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

CA403/2015
[2016] NZCA 173

BETWEEN	PETER ALAN HUTCHINS Appellant
AND	THE QUEEN Respondent

Hearing:	17 February 2016
Court:	Stevens, Simon France and Ellis JJ
Counsel:	C B Hirschfeld and C J Tennet for Appellant J E Mildenhall for Respondent
Judgment:	5 May 2016 at 3.00 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Ellis J)

Introduction

[1] Following a retrial in the District Court at Auckland before Judge Andrée Wiltens and a jury, Mr Hutchins was found guilty of one charge of sexual violation by unlawful sexual connection and one charge of sexual violation by

rape. He was sentenced to seven years' imprisonment.[1] He appeals his conviction on the grounds that a miscarriage of justice has occurred due to an accumulation of alleged errors by the trial Judge. In summary, he says the Judge:

(a) made two factual errors in the summing up, namely in relation to:

(i) whether it was in dispute that the complainant had complained of rape two days after the alleged incident;

(ii) evidence regarding a conversation between Mr Hutchins and the complainant about her underwear;

(b) misdirected the jury and/or declined to correct misdirections in relation to:

(i) whether the jury understood the respective sources of photographs produced by the defence and the Crown;

(ii) inferences which could be drawn from the evidence; and

(iii) the burden of proof; and

(c) failed to put the defence case adequately to the jury.

[2] Although the appeal filed related to his conviction only, Mr Hutchins subsequently sought also to appeal his sentence on the ground that it is manifestly excessive. The Crown did not oppose this expansion of the appeal.

Facts

[3] The events that formed the basis of the charges against Mr Hutchins took place at a birthday party in an Auckland suburb in the evening and early morning of 10 and 11 June 2011. The group of friends and acquaintances at that party included the complainant, S, her boyfriend, K, and their good male friend C, whose 20th

1 *R v Hutchins* [2015] NZDC 11605.

birthday it was. Relatively early on, K became unwell. Mr Hutchins then drove K and S back to the house where K and S were living together. S helped K into the house. S returned with Mr Hutchins to the party to retrieve property she had left there. Some time later, Mr Hutchins offered to drive her home. She accepted that offer. On the way, Mr Hutchins pulled off the road into the car park of a local hotel. He got out of the car to go to the toilet. He came around to her side of the car and digitally penetrated and raped her.

[4] Mr Hutchins then drove S home. She went inside. K was still asleep. At some point S texted C, telling him something bad had just happened to her and that she needed help. Her explanation was that she texted C because K had "passed out" and C was the only person she knew who was left at the party. By her account, C was so drunk and high on drugs at the time that he took her text as a joke. She told him to forget it.

[5] The next morning, S received a telephone call from C. He referred to her text from the previous evening and asked her what had happened. She said she could not tell him. Shortly thereafter, S went with C to C's parents' house to take photos of his car for her photography paper. S said that C basically locked her in the house and said she was not leaving until she had told him what happened. She eventually told him that Mr Hutchins had raped her.

[6] S did not tell her boyfriend K anything about what had occurred until some three or four months later. She did so following a confrontation between C and Mr Hutchins. K had observed that confrontation, and had asked S why the two were fighting. Shortly after those events, S told K that she had been raped by Mr Hutchins. A short while later, S made her complaint to the police.

[7] When spoken to by the police, Mr Hutchins admitted that he had driven S back to her house when she had wanted to go home but denied any sexual conduct with her. But when the results of forensic testing of S's underwear established the presence of Mr Hutchins' semen, Mr Hutchins admitted that he had engaged in some sexual conduct with S, but continued to deny that they had had penetrative sex. He

said he had not disclosed it because they both had partners and were embarrassed it had happened.

[8] Mr Hutchins also confirmed that, sometime later, C had confronted him with the rape allegation.

