NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA695/2014
[2016] NZCA 163

BETWEEN	NARAYAN PRASAD Appellant
AND	THE QUEEN Respondent

Hearing: 9 February 2016

Court: French, Simon France and Ellis JJ

Counsel: M J Phelps for Appellant
K S Grau for Respondent

Judgment: 2 May 2016 at 2.15 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] Mr Prasad has stood trial on three occasions in relation to allegations of historic sexual offending against three young girls (now adults) who are all related to him and each other. Initially there were 42 charges involving four complainants. Some charges were dismissed during the first trial, leaving that jury to consider

32 charges in relation to three complainants. Convictions were entered on 31 charges.

[2] Mr Prasad appealed and a new trial was ordered based on a conclusion Mr Prasad had been inadequately represented.[1] At the second trial Mr Prasad was acquitted on all but five charges, concerning which the jury could not reach agreement. Those five charges went to a third trial, this time before Dobson J and a jury in the High Court at Wellington, at which Mr Prasad was convicted on all counts. He was sentenced to 11 years and six months' imprisonment.[2] The convictions involved three complainants:

(a) J – there were two representative charges of indecency with a girl under 12 years of age. The charges involved Mr Prasad inducing J to touch his penis and put his penis in her mouth. The offending occurred when J was six to eight years old.

(b) B – B is J's younger sister. There was a single charge of indecency with a girl under 12. It involved Mr Prasad inducing B to masturbate his penis. B was around seven years of age at the time.

(c) A – A is J's daughter. The offending against the other two girls occurred in the late 1970s to early 1980s. This alleged offending occurred between 1995 and 1997. It involved Mr Prasad kissing A, and later that day raping her. A was aged five to six years at the time.

[3] Mr Prasad appeals against both conviction and sentence. Concerning conviction, he renews the matters advanced in a pre-trial application for a discharge under s 347 of the Crimes Act 1961 or a stay of proceedings.[3] The primary emphasis is on the unreliability of the complainants, the impossibility of responding to evolving complaints, and, generally, the history of the proceedings. Mr Prasad next contends prejudicial material was wrongly admitted and it has led to a miscarriage of justice. Finally, various challenges are made to Dobson J's summing-up.

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1 *Prasad v R* [2013] NZCA 267.
2 *R v Prasad* [2014] NZHC 3014.
3 *R v Prasad* [2014] NZHC 1931 [Pre-trial decision of Collins J].

[4] Concerning sentence, the primary focus is on what is said to be an excessive starting point of 10 years and six months' imprisonment for the rape of A.

Facts

[5] An extensive narrative is not required, but sufficient overview is needed in order to address the various appeal grounds. The victims J and B are related to Mr Prasad's wife. They are significantly younger than her and would on occasions visit the Prasads' house. It was said the offending occurred during the visits. The third victim, A, is also said to have visited on occasions when she was young.

[6] The history of the complaints was somewhat complex. J first contacted the police in 2001, as did B. Each made statements. Each was by then an adult woman. A, then aged 10, was evidentially interviewed at the same time. She reported only that Mr Prasad had kissed her. In 2002 Mr Prasad was interviewed. No charges were laid.

[7] In 2004 J again took her daughter to a police station. A had with her a note from her diary that recorded Mr Prasad had raped her. However, A tore up the note before leaving without being interviewed. A police officer reassembled the note and put it on file.

[8] In 2009 the two older women again asked the police to review their complaint and the following year A was re-interviewed. She complained of a rape. Further investigations followed and in 2011 Mr Prasad was re-interviewed and then charged.

[9] Mr Prasad's offending concerning J occurred when the Prasads lived in Petone. J said Mr Prasad would abuse her often, either in a bedroom or when she had been taken in a car to Petone Beach. There had been a further allegation dealt with at the earlier trials that the same conduct would also occur in the bathroom. Despite an acquittal on this charge at the second trial, the evidence was led in the present trial, and was the primary matter underpinning a mistrial application during the trial.

