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

ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE APPELLANT'S WIFE, MOTHER AND BROTHER PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS K, H AND L PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA128/2018
[2019] NZCA 625

BETWEEN	I (CA128/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	30 October 2019
Court:	Kós P, Venning and Thomas JJ
Counsel:	P H Tomlinson for Appellant J E L Carruthers for Respondent
Judgment:	9 December 2019 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal out of time is granted.

B The appeal is dismissed.

C The appellant's identity, and the identities of his wife, mother and brother, are suppressed.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] The appellant appeals his 13 convictions for sexual offending against four girls, all of whom were related to him and aged at the time of the offending between five and 11 years. His appeal is on the grounds of trial counsel incompetence, while also

alleging that the prosecutor's closing address to the jury contained an unfair submission that was not adequately corrected by the trial Judge.

[2] The appeal was filed 37 days out of time. The appellant has filed an affidavit explaining the short delay, which was as a result of counsel unavailability. In the circumstances, and unopposed by the Crown, leave to appeal out of time is granted.

Background

The charges and verdicts

[3] The appellant faced 19 charges involving the four complainants over the period from 2003 to 2015. V was his step-daughter, H and her younger sister L, his nieces by marriage, and K, his biological daughter.

[4] The appellant faced six charges involving V covering the period from 2003 to 2007. There were two charges of indecent assault on a girl under 12, one of doing an indecent act with a young person under 16 and three of sexual violation by unlawful sexual connection.

[5] The appellant faced two charges involving H covering the period from 2006 to 2009. They were both representative charges of doing an indecent act on a child under 12.

[6] The appellant faced six charges involving K covering the period from 2009 to 2013. There were three charges of doing an indecent act on a child under 12 (one of them representative) and three charges of sexual violation by unlawful sexual connection (one of them representative).

[7] The appellant faced five charges involving L covering the period from 2008 to 2015. There were three charges (two of them representative) of doing an indecent act on a child under 12 and two of sexual violation by unlawful sexual connection (one of them representative).

[8] At the conclusion of the Crown case, two of the charges involving V were dismissed because, on the evidence, it could not be proved that she was under 12 years old when the alleged offending took place. On the remainder of the charges involving V, the jury was hung on the three charges of sexual violation and found him guilty on the charge of doing an indecent act on a young person under 16.

[9] The appellant was acquitted on one charge involving H (alleging he rubbed her genitalia) but convicted on the other (alleging he rubbed her breasts).

[10] The appellant was convicted on all charges involving both K and L.

The Crown case

[11] The Crown case was that the appellant started sexually offending against the four complainants when they were between five and 11 years old.

[12] By way of background, K, the appellant's biological daughter, and his nieces L and H, lived with the appellant and his wife. The appellant's wife's daughter, V, stayed with them on weekends. The Crown alleged that, during these times, the appellant would find opportunities to be alone with the girls at his work, in their home and in his "man cave", which was a shed at the back of the house. When alone with them, he would sexually offend against them in a variety of ways.

[13] The offending against V was alleged to have begun in 2003, when she was 10 years old. It was alleged V accompanied the appellant at night when he worked as a tow-truck driver. V said he offended against her at the company's offices and when they were together in his tow-truck. When she was about 13, V told both her mother and her biological father that the appellant touched her. No action was taken.

[14] The offending against H allegedly began in 2006, when she was about six years old and moved to live with the appellant and his wife. She said the appellant sexually offended against her when she was in bed at night.

[15] The offending against K began in 2009, when she was around eight years old. She said the appellant sexually offended against her in the shed where he would show

her pornographic magazines.[1] She said he also showed her pornography on his computer and then sexually offended against her and he behaved similarly when she was in the bath and in bed. She said the appellant repeatedly told her not to tell her mother and, if she did so, it would ruin the marriage.

[16] The offending against L began in 2008 when she was five years old. It occurred when she was having a bath and in the "man cave" where on at least one occasion the appellant showed her a pornographic magazine which he had got from the shed. He told her not to tell anyone, that it was just between them, and to wait until she was 16 when they could have intercourse.

[17] In mid-2015, K told her mother of the offending. The appellant's wife contacted Child, Youth and Family and an investigation ensued. V then formalised her earlier complaint. L's disclosures followed and H's were made following the appellant's arrest.

[18] The Crown rejected the defence contention that the allegations were a result of the complainants colluding. At trial, the Crown prosecutor reminded the jury in closing that V first complained when she was around 13 years old, at which time the other complainants were very young, suggesting there could not have been collusion at that time. He pointed out that V moved at some point to the South Island and, when in her teens, to Australia. He submitted it was a "fairly major coincidence" that a number of years later, K, the appellant's own daughter, independently accused him of sexual abuse.

[19] The prosecutor stressed the similarities in the allegations — the use of pornography, both on the computer and in pornographic magazines kept in the shed, the appellant's particular style of offending (digitally penetrating the complainants and then putting his fingers in his mouth and that of the complainants, and what the appellant said to the complainants as he did so), that he told K and L repeatedly not to tell anybody, the evidence from the complainants of the sexually suggestive way

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1 As became apparent at trial, this was a different shed from the "man cave". The two sheds were apparently located next to each other, with this shed housing the appellant's tools and the pornography.

in which he spoke to them, and that the offending took place in similar locations — the bath, the shed and the "man cave".

[20] The prosecutor addressed the delayed complaints by noting the appellant's instruction to the complainants not to say anything, telling K it would ruin her parents' marriage, and evidence from L and V that they were too scared to say anything. H said she knew she should have told someone but was ashamed.