The trial

[9] The jury at Mr Hutchins' first trial could not agree. The central issue at retrial was consent/reasonable belief in consent. The defence case was, broadly speaking, that the sexual activity had been consensual, but unsatisfactory. S immediately regretted it and wanted it kept secret because she was in a relationship with K. Subsequently, she falsely claimed it was rape and the lie then snowballed. This was described frequently in the defence's closing address as a "runaway train" theory.

[10] Against that background, we now discuss the various appeal grounds in turn.

Alleged factual errors in the summing-up

Whether it was in dispute that the complainant had complained of rape two days after the alleged incident

[11] The part of the summing up to which the first ground of appeal relates occurred in the context of the Judge listing a number of matters as to which he suggested there was no dispute. He said:

> [36] [S] sent out some texts and you should look at the texts - what you make of them is a matter for you, but the timing of the texts might be important and the content of the texts might be important. Have a look at that evidence. She sends texts to [C]. And again, there is no dispute that two days later, or one day later, on the Sunday, she told him her allegation of rape.

[12] It was submitted for Mr Hutchins that the Judge was incorrect to tell the jury it was not in dispute that S made the rape allegation to C on the Sunday following his party.

[13] Although the defence closing address was rather discursive and perambulatory, it must be acknowledged that in it, Mr Tennet did convey the suggestion that what might have been disclosed to C that day was that S had had consensual sex with Mr Hutchins which she now regretted, either because it was unsatisfactory or because it involved "cheating" on her boyfriend (or both). At one point Mr Tennet also suggested that C may then have put his own spin on what S had told him.[2]

[14] It must also be acknowledged that the Judge did not specifically refer to this aspect of the defence theory in his summing up.

[15] But whether there is merit in this ground of appeal must be seen in light of the evidence at the trial. It was clear from the texts that S sent to C later that day that they had discussed something painful and upsetting to her. The evidence of both C and S was that S did tell him about the rape that day. The notes of evidence disclose that, as the Judge said when the issue was raised by counsel after his summing-up, it was never expressly put to either S or C by defence counsel that she had not complained of rape.

[16] Accordingly, to the extent that the Judge's comment may have overstated the level of agreement by defence counsel on the nature of the disclosure made to C, his comment was nonetheless consistent with the evidence. And even if this did constitute an error, the Judge reiterated many times during his summing-up that the jury should reach its own conclusions on factual matters and should feel free to disagree with any view he might have expressed. Importantly, the reference in the question trail to matters that were "not in dispute" was expressly limited to those things covered in the s 9 statement.

[17] We therefore accept the Crown submission that any error made by the Judge was of little moment in the context of the summing-up as a whole.

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2 He said: "… maybe what she described [C] decided it was rape."

Evidence regarding a conversation between Mr Hutchins and the complainant about her underwear

[18] This ground of appeal relates to that part of the summing up where the Judge said:

> [67] There are significant differences between their stories, even though there are a number of intertwining parts of the background that fit or dovetail very nicely. On the way back to the party there is a significant difference about the conversation regarding underwear. [S] says it was very short. Peter [Hutchins] says it went on considerably longer, and that it was much more suggestive. You have heard that evidence, but those are the two sides of what they say took place at that time.

[19] In her evidence-in-chief, S had said that, when she first got into the car after dropping K home, Mr Hutchins asked, "What colour underwear are you wearing?" She responded, "Why?" and Mr Hutchins said, "Because everyone can see up your skirt." But, under cross-examination, S accepted that she had told Police that her full response when Mr Hutchins asked about the colour of her underwear was to say "Well, what colour do you think they are?" This response is more suggestive or encouraging than the account given in her evidence-in-chief.

[20] Mr Hutchins' position was that their "tongue-in-cheek" conversation about how people at the party could see up her dress continued as they drove back to the party.