[10] J gave evidence of a troubled life as a teenager. She said she was the victim of physical abuse at her own home, and eventually she went to a foster home. During this period, when she was at high school, she would sometimes have contact with Mr Prasad for the purpose of sexual activity, for which he would pay her money. Eventually J ended up for four years at Odyssey House in Auckland.[4] She met the man she was to marry and together they had A, the third complainant. J testified that about a year after A's birth she contacted Mr Prasad to ask for money. They met and money was exchanged for sexual favours. It was the last sexual contact between them.

[11] B described a one-off incident when she was visiting the Prasads at the house in which they lived subsequent to Petone. She gave evidence of a similarly troubled life, but also noted that for a period she worked for Mr Prasad.

[12] A described visiting on weekends to play with her cousin who was a similar age. She described an incident of rape.

[13] The other primary witness called by the Crown was J and B's mother who gave evidence of the family connections and of opportunity. She recounted the working arrangements of herself and her husband and the visits the girls would make to the Prasads. Both parties submitted her evidence supported their case.

[14] The defence was that no offending had occurred and that the complainants had colluded. There were numerous threads raised, including alleged inconsistency across the various statements, lack of opportunity, lack of credibility buttressed by examples of changed evidence allegedly to suit the particular circumstance, the timing of complaints as allegedly all following a family altercation, and a lack of reliability due to a history of alcohol and drug abuse.

[15] Mr Prasad did not testify (having given a recorded interview) but his wife and two daughters did. The first daughter to give evidence disputed the claim that A was a regular visitor or that she ever stayed the night. She said at the relevant time the room where A's rape allegedly occurred was her bedroom, and denied the rape

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[4] Odyssey House is a well-known residential facility for those with alcohol and drug addictions.

occurred. She disputed detail given by A. The second daughter to give evidence had been close friends with B. She said she never saw anything inappropriate. She also queried whether A had stayed overnight.

[16] The third witness was Mrs Prasad. She gave evidence supportive of the defence. She felt J and B had not stayed often, although there was a short time when both girls stayed when their father was hospitalised. She disputed they would be left on their own with Mr Prasad. She also denied J had gone to the beach with Mr Prasad. Likewise, Mrs Prasad said A had not stayed with them at the age when the rape was alleged to have occurred, although she did stay when she was older.

[17] Against that background we turn to the grounds of appeal.

A stay of proceedings?

[18] Once the defendant is convicted any appeal is necessarily against that outcome rather than directly against the pre-trial decision. However, the same matters may be advanced in support of a claim the trial has miscarried, albeit regard must be had to what actually occurred at trial.[5] The proper approach to a stay application was recently settled by the Supreme Court in *CT v R* and need not be repeated here.[6]

[19] Some of the matters advanced pre-trial underlie specific appeal grounds and will be considered in that context. It is sufficient at this stage to observe there is no basis on which it can be contended Mr Prasad could not have, and did not have, a fair trial. All the relevant witnesses were available to be cross-examined and called by Mr Prasad. Whether the essential complaints of the complainants had in fact evolved was, at best, a contestable point, and the topic was well canvassed before the jury.

[20] Nor does any concern arise about this being a third trial. If one puts to one side the first trial (the outcome of which does not assist Mr Prasad), there was no

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5 See *Thompson v R* [2014] NZCA 136 at [16]–[17]; *R v R (CA60/08)* [2008] NZCA 318 at [22]; and *R v W* [1995] 1 NZLR 548 (CA) at 551.

6 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [32].

basis to consider the second jury had acted irrationally in not agreeing on five counts. Justice Collins in the pre-trial ruling rejected an application for a discharge under s 347 of the Crimes Act 1961,[7] and there is rightly no ground of appeal that alleges an insufficiency of evidence. There was sufficient evidence to support the five charges, they remained undetermined and the credibility of the complainants was a matter for the jury. There was nothing unusual or improper in proceeding to trial on the charges.