[21] L, K and H's evidence-in-chief at trial was given by their pre-recorded evidential interviews. By the time of trial, V was 24 years old, L 14, K 16, and H 17.

The defence case

[22] The appellant denied all the allegations, saying they were fabrications.

[23] Mr Johnston, the appellant's trial counsel, emphasised to the jury how difficult it was to defend historic allegations, particularly when they were not date specific. Mr Johnston described the evidence as disclosing that the appellant was a hardworking man, creating a stable life for him, his wife and their family. He noted some of the appellant's wife's relatives' lives were not so stable, involving drug and other issues, with the result that many children, including some of the complainants, came to stay with the appellant and his wife, who cared for them. He told the jury the girls were "quite tight" and set out the history of the complaints: K made the first complaint and told L about it; L's complaint, which he described as a "almost a poor copy" of that of K, followed; V, who had complained earlier but for good reason had not been believed; and then a year later, H complained.

[24] In respect of V's allegations that the appellant offended against her at his workplace, the defence stressed the lack of opportunity to do so. Mr Johnston challenged her inconsistency about timing.

[25] Mr Johnston challenged H about whether the offending occurred when she had broken her leg as she alleged (something both the appellant and his wife said in evidence they did not recall), and about a statement she had written about her allegations, which differed from what she said in her police interview.

[26] L was closely cross-examined on her allegations that the appellant abused her in the "man cave" on the basis that what she described could not have occurred. For example, she said the appellant sexually violated her and, when her brother appeared, the appellant pushed her underneath a table so she could not be seen. It was put to her that there were other items under the table meaning there was no room for her to hide there.

[27] K was cross-examined on the implausibility that she was abused in the shed as she alleged because of its small size; the fact K often bathed with L so there would not have been an opportunity for the appellant to abuse her while she was in the bath; the large amount of time the appellant spent at work or outside working on his cars; and the fact the appellant's brother had a box of pornographic magazines. Mr Johnston challenged K on the specifics of her allegation that the appellant showed her pornography on a computer, for instance, by asking whether the videos were on a disc. Mr Johnston also questioned K extensively on whether she was motivated in making her complaint by a desire to obtain money from ACC, including whether a cousin had told her about how she had received money from ACC after making a complaint of a sexual nature.

[28] The appellant gave evidence, addressing the matters put to the complainants in cross-examination.

Alleged trial counsel error

The principles

[29] To succeed on this aspect of the appeal, the appellant must show that a miscarriage of justice has occurred.[2] The leading authority on appeals based on trial counsel incompetence is *R v Sungsuwan*, where the Supreme Court stated:[3]

> [70] … while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to

2 Criminal Procedure Act 2011, s 232(2).
3 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70].

> ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[30] Accordingly, the correct approach is to determine whether there was any error or irregularity in trial counsel's representation of the appellant and, if so, whether there was a real risk that any such error or irregularity affected the outcome of his trial.[4] In order for the appeal to succeed, the alleged error or errors must have been such that, had they not occurred, there was a real possibility that a not guilty verdict might have been delivered.[5]

[31] In *Hall v R*, this Court drew a distinction between trial counsel error on fundamental matters, which would almost inevitably result in an unfair trial and so a miscarriage, and trial counsel errors on matters less fundamental, which would not always result in a miscarriage.[6] The Court noted:[7]

> … it is helpful to identify the three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage. The fundamental decisions are those relating to *plea, electing whether to give evidence and to advance a defence based on the accused person's version of events*.

[32] Where errors in making less fundamental trial decisions are alleged, a miscarriage of justice will generally only occur if the decision was not one a competent lawyer would have made and if what actually happened may have affected the outcome.[8] It is not a matter of whether counsel could have reached a different decision or conducted the trial in a different way.[9]

Alleged errors

[33] Counsel error in this case is said to comprise:

(a) failure to cross-examine the complainants on required matters;

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4 *Wang v R* [2016] NZCA 632 at [12].
5 *R v Sungsuwan*, above n 3, at [110].
6 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [61]–[62] and [65].
7 At [65] (emphasis added).
8 At [77].
9 *S (CA88/2014) v R* [2014] NZCA 583 at [16], citing *R v Sungsuwan*, above n 3, at [66].

(b) failure to provide disclosure to the appellant, take instructions, and properly prepare for trial;

(c) failure to advise the appellant on his election, prepare him to give evidence, and engage a communications assistant; and

(d) failure to call witnesses.

[34] The evidence at the appeal hearing comprised affidavits from the appellant, Mrs S (his mother), Julia Wright (a speech-language therapist), and Mr Johnston. The appellant and Mr Johnston also gave oral evidence and were subject to cross-examination.

Further evidence

[35] It is convenient at this point to address the further evidence filed for the purposes of the appeal.

[36] The first aspect of the further evidence comprised documents obtained by Mr Johnston as a result of a non-party disclosure application but which were not referred to by him when he cross-examined L and H.[10] This is relevant to the first allegation of trial counsel error and is addressed in more detail in our consideration of that ground of appeal.

[37] The second aspect of the further evidence comprised the affidavit from Ms Wright. Ms Wright provided a communication assessment report on the appellant for the purposes of determining the presence and extent of any communication impairment from which he might suffer. As it is relevant to both the second and third allegations of counsel error, we address it now.

[38] Ms Wright summarised the appellant's communication profile as follows:

> [The appellant] presents with significant difficulties in both his understanding and use of language. He has poor auditory memory, slow processing and his vocabulary is limited to concrete and simple vocabulary. He is easily confused

[10] *R v [I]* [2017] NZDC 20822; and *R v [I]* [2017] NZDC 22119.

