context, Gendall J stated:[30]

> [19] Counsel has submitted, if difficulties occur during the trial when matters arise which are not foreshadowed either in depositions or disclosure (and for that matter the accused was unaware of them) the accused might not be able to process that new material with sufficient intellectual awareness and ability to properly instruct counsel. That is something that the

> trial Judge will be alive to. There may be situations where adjournments from time to time might be required depending on how the trial progresses. The trial Judge can provide in his or her discretion for an accused to sit beside counsel, for breaks to be taken to enable instructions to be given or for that matter, for the accused to have a rest from the pressures of the trial. Those are all matters within the ambit and good sense and wisdom of the trial Judge.

[51] Mr Ellis says that if these accommodations were necessary at the trial, it follows that they must have been necessary in the pre-trial hearing. Gendall J's observation is, Mr Ellis puts it, "an own goal".

[52] We do not read Gendall J's observation as anything more than confirming the fairly obvious proposition that the trial Judge could and would consider what special arrangements or accommodations were necessary for an appellant in Mr RKJ's position. It does not necessarily follow from this that the same accommodations were required prior to trial. There may well be different needs at the various stages of the proceedings. A lengthy trial, for example, will generally place different stresses and needs on the participants, including the defendant, than a short legal argument on a pre-trial application. That said, obviously, Judges can be expected to take steps to ensure suitable accommodations are made where it is apparent that is necessary for those with intellectual and other disabilities at the various stages of a criminal proceeding.

[53] In this case, Mr RKJ was represented throughout the pre-trial procedures by experienced counsel. It is not suggested that he did not understand any aspect of those procedures or was hampered in the conduct of them in any way. There is no evidence from either Mr RKJ or trial counsel on this, or indeed, any of the issues raised on the appeal. We would expect that if there were such problems, evidence of them would have been advanced. There is no merit in this argument.

Accommodations during the course of the trial

[54] Counsel advise that Mr RKJ was given short breaks and that he sat with counsel throughout the trial except when the complainants gave evidence behind a screen. Exactly what occurred at the trial is a little unclear but it appears that the complainants H and R gave evidence behind a screen but complainants J and B did not.[31] That means, we understand, that the appellant was in the dock for the evidence of two of the complainants.

[55] Mr Ellis accepts that there may be a balance to be struck between the various interests. However, he submits that what occurred in this case is one of those "rare" examples where the court can "safely say that this is a triumph of pragmatism over principle". We disagree.

[56] As we understand it, the appellant was moved to the dock to ensure the complainant giving evidence was out of the line of sight of Mr RKJ. The applications were made on the basis that this measure would reduce the stress on the complainants. The decision to move Mr RKJ was based accordingly on a real, practical, concern. There has been no appeal as such from the decision to allow the complainants to give evidence behind a screen and indeed we understand no objection was taken to that course prior to trial. The Judge accordingly had to give effect to the decision to use a screen and that would be defeated by the architecture of the court if the appellant was not moved.

[57] There was no objection from Mr Blathwayt to the move to the dock on these limited occasions. Nor is it suggested that the move had any impact on the appellant, for example, in terms of the ability to give instructions to counsel. None of the concerns that formed the basis for the conclusion in the cases relied on by the appellant, such as *V v United Kingdom*[32] and *People v Zammora* are present here.[33]

[58] *V v United Kingdom* related to the trial of two ten-year-old boys for murder of a two-year-old boy. The European Court of Human Rights concluded that V had been denied a fair trial in breach of art 6.1 of the European Convention on Human Rights. One of the issues there related to the ability of V to participate adequately, in the sense of consulting with his lawyers during the trial and giving them information for the purposes of his defence. In reaching the conclusion there was a breach of art 6.1 the Court had "considerable" psychiatric evidence about V's inability to participate in the proceedings.[34] The public nature of the proceedings was an added issue for the, very young, defendant.

[59] Again, in *People v Zammora*, the concern with the use of the dock was linked to restrictions imposed during the trial that caused problems in instructing counsel.

[60] We add here that MacKenzie J gave an orthodox direction to the jury directing them not to read anything into the fact that the complainants had given evidence behind a screen.

