NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA308/2022
[2023] NZCA 135

BETWEEN	H (CA308/2022) Appellant
AND	THE KING Respondent

Hearing: 20 March 2023

Court: Brown, Lang and Palmer JJ

Counsel: J D Lucas for Appellant
E J Hoskin for Respondent

Judgment: 2 May 2023 at 10.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr H was found guilty by a jury in the District Court on five charges of sexual offending against his daughter when she was six to nine years of age. He was sentenced to 10 years and four months' imprisonment.[1]

[2] Mr H appeals against conviction on the basis that errors by his trial counsel have given rise to a miscarriage of justice. He also raises issues with several aspects of Judge Zohrab's summing up.

Background

[3] The alleged offending occurred between 2008 and 2011 at two rural addresses where Mr H, his then wife and the complainant were residing. The complainant alleged that on separate occasions during this period Mr H:

(a) digitally penetrated her anus;

(b) digitally penetrated her vagina;

(c) masturbated in front of her;

(d) kissed her in an indecent fashion; and

(e) raped her.

[4] The relationship between Mr H and his wife ended in 2011. The complainant said that by this stage the offending had ceased. Mr H then left the farm on which he had been living with the complainant and her mother, and moved to a different region. Mr H subsequently commenced a relationship with a new partner and became engaged to her. The complainant would sometimes go and stay with Mr H and his new partner

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1 *R v [H]* [2022] NZDC 11230.

at the farm where they were then living. The complainant does not allege any sexual offending occurred during these visits.

[5] In 2014 the complainant told her mother that Mr H had sexually interfered with her. They then went to the police, who interviewed the complainant. In November and December of 2014, the complainant underwent two videotaped interviews in which she disclosed the offending in considerable detail. The complainant ultimately elected not to take matters further in 2014. Aged 11 years at that time, the complainant did not wish to proceed through the prosecution process. The police also spoke to Mr H in early 2015, who denied any impropriety.

[6] In 2019, however, the then 17-year-old complainant contacted the police again. The police interviewed Mr H again, but he continued to deny any wrongdoing. On this occasion, however, the police decided to lay charges.

The trial

[7] Mr H engaged Mr Marcus Zintl to act as his trial counsel. Mr Zintl met with Mr H on several occasions before the trial to discuss trial strategy. They agreed Mr H would defend the charges on the basis that the acts giving rise to the alleged offending never occurred.

[8] Mr H believed his daughter had been prompted by her mother to make false allegations against him. He therefore instructed Mr Zintl to adopt a two-pronged strategy to defend the charges. First, he would argue that the complainant had colluded with her mother to make false allegations against Mr H. Alternatively, he would contend that, although the complainant may have believed the truth of what she was saying, she was nevertheless recounting false memories that had been implanted into her mind by her mother.

[9] When the trial began, Mr Zintl made a short opening statement to the jury in which he described the defence case in the following way:

> Members of the jury, Mr [H] is on trial, the defence says due to false sexual allegations. The alleged sexual offending just simply did not happen. Never occurred. The defence says that the complainant's mother … has used her

> daughter to come up with the allegations or believe that the allegations [had] happened to her. So we are saying that the complainant is not telling the truth and her evidence is not reliable. She has had at the very least false memories implanted into her mind by her mother.

[10] When Mr Zintl cross-examined the complainant, he suggested Mr H had never kissed her in an inappropriate manner. The complainant said Mr Zintl was incorrect. She also denied that her mother had acted in a controlling manner towards her. She similarly denied that her mother had "put in [her] head" the notion that she had been abused by her father. The cross-examination then continued:

> Q. What I'm suggesting to you is that she did and that you in fact have false memory or false memories of what happened.
>
> *A. I do not have false memories. Everything that I've said in those tapes I remember from my own memory.*
>
> Q. Well, you couldn't remember very much in the first interview, could you? You kept saying that you couldn't, "I'm not sure". You said that repeatedly. Is that because you didn't –
>
> A. I was –
>
> Q. Is that because you didn't have the memories at that time?
>
> A. I was 11 years old, and I honestly did not know what I was going into. I did not know what was happening with the interview. I was 11 years of age and I just learnt what had actually happened to me and that it was wrong.
>
> Q. And I'm saying to you, just so we're abundantly clear, you learnt that from your mother.
>
> A. No.
>
> (Emphasis added.)