> once language goes beyond the short simple sentences and struggles to fully comprehend language that contains multiple concepts, unfamiliar vocabulary or requires him to make inferences. Although in conversation about familiar topics he is able to express his ideas using short simple sentences, he takes time to formulate and organise his ideas and his sentences are punctuated by pauses, fillers and false starts. His performance on the standardised subtests of the CELF-5, for which detailed information is provided in section 5.1 below, indicates that his difficulties are likely to be in the severe range.

[39] Ms Wright qualified her comments by noting that a person's performance on language and communication assessments may vary on different days for a variety of reasons. The report therefore provided a "snap-shot" only of the appellant's skills on one day. The appellant's scores on certain tests suggested to her that he has major difficulties understanding and using language. In prison, he has been working with a Howard League tutor to develop his literacy skills.

[40] The appellant's test scores indicated he has significant expressive language difficulties, although he was able to engage in conversation about familiar topics. His difficulties became more apparent in tasks involving expressing detailed descriptions, explanations or reasoning. He was assessed as having significant difficulties with comprehension. He could follow and comprehend short conversational questions containing simple vocabulary and grammar related to familiar topics, but had difficulties comprehending abstract vocabulary and concepts. Long sentences and complex grammar were described as confusing for him. Ms Wright described gaps in the appellant's vocabulary knowledge and usage, saying he typically uses concrete and simple vocabulary to express himself.

[41] On the question of further evidence on appeal, the Privy Council has said:[11]

> If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[42] In *S (CA88/2014) v R*, this Court observed that, in appeals in cases involving allegations of trial counsel error, it will usually treat the evidence as fresh if persuaded

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[11] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

that counsel error explains its absence from the record and if satisfied that it would have been led at trial but for counsel error.[12]

[43] The new evidence was admitted on appeal without opposition. While not fresh, the new evidence is certainly relevant and credible. Whether it is cogent, that is, whether it might reasonably have led a jury to return a different verdict when considered alongside the other evidence given at trial,[13] is addressed in our assessment of the alleged errors.

[44] We now turn to explore each of the alleged trial counsel errors in turn.

(a) Failure to cross-examine the complainants on required matters

Complainant L

[45] The main focus of Mr Tomlinson's submissions for the appellant regarding L was on trial counsel's failure to cross-examine L on comments she made when interviewed by two social workers for Child, Youth and Family, her school principal and a school social worker on 3 December 2013 when she was 10 years old. At this time, L was living with the appellant and his wife. The following exchange took place:

> Q. What do you enjoy most about living with your Uncle and your Aunty?
>
> A. They don't smoke and they don't drink and they keep me safe.
>
> …
>
> Q. If you had the power to change anything at all would there be anything you would want to change at [the appellant and his wife's house]?
>
> A. Nothing
>
> Q. So things there are exactly how you would like them to be?
>
> A. Yes
>
> …

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12 *S (CA88/2014) v R* [2014] NZCA 583 at [15], citing *Loffley v R* [2013] NZCA 579 at [58]. See also *Scott v R* [2019] NZCA 261 at [12]–[15].

13 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [35]. See also *Wallace v R* [2010] NZCA 46 at [52] and [76]; *Redeemed v R* [2013] NZCA 61 at [20]; and *Chetty v R* [2017] NZCA 586 at [28].

Q. Are you happy with Aunty and Uncle?

A. Yes

Q. And you feel safe?

A. Yes

Q. And you have no worries about living there?

A. No

…

[46] In Mr Tomlinson's submission, this was potentially a very powerful tool in cross-examination, revealing that L had no concerns for her safety in living with the appellant. It would have supported, in his submission, the challenge to L's credibility and the defence case that she was making up her allegations to support the other complainants.

[47] Mr Johnston was of the opinion L's comments would likely have been dismissed as made by a child who had been molested but had divided loyalties. Mr Johnston did not see anything "major" in the disclosure, although accepted in hindsight it would have been useful to put the statement to L.

[48] Mr Carruthers, for the Crown, accepted that the notes were relevant and potentially probative of the defence case. He referred, however, to L's general reluctance to discuss the offending and submitted that, if cross-examined on what she had said, L would likely have referred to her reluctance to disclose her allegations. Mr Carruthers suggested the Crown would almost certainly have sought to adduce counter-intuitive evidence to the effect that it is not uncommon for victims of sexual abuse to refrain from disclosing that abuse, and even to be affectionate towards their abusers.[14]

[49] We agree this evidence was relevant. In saying that, some context is required. L said in her evidential interview, "once I knew that it was wrong for him to do that, I started becoming naughty. … that's when I was about 11."

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[14] See, for example, *DH (SC9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625.

[50] L said she got a "man bun" and shaved the sides of her head. It was at that point, she said, that the appellant stopped touching her.

[51] That quote from L suggests she did not fully understand that what the appellant was doing was wrong until she was about 11 years old, which would have been in 2014. L's comments to Child, Youth and Family were made in December 2013 when L was 10 years old. The offending against her continued into 2015.

[52] L was interviewed twice, in 2015 when she was 12 and then in 2017 when she was 13. Both interviews were replete with references to the appellant telling her it was their secret and she was not to tell anybody. She said she was too scared to say anything and she never "narked" on the appellant. She clearly found it very difficult to discuss what had happened to her. The first interview was terminated when she refused to answer any further questions. In the second interview, she referred to the fact she had to tell those details to a stranger.

[53] As Mr Carruthers observed, challenging L on what she had told Child, Youth and Family could have backfired in that it would have provided a further opportunity for her to explain why she did not disclose the offending earlier.

[54] On balance, we consider that L's statement should at least have been put to her (although there were risks in doing so) and the extent to which the matter should have been pursued would have depended upon L's response. However, in the circumstances as discussed above, we do not consider the omission to have been as serious as Mr Tomlinson contended.