[61] It is important also to remember that it was determined that Mr RKJ was fit to stand trial. There is no challenge to the correctness of that decision itself. That then is the framework within which these matters are to be assessed. This is the point made in *R v Te Moni* where this Court said:[35]

> It is not productive to make general statements about the measures required at a trial of this nature. The starting point is that the trial is taking place because a Judge has determined that the accused person is fit to stand trial. That means, in terms of s 4 of the . Act, that a Judge has determined that the accused person is able to conduct a defence or instruct a counsel to do so, which includes the ability to plead, to understand the nature or purpose or possible consequences of the proceedings, and to communicate adequately with his or her counsel for the purpose of conducting a defence. The measures which may be taken will, therefore, be measures which enhance the ability of the accused person in relation to those criteria. Normally one would expect that defence counsel will ask for time if this is required to explain a matter to the accused person.

[62] Mr Ellis referred to practices elsewhere, particularly in America where the dock is no longer used, and to discussion in academic and law reform commentary about the problems with the use of the dock.[36] Given our view on the use of the dock in this case, it is not necessary for us to consider the broader questions about the appropriateness of use of the dock generally. We were referred to information about a pilot scheme which suggests that the issue is under consideration at least in some form or another in New Zealand. We need say no more about it.

[63] The appellant had a further ground of appeal relating to the stay. That ground is dependent on our finding in favour of the appellant on the grounds we have discussed above and dismissed. It therefore falls away.

Reasonableness of verdicts

[64] This part of the appeal relates to counts arising from the familial offending (complainants H, J and B). Mr RKJ relies on evidence at trial that these three complainants were never formally cared for at his house at the time when the boy, H, was attending kindergarten and in circumstances where they would only have been in Mr RKJ's care. The submission is that H's recollection of fundamental details, namely, that Mr RKJ would pick him up each day from kindergarten, take him to his house, and abuse him and B cannot be true. Because H's account is so linked with that of B and J who, on H's evidence, were at the house at the same time, their accounts also cannot be true.

Our analysis

[65] The test on such an issue is whether, having regard to all the evidence, the jury could reasonably have been satisfied beyond reasonable doubt that Mr RKJ was guilty.[37] In *R v Owen*, the Supreme Court endorsed the following principles from this Court's decision in *Munro v R*:[38]

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[66] We consider that, having regard to all of the evidence, the jury could reasonably have been satisfied of Mr RKJ's guilt. The appellant's argument on this point is a reiteration of an important part of the defence case at trial. The matter was therefore squarely before the jury. This is the classic case of the jury exercising their fact-finding function and determining the weight to be given to individual pieces of evidence.

[67] Part of the argument for the appellant on this ground of appeal depends on the proposition that the Crown case was specific in describing the circumstances of the offending. The submission is that once there was evidence supporting the defence case that those circumstances did not in fact arise, it was not reasonable to convict. We consider this approach is misguided. There are two particular problems with the submission.

[68] First, we do not consider the Crown case was put on the narrower basis suggested by the appellant. It is the case that in opening the prosecutor said this:

> The Crown says that when [H] was between four and six years old … the [appellant] would pick [H] up from kindergarten and take him back to his house. Often and at the same time his [relatives], [B and J] would be there as well.
>
> … around that same time period and this is beginning when [J] was seven, … she was also abused the Crown says, by the [appellant] at his house and when [H and B] were outside, …
>
> [B] was also abused whilst at the [appellant's] house as part of the group and this is from a time when she was about six and a half years old onwards, …

[69] However, that is in the context of the submission in opening that the Crown case was that "through a combination" of the appellant living next door to his sister, who did some babysitting, and also babysitting in his own house, the appellant "got access to the three complainants". The respective cases on this aspect were put accurately by the Judge in summing up when he said:

> [44] As to opportunity, the Crown submits that there was ample opportunity for this offending to have occurred in respect of all complainants. In respect of the latter three complainants the defence says that they were not left regularly alone with the [appellant]. It submits that the evidence is that he did not pick them up regularly from kindergarten and they were not regularly left in his care. There is an issue in the evidence as to whether the offending took place on weekends or on school days. The defence says that it could not have happened regularly for the two year period which [H] described. All of those are matters for you. You need to access whether that opportunity was available and whether it is established that the offending took place in the time range.

