NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE COMPLAINANT IS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: ORDER MADE BY THIS COURT IN [2018] NZCA 153 PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE PROPENSITY OFFENDING VICTIM PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA633/2019
[2023] NZCA 474

BETWEEN	JESSIE ARTHUR HEKE-GRAY Appellant
AND	THE KING Respondent

Hearing:	1 May 2023
Court:	Gilbert, Thomas and Woolford JJ
Counsel:	N P Chisnall KC and L A Elborough for Appellant Z R Johnston and B So for Respondent
Judgment:	29 September 2023 at 2 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed.

D The sentence of preventive detention is set aside. A finite sentence of 15 years and one month's imprisonment is substituted.

E The minimum period of imprisonment of seven years and six months imposed by the High Court is confirmed.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Following a trial by jury in the District Court at Whangārei, Mr Heke-Gray was found guilty of 11 charges of sexual and other violent offending against the same female complainant over a two-week period commencing when they first met — one of rape, five of sexual violation by unlawful sexual connection, one of assault with intent to injure, two of threatening to kill, one of threatening to do grievous bodily harm, and one of unlawful possession of a firearm.

[2] Mr Heke-Gray had earlier pleaded guilty to one charge of conspiring to pervert the course of justice. This charge arose out of a telephone call he made from prison asking an associate to find a witness to help him by giving perjured evidence and to offer money to the complainant not to turn up to court.

[3] The trial Judge, Judge McDonald, declined jurisdiction to sentence Mr Heke-Gray and transferred the matter to the High Court to enable consideration of whether a sentence of preventive detention should be imposed.[1]

[4] Two health assessors (required pursuant to s 88(1)(b) of the Sentencing Act 2002) gave evidence about the likelihood of Mr Heke-Gray committing a further qualifying sexual or violent offence. Their opinions were tested at a disputed facts hearing before Whata J. The Judge was satisfied that the statutory criteria for a sentence of preventive detention had been met and that such a sentence ought to be imposed. He accordingly sentenced Mr Heke-Gray to preventive detention on the rape charge and ordered him to serve a minimum period of imprisonment of seven years and six months.[2] Concurrent sentences were imposed on the other charges.

[5] Mr Heke-Gray appeals against both conviction and sentence.

[6] Mr Heke-Gray applies to adduce further evidence being a report dated 17 March 2023 from Dr Brandon Birath, a neuropsychologist, who confirms an earlier

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1 Sentencing Act 2002, s 90.

2 *R v Heke-Gray* [2019] NZHC 2841 [sentencing judgment].

informal diagnosis (made when Mr Heke-Gray was aged 14) that he has Foetal Alcohol Spectrum Disorder (FASD). Dr Birath addresses the implications of this condition in conjunction with Mr Heke-Gray's other diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD). Dr Birath's evidence is said to be relevant to whether, in respect of the rape and other sexual violation charges, Mr Heke-Gray held a reasonable belief in consent.

[7] The grounds of Mr Heke-Gray's conviction appeal are:

(a) The fresh evidence available from Dr Birath has a material bearing on whether Mr Heke-Gray's belief in consent was reasonable. There is a reasonable possibility that more favourable verdicts would have been reached if this evidence had been before the jury and there is accordingly a real risk that justice has miscarried.

(b) The Judge's directions on the issue of reasonable belief in consent were incorrect, inadequate, or inappropriate.

(c) The Judge's directions on the propensity evidence were deficient.

(d) Trial counsel error, namely a failure to cross-examine the complainant about a prior inconsistent statement.

[8] Mr Heke-Gray appeals against the sentence of preventive detention contending that his risk of reoffending was lower than was assessed by Whata J. Mr Heke-Gray applies to adduce a report from Dr Shanmukh Lokesh, a forensic psychiatrist, who assesses Mr Heke-Gray's risk of committing a further qualifying sexual or violent offence as being somewhat lower than the two health assessors who gave evidence in the High Court and has better rehabilitative prospects than they assessed. He also relies on the fresh evidence from Dr Birath in support of this contention.

The trial

Crown case

[9] Mr Heke-Gray and the complainant met on social media in September 2016. Mr Heke-Gray was then aged 32 and living in Whangārei. The complainant was aged 26 and lived in Wellington. The complainant had recently broken up with her partner who was threatening her and her parents with gang violence. She was looking for someone who could protect her. The initial arrangement was that the complainant would pay Mr Heke-Gray for this service. However, the complainant was unable to arrange the money. Instead, she agreed to come and live with Mr Heke-Gray for a month on the understanding that he could have sex with her. Prior to meeting, they exchanged numerous sexualised messages, and the complainant sent him video chats showing her naked body.

[10] On 12 October 2016, the day before the complainant took the bus to travel north to meet Mr Heke-Gray, they exchanged further sexually explicit messages on Facebook, including the following:

> [Mr Heke-Gray]
>
> Morning huni
>
> Howz my delectable pussy 2day ? .ready 2 get bent ova and fukd l[i]ke a dirty slut ?? .lol
>
> [The complainant]
>
> Haha yes
>
> [Mr Heke-Gray]
>
> Yum .heads up to u my babez !!!
>
> I'm Guna SLAm ur ass deep
>
> [The complainant]
>
> Hehe nice
>
> [Mr Heke-Gray]
>
> Can I ram ur ass hole real hard baby ??
>
> Fukk I cant wait

[The complainant]

Haha can you use lots of lube?

…

[Mr Heke-Gray]

Does da thought of danger make u wet??

[The complainant]

Fuckin ay lol

[Mr Heke-Gray]

Shud do if ur a bad bitch !!

U play fantasyz babe ??

[The complainant]

Yeah I can

[Mr Heke-Gray]

We cud act out sumfng later ..do u luv ruff vicious forced sex ??

Xo

[The complainant]

Yeah I like it but just don't hurt me please

[Mr Heke-Gray]

Neva hurt u baby

[The complainant]

Thank you

[Mr Heke-Gray]

U have my word

Ur my pride and joy rite at dis minute !!

[The complainant]

Aw 😊

[Mr Heke-Gray]

Don't mistake my intentionz hun !! . I.plan 2 keep u as myne 4eva !! .see how it goes 4 dis month and then take it from ther[e] !! .xo

> All I want is da best 4 both of us !!
>
> [The complainant]
>
> Ok baby xo

[11] Mr Heke-Gray met the complainant at the bus stop in Whangārei on 13 October 2016. He instructed her to drive to a beach. While she was driving, he took her phone out of her handbag, demanded the PIN code to unlock her phone, and then went through her phone. (He later threw away the SIM card and he controlled her phone throughout the time they were together.) After arriving at the beach, Mr Heke-Gray assaulted her while she remained seated in the car, putting his hands all over her face, squeezing her face, slapping her, pulling her shirt up and biting her stomach. Mr Heke-Gray then inserted his fingers inside her genitalia and her anus. The complainant did not say yes or no to this activity, but said she moaned with the intention of conveying to Mr Heke-Gray that she was moaning with pleasure. Mr Heke-Gray then directed her into a cubicle in the public toilets and penetrated her anus with his penis. While he was doing this, his hands were around her throat. He ejaculated. The complainant said she was fearful and felt she had no choice throughout this entire episode, which formed the basis of charges 1 to 4, being three charges of sexual violation by unlawful sexual connection and one charge of assault with intent to injure.

[12] Later that evening, Mr Heke-Gray, one of his associates, and the complainant checked into a hotel in Whangārei. Mr Heke-Gray was under the influence of drugs and was paranoid. He placed clothing around the vents in the hotel room because he believed he was being gassed, and he used a table and chair and the complainant's suitcase to barricade the door. While the complainant was sleeping, Mr Heke-Gray grabbed her neck to wake her up. He grabbed her face and forced her to suck his penis. He then made her get onto her back, forced himself on top of her, and penetrated her anus, causing her excruciating pain. She pleaded with him to stop but he ignored her. The sexual assault was so rough that the complainant soiled the bed. The complainant said that Mr Heke-Gray had turned the music up loud so that no one could hear her. These events gave rise to charges 6 and 7, being sexual violation by unlawful sexual connection.

[13] Mr Heke-Gray threatened the complainant with a gun on multiple occasions. On one occasion, he waved the gun around while she was driving, making her fear for her life. On another occasion, he woke the complainant up by putting his thumbs into her eyes. He then put a pistol into her mouth and forced it towards the back of her throat, making her gag. Mr Heke-Gray threatened to kill her by saying "if you ever cross me or if you ever dob me into the police I will blow the back of your head off". On a third occasion, while talking on the phone in front of the complainant, he said "I'm getting rid of this bitch". He put the gun to the back of her head with the safety on and pulled the trigger. Mr Heke-Gray pulled the trigger multiple times and said, "I'm gonna blow the back of your head off, you whore". These events formed the basis for charge 5 — unlawful possession of a firearm, and charges 9 and 10 — threatening to kill.

[14] On another occasion, Mr Heke-Gray insisted that the complainant have his nickname tattooed above her eyebrow. He told her that if she ever left him or did anything, he would cut the tattoo out with a machete (charge 8 — threatening to do grievous bodily harm).