[55] The issue is whether there is a real risk this error may have affected the outcome of the trial and thus caused a miscarriage of justice. L was consistent in both her evidential interviews and her evidence at trial, and she responded well to the challenges to her version of events. It would likely have been inferred that she made the comment at a time she did not really understand that what the appellant was doing was wrong. Had the matter been pursued, the Crown would no doubt have called counter-intuitive evidence, which, in combination with L's repeated references to the appellant telling her not to say anything about the offending, would likely have led

to the conclusion that she said she felt safe not only out of ignorance but also because of his instructions (and potentially even affection for him).

[56] The Crown case was compelling. There was a high degree of similarity between all the complainants' allegations. As to collusion, as the prosecutor noted, it was a "fairly major coincidence" that a number of years after V first complained, the appellant's own daughter independently accused him of similar offending.

[57] In those circumstances, we are not satisfied there is a real possibility that, if the evidence had been put to L, a jury acting reasonably would have reached different verdicts on the charges involving her allegations (or indeed those of the other complainants).

Complainant H

[58] Mr Tomlinson referred to a complaint made by H's grandfather to a social worker on 2 July 2013:

> … [H's grandfather] expressed his concerns on [H's mother]'s parenting ability as accordingly, the latter was allowing H's 16 year old boyfriend to live in her property and permitting her daughter to have [a] sexual relationship with her boyfriend. [H's grandfather] is concerned that [H's mother] is not setting rules and boundaries at her home and because of this, H might get pregnant [at] a very young age.

[59] It appears that H should have been living with her grandfather and his wife pursuant to custody orders but was in fact living with her mother and H's boyfriend, who was at least 16 years old. H was 13 at the time and in a sexual relationship with her boyfriend.

[60] In Mr Tomlinson's submission, the document laid a foundation for a submission H had made a false complaint. By accusing the appellant of sexually abusing her, it deflected any issues concerning her being in a sexual relationship at 13 years old.

[61] Mr Johnston's view was that, as the defence was not one of transference but that the allegations were a lie, the evidence would not have assisted.

[62] We agree with Mr Carruthers that it is entirely speculative to suggest the grandfather's concerns had anything to do with H's allegations and there has been no further evidence put before this Court to support that position. Furthermore, we agree that any such questioning would likely have been precluded by s 44 of the Evidence Act 2006.

[63] Part way through the trial, the Judge was required to give a ruling as to the admissibility of the appellant's response when approached by the police to discuss the allegations from K, V and L in February 2016.[15] The appellant said:

> [A]ll these girls have got boyfriends and I'm the one in trouble. [V] has had a boyfriend since she was 12 and I'm the bad one. I work 6 days a week and I'm a mechanic.

[64] The Crown submitted that the evidence would infringe s 44. The defence sought the admission of the evidence on the basis it was the appellant's way of denying the charges. The Judge accepted that, saying not all young children who have boyfriends engage in sexual activity and noting that, if the evidence were not included, it would appear the appellant had nothing to say to the police about the allegations.[16]

[65] It is highly likely the Crown would have objected to the admissibility of the grandfather's statement in the same way as it did in respect of the appellant's statement to the police when first approached to discuss the allegations. Although the Judge ruled that statement admissible, it can be fairly surmised from the tenor of his ruling that he would likely have ruled the evidence of the grandfather's concerns inadmissible. That would certainly be our view.

[66] Mr Tomlinson also submitted that there was inadequate cross-examination on other aspects of H's evidence, including whether or not she had a broken leg. We have reviewed the transcript and are satisfied there can be no complaint in this regard and indeed Mr Johnston was able to make quite something of the fact neither the appellant nor his wife could remember that H had a broken leg. Furthermore, as pointed out by Mr Carruthers, Mr Johnston seized on a discrepancy between H's police interview and notes she had made leading up to the interview. In the former, she alleged the appellant

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15 *R v [I]* [2017] NZDC 24547.
16 At [10]–[12].

had touched both her breasts and genitalia whereas in the latter she mentioned only the touching of her breasts. Notably, the jury acquitted the appellant on the charge of touching H's genitalia.

Complainant K

[67] Mr Tomlinson criticised counsel's cross-examination of K as being very limited and that the lack of extensive cross-examination reflected his poor trial preparation.

[68] Again, we agree with Mr Carruthers' observations. Much of the cross-examination focused on the evidence the appellant would later give, seeking to undermine the Crown case and support the appellant's version of events. This included the matters Mr Tomlinson claimed were "little developed", such as the living arrangements; the appellant's hours of work; his involvement in parenting; use of household computers and whether the pornography belonged to the appellant's brother. It is unclear how a more thorough cross-examination on these matters would have assisted.

Complainant V

[69] There was no criticism of the cross-examination of V, nor indeed could there have been, given the appellant was convicted of only one out of six charges involving V.

(b) Failure to provide disclosure to the appellant, take instructions and properly prepare for trial

[70] The appellant provided the following chronology:

(a) First appearance on 19 February 2016 — saw Mr Johnston as duty lawyer while in the cells.

(b) Appearances on 10 March, 13 May and 2 June 2016.

(c) Meeting with Mr Johnston (described as brief) on 15 June 2016.

(d) Initial trial date 1 May 2017. Later fixed as 24 October 2017.[17]

[71] The appellant said:

> I did not get a full copy of disclosure until mid-September 2017 just a few weeks before the trial date of 24 October 2017. I had received some disclosure very early in the proceedings. I also had with the assistance of my mother … provided a lot of written information about my defence, the complainants and various witnesses I wanted to have called. I never got to discuss those aspects of the case fully with [Mr Johnston].