[21] As we understand it, the contention made on behalf of Mr Hutchins on appeal is that the Judge's statement that there was a "significant difference" between the two accounts of this "underwear conversation" was wrong because S had accepted under cross-examination that in her "previous inconsistent statement" to Police she had responded more suggestively. Mr Tennet said that this meant that S's evidence was more supportive of Mr Hutchins' account (at least in relation to earlier events that evening) than the Judge had conveyed to the jury.

[22] In our view there is little in this point. The Judge was not wrong to identify the difference in their evidence as being that S had said the conversation was very short and Mr Hutchins said it was longer and more suggestive. He also identified that Mr Hutchins had asserted there was a further conversation about her underwear

during the second trip immediately preceding the sexual activity which S denied. The Judge correctly identified that whether or not there was such a conversation was a question for the jury to decide.

[23] Finally, the Judge repeatedly stressed that such factual issues were ultimately matters for the jury.

Alleged misdirections

Whether the jury understood the respective sources of photographs produced by the defence and the Crown

[24] After both counsel had closed but before the summing-up, the jury asked the question: "Were the photos from the party in "Defence Exhibits" taken from the camera (SD card) or taken directly from [S]'s Facebook page?" The Judge decided to respond to this question. In his summing-up he said:

> There will not be any further evidence, you have heard the evidence and I want to deal with the second question that you asked me this morning - about the source of the defence photos, we do not know. Do not guess. Just look at the evidence and treat the evidence as photographs of the event, do not worry about where it came from.

[25] The adequacy of this response was raised with the Judge by both counsel after the summing up. First there was this exchange between the Judge and Mr Tennet:

> **MR TENNET:** Three factual matters. I'll start with the last one. The jury question conflates two matters, Your Honour. The defence photographs were actually taken by Ms [L].
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> **UNKNOWN VOICE:** No, she didn't take them.
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> **MR TENNET:** Oh sorry, she produces them, Your Honour. They are separate from the posting on Facebook which Ms [S] talks about in the texts after the party. They are the Crown photographs. I don't know whether Your Honour needs to correct that or not, when Your Honour said, "We don't know." That's a matter for you. That's the least important but I just thought I'd clarify that.
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> **THE COURT:** Yes, I'm not concerned about that.

[26] Shortly afterwards there was this exchange with Crown counsel:

THE COURT: All right, thank you. Thank you. Mr Tantrum?

MR TANTRUM: Yes, Your Honour. Just one issue, and that's the issue of question 4. In my submission it is something that needs to be raised.

THE COURT: Question what, sorry?

MR TANTRUM: Jury question 4.

THE COURT: Oh, which is?

MR TANTRUM: "Were the photos from the party in defence photographic exhibits taken from the camera or taken directly from [S]'s Facebook page?"

THE COURT: Yes.

MR TANTRUM: The memorandum of agreed facts refer to the Crown photos coming from [S]'s camera.

THE COURT: Yes.

MR TANTRUM: The defence photos were not from [S]'s Facebook. They were a defence exhibit. It was never suggested to [S] that they were from her Facebook or that she'd posted them. And I think my learned friend is right to say that that needs clarification because they were produced by a defence witness; nothing to do with the Crown case. And it's, if Your Honour leaves it in the way that Your Honour has, that's all the evidence, and there's, well, there's no evidence of where they came from. And on my submission, that is not helpful for the jury in answer to that question.

THE COURT: Well, I'm sorry but they will have to remain in that un-helped state.

[27] As this last exchange indicates the difficulty with this ground of appeal is that Mr Tennet was unable to identify for us during the hearing of the appeal the source of the defence photographs. Although he repeated to us that they were from S's Facebook (his point being why would she post photos of the party that led to the rape) he was unable to identify anywhere in the evidence where this had been established or even put to a witness. The position appears to be, as the Judge stated, that their source was unknown.

[28] More importantly, to the extent that, as a result of the Judge's refusal further to deal with the matter, the jury might have been left with the mistaken belief that the photographs were from S's Facebook page, that can only have been to the defence's advantage. There is accordingly nothing in this point.