[11] Mr Zintl's cross-examination then concluded. In an affidavit filed by the Crown on the present appeal Mr Zintl describes why it ended in this way:

> 48. The complainant was a formidable witness at trial, in evidence in chief and during cross examination.
>
> 49. She came across as extremely credible and reliable.
>
> 50. I put it to her that her mother had put into her head that she had been abused by Mr [H].
>
> 51. She denied that.

52. I also put to her that she had false memories put into her head.

53. Again, she denied that.

54. Towards the end of my cross-examination, she mentioned that she had learnt what her father had done to her when she was about 11 years of age.

55. I then said to her that she had learnt that from her mother.

56. She also denied that.

57. While I was on my feet I paused and considered whether I should put to her that she was lying.

58. Her inevitable answer would be "No".

59. I was concerned about getting off-side with the jury.

60. At the time, I was acutely aware of the criticisms of defence counsel in the media and from the Government for retraumatising complainants and putting them on trial themselves.

61. I decided not to ask her that question and sat down.

62. It was a split-second decision.

63. It was only later, just before the closing addresses, that the Crown raised that I had not put to the complainant that she had lied.

64. I then realised that I had been mistaken not to do so.

65. I closed the defence case without suggesting that the complainant was lying and focused on her being unreliable because of her mother's influence.

66. I felt that I could not say that to the jury in closing as I had not put that to her and knew the Judge would criticize me and the defence for not doing so.

[12] Mr Zintl mounted a strong challenge to the evidence given by the complainant's mother. The thrust of this was to the effect that she had prompted her daughter to make the allegations by asking leading questions. He suggested she had done so because she was angry with Mr H about the circumstances in which their relationship had ended. The complainant's mother denied this was the case.

[13] Mr H did not give evidence but he called his wife, cousin and a previous employee to give evidence on his behalf. Their evidence focussed on their

observations of the behaviour of the complainant's mother following the breakdown of her relationship with Mr H.

[14] In his closing address Mr Zintl emphasised the fact that there were significant differences between the nature and extent of the information the complainant had volunteered in the two videotaped interviews. He also contended there were significant inconsistencies between the allegations she had made in the first interview and those she made in the second interview. Mr Zintl then went on to say:

> You're quite right, I'm not saying that [the complainant is] lying. I'm not saying that you need to find that she's lying. I'm not inviting you to do anything like that at all. I'm saying though that you need to assess her evidence, examine her evidence through the lens of her mother's evidence and her mother's influence. Which means that I suggest it is unreliable. That is, [the complainant's] evidence is unreliable.

[15] By way of contrast, Mr Zintl suggested to the jury that the evidence given by the complainant's mother was neither credible nor reliable. He contended she had told several significant lies when she gave evidence and that she had undertaken a campaign to convince others that Mr H had sexually abused the complainant. Mr Zintl asked the jury to accept it was reasonably possible that the complainant's mother had persuaded her daughter to believe Mr H had sexually abused her.

The alleged error

[16] As will already be evident, Mr Zintl now believes he made a mistake in failing to suggest to the complainant that she was lying about the events she described. This meant he could not suggest in his closing address that this was the case.[2] Instead he was restricted to suggesting that the false allegations had been implanted in her mind by her mother. Mr Zintl acknowledges that this deprived Mr H of one of the two defence theories that would be used to defend the charges. He therefore accepts he made an error of judgement in failing to suggest to the complainant in cross-examination that she was lying about the events she described.

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2 Evidence Act 2006, s 92.