[72] According to the appellant, on 2 June 2016, the appellant and his mother went to the Legal Aid office in Manukau seeking a change of lawyer. The appellant (aided by his mother) put the request in writing, citing the appellant's difficulty in getting in touch with Mr Johnston and arranging a meeting with him to discuss the case. Legal Aid was not satisfied a transfer of the grant of legal aid was justified. A grants officer said he would write to Mr Johnston advising him of the appellant's concerns and asking him to contact the appellant.

[73] The appellant said he continually tried to obtain an appointment with Mr Johnston to discuss his case. Although there was a meeting on 15 June 2016, it was very brief. He complained that both he and his mother would telephone or text Mr Johnston to try and arrange appointments but the calls were either unanswered or Mr Johnston would text saying he was unavailable.

[74] He described a 10 minute meeting with Mr Johnston on 28 July 2017 and one meeting of less than an hour on 30 September 2017 when he went to Mr Johnston's office to watch the complainants' evidential interviews.

[75] The appellant agreed that he and his mother discussed the case and his mother gave their responses in writing to Mr Johnston. He said, however, he never really discussed the case with Mr Johnston. He accepted that he gave Mr Johnston his version of events and responded to specifics of the allegations with reasons why they could not be true. For example, that he never washed his hands inside the house but used the washhouse,[18] and information concerning the drain running under the table

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17 The first trial date was adjourned when H was added as a complainant.

18 Relevant as to whether he would have used the bathroom when the complainants were in the bath.

in the "man cave" over which he had put a beanbag, meaning there was no room for L to hide under the table as she alleged.

[76] In her affidavit, Mrs S, the appellant's mother, deposed that the appellant had been bailed to live with her in Rotorua. She assisted him whenever she could, became involved in the case, tried to track down evidence to support him, travelled with him to court appearances and went to see his lawyer. She undertook the task of going through the disclosure with the appellant. She felt it was Mr Johnston's responsibility to do so, not hers.

[77] Mrs S confirmed the difficulty in obtaining disclosure from Mr Johnston, saying it was not until one or two months prior to the trial that they received transcripts of the complainants' interviews, witness statements and other disclosure. This was despite several requests to Mr Johnston for these documents.

[78] Mrs S exhibited various text message exchanges between her and Mr Johnston, many of which are unfortunately undated. The affidavit and annexed disclosure index confirmed initial disclosure, comprising mainly the charging documents and summary of facts, was provided by Mr Johnston on 9 March 2016. In one message, Mrs S noted that the appellant had not been taken through the charges and she was concerned he was unaware of their seriousness. She referred to a list of witnesses she/the appellant suggested should be called for the defence.

[79] On 14 July, Mrs S texted Mr Johnston about meeting, and again on 17 July, noting the appellant would be attending the callover on 27 July "so it's urgent".[19] Mr Johnston responded that the matter had been put off to 23 August for pre-trials. On a date between 27 July and 6 September, Mrs S texted Mr Johnston saying:

> Hi ted, we are hoping that you have enough material to counter all the lies in the many contradictory statements affecting this trial. …

There followed information discrediting the complainants.

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[19] We assume these messages were generated in 2017, although it is unclear.

[80] On 6 September, Mrs S requested photocopies of the charges and an appointment, saying:

> … we are feeling not happy, not knowing what he is facing and [he] has not had the information to answer to, please call to make this appointment for us …

And on 11 September:

> Hi ted have not received the disclosures yet. …

[81] Mr Johnston texted in reply to the effect he was in Court and would be in contact as soon as possible. On what appears to be 12 September, he said the file was on the way. Some time in the next few weeks he texted saying:

> How is it going, looking through the disclosure. Make extra notes, then we can arrange a date to view the videos at the police station here.

[82] Mr Johnston explained that disclosure in cases like this is usually piecemeal and takes a long time. He acknowledged the concerns of the appellant and his mother and said he tried to ask them to be patient, noting that the trial did not commence until October 2017. Mr Johnston pointed out that, early on in the proceedings, the appellant moved to Rotorua, so communication was by phone, email and text. He noted the appellant was limited in when he was able to come to Auckland except for court appearances. He said Mrs S was frequently in contact, understandably worried about the case, but many of the comments made by the appellant and Mrs S, particularly concerning their criticisms of the complainants, were of limited value.

[83] Mr Johnston knew the appellant was dyslexic but pointed out he had provided written instructions at times, exhibiting examples of two such documents.[20] Mr Johnston understood the appellant was happy to have his mother assist him. He said he received written responses from the appellant and his mother in respect of all statements from the complainants and other witnesses. Mr Johnston observed that he received a copy of the transcripts with the appellant's instructions written on them, so that was the reason the appellant and Mrs S might have been without some of the evidence for a time.

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[20] The appellant confirmed those documents were written on his behalf and reflected his instructions, although maintained he did not write them himself.

[84] Mr Johnston's diary recorded meetings at his office on 15 June 2016, 30 July 2016, 5 May 2017, 19 July 2017, 17 October 2017 and 19 October 2017. He also referred to another meeting (location unclear) on 23 August 2017. He explained that the meeting to view the complainants' evidential interviews was mainly for the purpose of assessing how the complainants would give evidence, as transcripts of the interviews had already been provided and commented on by the appellant.

[85] Mr Johnston said he made sure the appellant fully understood the allegations, saying he went through them carefully at their "many face to face meetings" and phone discussions. He said he was fully instructed on how to question the complainants in an effort to undermine their evidence. He pointed out that he was able to challenge V's account based on the information provided by the appellant and that resulted in acquittals on most of the charges involving her. Mr Johnston did not consider the appellant needed further communication assistance. He noted that the instructions he received were of good quality and sensible.

