NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA673/2020
[2023] NZCA 78

BETWEEN	JESSE SHANE KEMPSON Appellant
AND	THE KING Respondent

CA694/2020

BETWEEN	JESSE SHANE KEMPSON Appellant
AND	THE KING Respondent

Hearing:	1 November 2022
Court:	Miller, Muir and Gendall JJ
Counsel:	R M Mansfield KC and JEL Carruthers for Appellant FMT Culliney and K N Nihill for Respondent
Judgment:	27 March 2023 at 11.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Gendall J)

[1] Following a judge-alone trial in the High Court on 23 October 2020, Brewer J convicted Mr Kempson on eight charges relating to offending against his former partner, Ms K. The charges were sexual violation by unlawful sexual connection (x2), threatening to kill, assault with a weapon (x2) and male assaults female (x3). For that offending, Brewer J sentenced Mr Kempson to seven years and six months' imprisonment.

[2] Also following a judge-alone trial in the High Court, on 6 November 2020, Venning J convicted Mr Kempson on a separate matter being one charge of sexually violating Ms O, by raping her. For this offending, Venning J sentenced Mr Kempson to three years and six months' imprisonment cumulative on the earlier sentence of seven years and six months' imprisonment for the separate offending against his former partner. This resulted in a total sentence of 11 years' imprisonment.

[3] Mr Kempson appeals both convictions and sentences.

[4] We now consider the two conviction appeals in turn.

Conviction appeal relating to CA673/2020 (appeal against Brewer J's decision)

Background

[5] Mr Kempson met the complainant, Ms K, on Tinder in September 2016. A relationship began and in November 2016 they decided to live together, moving into a townhouse in Mount Eden rented by Ms K. The couple lived there until April 2017 when Ms K ended the relationship for reasons including that she had learned that Mr Kempson had been seeing other women. Earlier, around December 2016, Ms K had moved out of the Mount Eden flat for a few days and then returned, only to end their relationship in April 2017 and move out for good.

[6] Mr Kempson and Ms K's relationship, both parties agree, was emotionally and financially abusive. It is accepted Mr Kempson had treated Ms K poorly in the sense of being unfaithful to her, constantly borrowing money from her with empty promises to pay her back, and at the very least being emotionally abusive towards her. Ms K

alleges, too, that Mr Kempson was physically and sexually abusive and the Crown position at trial was that this gave rise to the eight charges Mr Kempson faced.

[7] Charges 1 to 5 relate to a single incident on 19 January 2017. On that date, Ms K arrived home to find Mr Kempson asleep on the couch with weights around his ankles. When he woke, he told Ms K he had been sent by the CIA to kill her and that she was to die that night. Mr Kempson said Ms K had one minute to retrieve a USB from his bag and she did so. He then picked up a large knife and chased her around the house, tackled Ms K and put her in a choke hold. She was able to get away and soon after Mr Kempson calmed down.

[8] Later, however, the couple went upstairs and Mr Kempson demanded that Ms K perform oral sex on him. He then also demanded that she lick his anus. She did so and was crying, gagging, and dry retching throughout.

[9] In relation to this 19 January 2017 incident, Mr Kempson was convicted by Brewer J on those five charges which were that he:

(a) threatened to kill Ms K;

(b) assaulted Ms K using a knife as a weapon;

(c) being a male, assaulted Ms K, a female, by putting her in a choke hold;

(d) sexually violated Ms K by unlawful sexual connection by forcing her to perform oral sex on him; and

(e) sexually violated Ms K by unlawful sexual connection by forcing her to lick his anus.

[10] The other charges 6 to 8 on which Mr Kempson was convicted were representative. These were that between 5 November 2016 and 19 April 2017 Mr Kempson:

(a) being a male, assaulted Ms K by slapping her;

(b) assaulted Ms K using a knife as a weapon; and

(c) being a male, assaulted Ms K, by pushing her.

The key evidence

[11] Key evidence relied on by the Crown at the trial relating to these events involving Ms K included:

(a) Ms K's evidence (including her evidential video interview and the oral evidence she provided in Court), in which broadly she detailed a relationship with Mr Kempson of physical, emotional, and financial abuse. She confirmed he had pushed her, slapped her, and used knives throughout their relationship and she described in some detail the 19 January 2017 offending alleged by the Crown.

(b) Text messages between Mr Kempson and Ms K which illustrated financial and emotional abuse on the part of Mr Kempson. It seems, however, that they did not directly disclose physical violence.

(c) A letter describing events of the day Ms K had written on 19 January 2017 (the 19 January letter). This letter detailed what Ms K said Mr Kempson had done to her that day with the exception of the forced oral sex which the letter did not mention.

(d) A police statement Ms K gave on 19 April 2017 (the April 2017 statement). This statement was given by her in the presence of her father. It described that around Christmas 2016 Mr Kempson had put a knife to her throat and his hands around her throat. In the statement Ms K also said he had previously slapped her and that there had been about 10 instances of violence against her. Significantly, however, it did not mention the offending on 19 January 2017.

(e) An affidavit Ms K had provided subsequently in support of an application she made for a protection order against Mr Kempson in

May 2017. This affidavit detailed that he had threatened to throw her over the balcony of her flat, had put his hands around her throat in December 2016, and also at that time had both threatened her with knives and to kill her.

(f) The evidence of Mr Wilshire, a flatmate, and Detective Niu. Broadly, Mr Wilshire gave evidence that he had little to do with Mr Kempson and Ms K as his flatmates, but that he had heard arguments about money and the sounds of pushing and shoving while he lived at their address. Detective Niu gave evidence of statements made by a subsequent partner of Ms K who had told police he had been given a knife by Ms K and that Ms K had told him Mr Kempson had been abusive.

Brewer J's decision

[12] At the outset in his 23 October 2020 reasons for decision judgment, Brewer J confirmed he had reached his verdicts solely on the evidence he heard during the trial. But, in particular, properly he acknowledged the other charges and convictions at the time relating to Mr Kempson and that he would put what he knew of these to one side:[1]

> [10] …I am aware that Mr K has been convicted of the murder of Grace Millane. I am aware that he has appealed his conviction and the Court of Appeal has not yet released its decision on his appeal. I am aware also that Mr K will shortly face trial on charges, including charges of sexual violence, in respect of another complainant. As a Judge, I know that my knowledge of the Grace Millane trial and of the case yet to be tried can have nothing to do with my consideration of whether or not the Crown has proved the charges in this trial beyond reasonable doubt.
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> [11] I will consciously put aside my knowledge of those other matters because that is necessary if Mr K's trial on the current charges is to be a fair one.