[15] The final episode of violence took place on 25 October 2016. Mr Heke-Gray wanted to have sex with the complainant, but she said no because she had thrush.[3] Mr Heke-Gray responded by saying he wanted to have anal sex with her. She again told him no. Mr Heke-Gray then forced himself on top of her, removed her underwear and inserted his penis inside her vagina. While this was happening, the complainant was crying, pleading with him to stop, and tried to push him off. Mr Heke-Gray ignored her requests and overpowered her. He placed a pillow over her head to prevent her from screaming. Again, the complainant said the music was turned up and was loud. She explained "[t]hat was his little thing that he did, he always had the music up really loud so that nobody could hear anything" (charge 11 — sexual violation by rape).

[16] The complainant managed to escape from Mr Heke-Gray when she visited a sexual health clinic later that day.

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[3] The complainant was later diagnosed with chlamydia.

Defence case

[17] Mr Heke-Gray did not dispute that physical acts of the type described by the complainant took place at the beach on 13 October 2016, but he did contest the extent of the violence involved. He defended these charges on the basis the Crown had failed to prove that the complainant did not consent or that he did not hold an honest and reasonably held belief that she was consenting to both the physical and sexual behaviour. The defence relied on the preceding Facebook messages as indicating that the complainant was a willing participant in the sexual activity that took place. Mr Heke-Gray's defence was also said to be supported by the complainant's acknowledgment that she pretended she was enjoying the sexual activity and intended to convey this to him, even though she said that was not the case.

[18] Mr Heke-Gray denied the complainant's account that forced oral and anal sex took place in the hotel later that night. His evidence was that they went to bed early and had consensual anal sex in the morning. The defence pointed to the evidence of the hotel manager that the complainant did not appear to be distressed and did not raise any issue about what had allegedly occurred when she came to reception on her own and checked out the following morning.

[19] Mr Heke-Gray denied having a gun and maintained that those allegations were simply untrue. He also denied threatening to kill the complainant or cause her grievous bodily harm. As for the alleged rape on 25 October 2016, Mr Heke-Gray denied any sexual activity occurred that morning, stating that he was feeling unwell at the time, and he knew that the complainant had chlamydia.

[20] The defence also relied on the evidence that the complainant visited a sexual health clinic on three occasions while she was in Whangārei. Although Mr Heke-Gray accompanied her to the clinic on each occasion, she went into the consultation room on her own. During one visit, on 19 October 2016, she told the specialist sexual assault nurse that Mr Heke-Gray was "a bit of a dick but he was all right and she could handle him". The nurse asked the complainant four standard questions designed to screen for family violence. When asked "[w]ithin the last year has anyone forced you to have

sex in a way you didn't want to?", the complainant answered "no". The complainant also answered "no" to a question asking whether there was a gun in the home.

Summing up

[21] The trial commenced on 1 October 2018 and the evidence concluded just prior to 11 am on 11 October 2018. The Crown and defence closing addresses were both delivered that day. The Judge summed up the following morning, which was a Friday.

[22] Although one of the grounds of appeal is directed to one aspect of the summing up on the use of propensity evidence, the primary complaint concerns the Judge's directions on reasonable belief in consent.

[23] The Judge gave general directions to assist the jury answer the questions set out in the question trail. On the question of consent (question 2 for all relevant charges), the Judge said this:

> [17] … Consent means a true consent given by a person who is able to understand the significance of what is to happen and who is able to make an informed and rational decision as to whether to consent or not. Consent must be a freely given one. It is important to distinguish between a consent that is freely given and submission to what she may regard as unwanted or unavoidable. Lack of protest or physical resistance does not of itself amount to consent. Allowing sexual activity because of the application of force to the complainant or the threat or fear of such application of force is not consent. Now that is as a matter of law and that has to do with what she is thinking.
>
> [18] Before I go on, you see in the extreme situation, a woman, even a woman who has been in a relationship with the man, can be lying there, allowing the man to have sex with her and in her mind she says, "I don't consent to this, I don't want it," but says nothing about it, just lies there. And, the jury accepted that as the fact of the case. She didn't [in her own mind]. She wasn't consenting. Then she's not consenting. So this has really nothing to do with Mr Heke-Gray, it's what [the complainant] thinks.
>
> [19] If a woman, as I say, gives up because she is exhausted or she knows it's going to happen, it is unavoidable, unwanted, then that is not a true consent. So, you ask yourselves, "[h]ave the Crown proved beyond reasonable doubt to the point where you are sure that she did not consent?" and if you say, "[y]es, we're sure she did not," in the very strict terms that I have described and said to you, you move onto question 3. If you say, "no, we're not sure about that," then that is the end of it and you would find him not guilty.

[24] Turning to whether the Crown had excluded the possibility that Mr Heke-Gray had a reasonable belief the complainant was consenting (questions 3 and 4), the Judge explained to the jury how they should approach these questions:

> [20] If you are satisfied, beyond reasonable doubt, to the point where you are sure that [the complainant] did not consent, then you must consider whether the Crown have proven beyond reasonable doubt the defendant did not have a reasonable belief that she was consenting. Now there are two ways that the Crown can satisfy a jury of that and can satisfy you on that subject. The first way is contained in question 3, "[a]re you sure that Mr Heke-Gray did not believe [the complainant] was consenting?" If the Crown satisfy you that the defendant did not in fact believe she was consenting, and that is concerned with what the defendant himself thought at the time, that is, he did not believe she was consenting, that would be enough. The second way, and this is captured in [question] 4, that the Crown can prove this, and you only go onto [question] 4 if you say, "[n]o, we're not satisfied on [question] 3" is that Mr Heke-Gray had no reasonable grounds to believe that [the complainant] was consenting.
>
> [21] What the defendant, Mr Heke-Gray, thinks is reasonable is not the issue. The grounds of the belief have to be reasonable. That requires an objective assessment by you, looking at all circumstances, as representatives of our community, whether those grounds were reasonable. A person may think that the other is consenting, but he might not have any reasonable grounds for it. That is for you to decide objectively. Was it reasonable for Mr Heke-Gray to think that? If indeed you find he did think that. That is why what Mr Heke-Gray thinks about the reason, or the grounds, cannot be taken into account, as the sole decider of this issue.
>
> [22] That is pretty legalistic, so I will try and give you an example. If a man holds a knife to a woman's throat and says, "I'm going to have sex with you," and does, and, "[w]hen I am having sex with you, you are to continually say, '[y]es, I want it, I like it, moan.'" The man then cannot come along and say, "[w]ell, I thought she was consenting," because you, as representatives of our community, will say, "[n]o, no, a man can't hold a knife to a woman's throat and think that she was consenting to having sex." Does that help you? I just got some blank looks there. So that is why you decide, as representatives of our community, whether, if you find Mr Heke-Gray did believe she was consenting, whether that was reasonable or not, and if you find, "[y]es, we are sure he had no reasonable grounds to believe that she was consenting," then that is the second way the Crown can prove this essential element. It only requires one of those to be proved beyond reasonable doubt.
>
> [23] Now, the material time when you look at consent and belief in consent is at the time when the sexual connection, fingers in the vagina, penis in her anus, fingers in her anus, actually took place. The complainant's behaviour and attitude before and after the act itself may be relevant to that issue but it is not decisive. The real point is whether there was true consent or a reasonably based belief in consent at the time the act took place.

Jury question

[25] As noted, the Judge gave his summing up on Friday morning. The jury retired to consider their verdicts just before midday. At 3.45 pm, the foreperson presented a "jury trial communication" concerning the questions in the question trail for Charge 1.

[26] The questions in the question trail on Charge 1 were:

> 1 Are you sure that at the beach Mr Heke-Gray introduced his finger(s) into [the complainant's] genitalia?:
>
> 2 Are you sure that [the complainant] did not consent to that act?
>
> 3 Are you sure that Mr Heke-Gray did not believe [the complainant] was consenting?
>
> 4 Are you sure that Mr Heke-Gray had no reasonable grounds to believe that [the complainant] was consenting?

[27] The jury communication read as follows:

> Charge 1
>
> Q 1: all agree yes
>
> Q 2: all agree yes
>
> Q 3: all agree no
>
> Stuck on question 4
>
> How is any reasonable person to know that she did not consent if she pretended
>
> So generally speaking how is a man ever to know whether she is consenting or not if she pretends

[28] After discussing the matter with counsel, the Judge answered the jury communication at 4.25 pm by largely repeating the directions he had already given in his summing up:

> I proceed on the basis that you are considering questions 3 and 4 in relation to this jury trial communication so that you are satisfied beyond reasonable doubt that [the complainant] did not herself consent to the activity, and if you reach that point which you obviously have, there are two ways that the Crown can satisfy you on the subject that the defendant did not have a reasonable ground to believe that she was consenting and the Crown have to prove that beyond reasonable doubt.

> So question 3 covers the first of the two ways that the Crown can satisfy you of this. One would be for the Crown to satisfy you that the defendant did not in fact believe she was consenting, that is concerned with what the defendant, Mr Heke-Gray, himself thought at the time. If you are satisfied, if you are sure that he did not believe she was consenting that would be enough and you would find him guilty. If you say, no, we're not satisfied that the defendant himself thought she was consenting [you] would say well move onto question 4 which is the second way that the Crown can satisfy you on this limb, that is, that the defendant could not reasonably have thought that [the complainant] was consenting. What the defendant thinks is not the issue.
>
> If you are satisfied that the defendant had no reasonable grounds to believe that she was consenting that would be enough too. That requires an objective assessment by you of all the evidence, what occurred before, what occurred at the time and what occurred after. Bearing in mind you make this decision at a point in time when the physical act is taking place, that's the crucial bit. Of course, you look at what happened before, at that crucial point and what happened after and you decide that as representatives of the community considering all of the evidence. Have the Crown satisfied you the defendant could not reasonably have thought that she was consenting, and again that is not what the defendant thinks is reasonable it's what you think is reasonable. It's what we call an objective test. A general test – subjective test is in your own mind, objective test is other people in the community.
>
> Now having discussed it and taken submissions from counsel, I can't answer the two questions that you ask because those are questions of fact for you, at least at this stage.
>
> So I have given you the general law, the two limbs which are covered by questions three and four, directed you how or what you should look at and how you should come up with your decision.