[86] In his submissions, Mr Tomlinson referred to the appellant's attempt in June 2016 to have a new lawyer appointed. This, in his submission, was evidence of how dissatisfied the appellant was with his legal representation and reflected the matters of which he complains, that is, a lack of disclosure and a failure to take proper instructions.

[87] We consider that Mr Johnston's response to the appeal was less than satisfactory in many respects. He did not have a good memory of the file and it did not appear that he had refreshed his memory prior to giving evidence. He did not bring his full file to Court. He did not have file notes. He did not bring his Legal Aid provider time records to Court, these being "back at my premises". The detail he was able to provide to substantiate meetings with the appellant consisted only of entries in his diary and did not accord with the appellant's recollections. He was unable to substantiate, by reference to his own record keeping, his evidence that disclosure was provided to the appellant piecemeal throughout the process, as and when he received it.

[88] We accept that the appellant and his mother were concerned about the delay in receiving disclosure and may well have been frustrated at what they considered to be Mr Johnston's lack of responsiveness. These are matters of client service. The context does, however, require consideration. Disclosure is often made piecemeal. Defence counsel are usually extremely busy juggling a number of demanding clients. Mr Johnston was clearly working on the file without the appellant and his mother necessarily being aware of it. For example, the application for non-party disclosure.[21]

[89] We agree with Mr Johnston's assessment that a great deal of the material provided by (or on behalf of) the appellant, while useful background perhaps, could not be used at the trial, given it was hearsay, irrelevant and/or raised issues about the sexual experience of the complainants.

[90] The fact remains that, by the time of trial, Mr Johnston had clearly received meaningful instructions. His cross-examination of the complainants was relatively well-structured and thorough. Mr Johnston worked through the allegations, raising the inconsistencies identified by the appellant. There was a good level of coordination and specific lines of cross-examination with each complainant relying on information only the appellant could have provided. Such coordination could not have been achieved without Mr Johnston and the appellant reaching an understanding about the defence theory of the case and how it would be advanced. When the appellant gave evidence, he was led in an appropriate manner and given the opportunity to reinforce the issues raised in cross-examination of the complainants.

[91] Mr Johnston had a strategy and an explanation for the allegations, which he advanced to the jury right from the outset. In his closing address to the jury, Mr Johnston drew the threads together and focused on the inconsistencies in the complainants' evidence — for example, where at the appellant's work the offending against V had taken place, whether or not H had a broken leg, as she had alleged, the historic nature of the charges, discussion of ACC pay-outs, whether

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[21] In saying that, the application was made on 15 September 2017, very close to the trial date. We do not overlook Mr Tomlinson's criticism that there were procedural deficiencies in the application.

the pornography belonged to the appellant's brother or not, and the context of the family dynamics.

[92] Therefore, while we agree there might have been legitimate complaints about aspects of Mr Johnston's responsiveness and availability to the appellant prior to the trial, the appellant has not established any specific prejudice as a result of the alleged inadequacy of Mr Johnston's preparation. Indeed, we consider the fact the jury acquitted or were hung on a number of charges points in the opposite direction. In short, in our assessment, Mr Johnston did a good job in the face of a compelling Crown case.

[93] We conclude that any deficiencies in client service did not result in a miscarriage of justice.

(c) Failure to advise the appellant on his election, prepare him to give evidence, and engage a communications assistant

Failure to advise and prepare appellant

[94] The appellant said:

> I never had a meeting with my lawyer to discuss the evidence I would give. My lawyer never provided me with a brief of my potential evidence or sat down with me and prepared one. In fact, right up to the point after the Crown finished their case I was advised by my lawyer that I would not be giving evidence. I was completely taken by surprise when he then told me I would be giving evidence. It was never put to me that I had a choice about this but more that I needed to give evidence. I was not prepared at all.

[95] The appellant did not accept that he always wanted to give evidence. The appellant said he was told by Mr Johnston he would not be giving evidence and he understood that to be the position until told by Mr Johnston at the conclusion of the Crown case that it would be in his best interests to give evidence. He maintained he did not know what he would be asked.

[96] The appellant believed his dyslexia and lack of preparation seriously affected his evidence and what he described as his "obvious confusion" at some of the questions he was asked. He said no-one suggested he could have had the benefit of a communications assistant.

[97] Although acknowledging he signed the Case Instruction Checklist (a form provided by Mr Johnston that recorded his election to give evidence), the appellant said he did not know what he was signing, Mr Johnston did not take him through the checklist, he could not read it and he simply trusted Mr Johnston.

[98] Mr Johnston said he went through the checklist point by point explaining it to the appellant and the appellant initialled each point.

[99] The checklist is undated. It deals with eight numbered issues and the appellant's initials are shown alongside seven of the eight. Not all sections of the checklist have been fully completed. For example, item three records the election of "jury/judge alone trial". Neither option is shown as selected. It records receipt of disclosure but the date is not specified.

[100] Item eight records the decision to "testify at trial". When giving evidence, the appellant was unable to read the word "testify" as it appeared in item eight of the checklist. He thought "to testify" meant "to speak" but was not sure about that.

[101] Mr Johnston said the appellant had been advised throughout that he may need to give evidence. He described the appellant as happy and willing to do so. Mr Johnston was of the opinion that the appellant had a concise, clear and very good memory of the case and events. He did not consider the appellant was caught out by Crown questioning, saying that the appellant did a good job giving evidence.