[13] Justice Brewer went on to identify that Ms K's evidence, if accepted, was sufficient to prove each of the eight charges. As a result, the sole issue for determination was "whether [he] should accept Ms K's evidence as credible and

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1 *R v K* [2020] NZHC 2789 (Reasons of Brewer J) at [10]–[11].

reliable and, on each charge, satisfying the Crown's onus to prove the charge beyond reasonable doubt."[2]

[14] In considering the evidence before him, Brewer J was satisfied it did establish that Mr Kempson controlled and manipulated Ms K throughout their relationship[3] and that his tools of control included "explosive anger, alternately giving and withholding affection, and lies."[4] Ultimately, Brewer J found Ms K "entirely credible" in her account of being subject to low-level violence by Mr Kempson as part of his exercise of control over her.[5]

[15] It is clear, however, that Brewer J did not accept Ms K's evidence wholesale. He took the view that the later allegations against Mr Kempson, of having murdered Grace Millane, had resulted in some "unconscious exaggeration of the frequency of the physical attacks on [Ms K]."[6] His Honour found that Mr Kempson had threatened Ms K on, at least, two occasions but did not accept her earlier claims that it had happened between one and three times per week.[7]

[16] Overall, Brewer J was satisfied that, especially with their relationship deteriorating into 2017, the low-level violence of slapping and pushing by Mr Kempson had become more frequent.[8] Accordingly, he found the representative charges noted above at [10], being charges 6 to 8, were proven.[9] With regard to the 19 January 2017 incident, he accepted Ms K's evidence for reasons including:

(a) Ms K's account was consistent with Mr Kempson's manipulation and control of Ms K and his tendency for the "bizarre";[10]

(b) Ms K gave a convincing level of detail;[11]

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2 At [19].
3 At [49].
4 At [50].
5 At [56].
6 At [68].
7 At [68].
8 At [69].
9 At [70].
10 At [58].
11 At [58].

(c) When Ms K recounted the event, it was "as though it was happening again";[12]

(d) The existence of the 19 January letter Ms K wrote directly after the incident was entirely corroborative of her account;[13] and

(e) Subsequently Ms K felt it necessary to apply for a protection order.[14]

[17] Having accepted Ms K's account of the 19 January 2017 incident Brewer J also found charges 1 to 5 against Mr Kempson proven to the required standard.[15]

Conviction appeals – the test on appeal

[18] Section 232(2) of the Criminal Procedure Act 2011 provides that in the case of a judge-alone trial the appeal court must allow the appeal if satisfied that:

> (b) … the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) … a miscarriage of justice has occurred for any reason.

[19] Section 232(4) of the Criminal Procedure Act provides that a miscarriage of justice means:

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
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> (b) has resulted in an unfair trial, or a trial that was a nullity.

[20] On appeal, it is for an appellant to show that an error has been made.[16]

[21] The Supreme Court in *Sena v Police*[17] addressed s 232(2)(b) and set out the approach to appeals under that provision.[18] The Court held an appeal is to be by way

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12 At [58].
13 At [61].
14 At [66].
15 At [70].
16 *Webster v Police* [2019] NZHC 1335, [2019] NZAR 911 at [12].
17 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575.
18 At [26]–[40].

of rehearing, but a de novo hearing on the merits is not required.[19] The appellate court is required to form and act on its own assessment of the evidence, albeit that the onus is on the appellant to establish an error on the part of the trial judge. This will be difficult to do in cases where the complaint is directed at the facts as found by the trial judge (as distinct from the inferences to be drawn from, or an evaluative assessment of, them) and especially so in cases where those factual findings are based on credibility assessments.[20]

[22] The Supreme Court went on to confirm the approach adopted in *Austin Nichols & Co*[21] was applicable to appeals under s 232(2)(b) and, clarified the approach to s 232(2)(b), noting first the requirement for reasons which engage with the case, to identify the critical issues, to explain how the issues are resolved and to provide a rational and considered basis for the conclusions reached.[22] What the court on appeal is looking for is whether the trial court's reasoning addresses the substance of the case advanced by the losing party. The level of detail that is required varies according to the context of the case.[23] The Court also encouraged caution where the challenge is to credibility findings based on contested oral evidence. That is because a slow-paced trial confers on the trial judge the advantage of being able to evaluate the strengths and weaknesses of a case, including making demeanour-based credibility assessments. An appeal court, dealing with a case on the basis of a written record, lacks that advantage.[24]

Grounds of appeal

[23] Mr Kempson appeals his convictions on the ground that Brewer J erred in his assessment of the evidence, to the extent that a miscarriage of justice has occurred. In particular, Mr Mansfield KC for Mr Kempson contends Brewer J failed:

(a) to account sufficiently for what are said to be numerous and problematic inconsistencies in the evidence of Ms K; and

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19 At [26]-[32] and [38].
20 At [9] and [26].
21 *Austin Nichols & Co v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
22 *Sena v Police*, above n 17, at [36].
23 At [37].
24 At [38]–[40].

(b) to provide adequate reasons for his assessment of Ms K's credibility.

[24] Ms K's credibility as a witness was a key issue for determination. Mr Kempson's basis for appeal is that Ms K's evidence was inconsistent and, according to Mr Mansfield, "all over the place", making her evidence unreliable and simply not credible.

[25] On appeal, the following range of inconsistencies in Ms K's evidence is emphasised:

(a) In her police interview, Ms K said the first time Mr Kempson had laid a hand on her was when he slapped her in December 2016, but until then he had held a knife to her throat "all the time". At trial, however, Ms K contradicted this and said he had not used knives against her by the time he slapped her in December 2016. Later, she added, the first time Mr Kempson put a knife to her throat caused her immediate reaction to move out.

(b) Ms K's police statement also addressed the frequency of Mr Kempson's violence towards her. This maintained that there were about 10 instances of violence throughout their relationship, he being violent towards her a couple of times each week. Later in her evidence however, Ms K accepted that any violence from Mr Kempson was less frequent.

(c) Reference is made to the text messages between the couple. Mr Kempson contends that none of the text messages mention the episodes of violence or assaults Ms K claimed to have suffered at his hands.

(d) In Ms K's affidavit evidence for her protection order, she states that throughout their relationship Mr Kempson threatened to throw her off the balcony of their flat. In her police interview and trial evidence she also said he had tried to throw her out the top storey window of their

flat. Ultimately, it seems Ms K largely retreated on both these claims saying that so far as the balcony was concerned Mr Kempson had only locked her out on it. As to the issue relating to the top storey window, it appears, later she accepted it was a window that did not open at all.