[29] The Judge then addressed the options available to the jury if they needed more time to consider their verdicts, given it was already late on a Friday afternoon.

> Now, and you mightn't know this, when we reach about 5 o'clock you have the option at that point, and I don't put any pressure whatsoever. What you decide to do both I and counsel will just agree with, all right, so don't think we're trying to pressure you into anything but what I'm going to now tell you is the options that you have.
>
> At around 5 o'clock if you want you can stop for the day and come back on Monday. If you want to push on tonight we can do that, we can stay here till a reasonable hour and if it goes past about 6 o'clock dinner will be provided but we don't allow juries to sit till 9, 10, 11 o'clock at night or 1 o'clock in the morning because experience has shown that at that time sometimes juries just give in just to go home and have a sleep so we don't allow that but it's over to you. If you want to go through till 5 o'clock and then go home or thereabouts that fine. If you want to push on to 7 or 8 or 9, that's fine, just let me know and I will arrange for dinner to come in or at any time if you go past 5 and you decide, no, we've had enough, we're all getting a bit jaded here and it's all a bit repetitive what we're talking about and we'd rather go home well you just let me know and that's what you can do. We don't keep you together until sort

> of 7.00 am tomorrow morning and we're all sort of bleary eyed, [that is] not the way we do it. You've got to be fresh, you've got to be focused. I'm talking generally about juries.
>
> So those are your options and you just let me know in one of these jury trial communications what you would like to do and we'll do it and I know we've got a juror in the back there that doesn't really want to be here Monday and I suppose there are a number of others that don't but we cannot sit tomorrow being a Saturday with the industrial action and everything the Courts are taking, there's just no one here. We have people tonight, other people will come in and provide security for everybody so there's no difficulty with that but you can't sit tomorrow. He's not going now, he's going to go shortly. So you let me know, Mr Foreman, what your jury wants to do.

[30] The jury retired again just after 4.30 pm. They returned to give their guilty verdicts on all charges at 5 pm.

Appeal against conviction

First ground — reasonable belief in consent — Dr Birath's report

[31] Sexual violation is defined in s 128(1) of the Crimes Act 1961 as rape or unlawful sexual connection. Rape is defined in s 128(2):

> (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

[32] Unlawful sexual connection is defined in s 128(3):

> (3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

[33] Consent must be assessed at the time of the sexual connection. A "belief that the complainant gave broad advance consent to sexual activity of an undefined scope"

is plainly not sufficient.[4] The absence of any protest or offer of physical resistance does not constitute consent.[5] As the majority stated in the Supreme Court decision in *Christian v R*, there "must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent".[6] The Court elaborated that "[o]ne such factor could be a positive expression of consent" or "a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted".[7]

[34] As this Court observed in *R v Can*, the statutory language focuses on the actual state of mind of the defendant and the reasonableness of the grounds for any belief the defendant may have had as to whether the complainant consented.[8] It follows that a defendant's personal characteristics could potentially be relevant to the enquiry. However, the issue did not squarely arise in that case because it had not been argued at the trial that the defendant was any less likely than a hypothetical reasonable person to recognise that the complainant was not consenting.[9]

[35] In *Nixon v R*, this Court confirmed the possibility that a defendant's personal characteristics could be relevant to the reasonableness of an asserted erroneous belief in consent although it considered such cases were likely to be rare. The Court stated there would need to be a credible narrative or expert opinion that the particular characteristic was relevant to the asserted belief in consent.[10]

[36] This Court was invited to reconsider the issue in *Taniwha v R*, but it declined to do so because the defendant had not pointed to any personal characteristics that

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4 *R v Barton* [2019] SCC 33, [2019] 2 SCR 579 at [93] and [99] per Moldaver, Côté, Brown and Rowe JJ.

5 Crimes Act 1961, s 128A(1).

6 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [45] per William Young, Glazebrook, O'Regan and Ellen France JJ.

7 At [46].

8 *R v Can* [2007] NZCA 291 at [43]. See also *R v R* [2008] NZCA 222 at [31]; *Taniwha v R* [2010] NZCA 15 at [18]–[21]; and *Nixon v R* [2016] NZCA 589.

9 *R v Can*, above n 8, at [51]. The Supreme Court declined leave to appeal: see *Can v R* [2007] NZSC 93.

10 *Nixon v R*, above n 8, at [30].

distinguished him from the ordinary person.[11] Nevertheless, the Court accepted there may be cases where the trial judge should isolate particular circumstances or characteristics of a defendant that may be relevant to whether there were reasonable grounds for belief in consent.[12]

[37] Dr Birath is a clinical neuropsychologist who specialises in assisting adults with brain impairment, including those with neurological conditions such as FASD. He studied and practised in California and is currently Assistant Clinical Professor at the David Geffen School of Medicine at the University of California, Los Angeles. He immigrated to New Zealand in 2021 and is a Consultant Clinical Neuropsychologist at the FASD Centre Aotearoa in Auckland. Having assessed Mr Heke-Gray early this year, Dr Birath confirms the informal diagnosis of FASD made when Mr Heke-Gray was an adolescent.

[38] Dr Birath says that a diagnosis of FASD typically requires impairment in at least three of 10 brain domains. Dr Birath assesses Mr Heke-Gray as having impairment in seven of these, namely, intellect/cognition, academic achievement, language, attention/processing speed, memory, executive functioning, and adaptive/social functioning. Dr Birath explains that individuals with FASD tend to function with a concrete understanding of the world and have diminished ability to engage in abstract reasoning. They have impaired abilities in social understanding and judgement.

[39] Dr Birath suggests that this disorder may have contributed to Mr Heke-Gray's inability to assess and understand the complainant's "level of consent" to the sexual activity:[13]

> The facts of the case indicate that [Mr Heke-Gray] and [the complainant] *came to an agreement about sexual activities that were transactional in nature.* Prior to their activities, [the complainant] had communicated (to his understanding) both a willingness and a desire to engage in sexual activities. *At some point after this agreement, the dynamic apparently changed* such that she no longer wished to participate in them. *While a* cognitively-, intellectually-, and socially-*normally functioning adult might pick up on the nuances of a changing dynamic of consent*, *Mr Heke-Gray is none of these*.

[11] *Taniwha v R*, above n 8, at [21] and [23].
[12] At [22].
[13] Emphasis added.

> *In the absence of explicit and straightforward communication about her desire to alter or stop* their activities, *it would be very difficult for someone with his level of impairment to read the social nuance of the situation to understand that her internal mental state had changed such that she had a new and different desire to not proceed as previously agreed.* Furthermore, his executive functioning impairments, characteri[s]ed by cognitive inflexibility and *concrete thinking*, would have made him much more *likely to get "stuck" on the original* transactional nature of their *agreement* and have *little appreciation for any changing of their dynamic* as time passed while they were together. *If it was his initial clear impression that she was agreeing to their activities, his FASD-related deficits would make him very unlikely to waiver from this understanding without clear and direct contrary information.*

[40] Ms Johnston, for the Crown, submits that the evidence is not fresh. While she acknowledges that the extent to which a defendant's personal characteristics can be considered in the assessment of reasonable belief in consent remains unclear in New Zealand, she submits the evidence is not sufficiently cogent to justify admission on appeal. She contends the evidence does not indicate that any different verdict might have been reached.

[41] We accept that the evidence is not fresh in that it could have been obtained with reasonable diligence prior to the trial. This is particularly so given Mr Heke-Gray had been informally diagnosed with FASD years earlier. However, the evidence is plainly credible, and its admissibility turns on whether it is cogent in that it could have affected the outcome.[14] We therefore now consider whether there is a real prospect that a miscarriage of justice occurred because Dr Birath's evidence was not before the jury.[15]

[42] We make the preliminary observation that some of Dr Birath's evidence would not be admissible in any event. The passage quoted above does not accord with the correct legal position in that it appears to proceed on the assumption that a prior agreement to engage in sexual activity may be sufficient to constitute reasonable belief in consent to the particular sexual activity founding the charge unless the complainant made withdrawal of consent clear to him by "explicit and straightforward communication".

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14 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; and *R v Bain* [2004] 1 NZLR 638 (CA) at [22] and [25].

15 *Ieremia v R* [2020] NZSC 143, [2021] 1 NZLR 168 at [42].