Inferences

[29] The Judge's direction about inferences was as follows:

> [14] You have heard yesterday that you are entitled to draw inferences and you are, but an inference is not a guess. An inference is a logical conclusion from other reliably established facts. If we had windows in the Courtroom you might be able to see lightning coming through the window. You might be able to hear the clap of thunder and then, if someone was to come in through the backdoor of the Court, into the Court, with a wet raincoat, you could infer from those three established facts that that person had been outside recently - it is a logical conclusion from the other facts.
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> [15] In this particular case you are asked to draw inferences because one of the things you are going to have to consider is what was in Mr Hutchins' mind at the time. Did he think that [S] was consenting to having sex with him? We cannot tell that by looking at him. It is an inference from the entire surrounding facts that you will need to draw, if that is what you find.

[30] Mr Tennet submitted that the Judge should have directed the jury that where more than one inference is available from the established facts, it must adopt the one most favourable to the defendant. He was also critical of his use of the "wet raincoat" analogy.

[31] The difficulty with the first contention is that it is not correct. The jury's function is to assess the whole of the evidence and in so doing may conclude that a suggested alternative is not reasonably tenable. The jury may consider only one inference is reasonably open on its assessment of the evidence, or that one inference is of much greater weight. Accordingly, the possibility of drawing two different inferences from competing facts does not preclude the jury from drawing any inference at all. The important point is to be clear to the jury that it must only draw logical conclusions from proven facts and must not speculate or guess. The Judge expressly made that point.

[32] As for the "wet raincoat" analogy, this Court has endorsed the practice of judges explaining the proper process of inferential or deductive reasoning by reference to the evidence in the trial, rather than through the use of abstractions.[3] Undoubtedly that is the preferable approach. But that preference does not mean that the Judge fatally erred by using the "raincoat" example in this case. In that respect

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[3] See *R v Hunt* [2007] NZCA 179 at [19]–[20].

we accept the Crown submission that it would have been difficult to find two inferences of equal weight on any of the contentious issues at the trial. That is because the defence, to a large degree, was asking the jury to draw inferences that were contrary to the evidence given by Crown witnesses (for example, to infer that C was jealous of Mr Hutchins for having had sex with S). So in this case, the Judge's choice of a neutral example was, arguably, advantageous to the defence.

The burden of proof

[33] The Judge dealt with the burden of proof in his summing up in the following way:

> [44] We start off first of all, with Peter Hutchins being presumed innocent because that is his position in this trial - he is still presumed innocent. There is no onus on Peter Hutchins to prove anything. He did not have to give any evidence; he did not have to call any evidence. The fact that he did give evidence does not change his position at all. The prosecution has the onus of proof and it stays on the prosecution right throughout, it never moves. So the prosecution needs to prove the two charges before you can convict. If the prosecution has not proved them then, according to the oath that you took at the commencement of this trial, you must acquit. The prosecution needs to prove the charges to a certain standard, the burden of proof, beyond reasonable doubt. You have heard the passage from the case of [*Wanhalla*], that was read to you in the defence opening by Mr Hirschfeld. I need to go through that again.
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> [45] Proof beyond reasonable doubt is a very high standard of proof which the prosecution will only have met if you are sure at the end of the case that Mr Hutchins is guilty of either charge. It is not enough for the prosecution to persuade you that he is probably guilty or even very likely guilty. On the other hand, it is not possible to prove things looking back at human affairs over a number of years ago to a 100% degree certainty - we just cannot do that, and the prosecution do not need to do that.
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> [46] But the test that they have to meet is beyond reasonable doubt. As Mr Hirschfeld said, that is this, "An honest and reasonable uncertainty left in your mind about the guilt of Mr Hutchins after you have given careful and impartial consideration of all of the evidence" - so that you are sure. Now, being sure sounds significant, but really it is not. You make decisions everyday on the basis of whether you are sure or not. If like me you jaywalk on occasions, you stand on the sidewalk, you look to the right, you look to the left, there is nothing coming, so off I go. I am sure I can set off and cross the road without being bowled over. If there is a car coming, I then say: "Well is it far enough away from me to get across? Is it going too fast for me to go across?" And, if I am not sure then I will not set off, I will stop and wait until I am sure. It is not rocket science, do not dwell on this too much. If you are sure - decide the case on that basis.