[21] Related to this aspect, Mr Phelps for Mr Prasad submits there was unfairness in the five counts being considered in isolation. The credibility of the complainants was unfairly bolstered by the jury not being aware of more fanciful allegations on which Mr Prasad was acquitted. We accept this sort of retrial issue, which is not uncommon, requires a judgment call to be made about whether to impeach the complainants by reference to their allegations of further misconduct against the defendant. But it is not an unfair choice to have to make. It is a normal incident of litigation. The effect of Mr Phelps' argument would be that there could not be retrials in this situation, and that cannot be so. There was nothing to prevent counsel cross-examining the complainants about this other material, and any prejudice that arises as a result of such disclosure is not difficult to address. The Judge did so in his opening address by advising the jury Mr Prasad was acquitted on the wider allegations at the first trial, and by focusing the jury on its present task.

[22] This ground of appeal fails.

Inadmissible prejudicial evidence

[23] Several items of evidence are identified under this ground. Each will be considered in turn, and to the extent inadmissible evidence has been introduced, a cumulative assessment that has regard to any directions given by the Judge will then be required.

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7 Pre-trial decision of Collins J, above n 3.

(a) Evidence of further alleged offending of which Mr Prasad was acquitted

[24] The Crown indicated it would only lead evidence of the alleged misconduct underlying the remaining charges. As noted above at [9], J had alleged oral sex had occurred in the bathroom, but at the second trial Mr Prasad was acquitted on this allegation. However, during the evidence of J the Crown asked her whether anything occurred in the bathroom. J responded that Mr Prasad would come into the bathroom while she was in the bath, grab her head, and "away we go".

[25] The evidence was inadmissible in the absence of a propensity ruling allowing its admission. None was sought. However, the unfair prejudice introduced by this evidence was minimal. Its source was the same complainant and she was simply saying conduct that she alleged occurred almost every time she visited had happened in the bathroom as well as the bedroom. There was no fresh prejudice and any impact it might have had depended solely on the jury believing J in the first place.

[26] In response to this evidence the Judge directed the jury both that Mr Prasad had been acquitted on that allegation, and that, while it was relevant for the purpose of assessing the complainants' credibility, the jury did not have to make decisions about allegations not the subject of charges. This was sufficient. An aspect of the appeal is that there was an abuse of process in the Crown deliberately leading the evidence. We do not consider the situation has that flavour. We accept it was contrary to the indication the Crown had given, and that, in any event, prior permission was required. However, we are advised this evidence was included in an amended brief that had been provided to the defence prior to trial and no objection had been taken.

[27] Our assessment is that an error was made; however, its character is not such as to constitute an abuse of process, and the impact of the evidence was minimal. Defence counsel in fact applied for a mistrial during trial and were declined.[8] The Judge considered, and we agree, that directions would adequately address the matter. These were given.

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[8] *R v Prasad* HC Wellington CRI-2011-032-4065, 9 October 2014.

(b) Prior statement of the complainant J

[28] The defence case was that the complaints were fabricated. A strand of this proposition was that the initial complaints to the police in 2001 were made in response to an incident that had just occurred within the family. It was said J was embarrassed and angered by the incident and reacted by fabricating the complaints. Obviously, against that background, evidence of complaints by her prior to that date are relevant and provisionally admissible.[9]

[29] The evidence of J's prior consistent statement came initially from the foster mother with whom J was living in 1986. In response to a television programme they were both watching that concerned sexual abuse, J became upset and left the room. The witness pursued her and was advised by J that she had been sexually abused by a family member. The witness could remember J said it was a male, but not who. In cross-examination she agreed J had specified the relationship in terms capable of capturing Mr Prasad.

[30] The foster mother reported the matter to a social worker who made a file note. The social worker also testified. The file note effectively identified Mr Prasad as the perpetrator, but said the complaint was that he had "made sexual advances to her". It was undated.