[43] In any event, we do not consider Dr Birath's evidence could have provided any material assistance to Mr Heke-Gray on whether he had a reasonable belief in consent on the later charges relating to the sexual activity at the hotel (charges 6 and 7), and the charge of rape (charge 11). Mr Heke-Gray defended these later charges on the basis that the sexual activity did not occur. There was no narrative to support a submission to the jury that Mr Heke-Gray had an honest belief in consent and that this could be considered objectively reasonable taking into account his limited ability to "pick up on the nuances of a changing dynamic of consent". For these later offences, there was no evidence to raise the possibility of a nuanced changing dynamic that Mr Heke-Gray was not sufficiently attuned to because of his condition. Rather, the complainant's evidence, which the jury must have accepted, was that she made it perfectly clear to Mr Heke-Gray, by explicit straightforward communication of the kind Dr Birath suggests was necessary to get through to him, that she did not consent.

[44] We will address these later charges first before considering whether the absence of Dr Birath's evidence could have affected the outcome on the three charges of unlawful sexual connection on the first day, at the beach.

[45] In respect of charges 6 and 7 at the hotel on the night of 13 October 2016, the complainant's evidence was that she repeatedly told Mr Heke-Gray, "no, please don't", "stop, stop, this is hurting me", "please stop, it really hurts", "I'm in pain", but he carried on regardless in an extremely violent manner to the point where she soiled the bed. She said it was "just horrible, so painful" and that she had "never felt pain like it". She also said Mr Heke-Gray turned the music up "real loud" so that no one could hear her.

[46] The complainant was challenged in cross-examination on the basis that no sexual activity took place that night. She firmly rejected that. Mr Heke-Gray's evidence was that he was tired and went to sleep early, just on dark or a little after. He denied having sex with the complainant that night. This was the case advanced by his counsel in his closing address — "his case is there was no sex that night".

[47] The jury was clearly satisfied beyond reasonable doubt that the sexual activity described by the complainant took place and that she did not consent to it.

Having accepted the complainant's evidence about this, there was no basis for the jury to entertain a doubt that Mr Heke-Gray may have thought the complainant was consenting to this extremely violent sexual activity and he had reasonable grounds for that belief. The jury could not have been assisted by the knowledge that Mr Heke-Gray has difficulty picking up social cues and nuances. Dr Birath does not suggest that Mr Heke-Gray's condition could have impeded his ability to understand the complainant's repeated pleas for him to stop.

[48] The same analysis applies to the charge of rape on 25 October 2016. The complainant's evidence was that she woke up to find Mr Heke-Gray watching pornography. When he asked for sex, she told him that she did not want to because she had thrush and was sore. She said he took no notice and proceeded to forcibly remove her underwear even though she was resisting. He then forced himself on her and raped her despite her repeated pleas for him to stop, saying that he was hurting her. When she started crying and screaming, he put a pillow over her head to muffle the sound.

[49] Mr Heke-Gray gave a fundamentally different account in his evidence, denying he had sex with the complainant that morning. He was adamant that they had not had sex for days. He said he was dehydrated that morning and his head felt like it had been "kicked in". He said he was "spewing up" and "none of that little scenario happened".

[50] Again, the jury must have rejected Mr Heke-Gray's evidence about this incident and accepted the complainant's evidence. The jury's assessment would not have been assisted by Dr Birath's evidence that Mr Heke-Gray is rigid in his thinking and has difficulty reading "the social nuance of the situation".

[51] In our view, there is no prospect that Dr Birath's evidence could have assisted the jury in respect of any of the sexual violation charges other than potentially those arising out of the admitted sexual activity that took place at the beach, shortly after the complainant and Mr Heke-Gray first met. We now turn to consider those charges.

[52] In her evidential interview, the complainant described what happened in the car after she and Mr Heke-Gray arrived at the beach (charges 1, 2 and 3):

> … we parked up and this is the first time he sexually assaulted me and he basically was putting his hands all over my face, he was squeezing my face like this, he was slapping me, um, he pulled my shirt up … and he bit me on my stomach a few times, I've still got the bruises, um, he put his fingers inside me, um, inside my vagina, um, he squeezed my breasts quite hard, um, and was kissing me and, um, and then he put his fingers up my anus and was being quite rough, um, I, I didn't say no, I didn't, I didn't say I didn't want this to happen but I was, I had felt I had no choice, I was, I was extremely uncomfortable, extremely worried and … quite fearful because I thought if this is what it's gonna be like the first time, what's it gonna be like for the rest of the time.

[53] Later in the interview, the complainant was asked what Mr Heke-Gray said at the start of this episode. She replied:

> … he just said, "fucken pull your pants down you fucken whore", and that's it, that's all I remember …

[54] She elaborated on what happened:

> … he was just grabbing me, um, pulling my pants down, pulling my top up, just biting me on my, on my torso, kissing me really roughly, um, grabbing my face and doing that to it and slapping me like quite hard too, um, putting his fingers like in my mouth and down my throat like making me gag, it was just horrible …
>
> …
>
> He started with just two [fingers] and then he moved to four and then he tried to fist me. So he tried to put his whole hand up there basically, he was doing that like real hard. So it was quite painful, um, it was horrible, um, and then he did it to my anus. So he put his fingers up there and put four fingers up there and he was doing that thing again, um, and it just, it was a mess, made a mess. It was horrible.
>
> …
>
> There was just faeces everywhere. It was horrible.

[55] When asked whether she said anything at the time, the complainant responded:

> I wasn't saying anything. I didn't say a thing.

[56] When asked why not, the complainant responded:

> … I, it felt like I had no choice, felt like I, I was just moaning like I was just like writhing in pain and was just making pain sounds but I was trying to make it sound like I was enjoying myself but really I was just moaning in pain really, it was a really unpleasant experience and never, ever in my life have I ever had that.

[57] Turning to charge 4, which occurred in the toilets at the beach, the complainant said:

> … [S]o after that, um, we went into the toilet where he, um, penetrated me anally and hurt me quite bad, um, had his, while he was doing that he had his hands around my throat like from behind like pulling me back and, um, and then, yeah, he, he just, he just invaded my privacy completely, um, just, it was horrible, it was really just, it was just disgusting what he was doing …
>
> …
>
> [He was] calling me names. Just saying I'm a dirty whore and a slut and a hoe and, yeah, and filthy whore.

[58] The complainant was asked in her evidential video interview whether she protested during this incident:

> [Q.] … did [you say or do] anything during that time, that would've made him think that it, you didn't want it or?
>
> [A.] No, 'cos I didn't, I, to be honest I didn't say no, I didn't scream, I didn't cry, I just took it, I just crunched my teeth and took it, mm.

[59] In cross-examination, the complainant rejected the proposition that she was an active and willing participant in what occurred at the beach. She also rejected the suggestion that Mr Heke-Gray used only one or two fingers, saying that was "a lie". She agreed that she did not say "no".

> Q. So everything that happened in the car, no matter what was going on in your head, you didn't say anything to give him the message no, did you?
>
> A. No, I couldn't feel like – I didn't feel like –
>
> …
>
> Q. In the car. So what did you mean, "Like I was trying to make it sound like I was enjoying myself?"
>
> A. Yeah[,] 'cos I didn't, I didn't want to upset him or I didn't, I didn't want him to think I wasn't able to handle it like but I was really – the sounds I was making weren't enjoyment sounds.
>
> …

A. I never said yes. I never said yes. I never said no either, but I never said yes.

…

Q. Were you, you were moaning weren't you?

A. Moaning can have two different meanings.

Q. Okay.

A. Moaning in pain, moaning in pleasure.

Q. Were you moaning with pleasure?

A. No.

Q. Were you intending to convey to him though that the moaning was with pleasure?

A. Yes.

[60] It is evident from the jury communication that this part of the evidence caused the jury some difficulty on the issue of reasonable belief in consent. However, the jury clearly did not consider this evidence in isolation. They were entitled to consider this part of the evidence in the context of all the evidence in respect of this incident. The jury found it had been proved beyond reasonable doubt that Mr Heke-Gray assaulted the complainant with intent to injure her in the car. The extreme physical and sexual violence he inflicted at that time went well beyond anything discussed in the messages exchanged the previous day. Her earlier indicated willingness to participate in anal sex was on the express basis that he would use lubricant and not hurt her. Mr Heke-Gray assured her that he would never hurt her. He clearly knew the complainant was not consenting to being hurt. The absence of protest or complaint by the complainant at the beach does not assist Mr Heke-Gray on the issue of reasonable belief in consent.

[61] What happened in the car and later in the toilet went so far beyond what had been discussed that there was no room for the prospect that any subjective belief in consent held by Mr Heke-Gray could be rendered objectively reasonable in the light of the rigidity in his thinking and inability "to read the social nuance of the situation". The fundamental problem with Dr Birath's thesis is that there was no evidence that the complainant's "internal mental state had changed such that she had a new and different

desire to not proceed as previously agreed" and that Mr Heke-Gray could not reasonably be expected to be able to pick up on this because of his condition. We do not consider this case is analogous to the circumstances discussed by the Supreme Court in *Christian v R* (referred to at [33] above) as potentially supporting a reasonable belief in consent.

[62] For these reasons, we conclude that Dr Birath's evidence is not cogent in that it could not have affected the outcome. In our view, there is no risk that justice miscarried because his evidence was not before the jury. This ground of appeal fails.

Second ground — adequacy of directions on reasonable belief in consent

[63] Mr Chisnall submits that tailored directions on the elements of consent and reasonable belief in consent were required in this case given the unusual relationship between the complainant and Mr Heke-Gray. He submits that the Judge's directions were incomplete in three critical respects:

(a) The jury was not told that the objective reasonableness of belief in consent had to be considered from the perspective of a person in Mr Heke-Gray's shoes. This alleged error was repeated in answer to the jury question.

