ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.

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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA90/2017
[2017] NZCA 278

BETWEEN	A (CA90/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	24 May 2017
Court:	Asher, Venning and Ellis JJ
Counsel:	P L Borich for Appellant J E L Carruthers for Respondent
Judgment:	3 July 2017 at 10 am

JUDGMENT OF THE COURT

A The appeals against conviction and sentence are dismissed.

B Order prohibiting publication of name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Ellis J)

[1] Following a trial before Judge Ronayne and a jury in late 2016 A was convicted on five charges of violent offending against his former wife, K. Judge Ronayne sentenced A to 20 months' imprisonment.[1] A now appeals against both his conviction and sentence.

Background

[2] A is from Latvia and K is from India. After each had moved to New Zealand they became active in the Hare Krishna community. They met in January 2014, started a relationship in July 2014 and were married in September 2014. In June 2015 they travelled to India to visit K's family. While there, unbeknownst to A, K contacted New Zealand Police complaining of extensive abuse by A. He was arrested on re-entry into the country, on 2 September 2015.

[3] K subsequently underwent a lengthy evidential video interview (EVI) during which she made numerous allegations of sexual violation by rape and anal intercourse, physical violence of various forms and intensity, and threats to kill. As a result, A was charged with:

(a) sexual violation by rape (two charges);

(b) sexual violation by anal intercourse (two charges);

(c) assault with intent to injure (11 charges);

(d) injuring with intent to injure (two charges);

(e) threatening to kill (four charges); and

(f) male assaults female (three charges).

[4] The jury ultimately found A guilty of the following five charges:

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1 *R v [A]* [2017] NZDC 3036.

(a) assault with intent to injure: relating to an incident in which A punched K repeatedly on her shoulder and grabbed her by the hair while they were driving on the motorway. An eyewitness saw the offending, and A effectively admitted it to the police, and the jury;

(b) assault with intent to injure: relating to an incident in which, having argued with K, A grabbed her nose and twisted it in his hand. This caused a bruise which was seen by others. He admitted in evidence that he had grabbed and twisted her nose but denied any intention to injure her. He did however acknowledge that the act was designed to cause a bruise;

(c) assault with intent to injure: relating to an incident in which he forcefully hugged K while she was pregnant and sick, and then yanked her head down by her hair, causing significant pain to her neck. A accepted he had hugged K as described but denied yanking her head down and said his hands had got caught in her hair;

(d) threatening to kill: relating to a threat levelled at K which caused her to seek refuge at a friend's house. A denied the threat but K's friend gave evidence supporting K's account;

(e) assault (representative): K said A assaulted her often. He effectively admitted, through correspondence with the complainant and in his evidence at trial, to having assaulted her in various ways.

[5] The jury found A not guilty on seven of the other charges of violent offending, and were hung on the remaining 12 charges. The Crown has elected not to proceed to a retrial on any of them.

[6] In subsequently sentencing A, Judge Ronayne took the (motorway) assault with intent to injure as the lead charge.[2] He accepted K's evidence about the severity and duration of that incident and rejected A's account. He identified the aggravating

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2 At [2].

features as being breach of trust, K's vulnerability, the effect the offending had on her, and the inherent cruelty involved. He imposed a starting point of 16 months which he uplifted by nine months for the other offending. He discounted five months for remorse, rehabilitation, and time spent on restrictive bail. That resulted in an end sentence of 20 months' imprisonment, which the Judge refused to commute to home detention.

The conviction appeal

[7] The principal grounds for A's conviction appeal can be summarised under three broad headings:

(a) K's cross-examination:

(i) the Judge failed adequately to control K while she was giving her evidence;

(ii) the Judge wrongly directed defence counsel to advise his cross-examination in advance;

(iii) the Judge wrongly prevented the defence from fully cross-examining K and failed adequately to direct the jury about that;

(b) conduct by the prosecutor, Mr McColgan:

(i) the Judge wrongly permitted the prosecutor to cross-examine A about why he had pleaded not guilty and also to make comments in closing on that issue;

(ii) the Judge wrongly permitted the prosecutor to close on (and failed to rectify) incorrect statements of law about prior consistent and prior inconsistent statements;

(iii) the Judge wrongly permitted the prosecutor to refer in closing to the law in other jurisdictions and "other inappropriate matters";

(c) inadmissibility rulings:

(i) the Judge wrongly ruled evidence (or questioning) about K's other short-term relationships inadmissible; and

(ii) the Judge wrongly refused to allow cross-examination of a police officer about his objectivity.

[8] There is also one further general ground, namely that the Judge wrongly and without justification formed an overly favourable view of K, and an overly unfavourable view of A.

[9] Some of these appeal grounds are said to give rise to a miscarriage of justice in terms of s 232(4)(a) of the Criminal Procedure Act 2011 (the CPA), namely a real risk that the outcome of the trial was affected. Others were said to give rise to a miscarriage in terms of s 232(4)(b), namely that the fairness of the trial was affected. Some were said to give rise to a miscarriage in both senses. In either case, some potentially vitiating error, irregularity or occurrence during, or relating to, the trial must first be identified.

K's cross-examination

[10] Before turning to consider the first group of appeal points it is necessary to say a little more about the trial and, in particular, K's performance as a witness and under cross-examination and the decisions the Judge made around that.

[11] It is fair to say that the trial was, in some respects, not an easy one. It lasted some 15 sitting days, between 28 November and 16 December 2016. K gave her evidence by audiovisual link (AVL), from a room some distance away, with no other person in the room with her. She began her evidence on Tuesday 29 November 2016

and was not finished until the end of the day on Wednesday 7 December 2016 (albeit with some breaks and an intervening weekend).

[12] Mr Borich said, and we largely accept, that K was a difficult witness to cross-examine; her replies to questions tended to be long, discursive, unfocussed, argumentative and editorial. And because she was giving evidence by AVL and could not, while being questioned, see the Judge, it was difficult for him to exercise control over her responses without disrupting the flow.[3]

[13] Notwithstanding an express warning by the Judge, K emailed counsel during her cross-examination, forwarding further information to him and suggesting lines of re-examination. It also appeared from these communications that she had reviewed her EVI transcript overnight to refresh her memory, despite having been told by the Judge not to do so.[4]

[14] At the start of the sitting day on 1 December 2016, K complained to the Judge that she felt bullied and intimidated by defence counsel. The Judge explained to her that Mr Borich had obligations to his client and that he (the Judge) would be the "referee". It also transpired that, during the trial, K had googled for advice about how to deal with "a lawyer who is trying to bully you".