[34] Mr Tennet submitted that this was wrong because the analogy about crossing the road should not have been used and it weakened the previous (correct) definition of reasonable doubt.

[35] We agree that aspects of what the Judge said here were not ideal and run contrary to the guidance given by this Court in *R v Wanhalla*.[4]

[36] First, the Court in *Wanhalla* said that:[5]

> Directions on reasonable doubt should be given both at the start of the summing up and, in short form, when addressing the elements of the offence and any defences.

Here, the first time the subject is mentioned is half way through the Judge's summing-up.

[37] Secondly, there is the statement suggesting that "being sure sounds significant, but really it is not". Viewed in isolation, at least, there is a risk that this conveys a downplaying of either the importance or the level of the requisite standard.

[38] Thirdly, there is the use of the "everyday" crossing the road analogy. This practice was addressed by the Court in *Wanhalla*. After canvassing the historic use of domestic analogies in New Zealand and elsewhere William Young P said:[6]

> … it is right to recognise that the [important decisions in everyday life] analogy has the potential to puzzle jurors and for this reason is not helpful. It should not be used in the future.

[39] The issue was also discussed at length by Glazebrook J, who said:

> [131] There is no doubt, as William Young P says, that the domestic analogy has a long pedigree, both in New Zealand and England. It is also still commonly used in many States in the United States (see the Power and Richards articles referred to at [69] above). I, however, do not consider that it should be used in future in any form. The analogy may have been of some assistance in the past when many personal decisions required serious deliberation – for example, a decision to visit relatives abroad at a time when

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4 *R v Wanhalla* [2007] 2 NZLR 573 (CA).
5 At [51].
6 At [56].

travel was long, arduous and expensive or to purchase a car or other consumer goods when these were not only expensive but often not readily available. It is of much less relevance in today's throwaway consumer society.

[132] There are also not many decisions in daily life (even important ones) that require a reconstruction of past events. Most important decisions involve decisions as to future actions. As stated in *R v Adams* (Court of Appeal, CA 70/05), 5 September 2005 at [62]: "Such decisions will often be influenced by elements of speculation, hope, prejudice [and] emotion". Different jurors may also take differing levels of care and reflection in even important personal decisions. Further, even if a decision maker in ordinary life is required to reconstruct past events, the conditions under which he or she would be working are very different from those faced by a jury. Unlike those serving on juries, the decision-maker would normally be in charge of the inquiry and importantly be able to check many of the important facts (in the example given by William Young P at [28] by personally checking the trailer connection). The protagonists and their background would also likely be familiar and the decision maker may even have participated in the event in question.

[133] The domestic analogy was disapproved of by the Supreme Court of Canada in *Lifchus* at paras [23] – [24] and *R v Bisson* [1998] 1 SCR 306 at paras [6] – [8]. It was also disapproved of by Ginsberg J (but, contrary to what is said in *Lifchus*, not by the majority in that case) in her concurring opinion in *Victor v Nebraska* at p 24. Ginsberg J commented adversely on an instruction that a reasonable doubt is one which "would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." She referred with approval to the comments of a committee of federal judges reporting to the Judicial Conference of the United States. They said that the domestic analogy seems misplaced for the following reasons:

> "In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives – choosing a spouse, a job, a place to live, and the like – generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases."