(b) No direction on reluctant or regretted consent was given.

(c) The example chosen by the Judge to illustrate what does not constitute reasonable belief in consent as a matter of law was inappropriate given the close similarity to the Crown's case.

<u>Directions on objective reasonableness of belief in consent</u>

[64] For ease of reference, we repeat the passage of the Judge's summing up which Mr Chisnall submits was correct but incomplete:

> [21] What the defendant, Mr Heke-Gray, thinks is reasonable is not the issue. The grounds of the belief have to be reasonable. That requires an objective assessment by you, looking at all circumstances, as representatives of our community, whether those grounds were reasonable. A person may

> think that the other is consenting, but he might not have any reasonable grounds for it. That is for you to decide objectively. Was it reasonable for Mr Heke-Gray to think that? If indeed you find he did think that. That is why what Mr Heke-Gray thinks about the reason, or the grounds, cannot be taken into account, as the sole decider of this issue.

[65] We also repeat the relevant part of the Judge's response to the jury question:

> If you are satisfied that the defendant had no reasonable grounds to believe that she was consenting that would be enough too. That requires an objective assessment by you of all the evidence, what occurred before, what occurred at the time and what occurred after. Bearing in mind you make this decision at a point in time when the physical act is taking place, that's the crucial bit. Of course, you look at what happened before, at that crucial point and what happened after and you decide that as representatives of the community considering all of the evidence. Have the Crown satisfied you the defendant could not reasonably have thought that she was consenting, and again that is not what the defendant thinks is reasonable it's what you think is reasonable. It's what we call an objective test. A general test – subjective test is in your own mind, objective test is other people in the community.

[66] Mr Chisnall's complaint is that these directions omitted an important aspect of the enquiry which is directed to a hypothetical reasonable person "in the shoes of the defendant", being the formulation suggested by this Court in *R v Gutuama*:[16]

> [39] … The other way of satisfying the third element would be to satisfy you that no reasonable person in the [defendant's] shoes could have thought that [the complainant] was consenting. That is concerned with the belief of a reasonable person placed in the [defendant's] position. If no reasonable person would have thought that she was consenting, that too would be enough from the Crown's point of view.

[67] We do not consider there was any misdirection by the omission of any specific reference to a reasonable person "in Mr Heke-Gray's shoes". The purpose of the suggested direction in *Gutuama*, referring to a reasonable person in the defendant's shoes, was not to import any subjective element to this part of the enquiry, which is an objective test. Rather, the idea was to invite the jury to consider the matter from the perspective of a reasonable person placed in the defendant's position taking account of all relevant circumstances. That is effectively what the Judge directed the jury to do in his summing up using different words — "*looking at all circumstances*, as representatives of our community, *whether those grounds were reasonable … Was it reasonable for Mr Heke-Gray to think that*?"[17]

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[16] *R v Gutuama* CA275/01, 13 December 2001 at [39].
[17] Emphasis added.

[68] It is also what the Judge directed the jury in response to their question:

> That requires an objective assessment by you of all the evidence, what occurred before, what occurred at the time and what occurred after. Bearing in mind you make this decision at a point in time when the physical act is taking place, that's the crucial bit. Of course, you look at what happened before, at that crucial point and what happened after and you decide that as representatives of the community considering all of the evidence. Have the Crown satisfied you the defendant could not reasonably have thought that she was consenting, and again that is not what the defendant thinks is reasonable it's what you think is reasonable.

[69] It can be seen that the Judge directed the jury to consider all the relevant circumstances and what Mr Heke-Gray could reasonably have thought. We note that the Judge's directions align with the current specimen directions in the bench book, which similarly contain no reference to assessing the existence of a reasonable belief in consent from the perspective of a person in the defendant's shoes:

> If you are satisfied beyond reasonable doubt that the complainant did not consent, then you must consider whether the Crown has proven beyond reasonable doubt that the defendant did not have a reasonable belief that she was consenting. There are two ways that the Crown could satisfy you on that subject.
>
> 1. For the Crown to satisfy you that the defendant did not believe that she was consenting. That is concerned with what the defendant himself thought at the time. If he did not believe that she was consenting, that would be enough.
>
> 2. For the Crown to satisfy you that the defendant could not reasonably have thought the complainant was consenting. What the defendant thinks is reasonable is *not* the issue. If you are satisfied that the defendant had no reasonable grounds to believe the complainant was consenting, that too would be enough.
>
> The Crown must satisfy you as to at least one of those requirements, beyond reasonable doubt.

Direction on reluctant or regretted consent

[70] Mr Chisnall submits that the Judge erred by not giving a direction that consent includes a consent given reluctantly or hesitantly and one that might be regretted afterwards.[18] He submits that the way the complainant answered questions in evidence created the need for such a direction.[19] He argues the outcome could well have been

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18 Citing *R v Herbert* CA81/98, 12 August 1998.

19 Citing *Dibben v R* [2018] NZCA 134; and *Charlton v R* [2016] NZCA 212.

different if such a direction had been given. He says the jury's question highlights the materiality of this error.

[71] The Judge gave clear directions on what is meant by consent in this context. For the reasons summarised below, we do not consider there was any requirement for the Judge to go further in the circumstances of this case and discuss the possibility the complainant consented reluctantly, hesitantly, or later regretted giving consent.

[72] We have already reviewed the complainant's evidence. She was clear that she did not consent. It was not put to her in cross-examination that she gave consent reluctantly or hesitantly or that it was only later that she regretted giving consent. To the contrary, it was put to her that she was "an active and willing participant" in the sexual activity at the beach.

[73] Mr Heke-Gray defended the later charges on the basis that the sexual activity did not take place. As for the beach charges, his evidence was that the complainant not only consented, but she was a willing participant who enjoyed the experience.

[74] There was therefore no evidential basis for any suggestion of a reluctant, hesitant, or regretted consent in respect of any of the charges. The jury might have been puzzled if the Judge had attempted to give a tailored direction on this topic when it had not formed any part of either the Crown or the defence case.

<u>Direction on what does not constitute reasonable belief in consent</u>

[75] We have already quoted the Judge's directions in his summing up at [24] above. For ease of reference, we set out again the particular passage Mr Chisnall criticises:

> That is pretty legalistic, so I will try and give you an example. If a man holds a knife to a woman's throat and says, "I'm going to have sex with you," and does, and, "[w]hen I am having sex with you, you are to continually say, '[y]es, I want it, I like it, moan.'" The man then cannot come along and say, "[w]ell, I thought she was consenting," because you, as representatives of our community, will say, "[n]o, no, a man can't hold a knife to a woman's throat and think that she was consenting to having sex." Does that help you? I just got some blank looks there.

[76] Mr Chisnall submits that the Judge's example contained inflammatory elements drawing on themes running through the Crown's evidence on other charges and was unfairly prejudicial to Mr Heke-Gray's defence. The complainant did not say that Mr Heke-Gray held a knife to her throat or that he demanded that she feign pleasure. While it was part of the Crown's case that Mr Heke-Gray threatened the complainant with the firearm, this was not to secure submission to sexual activity. Mr Chisnall says the hypothetical example chosen by the Judge was fraught because it included features common to the actual offending alleged.

[77] We agree it would have been preferable if the Judge had chosen a hypothetical example that did not include features similar to the alleged offending. The Judge's reference to "moan" was not a hypothetical example, it correlated directly to the complainant's evidence relating to the beach incidents. The reference to holding the knife to the throat bore some resemblance to the evidence that Mr Heke-Gray put his fingers down her throat, and, on another occasion, put a pistol in her mouth and forced it to the back of her throat. The problem with the example chosen was that it unnecessarily created the potential risk of conveying to the jury the message that the moaning might have been in response to a threat of the kind Mr Heke-Gray allegedly made to the complainant and as such this evidence did not assist him on the issue of reasonable belief in consent.

[78] However, there was no evidence that Mr Heke-Gray threatened the complainant at the beach or that she moaned in response to any such threat or demand. There was also no evidence that he held a knife to her throat at any stage or that he even possessed one. None of this formed any part of the Crown's case, and the jury would have been clear about that. The Judge's directions, including those based on the example given, were legally correct. We see no real risk that the jury reached their verdicts otherwise than on the basis of the evidence and in accordance with the law. For these reasons, although we agree that the Judge could have chosen a better example, we do not consider this created a real risk that justice miscarried.

Third ground — adequacy of directions on propensity evidence

[79] The Crown made a pretrial application to adduce as propensity evidence Mr Heke-Gray's convictions for rape and two charges of unlawful sexual connection arising out of events that took place on 3 July 2008. Mr Heke-Gray pleaded guilty to this offending (as well as injuring with intent to injure, two charges of male assaults female and threatening behaviour) and was sentenced on 3 April 2009 to eight years' imprisonment.

[80] The facts of the 2008 offending were as follows. Mr Heke-Gray and the complainant had been in a relationship for six months. After the complainant ended the relationship and moved home to live with her parents, Mr Heke-Gray asked her to come to his room at the backpackers accommodation where he was staying to help him with his computer. Soon after she arrived, an argument broke out. She tried to leave but he blocked her from doing so. He started pushing her around and then kicked her in the face, stunning her. He continued to hit her about the head and face. When she started crying, he turned on the shower and put some music on to dull the noise. He forcibly removed her clothing, forced her legs apart and shoved the end of a bottle into her vagina. He grabbed her by the throat and forced three fingers into her anus. Despite her screaming and begging for him to stop, he did not. He continued to strike her on head, back and legs and threatened to break her fingers. He then appeared to calm down but demanded she perform oral sex on him. She did so and submitted to sexual intercourse with him because she feared for her life.