[15] Towards the end of the first week the Judge began to express concern about the trial running over the allocated time and the length of time K's cross-examination was taking.[5] It had become clear that her evidence would not be complete that week and she was required to return the following Monday.

[16] During the Monday afternoon (5 December 2016) Mr Borich was questioning K about the "Ohakune Motel incident", during which some of the sexual offending was alleged to have occurred. K advised him, and the Court, that she would walk out if she was asked anything further on the topic. When Mr Borich then asked her another such question, she did so.

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3 This point was expressly made by the Judge during the trial.

4 The prosecutor agreed with Mr Borich that K had acted contrary to the Judge's instructions.

5 In one of his rulings during the trial the Judge referred to K's cross-examination lasting 19 and a half hours. Mr Borich says that the cross-examination took only 16.4 hours.

[17] That evening K wrote an email to (inter alia) the prosecutor saying that she did not wish to continue with the trial. The next morning she did not turn up and the jury was sent home for the day. The Judge then made it clear that he was going to place some parameters around any further questioning of her. There was then the following exchange between the Judge and counsel:

> **THE COURT:**
> Are counsel ready to be heard in relation to the nature and extent of further cross-examination or do you want time to gather your thoughts?
>
> **MR BORICH:**
> No, Sir, I'm in a position to address Your Honour on that topic.
>
> **MR McCOLGAN:**
> I am also Sir.
>
> **MR BORICH:**
> I anticipate what Your Honour is seeking from me is an indication in some detail as to the questions I wish to put to the witness going forward.
>
> **THE COURT:**
> Not so much the actual detail of the actual questions but rather let's talk about topics and then if necessary the detail.

[18] Mr Borich then proceeded to advise the Judge in some depth about the subjects he wished still to canvas with K, should she return. The Judge asked questions about the relevance of certain of those matters and also about whether other matters sought to be pursued by Mr Borich had already been covered during his earlier cross-examination.

[19] The Judge then made a detailed ruling limiting the scope of future cross-examination on the various proposed topics, including not just events at the motel in Ohakune but also certain events in India, K's motive to lie and her delayed complaint.[6]

[20] The Judge's comprehensive reasons for this ruling noted that K had walked out and that she had not yet returned. The Judge also recorded that:[7]

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6 *R v [A]* [2016] NZDC 24716.
7 *R v [A]* [2016] NZDC 24662.

(a) K had been giving evidence for five days with a little more than three and a half of those under cross-examination;

(b) because A intended to give an opposing account in evidence, defence counsel had been permitted to explore issues "in close detail" during his cross-examination of K;

(c) it had become apparent early on that, for cultural reasons, K found talking about sexual matters very difficult;

(d) given the long-winded way in which K chose to answer questions the Judge did not accept Mr Borich's indication that his cross-examination of K would last for only another half day;

(e) the Crown had indicated that it would not take any issue under s 92 of the Evidence Act 2006 (the Act) about any failure to put A's case to K in relation to specific allegations of sexual violation; and

(f) the 5 December email K had sent to counsel and to police officers (which had been read by the Judge but not by counsel) had set out in detail the adverse effects that the trial was having on her.

[21] Then, the Judge said:

> [9] My current view is that it would be cruel for the Court to exercise any powers to require the complainant to come back to Court. The only option is to take whatever appropriate steps are available to make the rest of the complainant's evidence as easy as possible, always bearing in mind the overarching need for the trial to be conducted fairly.
>
> [10] It is my assessment that the complainant is a vulnerable witness. This much was apparent in her evidence-in-chief. She quite obviously finds it extremely difficult to discuss matters of a personal sexual nature. While this is not uncommon, her vulnerability seems to be exacerbated by her own cultural background. I do not have any sense that the complainant is endeavouring to avoid answering questions maliciously. Further to her underlying vulnerability as a witness, she has become even more vulnerable as a result of the length of her cross-examination. The transcript of her

> cross-examination must be approximately 250 pages or more. She has been cross-examined now for approximately 16 hours.[8]

[22] Then, the Judge expressed his view that:[9]

> … notwithstanding the number of charges and the proposed detail of the evidence to be given by the defendant, it is quite inappropriate for this trial to have become such an ordeal for the complainant. While the overriding consideration must be to ensure that this trial remains fair to the defendant who is, after all, the individual in jeopardy, the overall interests of justice also demand that the complainant not be re-traumatised and be given a realistic opportunity to tell her story without breaking down, failing to finish and jeopardising the trial. If this trial cannot conclude fairly, both the complainant and the defendant will suffer adverse consequences. Such an outcome cannot be conducive to the interests of justice. I have borne this overall aspect of this matter in mind in making my rulings. I have approached my rulings bearing in mind the provisions of the Evidence Act and in particular ss 6, 7, 8 and 85. One of the purposes of the Evidence Act is to promote fairness to the parties and witnesses. Another is to avoid unjustifiable expense and delay. I may also take into account the cultural background of a witness and the nature of the proceeding.

[23] The Judge went on to say that a defendant's right to put his case was not unfettered and had to be modified where a witness was vulnerable.[10] He recorded that, in general, the manner and tone of Mr Borich's cross-examination has been polite and respectful but he had chosen to adopt a level of detail in cross-examination well beyond any strict requirements to put A's case. He said:[11]

> … Moreover, for tactical reasons, he has chosen to visit topics more than once for different reasons, but with significant time lapse between these visits. This has understandably exasperated the complainant who is, after all, a layperson. Her exasperation has been quite apparent to all. So while his cross-examination cannot be described as extreme or overly-vigorous with regard to tone and style, it has in general become oppressive. I make this comment conscious of the normal limits of concentration. The complainant has a young, unwell child at home and is clearly exhausted. A police officer has had to fly from Auckland to her location in order to assist with child care arrangements because her pre-existing arrangements have now fallen through. This risks, on my assessment and observations in Court, alienating the jury. I have mentioned this risk to Mr Borich to no apparent effect.