[102] Mr Johnston was not of the opinion that the appellant needed a communications assistant, given the issue was with his dyslexia, which also meant a written brief of evidence would have been of little value. He described the appellant as fully knowledgeable and prepared on the basis of his responses to each separate witness.

[103] Mr Johnston said the final decision was made at the conclusion of the Crown case. Mr Johnston said two of the complainants in particular gave compelling evidence and he advised the appellant to give evidence. He said the appellant wanted to deny the offending before the jury.

[104] In our view, it would have been obvious from the outset that the appellant would likely have to give evidence. There was no police interview to draw on for his version of events. The appellant had declined to participate in an interview on legal advice from a lawyer (not Mr Johnston) contacted by the police on his behalf.

[105] In cross-examination, Mr Johnston often referred the complainants to the evidence the appellant would give. Indeed, the appellant had to give evidence in order for a number of matters canvassed in the complainants' cross-examination to carry any weight. That is, without his evidence, there would have been no evidential foundation for many of the propositions put to the complainants.

[106] These circumstances support Mr Johnston's evidence that the appellant had always known he would likely have to give evidence. We accept that Mr Johnston advised the appellant that he had the right not to give evidence but that it was his opinion he should do so, particularly given the strong evidence from the complainants at the trial. We also agree with that assessment.

The appellant's evidence at trial

[107] Mr Johnston took the appellant through the allegations in chronological order. He began by asking him about V and the allegations that she had made, involving offending at his workplace. The appellant was able to give evidence in some detail about what had occurred when V accompanied him to work.

[108] Mr Johnston asked the appellant about the environment at his home, eliciting evidence of the number of people staying and visiting, and that it was a busy house. This painted a picture for the jury about the lack of opportunity for, and unlikelihood of, offending. He asked the appellant who was in charge of looking after the children and generally laid the foundation for the defence — that the appellant's wife primarily had the childcare responsibilities, that the appellant was a hard worker both at work and at home, where he worked on cars outside, that there was a box of pornography belonging to his brother in the shed and that he did not have time to use the computer.

[109] The appellant was asked about and explained the arrangement in the "man cave". He said it was not a "man cave" but said it was really for his dogs because he had about eight at the time.

[110] When asked about whether he had committed any offending in the bathroom, the appellant explained that, when he needed to wash his hands, he would use the washhouse because he would have oil on his hands from working on his cars and needed to use washing powder to clean them.

[111] The appellant proved well able to stand up to challenges in cross-examination. For example, when it was put to him that he used the "man cave" for social purposes, not only did he say that was wrong but he gave a reason for his answer, which was that "it was yucky in there and it smelt". The issue of the drain running under the "man cave" had already been discussed with some of the witnesses, for example L, who conceded there was a drain and it smelled. This was important both to establish the appellant's credibility but also because it reinforced his version of events that the "man cave" was not used for social purposes and that, because of the need to cover up the drain with a bean bag, L's description of hiding under the table in the "man cave" when others approached could not have been correct because there was insufficient room.

[112] Mr Tomlinson referred to two specific examples to demonstrate the appellant's limited oral communication skills. The first was:

> Q. So when she has specific memories about sitting out there for drinking, smoking, watching television on one occasion she is completely wrong?
>
> A. Yeah we don't drink. Coffee but no alcohol.
>
> Q. Okay, I think that probably wasn't the point of the question, point of the question is this was an area for sitting out there and socialising might be a better way to put it.

[113] We cannot see any difficulty with this exchange and the appellant's interpretation of the question was entirely understandable. In fact, he then took the opportunity to undermine L's evidence by raising the issue of the drain.

[114] The other example was:

> A. We've only had one going TV and that's in the lounge.
>
> Q. It's portable isn't it?
>
> A. No, the TV is not portable.
>
> Q. You can't pick it up and move it?
>
> A. Yes you can but —
>
> Q. That's what portable means.
>
> A. — not — yeah it was quite heavy.

[115] Again, we do not consider this exchange particularly disadvantaged the appellant.

[116] The appellant was quite capable of requesting clarification if he did not fully understand propositions put to him. For example, asking the prosecutor to "rephrase" a question, telling the prosecutor he was "jumping a bit", saying he did not understand, or that he was getting a little lost. At one point he explained that he was dyslexic and the questions had become somewhat overwhelming.

[117] We do not consider the appellant was shown in a disadvantageous light by these exchanges. Indeed, in some of them, his observations and implied criticisms of the questions were justified.

[118] The appellant was challenged (repeatedly) on his claim that he never had anything to do with childcare and was never alone with the complainants. His evidence was that his wife always had control of the children and he had no say in their activities. He had to concede that there were occasions when he looked after the complainants. This enabled the Crown to put it to the appellant that he was changing his evidence and doing so because he wanted to hide the truth from the jury.

[119] The appellant's defence included his contention that he did not have the opportunity to offend against the complainants as they alleged. His position that he was never alone with the children might have been inadvisable but that was the

position he was entitled to take and on which he was legitimately challenged. He is not the first witness who has had to qualify earlier answers when cross-examined.

[120] In other instances, the appellant responded robustly to challenge, saying he was not changing his evidence. When his evidence was at odds with that of his wife, resulting in it being put to him that he was suggesting she had "falsely remembered", he adroitly responded, "[w]ell it was a long time ago so she could've got it wrong".

[121] The appellant's evidence about V's allegations was clearly considered compelling by the jury, given he was convicted on one only of the charges relating to her allegations. This is despite being challenged about his description of the layout of his workplace, the feasibility of his version of events, the fact he had not told his wife that V had allegedly tried to initiate sexual contact and it had been put to him that his evidence was a fantasy.

[122] The appellant made concessions when appropriate to do so, for example accepting a towel worn by him could have fallen off in front of V.