[40] But importantly, Glazebrook J then concluded:[7]

The inclusion of such a domestic analogy would not, however, automatically lead to an appeal being allowed. Whether an appeal is allowed must rest on an examination of the judge's directions on proof beyond reasonable doubt looked at as a whole. It is only if there is a reasonable possibility that the jury may have misconstrued the standard of proof that the conviction should be overturned. While the inclusion of a domestic analogy may contribute to this risk, it is not sufficient in itself to create it if the directions are otherwise impeccable.

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7 At [134].

[41] Notwithstanding the deficiencies we have identified we are not of the view that there was a real risk that the jury misconstrued the standard of proof here. The proposition that "being sure sounds significant, but really it is not" needs to be understood in the context of what follows (the domestic analogy). In our view the jury would have understood the Judge to mean that understanding the standard of proof was not "rocket science" not that the standard of proof was unimportant. And use of a domestic analogy is not fatal, provided the remainder of the direction is clear and robust. When the Judge's direction is viewed as a whole, we are satisfied it adequately covered the salient features of the *Wanhalla* formula.[8] In particular:

(a) it explained the rationale for the burden of proof, namely "the presumption of innocence";

(b) it expressly conveyed that "it is not enough for the Crown to persuade [the jury] that the accused is probably guilty or even that he or she is very likely guilty"; and

(c) notwithstanding the use of the domestic analogy, it explained what a reasonable doubt was ("an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence").

[42] In addition, the Judge subsequently returned to the requirement of the need to be sure when he spoke about the question trail.

[43] Accordingly, and notwithstanding that the Judge's direction did not conform with best practice, we consider that no risk of miscarriage arises on this ground. When the Judge's summing up on the standard of proof is viewed as a whole we are confident that the jury would have understood and applied the required standard.

Alleged failure to put defence case adequately to the jury

[44] Mr Hutchins contends that the Judge failed to put the defence case in the ways we have already discussed (and rejected) above but also by:

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[8] As noted by this Court in *R v Peato* [2009] NZCA 333 at [54].

(a) characterising the defence case as "asking the jury to believe Mr Hutchins";

(b) failing to mention defence counsel's closing address effectively; and

(c) isolating several factual issues (despite the usual direction that the jury did not have to follow him) which "amounted to a failure to put the defence case".

[45] We have no hesitation in rejecting the first of these propositions. Although at the beginning of his summing up the Judge did say that "Mr Tantrum wanted you to believe what [S] has said in her evidence and, similarly, Mr Tennet for the defence wanted you to believe what Mr Hutchins has said", his subsequent directions on this topic were both clear and correct. He said:

> [52] The fact that he gave his explanation, the fact that he gave evidence, the fact that he called evidence does not change the situation here - the prosecution still needs to prove the case. But if you accept what Mr Hutchins said in respect of any of the explanations that he has given, then obviously the proper verdicts here are going to be not guilty because, on his evidence before you, he says this did not happen. If what he says leaves you unsure then the proper verdict is not guilty because you will have a reasonable doubt. If what he said to you seems a reasonable possibility then the prosecution has not proved the charges beyond reasonable doubt.
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> [53] The last possibility is that you do not believe him and, indeed, the prosecution asks you not to believe him in respect of his DVD explanation, as does he. Do not jump from that assessment to a finding of guilt. The prosecution needs to prove this case and whether or not Mr Hutchins is believed or disbelieved does not add to the prosecution case except in one regard and I will deal with that in a little bit.
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> …
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> [66] Those are factual findings that you need to get your heads around and decide. So again, in respect of the rape allegation, all three things need to be proved by the Crown. This is not a situation where you can prefer the evidence of [S] to the evidence of Peter. Their evidence is the crux of this matter, they were the only two present at the time. What you have heard from other witnesses can help you with the surrounding circumstances, set up the background and that kind of thing, but there were only two people in the car at the time so their evidence is pivotal. What you make of those two witnesses, focus on that. But you cannot say, I prefer what [S] says to what Peter says. You must believe that [S] has told you the truth and that she has done so accurately if you are going to convict; and you must disbelieve Peter.

[46] We need say no more about this ground.