(e) Despite Ms K claiming that Mr Kempson had sliced the wall with a knife during one of his attacks on her, a photograph of the wall shows no evidence of any visible mark.

(f) Issues are said to arise too on Ms K's account of the sexual offending episode in January 2017. As to this episode, Mr Kempson notes from her evidence at trial, Ms K maintained that Mr Kempson forced her to perform oral sex and lick his anus. In the 19 January letter she wrote that evening however, Ms K does not mention the forced oral sex and also in her affidavit and police evidential statement she made no mention of sexual offending at all.

(g) In some of her evidence Mr Kempson maintains Ms K muddled the date of the January 2017 incident with events she said occurred in December 2016. Some of her explanations, it is suggested, had also left out details as to the worst of the violence she claims had occurred earlier. Questions arise therefore, according to Mr Mansfield, as to whether this evidence was fabricated entirely.

(h) The fact Ms K says in her evidence that she let Mr Kempson do whatever he wanted following the January 2017 incident does not sit well with the text messages the couple exchanged over the ensuing weeks and months. These messages, it is claimed, confirmed Ms K's commitment to their relationship. Again, this is puzzling in light of Ms K's claim that she left Mr Kempson the moment he laid a hand on her in December 2016 and did so again in April 2017 when she secured evidence of his infidelity. And all this Mr Kempson notes was in spite of his numerous alleged assaults on her with knives and the unpleasant sexual offending he subjected her to in January 2017.

[26] Mr Kempson contends first that these are significant inconsistencies in Ms K's evidence and, secondly, to the extent Brewer J addressed these in his decision, he gave Ms K the benefit of the doubt at every turn, not adequately considering whether she was lying or somehow mistaken in what were important aspects of her evidence.

[27] As to Mr Kempson's alleged knife violence across the course of their relationship, Brewer J did say that he was sure there were at least two episodes of such violence but he did not accept it had occurred more regularly as Ms K at one point had alleged. This, Mr Mansfield submits, is a significant discrepancy not addressed adequately by Brewer J. In attempting to do so, Brewer J simply said Ms K, owing to hindsight, and the impact of Grace Millane's murder, may have unconsciously exaggerated certain aspects of what occurred.

[28] The inconsistency Mr Mansfield identifies in the tone of the text messages sent by Ms K was also not adequately addressed in any way by Brewer J in his reasons.[25]

[29] Issue is also taken with Brewer J's decision to place weight on Ms K's demeanour when giving evidence despite the Judge acknowledging that, while demeanour can be taken into account, juries are often warned not to place too much weight on it – it is just one of many factors to consider.[26]

[30] Lastly, Mr Kempson endeavoured to argue that in this case particularly, caution was required in that there were reasons other than Ms K having been a victim of violent offending which could have led her to display the emotions and take the steps she did. When the charges were brought, Ms K knew Mr Kempson was suspected of having murdered Grace Millane and, as Brewer J observed, this seemed to affect her deeply. The complaint is made that in his reasons Brewer J gave little indication that he had reminded himself of the need not to be unduly influenced by such emotions.

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[25] According to Mr Mansfield, hundreds of text messages between the pair had mentioned emotional and financial abuse of Ms K by Mr Kempson but not physical abuse on his part.

[26] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116; and *E v R* [2013] NZCA 678 at [44]–[45].

Analysis

[31] In considering the High Court's assessment of the evidence here, as the Supreme Court decision in *Sena* made clear, appropriate deference is required of Brewer J's assessment as trial judge of Ms K's credibility. This is to acknowledge that, as the trial judge, Brewer J had the advantage of evaluating and assessing the plausibility of Ms K's evidence as it emerged, including the opportunity to assess what kind of a person she is.

[32] Brewer J identified the key issue for determination here as being whether Ms K was a credible witness. As we see it, in his decision he proceeded to assess this in some detail. In doing so, in addition to Ms K's oral evidence, he set out the text messages, the 19 January letter, the April 2017 statement, and her affidavit for the protection order. All of this, Brewer J noted, had a bearing on Ms K's credibility.[27] Addressing each in turn, we are satisfied Brewer J acted properly when he:

(a) considered the text messages were corroborative of Ms K's general description of the relationship and the extent of Mr Kempson's financial manipulation and general control over her;[28]

(b) accepted the 19 January letter as genuine and corroborative of her account of what happened on that day, thus explaining why he did not accept it was a fabrication;[29]

(c) did not consider it significant that Ms K's April 2017 police statement did not mention the 19 January offending – this incident was traumatic, it had happened months earlier, and was a "profoundly embarrassing" event to discuss in front of her father who attended the interview with her;[30]

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27 Reasons of Brewer J, above n 1, at [20].
28 At [23].
29 At [61].
30 At [64].

(d) did not further consider it significant that Ms K's protection application affidavit also did not mention the 19 January offending – he noted that although it may have been easier for her to tell her lawyer of this episode than to tell the police with her father present, he did not expect her necessarily to do so;[31]

(e) found it was significant that Ms K sought a protection order, given the process cost her around $3,000 when at the time, as a result of the substantial "loans" she had made to Mr Kempson, she had depleted the majority of her savings;[32] and

(f) determined, with respect to the 19 January offending, that the level of detail that Ms K provided was convincing and entirely consistent with what he described as Mr Kempson's tendency for the bizarre.[33]

[33] In all the circumstances before him, we consider Brewer J sufficiently identified in his decision why he found Ms K to be a credible witness. He addressed the inconsistencies in her evidence and explained why he did not consider them significant. Nor did he accept her evidence wholesale but rather he acknowledged that Ms K's awareness of Mr Kempson's suggested involvement in the murder of Grace Millane may have led her to unconsciously exaggerate the offending against her. We observe that Brewer J factored this into his overall assessment in the decision.

[34] Overall, we find Brewer J did not err in his appraisal of the evidence. Considering the totality of that evidence, we accept that on core matters in issue Ms K was generally consistent. In doing so she gave a coherent narrative of a relationship with Mr Kempson that was emotionally, financially, and physically abusive and one that included low-level violence throughout. Ms K gave a careful account of the 19 January 2017 offending and her overall accounts were corroborated to the extent we note above.

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31 At [65].
32 At [66].
33 At [58].

[35] We are not persuaded by Mr Mansfield's submission that Brewer J was wrong to place weight on Ms K's demeanour, given what he maintained were the inconsistencies in her evidence. In our view, Brewer J was entitled to consider demeanour here as he did as a relevant factor among others when assessing Ms K's credibility.[34] However, we disagree with the surprising contention that Brewer J, a very experienced judge, placed too much weight on demeanour. His reasons indicate clearly he did not. Rather, it was only one of the factors considered among the several indicia of credibility outlined at [32] above.