[24] The following morning (7 December 2016) K returned to Court and completed her evidence just after 5 pm on that day.

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8 This figure is disputed by Mr Borich.
9 At [12].
10 At [13].
11 At [14].

[25] It is against that background that we now turn to consider the first three appeal grounds.

The Judge failed adequately to control K while she was giving her evidence

[26] We have summarised above the key matters relating to K's evidence during the trial. She was plainly a difficult witness who seemed unable or unwilling to answer questions in a brief, focussed or straightforward way. Equally, however, we recognise that K's cross-examination was an extraordinarily long one and repeatedly traversed matters which K was uncomfortable speaking about.

[27] We accept that Mr Borich might have preferred greater intervention by the Judge, in terms of directing her to answer questions or stopping irrelevant digressions. But the fact that the jury rejected her evidence alone as a safe basis upon which to convict A on any charge strongly suggests that the perambulating and argumentative way in which she gave her evidence did the Crown case no favours and A no harm.

[28] Moreover, the Judge made it clear that his ability to intervene effectively was limited by the strictures of K giving evidence by way of AVL and expressly left it to defence counsel to seek his assistance when the need arose. Indeed, had the Judge intervened more frequently and forcefully it might well have engendered jury sympathy for K.

[29] We consider, too, that the Judge had a more than adequate basis for concluding that K was a vulnerable witness. Even putting to one side the truthfulness (or not) of the allegations that she had been physically and sexually abused, she was living apart from her family, caring for a young and sick child, and was stressed by the amount of time she was having to take off work to give her evidence. Her vulnerability was expressly recognised by A himself after the trial in a letter he wrote to the Court prior to sentencing. In it, he said:

> During the trial I have seen [K] for the first time since the day I was arrested. She looked very unhappy. It must be very hard for her living the life she has to live now after all the arguments, embarrassment and violence that took place and that she has to be a single mother …

[30] In the end, therefore, we can see no error or basis for criticism of the Judge on this ground. Moreover, the jury's verdicts clearly indicate that the jury only convicted A in relation to incidents which he had either admitted to or in relation to which there was some form of corroboration. Quite plainly, the jury did not consider that K's evidence on its own was sufficiently credible or reliable to found any conviction. It is therefore difficult to see how any criticism of the way in which she gave her evidence or the Judge's response to that could have led to a different, better, result for A. And from our own reading of the transcript we can see no basis upon which the manner in which K was permitted to give her evidence might give rise to some fair trial concern.

Requiring counsel to advise cross-examination questions in advance and placing limits on its scope

[31] It is convenient to address the next two appeal grounds together. They form part of a single sequence of events. Essentially, Mr Borich was asked by the Judge to outline his proposed cross-examination in order that the Judge could make a decision on any limits that should be placed on it. We note at the outset that he was not required to put specific questions in writing or even expressly to articulate the questions themselves.

[32] A defendant's right to test the case against him is, of course, fundamental. Also important, however, are the rules, reflected in ss 7 and 8 of the Act, which require evidence to be relevant, and which require its exclusion if its probative value is outweighed by the risk that it will unfairly prejudice or needlessly prolong the proceedings.

[33] As well, s 85 of the Act confers important powers on a Judge to disallow questions that are improper, unfair or needlessly repetitive. Section 85 provides that, in exercising that power, a Judge may take into account (inter alia):

(a) the age or maturity of the witness;

(b) the linguistic or cultural background or religious beliefs of the witness; and

(c) the nature of the proceeding.

[34] The operation of s 85 has recently been considered in *Metu v R*, where this Court said:[12]

> [18] The authorities establish that the judge has a duty to intervene, for example where necessary to protect vulnerable witnesses from being intimidated or where they may not understand what is being put to them. …
>
> …
>
> [20] The policy intent of s 85 as suggested by the Law Commission is to ensure that no party or witness is unfairly disadvantaged by the way he or she is questioned. The authors of *Cross on Evidence* state that s 85 was "intended to confer a wide judicial discretion to control the nature and manner of questioning".

[35] The Court went on to affirm the balancing that is required between the exercise of the power to control the manner of questioning of a witness and the right of a defendant in a criminal case to a fair trial, which includes putting the defendant's case to a witness as the defendant or his or her counsel sees fit. Then, the Court said:

> [24] The right to a fair trial is affirmed by the New Zealand Bill of Rights Act 1990 and the common law. This Court summarised the general position in relation to the scope of cross-examination in *R v Thompson*, which endorsed observations of the High Court of Australia:
>
> > [66] … robust cross-examination is one of the many options open to counsel, who must be accorded wide discretion. The matter was put as follows by the High Court of Australia in *R v Wakeley* (1990) 93 ALR 79, 86:
> >
> > > "It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is the more onerous because counsel's discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached – and it is for the judge to ensure that the stage is not passed – the court is, to an extent, in the hands of cross-examining counsel."
>
> (Footnotes omitted.)

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12 *Metu v R* [2016] NZCA 124 (footnotes omitted).

[36] In the present case, we can discern no error in the steps taken by the Judge or his approach. We have already recorded our acceptance of the Judge's assessment of K as a vulnerable witness. And notwithstanding that Mr Borich differs from the Judge about the precise duration of his cross-examination of her, it was, on any analysis, a very long time. From our own reading of the transcript, the questioning was highly detailed and involved returning to topics on more than one occasion. And Mr Borich is both an experienced and able counsel. It remained open to him to modify his cross-examination technique to accommodate K's particular idiosyncrasies and the difficulties her mode of testifying presented.

[37] By the time the Judge made the decision to limit further cross-examination it was readily apparent that K was struggling. There was a real prospect of the trial going off the rails completely. We agree with the Judge that alienation of the jury must also have been a real risk, had questioning of her been permitted to continue unchecked. The limits placed by the Judge on further questioning had been tested and discussed thoroughly with counsel, were carefully thought out and were, themselves, limited.[13]

[38] We do not accept Mr Borich's submission that he was prevented by the Judge's intervention from exploring important and relevant matters with K. To the extent the ruling did restrict his questioning on matters which he had not previously canvassed, A's different version of events would be, and was, made quite clear to the jury when he gave his own evidence. The Crown had confirmed there would be no s 92 issue and no such point was subsequently taken.