[70] To put this matter in context, we should explain that the appellant lived at a house with an older relative. His sister, S, lived next door. The evidence was that S was used by members of the family to babysit the children, including J and B.

[71] Mrs C, the mother of J and B, said that when S was sick then J and B would stay at Mr RKJ's house. She also referred to either Mr RKJ or his older relative picking the children up from kindergarten during the week. She said they were generally at S's but on "odd" occasions were next door at Mr RKJ's house. S herself said that the parents would get different people to babysit J and B and that sometimes included Mr RKJ. She also said that sometimes the children would be taken over to Mr RKJ's relative at the house the two men shared. Importantly, the sole defence witness, the appellant's aunt, confirmed that she also had seen H, J and B at the appellant's house.

[72] As Mr Downs submits, proof of the Crown's case did not entail jury acceptance that the offending occurred either after kindergarten or on weekends, but rather an acceptance that there was opportunity for the commission of the offences in the general manner alleged. That is, at the appellant's home while the children's parents were elsewhere. As Mr Downs also submits, H, J and B each said that was the situation, which evidence was also supported by Mr RKJ's aunt.

[73] Secondly, the appellant's submission overlooks the fact that the evidence of H's mother was consistent with that of H. She said that she or her husband would drop H off at kindergarten and Mr RKJ would pick him up at lunchtime and either take him home or take him to S's house. She referred also to leaving the children at either S's or Mr RKJ's when they were on trips or when she went shopping.

[74] Further, there was evidence, as we have noted from the appellant's mother, of her conversation with Mr RKJ in which he appeared to admit to at least one incident of sexual offending with two of the three familial complainants.

[75] Finally, the jury were entitled to have regard to propensity reasoning as between H, J and B in determining whether the charges were proved.

[76] This ground of appeal has no merit.

The Solicitor-General's sentence appeal

[77] MacKenzie J adopted a starting point of seven years imprisonment. This was reduced by two years because of Mr RKJ's limited intellectual functioning. That was seen to be relevant in two ways. First, the Judge said it reduced Mr RKJ's culpability. Secondly, MacKenzie J considered it made imprisonment harder for Mr RKJ.

[78] In adopting the seven year starting point, MacKenzie J took the view that he should apply sentencing levels appropriate to the period. Accordingly, the Judge said he did not consider he should "follow closely" the guidance in *R v AM*.[39] . MacKenzie J explained that was because of acknowledgement in *AM* that sentencing levels had increased considerably between 1996 and the present. The Judge also noted the recognition in *AM* that other forms of penetration should be seen as equally serious as vaginal or anal rape was a change in sentencing practice.

[79] The Crown submission is that the seven-year starting point adopted by MacKenzie J was manifestly inadequate. The argument is that the resulting sentence of five years imprisonment does not reflect the seriousness of the offending, particularly its intrusive and serial nature, its attendant breach of trust, and the very young age of the victims. The Crown submits that the Judge erred because he did not apply this Court's guidance in *R v AM* even though that guidance was applicable to the offending involving H, J and B. It is accepted that the offending involving R is in a separate category because that predated the increase of the maximum sentence for this offending, which took place in 1993.

[80] For the appellant, Mr Blathwayt submits that the Judge's approach was correct. If *R v AM* is to apply then there were only two counts falling within rape band three in *R v AM*. In any event, it is submitted that it would be wrong in principle to apply *AM* to counts involving penile penetration of the mouth. That is because this Court in *R v AM* stated that "[e]quating penile penetration of the mouth with other forms of penetration is a change in sentencing practice".[40]

[81] We should say at the outset of our consideration of the sentence appeal that our approach to this matter is affected by the fact that Mr RKJ has developed leukaemia. The prognosis is that he will not survive. In these circumstances, the Crown took the position that we should deal with the principles arising on the Solicitor-General's application for leave to appeal but, even if we accepted the Solicitor-General's argument, we should not make any adjustment to the sentence. Mr Downs submitted that the circumstances of this case were unusual and so it would not be appropriate to increase the sentence, leaving issues of release on the basis of ill health to the Parole Board. Mr Downs emphasised that the appeal was filed some time ago (October 2010). Further, Mr RKJ is already eligible for parole and we now know that he is very seriously ill.