[36] Accordingly, we find that Brewer J did not err in his assessment of the evidence.

[37] We turn now to the issue noted above at [23(b)] as to whether Brewer J provided adequate reasons for his decision as to Ms K's credibility.

[38] Brewer J's reasons are detailed and clearly address the substance of the case raised by Mr Kempson in his defence. He accepted the key issue for determination was whether Ms K was a credible and reliable witness. The substance of the case advanced for Mr Kempson was that she was not. The defence argument on this aspect was set out in detail at [39]–[48] of the reasons decision. In our opinion, Brewer J addressed this directly by carrying out a careful and reasoned credibility assessment.

[39] Mr Mansfield submits on appeal that Brewer J did not adequately "grapple" with the issues that appear above in detail at [25].

[40] We reject this submission. We are satisfied that Brewer J did in fact grapple with the principal inconsistencies he considered were key here. For example, he acknowledged a degree of unconscious exaggeration by Ms K in the allegations of repeated knife use. He was satisfied, however, that there had been at least two instances of knife violence by Mr Kempson, satisfying the elements of the related representative charge.

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[34] As the Supreme Court said in *Sena v Police*, above n 17, at [38]–[40], the ability to assess demeanour is one of the key advantages of a trial judge.

[41] It is accepted that Brewer J did not discuss in detail some of the claims of inconsistency raised by Mr Kempson. However, he did not need to do so. As we see it, these were peripheral matters. As the Supreme Court noted in *Sena*, reasons do not need necessarily to refer in detail to every issue advanced by a party.[35] What is required is a rational and considered basis for the conclusions reached. Justice Brewer, in our view, did identify the key pieces of evidence that related to Ms K's credibility and addressed these in some detail. We observe that his Honour was not required to reconcile every minor inconsistency in Ms K's evidence.

[42] On this aspect, we note too that Brewer J reminded himself that he was entitled to:[36]

> … assess Ms K as a witness using [his] knowledge of people and in a common sense way. It is not a matter of [him] having to accept everything Ms K said or having to reject everything that Ms K said. It is open for the trier of fact in a criminal case to accept part of what a witness has said as being credible and reliable but have doubts about other parts.

[43] As an experienced criminal trial judge, Brewer J would have been well aware that in sexual violence cases inconsistencies in a complainant's evidence are often common. With that knowledge, we are satisfied Brewer J was entitled to assess Ms K's credibility as he did and to determine which aspects of her evidence he accepted and which he did not, without being required to explain or reconcile every inconsistency. In our view, that is what Brewer J did here. His reasons engaged with the substance of Mr Kempson's case before him, they identified the critical issues, and explained how they were to be resolved.[37] Those reasons went to the heart of the key matter in issue here, namely Ms K's credibility, and Brewer J clearly provided thorough reasons to explain why he considered her evidence to be credible.

[44] Accordingly, we are satisfied Brewer J:

(a) did not err in his assessment of the evidence. Rather, he thoroughly considered the totality of that evidence when assessing Ms K's credibility and otherwise; and

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35 At [37].
36 Reasons of Brewer J, above n 1, at [12].
37 *Sena v Police*, above n 17, at [36].

(b) he provided sufficient reasons for his credibility and other findings.

[45] No error or miscarriage of justice occurred here. For these reasons, we dismiss Mr Kempson's appeal against his conviction on all the charges relating to Ms K under this appeal CA673/2020.

Conviction appeal relating to CA694/2020 (appeal against Venning J's decision)

[46] Also following a judge-alone trial in the High Court, on 6 November 2020, Venning J convicted Mr Kempson of one charge of sexually violating Ms O by raping her.[38] For this offending, Venning J sentenced Mr Kempson to three years and six months' imprisonment, cumulative on the sentence of seven years and six months' imprisonment already imposed by Brewer J on Mr Kempson for the separate offending against Ms K. This resulted in a total sentence of 11 years' imprisonment, which was to be concurrent with Mr Kempson's life imprisonment sentence for his earlier conviction for the murder of Grace Millane.[39]

[47] Mr Kempson's appeal against this conviction relating to Ms O is advanced on the ground that Venning J's assessment of the evidence was inadequate. In particular, it is claimed, Venning J erred in the assessment by failing to sufficiently account for evidence that impugned the complainant, Ms O's credibility.

Background

[48] Ms O is English and arrived in New Zealand at the start of 2018. In April 2018 she connected with Mr Kempson on Tinder. They arranged to meet on the evening of 17 April 2018 at a bar in the Viaduct precinct in Auckland. They had drinks there.

[49] Subsequently, they went to another bar in Auckland City and then travelled in Mr Kempson's car to a bar in Mount Eden.

[50] At the Auckland City bar, they had dinner and more drinks. While there, Mr Kempson kissed Ms O, which Ms O said surprised her but she kissed him back.

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38 *R v Kempson* [2020] NZHC 2924 (Reasons of Venning J).
39 *R v Kempson* [2020] NZHC 3138 (Sentencing Notes of Venning J).

On the later drive to the Mount Eden bar, Ms O used her phone to message her friends. At this, she said Mr Kempson got really angry, but when she apologised he then "flicked a switch" and calmed down again.

[51] At the Mount Eden bar they had more drinks. According to Ms O, Mr Kempson then suggested they go to a liquor shop. The pair, however, did not go to a liquor shop, Mr Kempson instead driving them back to the motel in Mount Eden where he was residing. Once there they started kissing and Mr Kempson tried to push up Ms O's dress and touch her vagina. She told him she did not want to do anything that night and this became the subject of an argument. Mr Kempson, it seems, got angry and asked her why she was denying herself when "he had treated her like a princess and paid for dinner and drinks." Ms O says she was crying and shouting at Mr Kempson but again it was as if a switch flicked and he calmed down.

[52] At this point, Ms O realised that she had left her bag, containing her house keys, wallet and passport at the Mount Eden bar. She tried calling the bar, her mother, and a friend, but the calls did not connect. Ms O then sent a message to a friend who lived in the Mount Eden area saying: "Please tell me you're still awake. Please, please, please."