[39] Mr Borich also said that the restrictions deprived him of the chance of obtaining answers (to the questions which had been prohibited) which might have enabled him further to impugn K's credibility or reliability. But as we have said, the jury quite plainly did not regard K's evidence on any topic to be sufficiently reliable or credible, without more, to found a conviction. We cannot see how pursuing the prohibited questions might have improved A's position on that front.

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[13] As we understand it, K was not advised of the specific limitations.

[40] And lastly, we do not accept the submission that the jury might have drawn adverse inferences from the absence of cross-examination on certain topics. To the extent that they were aware of any omissions at all (which we doubt) the Crown did not take any s 92 point. It seems to us to be inconceivable that the jury would have done so of its own volition.

[41] In short, we are unpersuaded that there was any error by the Judge in deciding to circumscribe cross-examination as he did. In the circumstances we have outlined we consider the decision was wholly justified. He did so in a reasoned and principled way. This ground of appeal discloses no miscarriage risk.

The prosecutor's conduct

Cross-examination and closing submissions about A's not guilty pleas

[42] A elected to give evidence at trial. As we have mentioned, he had admitted some occasions of violence towards K to police and he confirmed that at trial. This led to the following exchange between A and the prosecutor, during his cross-examination:

> Q. So is it fair for me to summarise that you agree that in this motorway punching incident you assaulted her?
>
> A. Yeah.
>
> Q. And you assaulted her with the intention of hurting her, yes?
>
> A. Perhaps yeah.
>
> …
>
> Q. "I punched you on the shoulder because I went crazy and I know that the shoulder isn't going to kill you but it is just going to hurt"?
>
> A. Yeah.
>
> Q. So you've assaulted her with the intention of hurting her haven't you?
>
> A. Yeah.
>
> Q. The very elements of the charge that you face in relation to that incident isn't it?
>
> A. I think it was intent to injure.

Q. Well let's have a look shall we?

A. Okay.

Q. "Charge 10, [A] on or about 30 March 2015 at Auckland with intent to injure assaulted [K]?

A. Yes so intent to injure yeah.

Q. That's right which is to cause her hurt?

A. Yeah, okay if that's what it means I never said that I wasn't, you know, I said I'm guilty of whatever I've done. So if it is what it is then I'm guilty of that. I'm just not sure.

Q. Would you like to be re-arraigned on that charge?

A. I don't understand what does that mean?

Q. Would you like to plead guilty to it now?

A. It's I think up to jury to decide whether I'm guilty of hurting, injuring with intent to injure I'm not sure.

Q. Even though you admit it?

A. I admit I wanted to hurt her I don't know if that's the same as injuring.

…

Q. You're not a truthful and honest man, [A], because you had an opportunity to be truthful and honest and open and you didn't take it, did you?

A. I took it when I had an opportunity.

Q. You're only willing to accept what you know you can't get away with, that's the truth, isn't it?

A. No, I could have said that I haven't done anything. No, that's not true.

Q. Well you couldn't have said that because you absolutely know that someone else saw you on the motorway, so you couldn't have said that.

A. Yes, but I you know, I didn't have to accept all the other stuff that happened.

[43] Objection to this line of questioning was taken by Mr Borich at the time on the grounds that A had a right under the New Zealand Bill of Rights Act 1990 (NZBORA) to plead not guilty and that it was wrong to suggest to the jury that

choosing to stand on that right reflected adversely on him. The relevant in chambers exchange between Mr Borich and the Judge ended as follows:

> **THE COURT:**
> Well, yes, but do you really want me to be telling the jury that a person's entitled to plead not guilty and they're entitled to put the Crown to the proof, isn't that — I wouldn't be asking — if I was you I wouldn't be asking me to go there.
>
> **MR BORICH:**
> Well can I leave it on this basis?
>
> **THE COURT:**
> Yes.

[44] Later, the prosecutor returned to the point in his closing address, when he said:

> … [A's] evidence, I suggest to you members of the jury, is quite simply a careful calculated concoction designed to be credible enough for you so that you return as few guilty verdicts as he is willing to admit to. And he wasn't even willing to admit to them. When I asked him about that assault with intent to injure on the motorway, I pointed out to him that not only in his evidence but also in his texts, he has admitted the essential elements of the charge. When I asked him whether he wanted to plead guilty he said, "Oh, no, I think I will leave it to the jury." What does that say about his integrity as a witness?

[45] Mr Borich maintains that the prosecutor's questions and his submissions to the jury were impermissible and should have been corrected by the Judge. Underlying this argument is the proposition that A had a right to plead not guilty and that his exercise of that right should not have been the subject of criticism or adverse comment. The submission depended in large part on the drawing of some analogy with the orthodox proscription on commenting on the exercise by a defendant of other rights, such as the right to silence or not to give evidence. It is said that somehow the presumption of innocence was undermined by the prosecutor's questions and his subsequent closing remarks.

[46] We are unable to accept either that the analogy is apt or that the presumption of innocence was negated by what occurred here.

[47] The starting point is that A had indeed accepted that the elements of the offence were met and, effectively, that he was guilty of the charge. We can see no

difficulty with the prosecutor putting that to him or making the point in closing. Importantly, the prosecutor did not seek to invite the jury to infer guilt on other charges from A's refusal to change his plea in relation to those which he had effectively admitted. Rather, he sought to have the jury draw conclusions about A's integrity and/or credibility from his refusal formally to accept guilt or responsibility in the face of the admissions he had made. While that line of reasoning may hardly be compelling, it does not infringe A's fundamental rights. So although we acknowledge that it would have been preferable for the prosecutor simply to make the more important point that A had admitted some of the charges against him, we do not consider the question or the submission gives rise to any risk of miscarriage here.