Analysis

[82] We agree with Mr Downs' proposed approach. We accordingly focus on the issue of principle raised by the sentence appeal.

[83] We agree that *R v AM* should have been applied to the offending involving H, J and B. This Court in *AM* said that the guidelines should apply to sentencing after the date of delivery of the judgment.[41] The Court made the point that the content of the guideline did not "differ significantly" from current sentencing practices.[42] Some limited exceptions were identified, none of which are relevant here.[43] In taking that approach, the Court was adopting the approach applicable to other guideline judgments.[44] The case of *R v Accused (CA463/97)*, applied by the sentencing Judge in this case, itself acknowledges that the observations made in that case are subject always to the maximum penalty.[45]

[84] It may be that in a particular case, as the offending date goes back in time towards the change in the maximum, a court may consider fairness requires a different approach. That said, we do not see applying *AM* as directly engaging the principle of retrospectivity given the maximum penalty was the same at the time of the offending as it was when the appellant was sentenced.[46] This approach also appears generally consistent with sentencing practice since AM.[47]

[85] In the present case, we agree with the Crown that given the number and nature of the offences, the extended period of the offending and the very young age of the children, a starting point of ten years imprisonment would have been appropriate. However, given the matters already discussed we do not consider the sentence further.

Result

[86] The notice of appeal was filed out of time. The delay is minimal. We make an order extending time to file the notice of appeal. The appeal against conviction is dismissed. The application for leave to appeal against sentence is granted but the appeal against sentence is dismissed.

Order

A Order made extending the time for filing the notice of appeal but the appeal against conviction is dismissed.

B Leave to appeal against sentence is granted but the appeal is dismissed.

Order

Orders accordingly.

Counsel for the appellant in CA728/2010 and respondent in CA742/2010: *M D Downs*

Counsel for the respondent in CA728/2010 and appellant in CA742/2010: *T Ellis*, *J K W Blathwayt* and *G K Edgeler*

Solicitors for the appellant in CA728/2010 and respondent in CA742/2010: *Crown Law Office*

Solicitors for the respondent in CA728/2010 and appellant in CA742/2010: *WCM Legal*

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1 *R v RKJ* HC Wellington CRI-2009-063-732, 19 August 2010 [the oral judgment] and 26 August 2010 [the reasons judgment], Gendall J.

2 *R v RKJ* HC Wellington CRI-2009-063-732, 22 June 2010, Miller J. The appellant was discharged under s 347 of the *Crimes Act 1961* on this count.

3 *R v RKJ* HC Wellington CRI-2009-063-732, 24 August 2010 (Minute of MacKenzie J). The assault charges were quashed under s 345 of the Crimes Act because they required the prior consent of the Attorney-General under s 10B of the Crimes Act. The necessary consent had not been obtained because of an oversight.

4 *R v RKJ* HC Wellington CRI-2009-063-732, 6 October 2010 [the sentencing remarks].

5 "Mild" has a technical meaning and denotes a level of disability that is more significant than the term would signify to an unqualified observer: Oral judgment at [7] and see *R v Te Moni* [2009] NZCA 560 at [10].

6 Counts 4 and 10 were the counts quashed under s 345. The appellant was acquitted of count 9. Counts 11 and 13 were counts of alleged sexual violation. The jury could not agree on either count.

7 A further report was prepared on 7 April 2010 by Dr Raksha Lutchman. Dr Lutchman's view was that Mr RKJ was fit to stand trial. For reasons that do not matter here, that report was not ultimately relied upon.

8 *R v Jeffries* HC Wellington CRI-2009-063-732, 19 April 2010 (Minute of Ronald Young J).

9 *McKay v R* [2009] NZCA 378 ; [2010] 1 NZLR 441.

10 *R v Te Moni*, above n 5.