Relevant principles

[17] The appeal will only succeed if Mr H can demonstrate that a miscarriage of justice has occurred.[3] The notion of a miscarriage of justice in this context requires the Court to undertake a two-step enquiry.[4] First, the appellant must establish an error. Secondly, he must establish there is a real risk the error may have affected the outcome of the trial or rendered it unfair or a nullity.[5]

[18] In *Hall v R* this Court held that an appeal based on trial counsel error focusses on the trial process and its outcome rather than on the characterisation of counsel's conduct.[6] An appeal will therefore not succeed unless it can be shown that an error by trial counsel may have affected the outcome of the trial.

[19] Earlier, in *R v Scurrah,* Arnold J noted that at one end of the spectrum there may be errors that could not have affected the outcome of the trial. In such a case there was no need to go further. However, at the other end of the spectrum the error may have effectively prevented the defendant from presenting a defence. In such a case prejudice would readily be found.[7]

[20] In *Hall,* this Court considered the situation that may arise where trial counsel fails to follow the client's instructions on a fundamental trial decision. The three fundamental trial decisions relate to plea, the election whether to give evidence and the need to advance a defence based on the defendant's version of events.[8] In *R v Condon* the Supreme Court also confirmed that trial counsel is obliged to present the defence an accused person wants to run.[9]

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3 Criminal Procedure Act 2011, s 232(2)(c).
4 Section 232(4).
5 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [23]–[24].
6 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [9], citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 as explained in *R v Scurrah* CA 159/06, 12 September 2006 at [13].
7 *R v Scurrah,* above n 6, at [14].
8 *Hall v R,* above n 6, at [65].
9 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [28].

Trial counsel error

[21] The complainant's response to Mr Zintl's cross-examination plainly left him in an awkward dilemma for the reasons he explains in his affidavit. This is not unusual in trials of this type. As this Court observed in *S (CA361/2010) v R*:[10]

> [60] Defence counsel who are required to cross-examine a complainant in sexual abuse cases, and particularly a young complainant, are faced with a tricky forensic task. On the one hand it is necessary to test the evidence, but on the other, there is a risk that a young and vulnerable complainant may be seen as subjected to unnecessary defence browbeating. Moreover, there is the real risk that as defence questioning proceeds, further compelling detail is elicited unwittingly. This Court will ordinarily be slow to second-guess defence counsel who must make immediate important decisions about the extent of cross-examination, often based simply upon instinct and experience. …

[22] Furthermore, this Court noted in *W (CA272/2017) v R*:[11]

> [15] Relevantly for present purposes, decisions regarding the style and ambit of cross-examination are not regarded as a fundamental decision where a failure to follow a client's instructions will generally make the trial unfair. In *S (CA361/2010) v R* it was noted that the Court will ordinarily be slow to second-guess defence counsel who must make immediate important decisions about the extent of cross-examination, noting that such decisions were often based simply on instinct and experience. There is a degree of latitude accorded to counsel as to how to conduct cross-examination. Thus, the decision as to how cross-examination should be approached is, quintessentially, the province of counsel who is best placed by dint of trial experience to determine the most effective approach in any given case.

[23] Mr Zintl clearly concluded that he was faced with a formidable witness who came across as extremely credible and reliable. She made it clear in the italicised portion of the cross-examination set out above[12] that she was giving evidence based on her memory of events as they occurred. This means the inevitable answer to any direct question as to whether she was lying would have been no. Mr Lucas, counsel for Mr H, accepted on Mr H's behalf that this was so.

[24] As this Court emphasised in *Hall,* one of Mr Zintl's fundamental obligations as trial counsel was to advance the defence based on Mr H's version of events. Mr H's version of events was that the alleged offending never happened. This was the way

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10 *S (CA361/2010) v R* [2013] NZCA 179.
11 *W (CA272/2017) v R* [2018] NZCA 11 (footnotes omitted).
12 Above at [10].

Mr Zintl opened and closed the case. To explain why this had occurred he and Mr H agreed that Mr Zintl would suggest the complainant was either lying or speaking about fictitious events implanted in her mind by her mother. However, these were only theories. They did not amount to Mr H's version of events.