Closing submissions on prior consistent and inconsistent statements

[48] K had made a six-hour EVI over two days. We agree with Mr Borich's assessment that the transcript discloses a discourse that was long, monologue-like and unstructured. It contains inadmissible, prejudicial and irrelevant material. It was not played to the jury.

[49] The jury was, however, aware of the EVI's existence and there was some cross-examination of K about it by way of impeachment by omission. By way of example only, during her cross-examination K had made an allegation of forced sex in Glen Eden, which she had not complained of in her EVI or in her evidence-in-chief. There are other instances which we do not need to set out here.

[50] In his closing to the jury, however, the prosecutor said:

> I suggest to you [K] came before you and gave credible and consistent evidence. What she said about the offending and that's all the offending, all of it was, but for one minor matter, completely consistent with what she had said on earlier occasions, including that six hour, two day, marathon interview when she first got back of India. What she said, you can take it that what she said in evidence, but for that one minor matter, which I will come to, was completely consistent with what she said 15/16 months ago when she first got back from India.
>
> How do you know that? Well I will tell you how you know that, because it's the rules by which we play. It's the rules within the Courtroom. Consistency is seen as one of the key indicia of the truth. Because, if we have experienced things and we see it in our mind's eye, as these things occur, we should be able to retell the account in a consistent manner

> shouldn't we? That's why consistency is seen as a key indicator of the truth. Because of this, defence counsel is obliged to identify and illustrate and put to you any inconsistencies between her account back then, her account in evidence.
>
> Now, again, I'm not going to trawl through this evidence with you, you will have it in front of you, you have seen and you have heard it. You look through [K]'s evidence, including all of the cross-examination, members of the jury, on her account of the abuse she suffered you won't see her being referred back to her six hour interview transcript once, not once. That was the first time she was formally interviewed about all the abuse by a specialist interviewer and you don't see her in her evidence being referred back to those transcripts once. And if there was an inconsistency you would have been.
>
> That is because everything she said over those two days all those months ago in September 2015 was consistent with her evidence in Court. That is because, as I suggest to you, when she recounted what [A] did to her she was recounting what was actually in her mind's eye, what she experienced, not some script that she has manufactured.

[51] In the Judge's summing-up, he dealt with reliability and credibility at some length. At one point he said that:

> [93] So when making these assessments of the truthfulness and reliability of a witness personally, you will consider such things as their demeanour but with the caution that I have just mentioned. Consistencies and any inconsistencies, or changes in evidence either from an earlier time or while giving evidence. Consistencies or inconsistencies with other evidence in the case. Prevarication, in other words evasive answers, and any likely reasons to lie; a witnesses' interest in the outcome or possible bias may be a factor of help to you also. The memory of a witness is a factor to bear in mind although these events did not happen a long time ago, you might not expect fading memories to be a major factor in your decision-making here. On the other hand, you might not necessarily expect someone to remember precisely words used in 2014 and 2015, for example.

[52] Mr Borich objected to the prosecutor's statement and sought to have the Judge correct it. In the Judge's subsequent minute (in which he also addressed a range of other objections raised by Mr Borich about the Crown closing), he said:

> (vii) Mr Borich complains that the Crown submission that the complainant's evidence in Court must be consistent with her evidential video interviews, because no inconsistencies were raised in a long cross-examination, was inappropriate. As I understand what Mr Borich is at least implying with this submission, my earlier ruling restricting Mr Borich's cross-examination has somehow restricted his ability to put inconsistencies to the complainant. In submissions, it appeared to me that Mr Borich accepted the proposition that at no time when the issue of restriction of his further cross-examination was argued before the Court, did he seek to

> cross-examine on inconsistencies and thus there was no ruling on the point.

[53] After detailing several other of Mr Borich's "complaints" the Judge said:

> [3] I pressed Mr Borich for a submission as to what, if anything, he required from the Court by way of a ruling or directions to the jury. Mr Borich responded that he was unaware of any direction that could be given to the jury. The matter rests there.
>
> [4] I comment that, in my view, the submissions made by the Crown complained of above represented no more than, at worst, rhetorical flourishes and did not require directions.

[54] We agree with Mr Borich that the prosecutor's closing remarks on this point were both wrong and misleading. More particularly:

(a) it was wrong and misleading to suggest that K's EVI statement might be particularly truthful or reliable because she had been interviewed by "a specialist interviewer";

(b) it was wrong and misleading to say or imply that K's evidence had been consistent with her EVI and was therefore credible and reliable; and

(c) it was wrong in law to say that the jury could take that consistency as read because defence counsel was obliged to draw attention to any inconsistencies.

[55] Because these remarks were wrong and prejudicial they should have been corrected by the Judge. Notwithstanding the Judge's general statement (which pertained to the list of matters raised by Mr Borich) that no remedial direction had been suggested, one could easily have been given. It was simply a matter of telling the jury that what the prosecutor had said was wrong and that Mr Borich was not obliged to identify or put any inconsistencies between K's EVI and her evidence, that they should not proceed on the basis that K's EVI statement had been consistent with her evidence and that they should draw no inference about K's reliability from its existence. But the Judge appears to have been deflected from doing any of this by

his belief that Mr Borich's criticism was aimed at his earlier ruling limiting the scope of cross-examination.

[56] And while correct on its face, the Judge's own suggestion to the jury that they might test credibility and reliability by considering any consistencies or inconsistencies between witnesses' evidence and earlier statements made by them only served to exacerbate the problem. Nor are we able to agree with Mr Carruthers that the Judge's standard direction that the jury should only decide the case on the evidence they had heard would have had a corrective effect. Although it is true that K's prior EVI statement was not in evidence, the prosecutor had expressly, but wrongly, told the jury that they were entitled to take it into account in their deliberations. Moreover, the prosecutor's characterisation of what the contents of the prior statement actually were (namely consistent with K's evidence) was, at least in part, also wrong.

[57] In terms of any real risk that the outcome of the trial was affected by the uncorrected error, we acknowledge that K's credibility and reliability were undoubtedly central to the Crown's case. But as we have said, the jury's verdicts clearly indicate that they did not find her evidence by itself sufficiently credible and/or reliable to found a conviction on any charge. And in relation to three of the five charges on which A was convicted, he had admitted key aspects of the offending in any event. We are therefore unable to find that there was a real risk that the jury would have reached different verdicts had the statement by the prosecutor not been made.