[53] Mr Kempson apparently refused to drive Ms O to the Mount Eden bar or to take her to her home. As a result, Ms O said she accepted she would have to stay at the motel. She put the TV on and got into bed with Mr Kempson. He started to touch her and pulled her into his arms. Ms O says she was upset and crying but he continued kissing and touching her. Ms O was adamant in her evidence that she gave Mr Kempson no positive response to his overtures. Nevertheless, Mr Kempson initiated intercourse. During the act of sexual intercourse, Ms O says she was crying. She accepted she did not say "no" again but she was clear she did not consent. At some point during the intercourse Mr Kempson said: "I forgive you." Afterwards, Ms O went to the bathroom and then went to bed. She said she sat as far away from Mr Kempson as she could and watched television until he fell asleep and then she, too, went to sleep.

[54] The next morning Ms O spoke to her mother on the phone for about nine minutes but she did not tell her what had happened. Rather, she said Mr Kempson was going to drop her home after taking her to collect her belongings from the Mount Eden bar. This is what occurred. Mr Kempson and Ms O never spoke to each other again after he had dropped her off on the North Shore close to her mother's house.

[55] It was about eight months later that Grace Millane went missing. The Daily Mail in England named Mr Kempson as a person of interest in the investigation and Ms O's colleagues then looked him up on Facebook. Ms O recognised one of the photographs on Mr Kempson's Facebook page from his Tinder profile. She said she went into a state of shock and spoke to her boss, albeit without disclosing exactly what Mr Kempson had done, other than to say he had forced himself on her. Ms O's boss encouraged her to go to the police which she did. The Crown case was that Mr Kempson had raped Ms O.

[56] Mr Kempson's position is that Ms O fabricated the complaint. He accepted sexual intercourse took place between the pair but maintained that it had been consensual and that once Ms O found out that he had been implicated in Grace Millane's murder, she had invented the rape complaint.

The key evidence

[57] As to the key evidence before Venning J, the Crown relied on the following:

(a) A preliminary police statement that Ms O gave on 10 December 2018. This included the identification of Mr Kempson in a photo montage as the person who had raped her.

(b) Ms O's evidential video interview, conducted on 11 December 2018, and the evidence she gave at trial.

(c) The evidence of Ms F, Ms O's employer. As we have noted, upon learning of Mr Kempson's involvement in Grace Millane's murder, Ms O became upset at work and told Ms F that she had previously been on a date with Mr Kempson and that he had forced himself on her.

(d) Photographs of the motel and phone data extracted from Ms O's phone, including screenshots of calls and messages.

Venning J's decision

[58] At trial, as we have noted, it was accepted for Mr Kempson that he and Ms O had engaged in sexual intercourse. The principal issue for determination was whether the encounter was consensual or at least whether Mr Kempson had a reasonable belief in consent.[40]

[59] On the first question, as to whether Ms O had consented, Venning J accepted this was a question of credibility as Ms O had given evidence that she did not consent, that she was frozen, crying, and felt trapped.[41] In his conclusion on this question Venning J said:[42]

> I find that Ms O was a credible witness, and that she tried to give her evidence honestly as she remembered events. I reject the criticism of her credibility in the defence submission that she was in some way embarrassed by having sex with Mr Kempson and so effectively falsely recast the night in her mind and in her statement to the Police and her evidence.

[60] Venning J reached that conclusion having regard to a number of factors which he found confirmed Ms O was a credible witness. Those factors were:

(a) The fact that having seen Ms O give evidence, Venning J accepted she was trying to relate the events of the night as best as she could recall and that her emotional response was real and not in any way contrived.[43]

(b) His finding that Ms O made a number of concessions and did not "try and improve her evidence." She acknowledged in her evidence that Mr Kempson did not threaten her and she accepted that when she told him "no" on the first occasion, he had stopped .[44]

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40 Reasons of Venning J, above n 38, at [58].
41 At [60].
42 At [64].
43 At [65].
44 At [65].

(c) As to her reliability, Venning J noted that on the evening in question Ms O was badly affected by alcohol and may have been unsure or even mistaken on some points in her evidence.[45] However, on the key points, such as consent and the content of the argument they had, Venning J accepted she was a reliable witness.[46]

(d) Notwithstanding suggestions from counsel to the contrary, it was not significant that Ms O had not taken up other options such as taking an Uber home.[47] Venning J considered Ms O was not a confident person and was "generally concerned not to upset other people, including [Mr Kempson] and sought to avoid confrontations."[48] Further, he noted she was in a part of Auckland that she was not familiar with, she had lost her house keys, her passport and wallet, her phone was not working properly, and she was significantly affected by alcohol such that her "decision-making was undoubtedly affected."[49] Although "the evening had not gone well" and finally Ms O had "accepted she would stay in the motel room until the morning",[50] Venning J stressed it was important to note this did not mean she consented to having sexual intercourse with Mr Kempson.[51]

(e) No evidence was before the Court to suggest Ms O had been actively responding to the sexual activity. In cross-examination it had been put to Ms O that she had been kissing the appellant during intercourse but as this had been firmly denied by Ms O, no basis existed for this suggestion.[52]

(f) Ms O also denied having discussed condom use with Mr Kempson.[53]

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45 At [66].
46 At [66].
47 At [67].
48 At [67].
49 At [68].
50 At [68].
51 At [69].
52 At [70]–[71].
53 At [76].

(g) Her employer, Ms F, in her evidence broadly corroborated Ms O's account of the evening.[54]

(h) It was not significant there had been a delay in Ms O's reporting the rape. Venning J accepted an obvious explanation for this was that Ms O had tried to put it out of her mind and managed to do so until she saw the appellant's picture in relation to Grace Millane's disappearance.[55]

(i) Overall, Venning J, having assessed Ms O as she gave her evidence, found her to be a credible witness and he accepted her account she had not consented to sexual intercourse with Mr Kempson.[56]

[61] On the second question as to whether Mr Kempson had a reasonable belief Ms O was consenting, Venning J concluded that he did not.[57] On that aspect, Venning J considered the following factors relevant:

(a) The lack of any positive response from Ms O to Mr Kempson's advances immediately before and during sexual intercourse.[58]

(b) The overall context of the events. He accepted Ms O was prepared to kiss Mr Kempson, particularly at an earlier time, but at no stage did she agree to go further. She told him specifically and explicitly that she did not want to do anything that night, which led to an argument.[59] From that argument, Venning J found that Mr Kempson "could have been left in no doubt that Ms O did not want to have sex with him at that time."[60]

(c) After the argument, Ms O was upset. She became more upset when she realised she had left her bag, wallet, passport and keys at the Mount

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54 At [74]–[75].
55 At [77].
56 At [78].
57 At [92].
58 At [79].
59 At [80].
60 At [81].