[47] As far as the second point is concerned, this Court said in *R v Shipton*:[9]

> There are limits on a Judge's duty to put the defence case before the jury. The Judge is absolutely required to see that the nature of the defence is squarely put through his office by summarising the nature of the defence and the evidence. The Judge is not, however, required to repeat defence counsel's arguments, nor to endeavour to "top up" a weak defence case by setting out inconsistencies or matters of that kind.

[48] Here, Mr Tennet summarised the defence case in his submissions on appeal as follows:

> (a) The sex that went on in the carpark at the Clevedon Hotel was unsatisfied.
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> (b) The sex that went on was inappropriate for both partners.
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> (c) The sex that went on was brief.
>
> (d) The sex that went on was regretted.
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> (e) The sex that went on was forgotten after the next day or two and deliberately pushed out of both their minds until it came back to the surface in September, because [C] couldn't restrain himself bumping chests against this accused.
>
> (f) It was a buried secret and at that stage [September 2011] the complainant had to think back as to what happened.

[49] Mr Tennet then said "Counsel used the metaphor of a 'runaway train'. It ran away with that complainant and it ran away from Mr Hutchins."

[50] Put simply, the defence case was that the sex was consensual but immediately regretted (and subsequently lied about) by S. We observe that the case was not put as clearly during Mr Tennet's closing address as was advanced before us. The closing address raised a large number of points not always in a logical structure. No doubt each member of the jury picked up on points along the way that were of interest, but the style did not lend itself to a concise précis by the trial Judge.

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[9] *R v Shipton* [2007] 2 NZLR 218 (CA) at [37].

[51] Although the Judge did not refer to the detail of the defence hypotheses as to why S might have subsequently lied, we are satisfied he did adequately address the critical issue of consent.[10] He also referred to evidence that suggested that S might not have become concerned about what had happened until some time later. In his summing-up, the Judge said:

> [38] There is no dispute either that Peter was at and drove to [A]'s 21st birthday party on 24 June, just two weeks later; and that there were six of them crowded into the car, [S] was in the back. Prior to going to that party the group of them had some drinks and possibly/probably played X-box, some of them, at [E]'s house while the girls were getting ready, getting dressed up for the dress-up party. No dispute about that.
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> [39] There is no dispute either that following that party there was a growing tension within the group of friends, the small group that we have heard about and heard from. Eventually [S] tells her partner [K], tells her parents and tells the police, I think in September 2011. As a result, Peter is interviewed, initially in March, and you have seen that DVD. He is then asked to provide a buccal swab and that is tested in late 2013 and he is then arrested in January 2014 - there is no dispute about any of those things.
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> …
>
> [71] Can I ask you to consider four questions and again, these are not the only questions, but they are questions that you might think are helpful. There is some continued association after the alleged rape on the night in question between [S] and Peter. We know that they were in the same car together going to [A]'s party [a fortnight after [C]'s party]; we know that there was some interaction at the house before they went and there is other interaction between them. What do you make of that? Is that what you would expect had there been a rape? Was she able to put that to one side for the purpose of social niceties because her partner wanted to go to the party? You have heard the explanations both ways. That is one of the things I would look at, were I you.
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> [72] Have [S] and [K] created an explanation for this continued association by talking about the dispute that they had about whether they were going to go to [A]'s party. This is evidence that apparently was not led at the previous trial, it only came to the knowledge of the officer in charge of the case in March of this year and it does suit the explanation, their overall story. And that is what the defence are asking you to think about, have they made that up? Does that affect their reliability, their credibility, et cetera?

[52] With hindsight it could be said that neither the Crown nor the defence case was put especially well to the jury. However, the closing arguments were dealt with in a balanced manner; to the extent that the summation of the defence case was brief, so to was the summary of the Crown's. But defence counsel did not raise the

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[10] We do not need to set out the relevant passages from his summing-up here.

adequacy of the Judge's summary with him at the time, nor was it explained to us how reference to the "runaway train" would have benefitted Mr Hutchins. Overall we are satisfied that the jury would have been aware of the primary thrust of both cases. The core issues were clear, and the detail left to counsel submission.