[25] We also consider Mr Zintl was entitled to conclude it would be counterproductive and not in Mr H's interests to suggest to the complainant that she was lying. There was no obligation on him to take that step when, in his judgement, it might antagonise the jury and predispose them against Mr H.

[26] Furthermore, Mr H discussed the issue of why the complainant might be lying during his discussions with Mr Zintl before the trial. During one of their meetings Mr Zintl read out to Mr H a file note he had taken earlier. This recorded Mr H's theory that the complainant was deliberately telling lies because she was telling her mother what she knew her mother wanted to hear. We consider that this theory and that based on the implanting of false memories are qualitatively similar — both rely on the premise that the allegations were the product of influence exerted by the complainant's mother. We also consider this theory was less credible than that based on the implanting of false memories. If Mr Zintl had explored it in his cross-examination, it would probably have made Mr H's position worse in the eyes of the jury. We therefore do not consider Mr Zintl committed a fundamental error in ceasing his cross-examination without putting to the complainant that she was lying to please her mother.

[27] We accept it would have been preferable for Mr Zintl to have sought a brief adjournment so he could advise Mr H about the position the cross-examination had reached and the likely consequences of going on to suggest the complainant was lying. To that extent we accept Mr Zintl may have erred in his approach. However, we do not consider there is any risk that this affected the outcome of the trial.

[28] This ground of appeal is not made out.

The Judge's summing up

[29] Mr Lucas takes issue with three aspects of the Judge's summing up. First, he contends the Judge gave an inapt example when directing the jury as to what constituted evidence. Secondly, he contends the Judge erred in his directions about the delay that had occurred in the complainant disclosing the alleged abuse. Thirdly, he contends the Judge undermined the defence case when he summarised it at the conclusion of his summing up.

The direction about what constituted evidence

[30] The Judge gave the jury orthodox directions about what constitutes evidence. He concluded this by directing them that the submissions made by counsel were not evidence and that a question put by counsel to a witness was not evidence unless the witness agreed with it. He then gave an example of the latter from the cross-examination of the complainant. Mr Zintl had asked the complainant whether she had been asked to be a flower girl when Mr H married his new partner. She agreed with this proposition. The Judge told the jury this was an example of a witness accepting the correctness of counsel's proposition.

[31] The Judge then gave an example of a witness not accepting counsel's proposition. He reminded the jury that Mr Zintl had subsequently suggested to the complainant that she had false memories of what had happened. She responded by saying that she did not have false memories and that everything she had said in the tapes she remembered from her own memory.[13] The Judge told the jury that the question Mr Zintl had put to the complainant did not become evidence because the complainant had not accepted it.

[32] Mr Lucas submits the second example the Judge gave was inapt. He points out that Mr Zintl was obliged to put that proposition to the complainant. He also says the Judge ought to have emphasised that the weight to be given to the evidence was a matter for the jury. He argues that the use of this example suggested to the jury that the denial meant the complainant did not have false memories.

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[13] This aspect of the cross-examination of the complainant is set out above at [10].

[33] We do not accept these submissions. We consider the second example aptly demonstrated the effect of a witness not accepting the correctness of a proposition. Furthermore, the Judge went on immediately to direct the jury that it was up to them to decide what evidence to accept or reject and the weight or importance they ascribed to any evidence or different parts of the evidence. We do not accept he needed to go further and direct the jury that it was a matter for them to determine the weight to be given to the allegations made by the complainant. Nor do we accept the jury would have understood the Judge to be suggesting that the complainant did not have false memories.

[34] We therefore do not consider there is any substance in this ground of appeal.