Eden bar. She was also frustrated Mr Kempson would not drive her home at the time.[61]

(d) Although Ms O had not said "no" again, Venning J accepted the circumstances had not changed since she previously said "no"[62], and that "during the sexual intercourse she was crying"[63] and "when she decided to stay she got *into* the bed wearing her dress."[64]

[62] It was for these reasons that Venning J found Mr Kempson did not have a reasonable belief in consent, nor would any person in his shoes at the time have had such a belief, and thus he convicted Mr Kempson of the charge of rape.[65]

Conviction appeals – the test on appeal

[63] As noted above, the test on appeal under s 232(2) of the Criminal Procedure Act requires an appellant to satisfy the Court that a miscarriage of justice has occurred. The law appears above at [18]–[22], but we do note again for emphasis the cautionary approach to be taken on appeal where the challenge is to credibility findings which reflect a trial judge's assessment of the evidence, including oral evidence.

Grounds of appeal

[64] Mr Kempson's position on appeal is that Venning J erred in his assessment of the evidence and, in particular, his Honour failed to address various factors that impugned Ms O's credibility. Mr Mansfield emphasises this is a case where caution is appropriate for three reasons:

(a) Ms O was, as Venning J observed, "very emotional relating her evidence."[66]

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61 At [82].
62 At [86].
63 At [91].
64 At [91].
65 At [92]–[95].
66 Reasons of Venning J, above n 38, at [67].

(b) Mr Kempson claims there are obvious inconsistencies, exaggerations and implausibilities in Ms O's account.

(c) Other reasons existed to explain why giving evidence about her date with Mr Kempson might have evoked an emotional response from Ms O, the most notable factor being Ms O's subsequent knowledge of his involvement in the murder of Grace Millane. Like Ms O, Grace Millane was a young Englishwoman enjoying her time in New Zealand, and on her first date arranged after a Tinder connection with Mr Kempson. Given those parallels, Mr Mansfield suggests that Ms O may well have seen herself in Grace Millane's shoes and might have considered herself lucky in all the circumstances.

[65] Generally, on credibility issues, Mr Mansfield maintains that Venning J did not adequately consider the following range of factors:

(a) The inconsistency between Ms O's evidence that she did not want to be at the Mount Eden bar or the motel with Mr Kempson, and her actions that night in not going home in an Uber as she had originally planned, namely that she had failed to "help herself."

(b) The fact that Ms F stated the pair had argued about drinking (and not sex).

(c) Ms O's evidence regarding contraception.

(d) Other problematic aspects of Ms O's evidence arising from the fact that, according to Mr Mansfield, Venning J gave Ms O the benefit of the doubt at each and every turn and placed undue weight on Ms O's demeanour when giving evidence here.

Analysis

[66] It was common ground that sexual intercourse had occurred. The Crown case was that Ms O did not consent, nor could Mr Kempson have any reasonable belief that

she was consenting. It was Mr Kempson's defence that Ms O had consented at the time but later fabricated the rape complaint.

[67] This is not a case of reluctant or regretted consent, nor a case where consent was withdrawn partway through sexual activity.[67] In his decision, Venning J did not appear to refer to the principles of reluctant or regretted consent. But in our view this was simply not necessary here. That is because no factual narrative was open on the evidence in this case to the effect that Ms O may have agreed reluctantly to sex or later regretted it. Nothing in the evidence suggested an inference of consent on the part of Ms O, either reluctant or otherwise. The most that might be said from Ms O's evidence about her actions during the sexual intercourse that took place is that she was simply being avoidant and passive (as well as being in tears at the time), motivated by not wanting any further confrontation with Mr Kempson, in light of his earlier angry outbursts. Passivity on the part of a complainant plainly does not equate to consent or even acquiescence, as this Court made clear in *Henry v R.*[68] Put another way, "submission is not consent."[69] And, in any event, as we see the position, all this simply leads to some explanation as to Ms O's reluctant conclusion that, in all the circumstances that she found herself in that evening, she had little choice but to stay the night in Mr Kempson's motel. Venning J accepted this, explaining why Ms O, with her decision-making impaired somewhat through alcohol, felt trapped, without options and did not leave.

[68] This is also not a case where a previous history of consensual (or "unwillingly consensual") sexual intercourse exists between a couple in a longer-term relationship. Justice Venning took into account the crucial point that Ms O's refusal of consent was communicated to Mr Kempson well before any sexual intercourse began to take place. There was no change to the circumstances to eliminate the effect of that clear communication. Ms O's verbalised "no" to sex continued to be operative throughout

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67 As to this latter situation, which we accept differs from the appeal case before us, see by way of example *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454, although we do acknowledge this case relates to prior consensual activity as a possible mitigating factor in a later sentencing exercise following a rape conviction.

68 *Henry v R* [2019] NZCA 266; and see Anna High "Reluctant consent" (2022) NZLJ 310.

69 *R v Bruce* [2021] NZHC 626 at [32]; and Crimes Act 1961, s 128A.

the rest of the interaction.[70] This included when Mr Kempson proceeded to have sexual intercourse with her regardless and in defiance of that clear communication. The lack of consent rendered that act a sexual violation. In effect, no other detail in all the circumstances prevailing in this case matters in the face of that clear and unchanged communication of "no". Various factors which support this can also be noted here: first, the fact Ms O was crying during the sexual intercourse; secondly, her complete lack of positive response to Mr Kempson's overtures; and thirdly, the prior argument where Ms O had made her position clear.

[69] On the issue as to whether in her evidence Ms O's employer had said the argument at the motel had been about drinking rather than about sex, Venning J gave little weight to this portion of Ms F's evidence. He noted Ms F was actually unsure as to what the argument was about. There is little in this to assist Mr Kempson here.

[70] In her statement to the police, Ms O had said: "I don't think he used a condom because I was on the injection." Mr Mansfield before us endeavoured to argue that this statement implies that Ms O and Mr Kempson had a discussion about contraception. We reject this. Venning J in his decision clearly addressed this aspect. In doing so he said:[71]

> … the reference to being on the injection is something that could have occurred to her when she was asked if he used a condom. She did not know whether he had…but it was irrelevant from her point of view because she was protected from pregnancy.

In addition, Ms O in her evidence firmly denied that she and Mr Kempson discussed contraception. Venning J accepted this.[72] This finding was clearly available and we do not accept there was any error here.

[71] Finally, we return to a principal plank of Mr Kempson's appeal here. This was that Ms O's evidence was problematic and inconsistent in various respects. Justice

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70 Reasons of Venning J, above n 38, at [80] where his Honour accepted that: "… shortly after they arrived at the motel and [Mr Kempson] started putting his arms on her legs and pushing her dress up and then went on to touch [Ms O's] vagina, she said she told him that she 'didn't want to do anything, no not tonight, like not now, I don't want to do that today' and that then led to the argument."