11 *R v Jeffries* HC Wellington CRI-2009-063-732, 21 June 2010 (Minute of Miller J).

12 *R v RKJ*, above n 2.

13 *R v Jeffries* HC Wellington CRI-2009-063-732, 23 June 2010 (Minute of Miller J).

14 *R v Jeffries* HC Wellington CRI-2009-063-732, 3 August 2010 (Minute of Simon France J).

15 Above n 1.

16 Above n 1.

17 Reasons judgment at [17].

18 Mr Ellis' request that this Court provide him with an explanation for Miller J's absence was declined: *Jeffries v R* CA742/2010, 9 August 2012 (Minute of Randerson J).

19 *Ruka v R* [2011] NZCA 404 ; (2011) 25 CRNZ 768.

20 The Judge did observe that he did not consider s 9 required a "mini trial" so that Crown witnesses and complainants are required to give their evidence: oral judgment at [5].

21 Not every procedural error in relation to s 9 is necessarily fatal to a conviction: *McKay v R*, above n 9.

22 *Summary Proceedings Act 1957*, s 185C.

23 *R v Te Moni*, above n 5, at [68].

24 *R v Te Moni*, above n 5.

25 The oral judgment, above n 1.

26 The dates in the indictment were subsequently amended towards the end of the trial.

27 *McKay v R*, above n 9, at [50].

28 *McKay v R*, above n 9, at [50].

29 A further argument was made that in cases of this nature, any hearings related to an impaired defendant should be conducted by the same judge. We do not see any merit in that point.

30 Oral judgment, above n 1.

31 The information we have suggests applications to give evidence from behind a screen were made in respect of B and H. The Notes of Evidence however record the use of screens for H and R.

32 *Vv United Kingdom* (2003) EHRR 121.

33 *People v Zammora* 66 Cal App 2d 166.

34 *V v United Kingdom*, above n 33, at [89].

35 *R v Te Moni*, above n 5, at [49].

36 Steven Shepard "Should the Criminal Defendant Be Assigned a Seat in Court?" (2006) 115 Yale LJ 2203; Lionel Rosen "The Dock — Should it be Abolished?" (1966) 29 MLR 289; Linda Mulcahy *Legal Architecture; Justice, Due Process and the Place of Law* (Routledge, Oxford, 2011) at 59–82; David Tait "Glass Cages in the Dock? Presenting the Defendant to the Jury" [2011] Chi-Kent L Rev 467; and Howard League for Penal Reform *No Brief for the Dock* (Barry Rose Publishers Ltd, Chichester, 1976).

37 *R v Owen* [2007] NZSC 102 ; [2008] 2 NZLR 37 at [17].

38 *Munro vR* [2007] NZCA 510 ; [2008] 2 NZLR 87, cited in *R v Owen* at [13].

39 *R v AM (CA27/2009)* [2010] NZCA 114 ; [2010] 2 NZLR 750.

40 At [76].

41 *R v AM*, above n 38, at [125].

42 *R v AM*, above n 38, at [125].

43 *R v AM*, above n 38, at [126] and [127].

44 For example, *R v Taueki* [2005] 3 NZLR 372 (CA).

45 *R v Accused (CA463/97)* (1998) 15 CRNZ 602 (CA) at 609.

46 *R v Wilson* (2006) 23 CRNZ 531 (CA); leave to appeal declined *Wilson v R* [2006] NZSC 88.

47 See, for example, *Harris v R* [20120] NZCA 525 (AM applied to offending occurring over the period from 1998 to 2005); *V (CA400/2012) v R* [2012] NZCA 465 (AM applied to offending occurring over the period from 1996 to 2001); *R v Ngawhika* HC Auckland CRI-2010-092-6946, 12 November 2010 (AM applied to offending in 1996); cf *R v Boyd* HC Auckland CRI-2008-019-10238, 6 July 2010 (AM applied to offending occurring over a period over which the maximum penalty was increased, from 1992 to 1999, but the Judge also had regard to *R v A* [1994] 2 NZLR 129 (CA), the tariff case for sexual violation nearer the time of the offending.)

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