[58] In terms of whether the error can be said to have jeopardised A's fair trial rights, the right to a fair trial is absolute, and any breach will always undermine a conviction. But not every error or mishap produces an unfair trial. An overall assessment must be made. This Court in *Wiley v R* referred to the following comments of the Privy Council in *Randall v R*:[14]

> There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable an appellate court will

[14] *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28]; *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [35].

> have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.

[59] The Court in *Wiley* gave examples of trial unfairness that might vitiate a conviction irrespective of its potential impact on the verdict: lack of legal representation, failure by counsel to follow instructions on fundamental issues such as plea or the giving of evidence, or deprivation of a defendant's right to have his case put fully and fairly in closing.[15] These involve failures of process or substance of such importance that values fundamental to the criminal process itself are undermined by them. They go to the heart of the right of all defendants to present a defence and to enjoy the fruits of natural justice.

[60] In *Guy v R* the Chief Justice and Glazebrook J elaborated on the dicta from *Randall* in the following way:[16]

> [39] In deciding whether defects are "so gross, or so persistent, or so prejudicial, or so irremediable" as to amount to denial of fair trial, the critical question is not the strength of the prosecution evidence or the weakness of the defence, but the effect of the defect on trial fairness. In that assessment, important background to what constitutes a fair trial is the statement of the "minimum standards of criminal procedure" recognised in s 25 of the New Zealand Bill of Rights Act and the "right to justice" contained in s 27 of that Act.
>
> [40] Minimum standards of criminal procedure include "the right to a fair and public hearing by an independent and impartial court", "the right to be presumed innocent until proved guilty according to law", and "the right to examine the witnesses for the prosecution". The "right to justice" recognised by s 27 is a right "to the observance of the principles of natural justice by any tribunal … which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law". These rights affirm principles recognised as fundamental to the common law before enactment of the New Zealand Bill of Rights Act. All were implicated in the error by which the two statements were given to the jury without the knowledge of counsel or the Judge.

[61] In *Guy* two interview transcript documents which had not formed part of the evidence at trial had been accidentally provided to the jury prior to their deliberations. The majority in the Supreme Court held that Mr Guy's fair trial rights were breached because an essential principle of criminal justice, namely that a

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15 *Wiley v R*, above n 14, at [40].

16 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 (footnotes omitted).

criminal charge must be established only on evidence produced at trial, had been transgressed.[17]

[62] Here, however, the error is not quite of that order. The jury were not given a copy of K's EVI statement; they were told that it was consistent with her evidence in Court and that inferences about her reliability could be drawn from that. Wrong as that suggestion was it did not inhibit the defence from putting its case or from answering the prosecution's. Although K's reliability as a witness was crucially important to the Crown, it is clear from the jury verdicts that what the prosecutor said about the EVI did not sway the balance against A. As we have said already, the jury did not accept that, by itself, K's evidence was sufficiently reliable or credible to found a conviction on any of the charges. So while we consider that the error, and the Judge's failure to correct it, were grave matters, they were not in the end so gross or so prejudicial that the fairness of A's trial was prejudiced.

Reference in closing to the law in other jurisdictions and other inappropriate matters

[63] Mr Borich also objected to the following statement by the prosecutor in his closing address to the jury:

> Some of you might know from general knowledge that in some societies the law requires four independent male witnesses to have witnessed an act of sexual offending. I suggest to you that that requirement not only renders rape an improvable crime, it tacitly encourages it, because it wholly fails to recognise how these acts occur. Think about it. Four independent male witnesses have to watch this in order for it to be prosecutable. I can't imagine, and I suggest you can't either, I can't imagine a world where I would stand by and watch someone abuse another human being in that way, let alone have to have three of my mates there as well. In New Zealand we don't have this requirement because our law recognises how and in what circumstances this offending occurs.

[64] And similarly he objected to the prosecutor's comparison between K and an abused SPCA dog:

> Now I don't know if any of you have experienced this and if you don't agree with me that is your prerogative. But I wonder whether any of you have been to the SPCA and the most abused and cowed animal is the most fawningly survival. Have you ever seen a dog that has abused and battered? The head is down, crouching down as they come up to you. They are

[17] At [64].

> shaking, tail between the legs, slightly wagging. Wanting what? Wanting what? Nothing more than a kind word and a pat and you give them that kind word and that pat and all of a sudden things are different. And that's what was going on in that relationship when you look at those texts, "How are my babies, how are my this, how are my that? Alright, I'll come home, I will look after you." I suggest to you, when you look through those texts and you watch that pattern, you are watching the pattern of an abused and cowered person doing what we know, perhaps not understand, perhaps not agree with, but what we know they do as human beings. Please just give me a kind word. Please just be nice to me. And if you are nice to me I will do, I will do anything for you. Can I do this? Can I do that?

[65] The first of these submissions was also the subject of objection by Mr Borich. The objection was dismissed by the Judge in the way we have set out at [53] above, namely on the basis that Mr Borich did not identify what corrective statement should be made to the jury and that the impugned submissions were, at worst, "rhetorical flourishes". As far as we can tell no point was taken at the time about the "abused dog" reference.

[66] We are inclined to agree with Mr Borich that these remarks were unwise and, ideally, should have been the subject of correction by the Judge.

[67] The prosecutor's reference to the operation of the law overseas was irrelevant and potentially confusing. Although we accept that he may have simply been intending to make the point that, in New Zealand, it is possible to return guilty verdicts on a rape charge on the basis of the complainant's evidence alone, it was clumsily done. Nonetheless, the reference arguably favoured A as much as it would have prejudiced him, because it would have drawn to the jury's attention that "he said/she said" cases were regarded elsewhere as difficult to prove and, indeed, that A could not possibly be convicted in certain other jurisdictions.

[68] As far as the abused SPCA dog metaphor is concerned we acknowledge that what the prosecutor appears to have been trying to do was to explain the swings in K's behaviour and her response to A as disclosed in various texts and emails. Nonetheless we consider that effectively inviting a comparison between K and an abused dog in the SPCA involved a level of emotiveness that has no place in a Crown closing address. We consider that the reference was contrary to the orthodox

rules that prosecutors are to be dispassionate and measured in their presentation of the Crown case.