[81] Judge McDonald ruled that the evidence of the prior convictions for rape and unlawful sexual connection was admissible propensity evidence.[20] At the time the application was made, Mr Heke-Gray was not facing any charges arising out of the events at the beach. Those charges were not added until 8 May 2018. Accordingly, the pre-trial ruling did not consider the admissibility of the propensity evidence in connection with the beach charges, only the later charges.

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[20] *R v Heke-Gray* [2017] NZDC 26064.

[82] Mr Heke-Gray appealed against the pretrial admissibility decision, but the appeal was dismissed.[21] This Court described the relevant propensity as being "a propensity to act towards women in an aggressive, possessive and controlling way, and [to be] sexually and physically violent towards them".[22] This Court considered the 2008 offending was similar to the alleged offending in 2016 (at the hotel and subsequently):[23]

> [40] Therefore, while there are some differences in the background to the 2008 offending and the 2016 allegations, ultimately, the core elements of both are significantly similar. The complainants were both situationally vulnerable women. The [complainant in] the 2008 offending was not permitted to leave and was repeatedly hit about the head and choked, while the complainant in the 2016 allegations was overpowered by Mr Heke-Gray's threats and actions. That continued until she was able to escape. She knew no one in Whangārei. Mr Heke-Gray remained with her throughout.
>
> [41] Mr Heke-Gray used the noise of showers and/or loud music to mask his offending. He was possessive, in the extreme, towards both women. He took each of their cell phones and accused them of being unfaithful. He accompanied them both to medical appointments in respect of their injuries but tried to stay with them so they could not complain or tell medical staff what had occurred. He sexually assaulted them both, including by digital anal penetration, despite their protests.

[83] Judge McDonald gave the jury the following directions on the relevance of the propensity evidence and how it could be used:

> [68] … The Crown says it is therefore likely that he has done what he is charged with, on this occasion, in this trial. The Crown highlight similarities between these two complaints, the one in 2008 and the one before you, saying the similarities between the two disclose a pattern of behaviour which makes it more likely the defendant has committed the offences he now faces. That is a legitimate argument only if you first accept that similarities or [a] pattern between the earlier admitted offending and the current alleged offending actually exist.
>
> [69] Here, the issue in relation to the beach and the [hotel] is whether the complainant consented and whether the defendant had reasonable grounds to believe she was. In relation to the last incident, the rape on 25 October 2016, the issue is whether there was sexual intercourse that morning. The Crown highlights that on both occasions, in July 2008 … for which he pleaded guilty to the charges, and the alleged offending here in 2016, there are similarities and points to the following. The offending, in relation to both, was against vulnerable women. In July 2008, the complainant was, in effect, trapped in his room at the backpacker's. Here, [the complainant] came up to Whangārei where she knew no one, was in his car driving at his direction, where to go,

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[21] *Heke-Gray v R* [2018] NZCA 153.
[22] At [31].
[23] Footnote omitted.

where to stay, and was almost always with him and controlling of her. Secondly, there was anal sex on both occasions. That is in 2008 and here. The Crown say that is unusual, that type of sexual activity. Three, he used noise, music, the shower, to mask the sounds of what he was doing to each of the women. Four, he was intimidating on both occasions. Both the woman in 2008 and [the complainant], are slender, small built women, where he is a powerful, well-built man. On both occasions, in 2008 and in 2016, he was possessive and displayed paranoid behaviour, jealous behaviour, in relation to both of them. Both complainants, with his assistance, used medical professionals to get away. In 2008, he took the [complainant] to the … Hospital. In 2016, on the last occasion, 25 October, he took her to [a] Clinic, attempted to remain close by, but on both occasions the medical staff separated them. The Crown say while there is a considerable time distance between the two events, 2008 and 2016, that can be explained by him being in prison. He was only released on 4 July 2016 and, to be kind, was being managed by [a probation officer] until 22 September 2016 when he went on the run and came up here.

The defence contest those similarities, arguing that there is no pattern established between the two. The defence say the 2008 admitted offending was at the end of a six month relationship, whereas in 2016 he had just met [the complainant] and that relationship was just beginning. 2008, was one occasion overnight. 2016, a number of days. In 2008, there was one place, the backpacker's, whereas in relation to this trial, there were several different locations. In 2008, there was a rape and fingers in the anus, whereas here, there were fingers and a penis in the anus. 2008 was not a business arrangement but the end of a relationship. In 2016, Mr Fairley says it was. In 2008, he raped her because he thought she was being unfaithful. Mr Fairley says in 2016 not so. In 2008, she was down there living with her family and had support, whereas [the complainant] came up to him and had none.

You need to ask yourselves a simple question, "Are we satisfied that these incidents disclose a pattern of behaviour on his part?" Of course, no two events or incidents would be exactly the same and they need not be for you to take it into account. If the answer to that question is yes and you accept the idea that these incidents disclose a pattern of behaviour, then that is evidence you can take into account in deciding whether there was consent and/or belief in consent, on reasonable grounds, in relation to the first two, and whether there was sexual intercourse in relation to the last. If the answer is no and you reject the idea that these incidents disclose a pattern of behaviour, you should put the 2008 incident to one side and concentrate on the remaining evidence. Just because the defendant was involved in sexual misconduct on a previous occasion does not mean he has not done so on this occasion. It is also important to remember that the evidence of the earlier rapes and sexual violations is only one item of evidence. It may assist you, but you need to consider all the evidence in order to decide the issues in this case. Please do not reach that conclusion simply out of a dislike for the defendant arising from his prior misconduct. Do not conclude that because he has previously been involved in sexual misconduct, he therefore must be guilty of these charges.

[84] Mr Elborough submits that the probative value of the 2008 offending to the issues in dispute in relation to the beach incidents was outweighed by the risk of illegitimate prejudice. He says the key similarities — unusual possessiveness, threats,

and the use of loud music to muffle sound — did not emerge until after the incidents at the beach. Mr Elborough submits that the Judge was therefore required to "ringfence" the beach charges to mitigate the risk of illegitimate propensity reasoning. He also argues that the Judge's reference to "a pattern of behaviour", without identifying the alleged propensity more specifically, effectively invited the jury to engage in illegitimate reasoning that Mr Heke-Gray had a general tendency to rape.

[85] We consider the propensity evidence was admissible in respect of the beach charges as well as the other sexual violation and rape charges. While Mr Heke-Gray accepted that sexual activity took place at the beach, he disputed the complainant's account that it involved significant violence. For example, he disputed her evidence that he forced four fingers into her anus and tried to "fist" her. His evidence-in-chief was that he "play[ed] with her vagina" and "then started playing with her bum". When cross-examined, he was only prepared to accept that he inserted a single finger into her anus. There were other unusual and distinct similarities, such as Mr Heke-Gray's extremely possessive and controlling behaviour, which included taking control of the complainant's phone.

[86] We agree with Ms Johnston that the propensity directions were adequate and met the requirements set out in the Supreme Court's decision in *Mahomed v R*.[24] In particular, the Judge identified the propensity evidence, explained why it had been led and how, if at all, it could be taken into account by the jury. The Judge summarised the competing contentions of the parties and gave standard directions to guard against the risk of unfair prejudice associated with the propensity evidence. We note that no issue was raised by the experienced trial counsel about these directions at the time.

Fourth ground — trial counsel error

[87] One of the Crown witnesses was the nurse at the sexual health clinic who spoke to the complainant on 19 October 2016 and asked her the questions we have already referred to (above at [20]) in order to screen for family violence. These included whether "[w]ithin the last year, [anyone had] forced [her] to have sex in a way [she] didn't want to". The nurse recorded the complainant's answer to this question as being

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24 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [95] per McGrath and William Young JJ.

"no". When Mr Fairley elicited this evidence from the nurse in cross-examination, the Crown solicitor objected on the basis that Mr Fairley had not questioned the complainant about this prior inconsistent statement. Mr Fairley acknowledged his oversight and the Judge directed that the complainant be recalled so that these questions could be put to her. However, the complainant was not recalled because she was unavailable.

[88] In the circumstances, the Judge directed the jury in his summing up that when they assessed this evidence, they were entitled to take into account that the complainant was not asked about it.

[89] That trial counsel made an error is not in dispute. There is no criticism of the Judge's direction. The sole question is whether the error created a real risk that the outcome was affected, rendering the verdicts unsafe.[25] For the reasons that follow, we are satisfied the error could not have affected the outcome.

[90] Mr Fairley cross-examined the complainant extensively and squarely put to her Mr Heke-Gray's case that all the sexual activity between them was consensual. Her firm rejection of that proposition was unwavering. It is highly improbable that her evidence on this fundamental issue would have altered if she had been asked about the responses she gave to the nurse's questions.