71 Reasons of Venning J, above n 38, at [76].

72 At [76].

Venning, in considering her evidence, it is claimed, did so only in a general and superficial way and placed undue weight on Ms O's demeanour. Mr Mansfield suggested too that Ms O's later knowledge of Mr Kempson's connection to the Grace Millane inquiry was a motive for her delayed complaint and a driver for her exaggerating the events of the night in her police complaint and evidence at trial.

[72] We do not accept this. Rather, we agree with the conclusion reached by Venning J here that it was not significant that there had been delay in Ms O discussing the events of that night with her mother, family or friends, or indeed of reporting the rape by way of complaint to the police.[73] An obvious explanation, as Venning J noted, was that Ms O, who he accepted was not a confident person, had tried to put the events of that night out of her mind and was able to do so initially, until she saw Mr Kempson's photo in relation to Grace Millane's disappearance.

[73] Turning now to the question of whether Venning J provided adequate reasons when undertaking his assessment of Ms O's credibility, we are satisfied he did. Those reasons addressed the substance of the case raised by Mr Kempson, in the context of a sexual violence trial where the defence rested on calling into question the credibility of the complainant, Ms O.

[74] In this case, Venning J's reasons were detailed. He was alert to the fact that Ms O's credibility was in issue. This was particularly so as the substance of Mr Kempson's case before him was that she was not a credible witness, and that she had fabricated the rape complaints. Mr Kempson's argument on this was set out in some detail at [59] of Venning J's Reasons Decision. It is our view that Venning J adequately addressed this by carrying out the reasoned assessment of Ms O's credibility that he did. We observe that his Honour had the advantage, noted by the Supreme Court in *Sena*, of seeing and hearing Ms O's evidence in order to assess her credibility. Any weight Venning J placed on Ms O's demeanour formed only one limb of his detailed credibility analysis. This is far from a case where the reasoning consists only of a conclusory credibility preference. Rather, Venning J provided ample reasons for finding Ms O to be a credible witness, as we describe at [60] above.

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[73] At [77]; and note Evidence Act 2006, s 127.

[75] It must follow that we are not persuaded by the argument on appeal that Venning J's reasons here might be said to be inadequate in any way.

[76] In conclusion, we find that:

(a) Venning J did not err in his assessment of the evidence and in particular he thoroughly considered the totality of the evidence when assessing Ms O's credibility and in finding the charge proven.

(b) He provided sufficient reasons for his findings.

(c) No miscarriage of justice occurred here.

[77] For these reasons, Mr Kempson's appeal against conviction on the charge of raping Ms O is dismissed.

Sentence appeals

[78] We now turn to Mr Kempson's appeals against his sentences, first as to the CA673/2020 appeal against the charges relating to Ms K and secondly as to the CA694/2020 appeal against the charges relating to Ms O.

[79] Mr Kempson has appealed first, the sentence imposed by Brewer J of seven years and six months' imprisonment for his offending against Ms K, his former partner and secondly, the sentence imposed by Venning J shortly thereafter of three years and six months' imprisonment for his offending against Ms O (cumulative upon that earlier seven years and six months' imprisonment imposed).

[80] An appeal against a sentence may only be allowed by this Court if it is satisfied there has been an error in the imposition of the sentence and that a different sentence should be imposed.[74] The focus is not on the process by which the sentence was reached but on the correctness of the end result.[75]

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74 Criminal Procedure Act, ss 250(2) and 250(3).
75 *Ripia v R* [2011] NZCA 101 at [15].

Appeal 673/2020 against the Brewer J sentence

Grounds

[81] Mr Kempson appeals this sentence on two grounds:

(a) that the end sentence imposed was manifestly excessive, having regard to the principle of totality; and

(b) the sentence failed to adequately account for mitigating factors relevant to Mr Kempson.

The sentence

[82] Mr Kempson appeared before Brewer J on the eight charges arising out of his offending against Ms K, his former partner. The charges were sexual violation by unlawful sexual connection (x2); threatening to kill; assault with a weapon (x2); and male assaults female (x3).

[83] In his sentencing decision Brewer J identified the lead offending as the sexual violation offending. The parties accepted this offending fell within band 1 of the tariff case *R v AM*[76] and agreed broadly that a starting point of between six and seven years' imprisonment was appropriate.[77]

[84] Aggravating features of the offending were identified by Brewer J as breach of trust, the vulnerability of Ms K who felt trapped and isolated in the relationship, the harm suffered by her, the particular cruelty exhibited having regard to the context of the offending and the degrading nature of the sexual activity Mr Kempson required Ms K to perform.[78] Brewer J was satisfied there were no mitigating factors relating to the sexual offending and he adopted a starting point of seven years' imprisonment.[79] This was then uplifted by one year to take into account the totality of the appellant's offending at that point.[80]

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76 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
77 *R v K* [2020] NZHC 3069 (Sentencing Notes of Brewer J) at [22].
78 At [23].
79 At [24].
80 At [28].

[85] A six month deduction was applied to reflect Mr Kempson's personal background, including the fact that he was estranged from both his family and his Māori culture.[81] Justice Brewer took the view, however, that there was no clear nexus between Mr Kempson's background and his offending. This led to the final sentence imposed of seven years and six months' imprisonment.

This sentence appeal

[86] It is appropriate on this appeal to consider first Mr Kempson's second ground of complaint noted above at [81(b)] which is that the six months' deduction to reflect Mr Kempson's personal background, being only around six per cent, is inadequate. We do not accept this submission. While the discount might be seen as somewhat low, Brewer J's rationale was that he was struggling to see what was a tenuous causal nexus between Mr Kempson's background and his offending. We accept that the reports before the High Court disclose that Mr Kempson had a somewhat difficult upbringing. However, we agree with Brewer J's conclusion that there was little causal connection between his background and Mr Kempson's offending against Ms K. The discount given we find is within the available range.

[87] Turning next to Mr Kempson's first ground of appeal, this being that the final sentence imposed was manifestly excessive given the principle of totality, we will address this shortly under the appeal against the Venning J sentence decision.

Appeal 694/2020 against the Venning J sentence

[88] Mr Kempson was sentenced by Venning J in relation to his conviction for raping Ms O, to three and a half years' imprisonment, cumulative on the seven years and six months' imprisonment imposed earlier by Brewer J for the offending against Ms K.