[31] The admissibility of this evidence was challenged at the start of trial and now again on appeal. The challenge is that the evidence is too vague and could not be related to specific conduct, especially given only two, albeit representative, charges proceeded in relation to J.

[32] In his ruling Dobson J accepted there was generality in the nature of the complaint, but considered more weight had to be placed on the clear identification of Mr Prasad as the perpetrator.[10] We agree and do not consider the point to be seriously arguable. In a situation where fabrication is alleged and is said to be motivated by a specific event evidence that well before that event J made allegations

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[9] Evidence Act 2006, s 35(2); *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

[10] *R v Prasad* HC Wellington CRI-2011-032-4065, 8 October 2014 [Admissibility ruling of Dobson J] at [41].

against Mr Prasad of sexual offending is plainly relevant and admissible. The prior complaint does not afford proof of what form the sexual abuse took, but that does not make it irrelevant. In other respects it directly responds to the defence.

(c) Mr Prasad's extramarital affair whilst working at Ford

[33] This was also dealt with in the same ruling.[11] During his interview with the police Mr Prasad was asked about the affair and admitted to it. The Crown contended for its admissibility on two bases — that there was inconsistency on Mr Prasad's part about the issue and so it went to his credibility, and it might be relevant to Mrs Prasad's evidence should she testify, which she did. The theory was that it showed, contrary to Mrs Prasad's evidence, that there were secrets in the marriage and she would not necessarily have known about the abuse of the complainants.

[34] This is one of those issues on which different viewpoints can reasonably be held. Lack of knowledge of an affair with a work colleague does not necessarily establish Mrs Prasad did not know what was happening in her home. Some judges may have required its excision from the evidence-in-chief as it is plainly collateral to any real trial issue and has some general prejudice, but we do not say the Judge was wrong.

[35] No specific direction on the issue was given, but there was, of course, the usual prejudice and sympathy direction and numerous directions to the jury about focusing on the key issues. Finally, at this stage, we observe that, even if inadmissible, the nature of the evidence is not such as would — of itself — support a miscarriage argument.

(d) Evidence of subsequent consensual sexual activity with J

[36] As noted, J gave evidence of consensual sexual activity with Mr Prasad for money when she was at high school and then a year after A's birth. Mr Prasad denied any sexual activity with J while she was at high school, and said the later activity occurred more often than J acknowledged. He said the relationship at that

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11 Admissibility ruling of Dobson J, above n 10, at [9]–[10].

time lasted for a few months. Mr Prasad had volunteered this information in his police interview.

[37] The defence objection was that the present trial, unlike the earlier ones, contained no counts that involved sexual intercourse with J. Accordingly, evidence of consensual intercourse with Mr Prasad when J was at high school or later could not be relevant to whether sexual abuse occurred when J was a child.

[38] Justice Dobson ruled the evidence admissible on the basis the nature of any ongoing sexual relationship between J and Mr Prasad was relevant, the consensual sex formed part of the narrative and it would be artificial to omit it.[12] We agree with the reasons given by Dobson J and add only a brief comment. The reality is that the whole of the relationship between J and Mr Prasad was plainly relevant to the charges, and in cases such as these it is artificial to seek to partition the relationship up. The evidence given by both J and Mr Prasad showed Mr Prasad had a sexual interest in J as an adult. If J was believed it had been a rather constant interest starting when she was much younger. The evidence was relevant to the family dynamics and had relevance to Mrs Prasad's reliability once she testified about whether the events could have happened.

(e) Rebuttal evidence

[39] The Crown was given leave to call rebuttal evidence designed to discredit a peripheral aspect of Mrs Prasad's evidence. The rebuttal evidence, which concerned whether Mr Prasad had long hair at one point, contradicted Mrs Prasad's assertions that he had not.