[69] Notwithstanding our conclusion that these remarks by the prosecutor were not warranted or helpful we do not consider that either the remarks themselves or the Judge's subsequent failure specifically to address them gives rise to a risk of miscarriage here. As we have said, the reference to overseas law was just as likely to have favoured A as not. And any possible influence that the "abused dog" comments might have had was more than adequately balanced by the orthodox directions given by the Judge about prejudice and sympathy. Nor could these minor infelicities have any fair trial ramifications.

Inadmissibility rulings

Disallowing questions and evidence about K's other short-term relationships

[70] It was part of A's case that K had rushed him into marriage (and had even given him an ultimatum in that respect) in order to advance her immigration status. A said that K's claims that it was he who had pressed her into a hasty marriage were untrue, as was her claim that she was committed to the observance of Hare Krishna marriage principles.

[71] In order to undermine K's evidence about who had rushed whom, and her credibility more generally, Mr Borich wished to call evidence and put to K that she had previously exhibited a willingness to enter relationships quickly and to commit to marriage after a short period. More particularly, he wanted to question K about two short-term relationships she had formed in the six months leading up to her relationship with A and to call evidence from one of the gentlemen concerned. The Judge disallowed the questions (and implicitly the evidence). Although no formal reasons for the ruling were given, the discussion between the Judge and counsel suggests that he simply did not accept that there was a logical link between K's previous alleged relationships with others and her attitude to marrying A.

[72] We agree with the Judge that any reasoning that the dynamics of K's past relationships could assist the jury in determining the nature of her relationship with A

would be unsafe. For the same reason we do not think the evidence could have much legitimate bearing on K's credibility more generally. The relevance of the proposed evidence was tenuous at best. There was a risk of prejudice. We can discern no error in the Judge's ruling.

Disallowing cross-examination of a police officer on his objectivity

[73] Mr Borich submitted that one of the themes of the Crown case was K's concern for her unborn child which, she said, had caused her to come forward with her complaints. K's evidence was that A's violence (particularly the sexual violence) increased once K became pregnant and that A did not love the child. Purportedly in support of this last proposition, evidence was led by the Crown that A had refused to sign the child's birth certificate when asked to do so while on bail by the officer in charge, Detective Patrick.[18]

[74] Subsequently, Mr Borich cross-examined Detective Patrick both about the birth certificate incident and also in relation to the conduct of A's initial police interview on 2 September 2015.[19] In that context Mr Borich asked a question about Detective Patrick's objectivity and professionalism in relation to the investigation. The Judge ruled the question was irrelevant and inadmissible.

[75] Mr Borich later explained why he wanted to explore this topic. He gave the Judge an email which Detective Patrick had sent to a colleague in which he said "See if we can't get enough to lay more charges. I'll stack them up on that prick" (referring to A).

[76] Mr Borich submitted that, had he been permitted to pursue this line of questioning, it would have put A's refusal to sign the birth certificate in context for the jury. More broadly, he said that it was legitimate to question the professionalism and integrity of the police investigation when the email gave him a basis for doing

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[18] Objection was taken by Mr Borich to the evidence due to the circumstances which gave rise to it being led. Mr Borich said that the prosecutor introduced the evidence in re-examination after K had sent an email suggesting that line of questioning while she was in the middle of cross-examination.

[19] The prosecutor had been critical of A for not being more forthcoming at the interview.

so. He said that not allowing the questions prevented a legitimate attack on K's credibility and a legitimate enhancement of A's credibility.

[77] In our view the refusal to sign the birth certificate was neither relevant to the fundamental matters at issue in the trial nor reasonably capable of forming any basis for an inference that A did not love his unborn child. To that extent, its introduction at all was unfortunate. But we do not think the Judge can fairly be criticised for refusing to permit counsel to go further down that particular rabbit hole.

[78] Similarly, we struggle to see the relevance of any alleged lack of objectivity by the officer in charge. There was no suggestion (nor any basis on which to suggest) that he had fabricated evidence, wrongly elicited a confession from A, or materially influenced evidence relevant to the issues in dispute. While the email did not, perhaps, show the Detective in the best light, it is impossible to see how (had it been put) it might have had any effect on the jury's guilty verdicts. Similarly, ruling it inadmissible could have no conceivable impact on A's fair trial rights.

The Judge's overall views of the complainant and A

[79] Mr Borich submitted that, in addition to the matters already discussed (which he said were indicative of the Judge's unfair preference for K over A), the Judge:

(a) permitted the complainant to give evidence from a distance, via AVL, without a Court officer or Court taker present in the room;

(b) warned counsel a number of times that the defence conducted was running the risk of "alienating the jury";

(c) refused to hear an objection in chambers relating to evidence of a witness, instead requiring the argument to be in the presence of the witness and the jury;

(d) gave a positive commendation to the complainant at the conclusion of her evidence-in-chief, which thanked her for her "dignity and patience", and included a comment that he had never seen such long

cross-examination; and at sentencing he commented that he gained a good impression of her; and

(e) accepted the complainant's entire account in relation to the lead offence at sentencing, despite independent evidence not supporting that position and despite rejection of much of her evidence by the jury.

[80] None of these points (save for the last, which is relevant to the sentence appeal) were pursued with any real vigour at the hearing before us. We nonetheless acknowledge that there are aspects of the record which suggest that the Judge did form a reasonably favourable, or at least sympathetic, view of K. It is also clear from the record that the relationship between the Judge and Mr Borich, while always polite, was at times a little frayed around the edges. As we have said, it was plainly a difficult trial.

[81] But we are unable to accept that any of the above matters, either singly or in combination, give rise to any discrete appeal point here. We have already expressed the view that the Judge was right about the risk of alienating the jury. The positive comments made to or about K by the Judge were not said in front of the jury. To the extent those views are said to have played out in sentencing, we consider them in that context below. There is no evidence that supports the proposition that the few, relatively minor, errors made by the Judge which we have identified above were actuated by impermissible or irrational favouritism. We are not persuaded that any of these matters either separately or in combination could give rise to a miscarriage of justice on the last ground asserted.