The sentence

[89] As a starting point, counsel agreed that Mr Kempson's offending against Ms O fell toward the lower end of band 1 of *R v AM*, justifying a starting point of around

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81 At [31].

six years' imprisonment.[82] Venning J adopted that starting point of six years' imprisonment.[83]

[90] The same s 27 cultural report that had been provided to Brewer J was before Venning J. This report, as we noted, recorded Mr Kempson's troubled upbringing. His parents separated when he was three, his father was at times violent, and his mother rejected him. Venning J said that although "it [was] very difficult to see that there is any connection between your cultural disconnect identified in the report and this offending",[84] Mr Kempson's general upbringing might explain to some extent his attitude toward women. A discount of about eight per cent was awarded. This brought the sentence to one of five years and six months' imprisonment.[85]

[91] Venning J then considered that the sentence ought to be cumulative on the sentence imposed earlier by Brewer J since the two sets of offending were separated in time by some four to five months and were committed against two different victims. Being cognisant of the risk of not giving adequate recognition to the harm caused to each victim in cases involving multiple victims,[86] Venning J imposed an uplift of three and a half years.[87]

[92] This resulted in a total cumulative sentence of 11 years' imprisonment.

This sentence appeal

[93] At the outset, Mr Mansfield in his submissions acknowledged that in practical terms, the issue on both these sentence appeals is a rather academic one. That is because Mr Kempson is currently serving a minimum term of 17 years' imprisonment on his life sentence for murdering Grace Millane and he has essentially exhausted all conventional avenues of appeal against that conviction. Nevertheless, Mr Mansfield properly noted that it is important for all sentences to adequately reflect the offending in question. His argument followed here that the cumulative sentence imposed on

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82 Sentencing Notes of Venning J, above n 39, at [9].
83 At [10].
84 At [13].
85 At [15].
86 *R v AM*, above n 76, at [47].
87 Sentencing Notes of Venning J, above n 39, at [21]–[22].

Mr Kempson was excessive on the basis of the same two grounds outlined at [81] above.

[94] On the totality question, Mr Mansfield does not take issue with the starting point adopted by Venning J on the rape conviction against Ms O of six years' imprisonment but he submits that the final uplift of three and a half years' imprisonment imposed for totality was excessive.

[95] In support, he refers us to the decision of this Court in *Semmens v R*.[88] In *Semmens*, starting points of eight years and seven years and six months' imprisonment were considered appropriate for two separate sets of sexual offending. Having regard to the principle of totality, the Court there adopted a total starting point of 11 years and six months' imprisonment.[89]

[96] In the present case, Mr Mansfield's argument is that, given Brewer J's starting point for the offending against Ms K of eight years' imprisonment and Venning J's starting point for the offending against Ms O of six years' imprisonment, in order to apply a similar uplift to that in *Semmens* (being a little less than half the lower starting point), the appropriate starting point for the totality of Mr Kempson's offending here should have been in the region of 10 years 9 months' imprisonment. From that point, Mr Mansfield contends that reductions should have been made for Mr Kempson's mitigating factors.

[97] Applying a discount suggested by Mr Mansfield of at least 10 per cent for Mr Kempson's upbringing, the final end sentence, he maintains, should have been below 10 years' imprisonment and the cumulative sentence imposed to achieve that end point no more than two years and six months' imprisonment.

[98] In our view, the approach from the *Semmens* case suggested by Mr Mansfield is unduly formulaic and wrong. In cases where cumulative sentences are to be imposed, the general principle is that the end sentence must not result in a total period

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88 *Semmens v R* [2021] NZCA 135.
89 At [66].

of imprisonment wholly out of proportion to the gravity of the overall offending.[90] Beyond this, there is no precise mathematical calculation required.

[99] The question to be asked is whether the total sentence appropriately reflects Mr Kempson's overall culpability here, considering the purposes and principles of the Sentencing Act.[91] We are satisfied it does.

[100] The uplift imposed by Venning J, as we see it, fell well within the range available. The offending against both Ms O and Ms K was serious. Although it involved two distinct sets of offending arising out of different circumstances, it contained the various aggravating features we have noted above. The offending against Ms K arose in the context of their relationship. Mr Kempson actively manipulated Ms K so that she felt isolated and trapped in the relationship, he abused her trust and did so in her own home. He then engaged in particularly cruel and degrading offending that resulted in ongoing psychological trauma for Ms K. He also engaged in low level violence towards Ms K throughout their relationship.

[101] In the offending against Ms O arising out of a single evening, Mr Kempson was aggressive and intimidating toward a vulnerable young woman. He intentionally isolated Ms O and exhibited a sense of entitlement to sex, irrespective of her wishes.

[102] The overall sentence imposed was appropriate to account for the totality of Mr Kempson's offending, including the need to hold him accountable, to promote in him a sense of responsibility, to denounce and deter the conduct, and to acknowledge the separate harm caused to each of the victims.

[103] Mr Mansfield also takes issue with the discount applied to Mr Kempson's sentence on account of personal mitigating factors outlined in the s 27 cultural report before the Court. It was Mr Mansfield's submission that a discount of at least 10 per cent should have been applied for Mr Kempson's troubled upbringing, his mental health issues and his dislocation from his Māori heritage. Mr Mansfield

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90 Sentencing Act 2002, s 85.
91 Sections 7 and 8.

suggests the discounts applied, of six and eight per cent, by Brewer and Venning JJ respectively, were at the low end of the available range.

[104] While we accept that the s 27 cultural report, although outlining only a very limited history for Mr Kempson, does appear to show a somewhat volatile upbringing and some degree of cultural isolation, we do not agree that Mr Kempson's personal mitigating factors warrant any greater discount here. That is because there is little causal connection between Mr Kempson's background and the offending he committed. It was open to Brewer and Venning JJ to come to the conclusion that not only was Mr Kempson's background not an operative or proximate cause of his offending, but perhaps it did not satisfy even the lower threshold of being a causative contribution.[92] In such circumstances, we do not consider an error occurred here in not applying greater discounts. In any case, we reiterate, the ultimate focus in a sentence appeal is on the end result and whether the sentence is within range, rather than how the Court may have arrived at it. We are satisfied that the aggregate sentence here of 11 years' imprisonment, effectively set by Venning J, was well within the appropriate range.

Conclusion

[105] For all the reasons we have outlined above, we find that neither of the individual sentences imposed by Brewer and Venning JJ contained any error, nor is the total cumulative sentence of 11 years' imprisonment manifestly excessive.

[106] Both appeals against sentence are also dismissed.

Solicitors:
Mills Lane, Auckland for Appellant
Crown Solicitor, Auckland for Respondent

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92 See, for example, the discussion in *Berkland v R* [2022] NZSC 143 at [107]–[112].