[91] The jury heard the nurse's evidence, which was unchallenged. The evidence was also recorded in the notes of evidence that were available for the jury to review. In his closing address to the jury, the Crown solicitor made no point about Mr Fairley's failure to cross-examine the complainant on this issue. Mr Fairley acknowledged in his closing address that the error was entirely due to his oversight, and he asked the jury not to hold this against Mr Heke-Gray. The Judge's direction on the topic was appropriate and brief. Importantly, he did not tell the jury that the nurse's evidence about the answers the complainant gave her should be put to one side or given less weight. There was no reason for the jury to doubt what the complainant told the nurse. The issue for the jury, as they clearly appreciated, was whether those answers reflected the true position. They were plainly satisfied the complainant's statement to the nurse

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25 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] per Gault, Keith and Blanchard JJ.

did not reflect the truth. In our view, there is no realistic possibility that the jury would have reached a different view had the complainant been questioned about this. In other words, we do not consider there is any risk that the outcome was affected by this error and that justice has miscarried as a result.

Conclusion on conviction appeal

[92] All grounds of appeal having failed, the appeal against conviction must be dismissed.

Appeal against sentence

Health assessors' reports considered by the Judge

[93] Mr Jim van Rensburg, a clinical psychologist, considered that Mr Heke-Gray's failure to respond to treatment indicated that an indeterminate sentence would be the best way of motivating him to make "a sincere effort towards desisting from sexual and violent offending":

> Given that Mr Heke-Gray has recently completed a lengthy prison sentence that ostensibly had no deterrent effect the court may consider imposing an even longer custodial sentence on this occasion. During his previous prison sentence Mr Heke-Gray's conduct was such that he was found unsuitable to take part in group therapy. He left it till late in the sentence to display more pro-social conduct to then have the benefit of individual treatment for a short while. It is therefore possible that an indeterminate prison sentence with a relatively short parole eligibility period may motivate him to display pro-social behaviour from the outset and to seriously seek treatment for his problems. It will also ensure that he will be monitored for the rest of his life.

[94] Dr Olivera Djokovic, a consultant psychiatrist, took a more neutral stance on whether a sentence of preventive detention was required. She noted that Mr Heke-Gray had failed to engage in therapeutic programmes related to sex offenders and he had also failed to complete alcohol and drug related programmes. Although he engaged in 11 individualised sessions with a psychologist, she said these were of variable efficacy. Nevertheless, Dr Djokovic considered that various risk management strategies could be employed prior to Mr Heke-Gray's release, and she considered his risk of reoffending could be reduced if he engaged in recommended therapeutic interventions. These would include individualised psychological intervention to address his poor emotional regulation and participation in a sexual offender treatment

programme. Dr Djokovic noted in her report that Mr Heke-Gray appeared to have good support from his extended family and liaison with them prior to his release would be a critical factor in successful community risk management.

Sentencing judgment

[95] Whata J commenced by considering the finite sentence that would otherwise be imposed as an alternative to preventive detention. The Judge assessed the offending as falling within the mid to upper end of band 3 of this Court's guideline judgment in *R v AM (CA27/2009)*.[26] The offending involved multiple occasions of serious violence and violation of a complainant who was in a vulnerable and isolated position. It also involved terrifying threats of violence with a weapon and caused significant emotional and physical harm to the complainant. The Judge considered an overall starting point of 16 years would be appropriate for the sexual and violent offending in all the circumstances.[27]

[96] The Judge would have applied a discrete uplift of 12 months for the charge of conspiring to pervert the course of justice. However, because Mr Heke-Gray pleaded guilty to that charge, the Judge discounted this by three months, resulting in an overall starting point of 16 years and nine months' imprisonment.[28]

[97] The Judge carefully reviewed Mr Heke-Gray's seriously disadvantaged background and upbringing, which the Judge described as traumatic.[29] We need not repeat any of the detail here. The Judge was satisfied there was a clear causal nexus between Mr Heke-Gray's systemic and social deprivation and traumatic upbringing and his offending. The Judge accepted that these factors, together with Mr Heke-Gray's symptoms of ADHD and FASD and substance abuse, were the genesis of his antisocial and violent tendencies and lack of insight.[30] However, any allowance for these personal mitigating factors had to be tempered by Mr Heke-Gray's ongoing denial of his offending:

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[26] *R v AM (CA27/09)* [2010] NZCA 114, [2010] 2 NZLR 750.
[27] Sentencing judgment, above n 2, at [39].
[28] At [41].
[29] At [13]–[17].
[30] At [45].

> [49] I must, however, moderate my approach to any personal circumstances discount because it is not clear to me that you are at all ready to rehabilitate. Indeed, I remain concerned about your ongoing denial of the offending and of the previous offending, in the sense of the harm that you caused. That is a significant factor in any rehabilitation. So, while the deep-rooted causes of your offending reduce your moral culpability, I cannot be naïve about the fact that, on the information available to me, you continue to maintain the [complainant] consented to the abuse. This is also important in cases of serious sexual violence because deterrence and denunciation may need to prevail. Your failure to acknowledge your wrongdoing brings this into consideration.

[98] For these reasons, the Judge said that a 10 per cent discount was the most that could be allowed for personal mitigating factors. No allowance could be made to recognise Mr Heke-Gray's capacity for rehabilitation given his entrenched view that the complainant consented. Mr Heke-Gray expressed no remorse.[31]

[99] Applying this discount, the indicative finite sentence was 15 years and one month's imprisonment.[32] We note in passing that Mr Chisnall does not challenge any aspect of the Judge's analysis or conclusion on the appropriate finite sentence that would otherwise be imposed.

[100] The Judge also considered that a minimum period of imprisonment of 50 per cent or seven years and six months was required to hold Mr Heke-Gray accountable for the harm caused to the complainant, to denounce his conduct, to deter this type of offending and to protect the community.[33]

[101] The Judge then turned to consider whether preventive detention should be imposed instead of the indicated finite sentence. The Judge explained in the following paragraphs of his judgment why he felt compelled to impose preventive detention:[34]

> [54] I am satisfied that all of the factors [in s 87(4) of the Sentencing Act] are engaged to varying degrees. It is clearly aggravating that you were on release conditions when you offended against the [complainant]. Dealing with the issue of treatment, which has been raised by your counsel and which I accept there is some dispute about, while not clear-cut, I am satisfied that there were problems with you gaining your access to [the Special Treatment Rehabilitation Programme]. That being the case, it cannot be said that you failed to seek out that treatment. Balanced against this, your level of

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31 At [50].
32 At [51].
33 At [52].
34 Footnote omitted.

> cooperation in terms of rehabilitative treatment was clearly poor. Furthermore, your ongoing denial suggests that you are not genuinely open to rehabilitative treatment at this time. This favours a cautious approach and close examination of whether a lengthy sentence is preferable.
>
> [55] Coming then to that assessment. With an end sentence of 15 years and one month, you will be in prison for a lengthy period, particularly if you continue to deny your offending. You are also eligible to be considered for an extended supervision order at the end of your sentence. These are mitigating factors, as the Court of Appeal noted in *Parahi*. Furthermore, given what appears to me to be a clear link between your traumatic upbringing and substance abuse and your violent tendencies, there is clear scope for rehabilitation directed to those underlying causes, including via reconnection to your whanāu and to your culture. But, regrettably, I have come to the view that given what appears to be an entrenched denial of your offending, I consider I am obliged to impose a sentence of preventive detention.

Application to adduce further evidence

[102] Mr Chisnall relies on Dr Birath's report to establish that Mr Heke-Gray has FASD and ADHD. The neuropsychological testing he carried out indicates that Mr Heke-Gray has significant intellectual and cognitive impairment, consistent with FASD. Dr Birath assesses Mr Heke-Gray's full-scale intelligence quotient as being in the 2nd percentile, which is in the extremely low range. Dr Birath considers this helps explain Mr Heke-Gray's impaired decision-making, marked impulsivity and reduced ability to understand the consequences of his actions.

[103] Dr Birath says that Mr Heke-Gray is likely to have limited success in any group-based educational rehabilitation setting because of his impairment, but he has benefited from the individual counselling sessions that were provided more recently. Dr Birath considers there are effective and therapeutic ways of managing a disabled person like Mr Heke-Gray and if he is adequately medicated and abstains from abusing substances, "he is likely to benefit greatly from such treatment and have a measure of success in life".

[104] Mr Chisnall also applies to adduce a report from Dr Shanmukh Lokesh, a consultant forensic psychiatrist and senior lecturer at the University of Auckland, who says that Mr Heke-Gray also fulfils the criteria for PTSD. Dr Lokesh considers that a sentence of preventive detention would be counterproductive, and he recommends that a finite sentence be imposed. His primary reasons for reaching this view are captured in the following passages of his report:

> The risk assessment profile indicated a moderate risk of further re-offending. Considering that he has had limited opportunities to engage in any rehabilitation in the past, a sentence of preventive detention would make him less motivated to engage in any therapeutic activities or rehabilitation in future.
>
> One positive factor for Mr Heke-Gray is that he is increasingly motivated to make changes in his behaviour and maintain his resilience. He has taken responsibility and is aware of addressing the earlier mistakes in his life. Despite the legal outcome, he is keen to engage in rehabilitation recommendations and obtain a qualification in the custodial setting so that he could change himself to be a better person and have realistic goals for success.
>
> Hence, in my opinion, a determinate sentence, rather than preventive detention, would be the most effective way to motivate him to engage in relevant rehabilitation interventions to reduce the risk of re-offending.
>
> With the above recommendations implemented, the downward spiral for Mr Heke-Gray could be reversed. There is significant potential for him to be rehabilitated to become a successful citizen in the community, which would mitigate the risk issues in the future.