[53] The third and final point relates to the Judge's identification of four questions that he thought the jury might find helpful. The beginning of the relevant part of the summing up, and the first two questions have been set out above.[11] The other two specific issues raised by the Judge related to:

(a) Mr Hutchins' evidence that he had used his right hand to adjust the car seat where [S] was sitting but then changed it to the left hand and S's evidence that the digital penetration was with his left hand; and

(b) the significance of Mr Hutchins not referring in his evidence to performing oral sex on S until he was cross-examined about it.

[54] It is not immediately obvious why the Judge identified these particular questions as being likely to assist the jury. However, they were not prejudicial nor did they particularly favour one side or the other. However, he repeatedly stressed that factual matters were for the jury to determine, that they should focus on the question trail, and that they should feel free to ignore what he said about any such matters. In particular, in the passages both immediately before and after the identification of the "four questions" the Judge said:

> [70] Now I do not want to give you any hints at all and I am doing my best not to do that because these are factual findings for you to make. So you need to decide these things. The parts of the evidence that I have mentioned in my summing up are parts that I want to talk to you about but you might think that they are not significant, or you might think that other things are more significant. That is fine, that is for you to decide. So please do not decide the case on the basis of what I have focussed on. You work out what is important and what is not important; what you accept and what you do not accept.
>
> …

[11] At [51].

> [76] There are any number of factual issues here that you need to grapple with. I have highlighted a few. I do not say they are the only ones; I do not say they are main ones. The main ones are undoubtedly set out in my legal issues sheet and they are the ones that you should concentrate on, but the other ones may help you to get there to decide what you believe has been proved and what you do not accept as having been proved. But concentrate on what you are here to do, which is to decide the six questions set out in the legal issues document.
>
> [77] I do not want to say anymore about the facts. I just want to remind you that you are the ones who decide this case not me. So ignore what I have had to say about the evidence if it does not help you please, that is your domain completely.

[55] We consider that these statements adequately make the point that the jury ought not be swayed or influenced by the Judge's comments.

Conclusions on conviction appeal

[56] Our analysis has identified aspects of the Judge's summing up which were not, perhaps, ideal. However we are not satisfied that any of those aspects (whether considered either individually or collectively) gave rise to any real risk that a miscarriage has occurred.

[57] The appeal against conviction is dismissed accordingly.

Sentence appeal

[58] Mr Hutchins also says that the sentence of seven years' imprisonment is manifestly excessive.

[59] The Judge recorded that counsel were agreed that the offending fell in the middle of the lowest band in *R v AM (CA27/2009)*.[12] Rape band one (with starting points between six and eight years) deals with offending where aggravating features are not present or present to a limited extent.[13] Here, the aggravating features were:

(a) a degree of premeditation (because Mr Hutchins had dissuaded another potential passenger from travelling with them in the car); and

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12 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 1 NZLR 750. Before us, counsel for Mr Hutchins denied this agreement.

13 At [93].

(b) the fact of two "separate" incidents.

[60] In these circumstances we consider it is unsurprising that the Judge chose a starting point of seven years imprisonment. He declined any uplift for previous convictions or for the fact Mr Hutchins was subject to a sentence to come before the Court if called upon at the time of the offending. He declined to give discount for youth (Mr Hutchins was 27) or for remorse (as there was none).

[61] We are satisfied the starting point adopted by the Judge was well within the available range. No mitigating factors that were ignored by the Judge have been identified on Mr Hutchins' behalf. The end sentence of seven years' imprisonment cannot be said to be manifestly excessive.

[62] The appeal against sentence is dismissed accordingly.

Result

The appeals against conviction and sentence are dismissed.

Solicitors:
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