The direction about delay

[35] Section 127 of the Evidence Act 2006 permits a trial judge in a case involving allegations of unlawful sexual activity to give a jury a direction about any delay by the complainant in disclosing allegations of the abuse. This may be done where a question is asked, or a comment is made, that tends to suggest the complainant either failed to make a complaint or delayed making a complaint. The direction will be to the effect that there can be good reasons for a complainant to delay making or not to make a complaint about the activity that has allegedly occurred.[14]

[36] Mr Lucas acknowledges the Judge was required in the present case to give a direction to the jury about the delay that had occurred in the complainant disclosing the alleged abuse. He also accepts the Judge gave an orthodox direction about that issue. However, Mr Lucas contends the direction did not go far enough. He submits that, although the Judge advised the jury there may be good reasons for delay in disclosing a complaint of sexual abuse, he should also have emphasised that delay was a neutral factor that neither supported nor detracted from the complainant's credibility. He says the Judge should also have referred to the factors relied upon by the defence to suggest the complainant had not given a credible reason for delaying her disclosure of the alleged abuse.

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[14] Evidence Act, s 127(2).

[37] We do not accept the Judge was required to take either of these steps. Delay is not necessarily a neutral factor. As Mr Lucas pointed out, this Court confirmed in *Bian v R* that s 127 does not prevent the jury from taking anything adverse from a delayed complaint.[15] The point of s 127 is to neutralise any perception that a victim of a sexual offence will complain immediately. The weight to be given to the issue of delay remains a matter for the jury, which must take into account the reasons given by the complainant for any delay and the direction that there may be good reasons for delay in sexual cases.

[38] The Judge directed the jury on this issue as follows:

> [34] Now you might think that it is to be expected that a child would complain to her mother, for example, about sexual abuse and would complain about the abuse at the first opportunity and you will recall here it has been suggested that she had the opportunity to complain to the lawyer for child [in previous Family Court proceedings].
>
> [35] I am pointing out to you that it is not uncommon for victims of sexual abuse to delay reporting the abuse for a considerable period of time, even though they may have had opportunities to disclose the abuse to members of their family or others whom they trust.
>
> [36] It is for you [to] decide whether and to what extent the delay in making a complaint should affect your assessment of [the complainant's] evidence. You might recall what she said during the course of her evidence at various times, she talked about, and this is her reasons for not raising it, fearful of getting into trouble, she talked to you about how the assaults stopped and she never spoke to anyone about it. She talked to you about how it did not happen all the times. When things were good with her father, they were good. Also [the complainant] said she had started a programme at school [in] which she had learned about sexual abuse and all of those matters contributed to why it was she decided to then go and make the complaint. So I ask you to bear those matters in mind and both lawyers touched on those matters in their closing addresses to you.

[39] We consider these directions were appropriate in the circumstances and that they did not need to go further as Mr Lucas suggests. We note also that in summarising the defence case the Judge subsequently reminded the jury that the defence relied upon the timing of the allegations in support of its argument that they were false.

[40] This ground of appeal accordingly fails.

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15 *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 at [51].

The Judge's summary of the defence case

[41] After summarising the Crown case the Judge spent some time summarising the defence case. He emphasised that the defence contended the complainant's allegations were false and that the jury could not be sure the Crown had proved the charges beyond reasonable doubt. He also emphasised that, although the defence bore no evidential onus, the jury nevertheless needed to be aware that in drawing inferences they needed to start from a reliable evidential base. Mr Lucas contends the Judge undermined the defence case during this process because, after summarising specific points made by the defence, he then also reminded the jury of the Crown's response to those points.

[42] This submission needs to be measured against the fact that, after summarising the Crown case in relation to each charge, the Judge also briefly told the jury what the defence case was in relation to that charge. Furthermore, in summarising the case for the Crown the Judge largely reiterated the Crown's submission that the complainant and her mother were credible and reliable witnesses and that the jury should find the charges proved on that basis. He did not summarise the prosecutor's submissions in response to the points he anticipated Mr Zintl would make in his closing address. The Judge reminded the jury of those submissions after summarising the specific points made by the defence. The Judge therefore approached the summary of both the Crown and defence cases in the same way. In doing so we are satisfied he did not undermine the defence case.

Result

[43] The appeal against conviction is dismissed.

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