[105] Dr Lokesh concludes by making the following observations:

> Finally, it is important to realise the impact of cumulative insults over his life from his birth, where he encountered physical abuse from his mother, who had issues with alcohol dependence. Moreover, his father was largely absent in his upbringing and allegedly had mental health issues and a criminal background. Subsequent abandonment by his parents and the emotional abuse by his extended family got worse over the next decade with substantial physical, emotional, and sexual abuse whilst he was under the care of [Child Youth and Family Services], leading to the development of PTSD symptoms.
>
> These extremely traumatic experiences were well documented and have had a significant negative impact on this young man, who used alcohol and drugs as a means of escape. He was constantly marginalised and victimised for his physical and psychological handicap. This was made worse by the social disadvantages he encountered that exacerbated this disability at various levels and contributed to his substance abuse. These deep-rooted psychological issues could be addressed through meaningful psychological sessions.

[106] We are prepared to admit the further evidence from Dr Birath and Dr Lokesh. Whata J recorded in his minute dated 14 August 2019 that there was sufficient information about ADHD and FASD to justify a short adjournment to enable Mr Heke-Gray to seek an expert report on these matters.[35] However, this proved not possible. The Judge noted in his sentencing judgment that Mr Heke-Gray was unable

[35] Sentencing judgment, above n 2, at [29].

to instruct a further expert in relation to these matters in the time available.[36] We consider the evidence can be treated as being fresh in the circumstances.

[107] The evidence is credible and cogent in that it could have affected the outcome of what was a difficult and finely balanced sentencing decision. The further evidence is relevant to the mandatory consideration in s 87(4)(d) of the Sentencing Act — the absence of, or failure of, efforts by the offender to address the cause or causes of their offending. The further evidence helps explain why Mr Heke-Gray lacks insight and persists with his denial of the offending. The evidence also sheds light on the difficulties Mr Heke-Gray likely faced in engaging appropriately with the group rehabilitative treatment that was offered to him during his earlier term of imprisonment and whether other treatment options are likely to be effective.

[108] Taking into account the importance of any decision to deprive a person of their liberty indefinitely, we consider the overall interests of justice favour granting the application to adduce this further evidence.

Submissions

[109] Mr Chisnall does not contest that the criteria founding jurisdiction to impose a sentence of preventive detention were met.[37] The issue on appeal is whether this was the least restrictive outcome appropriate in all the circumstances.

[110] Mr Chisnall notes that Dr Djokovic did not accept there was sufficient information to make a diagnosis that Mr Heke-Gray has FASD or ADHD.[38] On the other hand, Mr van Rensburg accepted that Mr Heke-Gray may have ADHD and he could not discount the possibility of FASD.[39] However, they both said that a diagnosis of ADHD and/or FASD would not change their risk assessment.[40] Mr Chisnall says that, in expressing those opinions, neither of these experts addressed the issue of whether, if Mr Heke-Gray did have FASD, ADHD and PTSD, this would have impeded his ability to meaningfully participate in group treatment options.

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36 At [30].
37 Sentencing Act, s 87(2).
38 Sentencing judgment, above n 2, at [28(b)].
39 At [28(c)].
40 At [28(d)].

[111] Dr Birath is firmly of the view that Mr Heke-Gray will not be reformed by repeated or prolonged incarceration. He says that harsh punishment will not act as an effective deterrent in his case. Rather, he suggests there are more effective and therapeutic ways of managing a disabled offender like Mr Heke-Gray, specifically:

> He should be under the care of a psychiatrist both in and out of custody. Treatment with stimulant medication is often successful in curbing impulsivity that is neurological in origin. There is [a] strong suggestion from his history that his in custody behaviour suffers from the absence of treatment with medication. His medications must be administered to him in such a way as to ensure regular compliance.
>
> Mr Heke-Gray will most benefit from having an environment that is adapted around his individual and specialised needs. This will involve providing external structure, support, and supervision. His life needs to be simplified, his stresses reduced, and he needs opportunities provided to build on strengths. He will need assistance navigating the responsibilities and tasks of adulthood, as he has never demonstrated an ability to do so. For example, he will need direct personalised assistance (e.g., from a support worker) with tasks such as making appointments, enrolling for benefits, finding housing, and finding employment. All of this may best be accomplished in a supportive housing situation for patients with brain disabilities.

[112] Dr Lokesh agrees with Dr Djokovic that Mr Heke-Gray's overall risk is capable of being reduced through effective rehabilitation. He too disagrees with Mr van Rensburg that an indeterminate sentence would provide the best prospect of motivating Mr Heke-Gray to desist from sexual and violent offending. On the contrary, Dr Lokesh considers such a sentence would be counterproductive and would likely reduce his motivation to engage in any therapeutic activities or rehabilitation.

[113] Ms Johnston submits that Mr Heke-Gray's pattern of offending and risk factors demonstrate that preventive detention was the appropriate sentencing outcome. She contends that the diagnoses of ADHD, FASD and PTSD do not alter this. Ms Johnston points out that within months of being released from a lengthy sentence for the 2008 offending, Mr Heke-Gray breached his release conditions, removed himself from his approved address and committed similar offending.

[114] As to Dr Birath's contention that a sentence of preventive detention is unlikely to have a deterrent effect on Mr Heke-Gray, Ms Johnston notes that this is not the purpose of such a sentence, which is to protect the community. She submits that the evidence shows that Mr Heke-Gray is unlikely to abide by release conditions including

any treatment plans and he is therefore likely to pose a significant risk to the safety of the community following his release after serving a finite sentence. She contends that the possibility of an extended supervision order following release does not provide a compelling alternative given Mr Heke-Gray's deeply entrenched risk factors, his disregard for court-imposed conditions and his persistent denial of his offending. Ms Johnston submits that even if Mr Heke-Gray has ADHD, FASD and PTSD, this does not lessen the need for the community to be protected from him.

Assessment

[115] As we have seen, the Judge considered he was obliged to impose preventive detention because Mr Heke-Gray's ongoing denial of his offending suggested he was not genuinely open to rehabilitative treatment "at this time".[41] The question is whether the further evidence now available, and which the Judge indicated he would have received if it could have been obtained prior to sentencing, leads to a different conclusion. For the reasons summarised below, we have come to the conclusion that preventive detention is not the least restrictive outcome appropriate in all the circumstances and that such a sentence is not required to secure adequate protection for the community. There appear to us to be better options available for mitigating and managing the risk in Mr Heke-Gray's particular circumstances.

[116] We agree with the Judge that Mr Heke-Gray's violent tendencies and comparative lack of insight into his offending are connected to the trauma he suffered in his upbringing combined with his neurological conditions. We also agree with him that Mr Heke-Gray has the capacity for rehabilitation and that the support he has from his wider whānau will likely play an important part in this. Where we respectfully part company with the Judge, is when he says that Mr Heke-Gray's ongoing denial of his offending indicates that he is not genuinely open to rehabilitative treatment. This was the pivotal factor in the Judge's decision to impose preventive detention. While in many cases, perhaps most, denial of offending will present a significant obstacle to successful engagement in rehabilitative treatment, this may not hold true for someone like Mr Heke-Gray given his cognitive impairment and his other neurological conditions. These conditions help explain why he lacks insight into his

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[41] At [54].

offending. Drs Birath and Lokesh also say that Mr Heke-Gray's FASD and ADHD explain his disruptive behaviour and why he had difficulty engaging in group therapy.

[117] However, notwithstanding his lack of insight and the difficulties experienced to date, Drs Birath and Lokesh consider that Mr Heke-Gray is willing to engage in individualised rehabilitation tailored to his needs and he would be very likely to benefit from this. Their opinions appear to be supported by the evidence that Mr Heke-Gray has himself sought counselling and participated in the counselling provided through ACC. The reasonable prospect of successful rehabilitative treatment is also supported by Dr Djokovic's opinion. She suggested that Mr Heke-Gray should continue with the individualised psychological intervention being provided to address his poor emotional regulation. She says this will assist him to participate in other treatment programmes.

[118] The lengthy finite sentence of 15 years and one month's imprisonment that would otherwise be imposed ought to be sufficient to enable Mr Heke-Gray to be given the counselling and treatment he needs to reduce his risk of committing another qualifying sexual or violent offence upon release. If his risk remains sufficiently elevated at that time, an extended supervision order could be made subject to suitable conditions to manage this risk. We do not consider this prospect should be disregarded merely because Mr Heke-Gray did not comply with his prior release conditions. He was largely untreated at the time he was released following his earlier sentence. Further, the conditions that can be attached to an extended supervision order could be significantly more restrictive if necessary. Given the potential scope and nature of such conditions, it is not clear to us why these would not be adequate to protect the community.

[119] In conclusion, we consider the statutorily preferred option of a lengthy finite sentence should be imposed. We do not consider it is necessary to impose a sentence of preventive detention, depriving Mr Heke-Gray of his liberty indefinitely.

Result

[120] The application to adduce further evidence is granted.

[121] The appeal against conviction is dismissed.

[122] The appeal against sentence is allowed.

[123] The sentence of preventive detention is set aside. A finite sentence of 15 years and one month's imprisonment is substituted.

[124] The minimum period of imprisonment of seven years and six months imposed by the High Court is confirmed.

Solicitors:
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