[123] We therefore cannot agree with Mr Tomlinson's observation that the answers given by the appellant in cross-examination demonstrate that he was ill-prepared to give evidence.

[124] We have considered the report from Ms Wright, the communication expert. It would appear to be the case that, when he gave evidence, the appellant operated at a higher level than on the day of his testing by Ms Wright. Despite the appellant's dyslexia, he certainly presented to us as being relatively articulate when giving evidence at the hearing of his appeal and it appears he was so during his evidence at trial as well. The issue identified by Ms Wright as to the appellant's expressive language difficulties was not apparent when he gave evidence, perhaps because the questions and answers were confined to factual matters.

[125] Prior to trial, Mrs S (the appellant's mother) effectively played the role of a communications assistant and obviously did a very good job, considering the grasp of the various issues the appellant demonstrated when giving evidence.

[126] We do not therefore accept Mr Tomlinson's submissions that the appellant's disabilities had a real impact on his evidence and was detrimental to his case. We do not agree that he was seriously disadvantaged by the lack of a communication report and adoption of procedures to assist. We are not satisfied that the use of such procedures might reasonably have led a jury to return different verdicts.

[127] For these reasons, we are not persuaded by this ground of appeal.

(d) Failure to call defence witnesses

[128] The appellant says there were a number of witnesses he wanted called. Although R and the appellant's brother, D, and an old friend of the appellant were called, the appellant wanted others called, including his son, and several neighbours and regular visitors to his property. He said the witnesses could have given evidence on the nature of the household, the regularity of people staying and visiting and what the appellant normally did. He said it was never explained to him why they were not called.

[129] Mr Johnston said he contacted those identified by the appellant as potential witnesses but many did not wish to give evidence or had little practical, useful evidence to provide. Although the appellant's son and niece had been prepared to give evidence, their proposed evidence was inconsistent with that given by the appellant. Mr Johnston said he advised the appellant of his opinion that they should not give evidence in the circumstances and the appellant agreed.

[130] We do not accept the criticism concerning the failure to deal with potential defence witnesses properly. Mr Johnston's evidence that he did not call two intended witnesses because their evidence would undermine that given by the appellant on certain matters was not challenged. Furthermore, there is no affidavit evidence from other prospective witnesses who the appellant says should have been called but were not. Without that, the relevance and probative value of any evidence they could have given cannot be assessed.

Conclusion

[131] For the reasons given, we are satisfied the issues complained of as to trial counsel's incompetence, taken separately or cumulatively, did not result in a miscarriage of justice.

Prosecutor's closing address

[132] In Mr Tomlinson's submission, there was no basis for the prosecutor's comment to the jury in his closing address:

> The Crown says in terms of what you heard, in terms of behavioural issues and so forth, why were they troubled and acting up? Because they had been sexually abused by the defendant for a number of years.

[133] The Judge in his summing up said:

> There was vague reference to troubled girls. I suggest you disregard that, ladies and gentlemen. You decide this case on the evidence you have heard in this Court, …

[134] In Mr Tomlinson's submission, the jury should have been told in strong terms that there was no evidence to support the prosecutor's statement. The jury should have been instructed that they were not to link any misbehaviour with sexual abuse and that there could be many reasons why misbehaviour could occur.

[135] There was evidence of behavioural issues. As we have mentioned, L said the offending against her stopped only once she started being naughty, got a "man bun" and shaved the sides of her head. She started smoking more, going out, swearing and associating with "all the naughty people". There was, therefore a link drawn by L between her behaviour and the offending, albeit it was her explanation for why the offending against her stopped. There was also evidence V had been a difficult child, began smoking at an early age and lied to her caregivers about it. The Judge then ruled that the defence was not permitted to ask V further questions about these aspects of her behaviour when she was young.[22]

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22 *R v [I]* CRI-055-371, 2 November 2017.

[136] More to the point, perhaps, it was the appellant who put this in issue. Indeed, that was the context of this aspect of the prosecutor's closing. Immediately before the passage to which Mr Tomlinson objected, the prosecutor said:

> Indeed, when Detective Norton did come to speak to the defendant, what he said about the allegations was, "They've got boyfriends and I'm the bad one." Something to that effect.
>
> It's a matter for you, but you might think this is pretty telling and [a] deliberate way for the defendant to blacken character, really divert attention away from himself, and there was a similar kind of reference, this is not intended to be a criticism but in the defence opening address that the fact that these are troubled girls, you know, behavioural issues, and that has come up to some extent on the evidence. Suggestion perhaps therefore that these girls are less likely to tell the truth or something. There is very limited evidence of that what the behavioural issues were and so forth, you can't put much weight on it.

[137] The prosecutor himself informed the jury they could not put much weight on this issue and the Judge informed the jury to disregard any suggestion they were troubled girls. The prosecutor did not suggest that the complainants' behavioural issues were evidence the allegations were true.[23]

[138] In the context of the closing address as a whole, and in light of the two factors we have identified, we do not regard this as an issue of concern.

Result

[139] The application for leave to appeal out of time is granted.

[140] The appeal is dismissed.

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[23] Compare *R v Henderson* [2007] NZCA 524 at [56]–[58]; and *R v A (CA664/2008)* [2009] NZCA 250 at [32]–[33].

[141] The complainants' names and identifying details are automatically suppressed pursuant to ss 203 and 204 of the Criminal Procedure Act 2011. We order the suppression of the appellant's identity, and the identities of his wife, mother and brother, in order to protect the identities of the complainants.[24]

Solicitors:
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[24] Criminal Procedure Act, ss 200(2)(f) and 202(2)(d).