Conclusion

[82] To the extent that we have identified errors in aspects of the conduct of A's trial, we do not consider that they give rise to a risk that different verdicts would have resulted had the errors not been made. Nor do they give rise to any fair trial concerns. The appeal against conviction must be dismissed accordingly.

The sentence appeal

[83] A's appeal against sentence had two principal strands:[20]

(a) it was not open to the Judge to set the starting point on the index (motorway) offence based on K's account of the relevant events; and

(b) the five-month discount for mitigating factors was too low, given the 11 months that A had spent on very restrictive (24-hour curfew) bail conditions.

[84] Each is considered in turn.

[85] As far as the first point is concerned, it is clear from the Judge's sentencing notes that he accepted K's account of the lead offence, namely that A had punched her constantly throughout the 40-minute car journey.[21] Mr Borich submits that it was not open to him to take this view because:

(a) the jury verdicts indicated that the jury had largely rejected K's credibility;

(b) A's account of the incident involved five to six punches;

(c) the account of the independent witness involved three to four punches and three pushes against the car window; and

(d) the photographs taken of K the next morning did not support a claim of 40 minutes of hard punching.

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[20] Mr Borich also took issue with the 12-month concurrent sentences imposed on charges nine (threatening to kill) and 14 (assault with intent to injure) which he said must be manifestly excessive given that the Judge had given only a nine-month uplift in relation to all the other (four) charges. He cited *Banaba v R* [2016] NZCA 122 in support. In our view, however, that submission misses the point in *Banaba* which was that the concurrent sentence was excessive because it did not reflect the seriousness of the offending, not because it was greater than the uplift: see at [48]–[49]. We do not, therefore, consider this point further.

[21] *R v [A]*, above n 1, at [2].

[86] Also, Mr Borich submits, the Judge was wrong to say that the jury's verdict was inconsistent with A's claim that there were only five or six punches. A's version could still sustain a conviction. On the basis of a more charitable view of the facts, Mr Borich submitted that a much lower starting point of 10–12 months was appropriate.[22]

[87] It is worth setting out the relevant passage from the Judge's sentencing notes in full:[23]

> [2] … My view of the facts is not inconsistent with the verdict of the jury. I have assessed all of the evidence. You were driving your car with your wife, the victim, in the front passenger seat from New Lynn to the Hare Krishna farm in Riverhead. That is about a 40 minute trip. During the trip you repeatedly punched your wife on her right shoulder and upper right arm. I accept her evidence that the punching took place constantly throughout all or at least much of the journey.
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> [3] An eyewitness followed behind you on the motorway for approximately 10 minutes and he saw you violently shake her. He saw you throw multiple punches at her. You accepted in your evidence that you shook her by her hair during the incident. The eyewitness saw you violently shake her with one hand around her neck area, although he was not entirely certain about that particular contact. The eyewitness was so concerned that he made a call directly to the police during which he described you pushing your wife violently about three times against the car window. He thought her face hit the window multiple times.
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> [4] You were on the motorway and you were more focused on assaulting your wife than driving properly. The eyewitness called the police on the emergency line because he saw your vehicle veering in its lane, nearly going into the centre lane and then pulling back into the right lane multiple times. There was plainly a risk of a car crash, thus further endangering your wife and others.
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> [5] Your wife had no way of freeing herself from this situation. The assault was accompanied by verbal abuse such as telling your wife to go and find a new husband. You knew very well that your constant punching was going to hurt her and you told her later that you went crazy, that you knew her shoulder was not going to kill her, but that it was going to hurt her. For her the experience was very painful. She was bruised on her upper right arm and right shoulder. The people at Women's Refuge saw fit to photograph the bruising.

[88] We do not consider that Mr Borich's submissions do justice to the Judge's analysis. His reasoning is thorough and, in our view, compelling. It was not simply

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22 As we have noted earlier, this lead charge was a charge of assault with intent to injure. The maximum penalty is three years' imprisonment.

23 *R v [A]*, above n 1.

based on K's account. The Judge had sat through the trial. The offending as described was serious offending of its kind, even if the assault did not continue for the whole 40-minute period. We consider that the starting point was within the available range.

[89] As far as the five-month (20 per cent) discount is concerned, the relevant facts were that A had spent 11 months and 15 days on restrictive 24-hour curfew electronically monitored (EM) bail (after six months in custody), he had no previous convictions, he was of previous good character, and he had undertaken courses in self-improvement and family violence. As we have said, however, the focus of this aspect of the appeal was on the time spent on EM bail. Mr Borich did not, however, refer us to any specific authorities on the point.

[90] The wording of s 9(3A) of the Sentencing Act 2002 makes clear there are a number of factors which a sentencing Court is required to take into account in relation to such discounts. There can, therefore, be no arithmetical formula that is capable of universal application. Moreover, as this Court has recently observed, time spent on EM bail is not equivalent to pre-sentence custodial remand.[24] In that case the Court regarded a four-month discount for 10 months spent on EM bail subject to a 24-hour curfew as "not … inadequate", while also acknowledging that a higher discount "would not necessarily be wrong".[25] And in another relatively recent decision this Court allowed a discount of four months to recognise 13 months on EM bail and full compliance with all bail conditions.[26]

[91] Against the background of both s 9(3A) itself and those recent decisions there can be no basis for the submission the discount afforded to A was wrong, even taking into account good character and self-improvement. While we do not accept Mr Carruthers' submission that the discount was generous, it was one that was open to the Judge.

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24 *Parata v R* [2017] NZCA 48 at [10]–[14].
25 At [15].
26 *Chea v R* [2016] NZCA 207. It is not clear that the EM bail was subject to a 24-hour curfew, although this appears to have been the assumption on which this Court proceeded.

Result

[92] The appeals against conviction and sentence are dismissed.

[93] Although K's name is automatically suppressed by virtue of s 203 of the CPA, given her former relationship with A we consider it prudent to suppress his name as well, lest it lead to her being identified. Accordingly, we make an order under s 200 of the CPA prohibiting the publication of the name, address, occupation or identifying particulars of the appellant.

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