[40] The admissibility of the evidence had been the subject of another pre-trial ruling by Collins J, who held it was provisionally admissible.[13] We acknowledge there had already been a trial so there was more knowledge than usual about likely defence evidence, but we do query the usefulness of determining pre-trial the admissibility of evidence that is dependent both on the witness being called by a defendant, and then on what answers she gives.

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[12] Admissibility ruling of Dobson J, above n 10, at [28].

[13] *R v Prasad* [2014] NZHC 1938.

[41] We do not consider leave to call this evidence should have been given. When taxed on the matter Mrs Prasad accepted she may have been wrong. We acknowledge there was a lack of clarity about the answers, and recognise the Judge is best placed on these matters. However, it is evidence that has no merit at all other than to contradict one very peripheral point.

[42] That said, again, different views can be taken and, more importantly, there is no real possibility of prejudice. The subject matter of the evidence is bland and raises no concern. If it does show Mrs Prasad to be incorrect or untruthful on a point, there is no illegitimate prejudice.

(f) Conclusion on inadmissibility

[43] We accept evidence of the other allegations was technically inadmissible without a propensity ruling, but consider minimal prejudice was involved and directions adequately addressed it. If pressed, we would hold the rebuttal evidence should not have been led, but see it as wholly immaterial. We do not accept the appellant's other complaints establish inadmissible evidence was led, nor that some particular warning was required in relation to the evidence, the absence of which would give rise to a miscarriage. Overall, it was not a trial in which there was a concerning amount of illegitimately prejudicial material, and we consider the summing-up as a whole properly instructed the jury on these aspects.

Summing-up

(a) Inadequate direction on prejudice arising from delayed trial

[44] Relying on *CT v R*, Mr Prasad submits the Judge's direction to the jury about unreliability because of delay under s 122 of the Evidence Act 2006 was inadequate.[14]

[45] Section 122(2) of the Evidence Act provides that a Judge must consider whether to warn a jury about reliability when there is evidence about conduct by the defendant that allegedly occurred more than 10 years previously. This provision was

[14] *CT v R*, above n 6.

the subject of extensive consideration by the Supreme Court in *CT v R*.[15] That Court's statement that in cases of this type of delay there will almost always be a risk of prejudice such that a reliability warning may be required was applied by the Court in *L v R,* where the absence of a warning led to a conviction being overturned.[16]

[46] Since *CT v R* this Court has considered several appeals in relation to trials conducted prior to that decision. In light of the firm conclusions in *CT v R*, in most cases the absence of a warning, or one given in minimalist terms, has been held to be an error. The issue has then been whether in the circumstances of the case the error has caused a miscarriage. In *Tranter v R* a new trial was directed but not so in *D (CA95/2014) v R*, *K (CA665/2014) v R* and *Gurran v R*.[17] In each of those three cases the conviction was upheld and leave to appeal to the Supreme Court was declined. It is apparent that a case-specific analysis of what was said by the Judge, and what the trial issues were, is needed.

[47] Justice Dobson in the present case directed in these terms:

> [42] A different consequence of the age of the complaints is the risk that it would make the allegations more difficult for Mr Prasad to defend. That is not a matter that has specifically been raised on his behalf in closing, and of course he does not bear any onus to disprove the Crown case at any stage. However, you might think that Mr Prasad could have been able to more positively refute the elements of the Crown case if the allegations had been aired more promptly. More generally, I urge you to use your common sense in making allowances for all the witnesses when you assess how accurate you might expect them to be when describing events that occurred so long ago.

[48] It is submitted the warning is deficient because it did not directly tell the jury to be cautious about the evidence of the complainants, it did not comment on the effect of time on memory, it did not identify examples of specific prejudice and did not talk about the effect of substance abuse on the complainants' capacity to remember.

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15 *CT v R*, above n 6.

16 *L v R* [2015] NZSC 53, [2015] 1 NZLR 658.

17 *Tranter v R* [2014] NZCA 602; *D (CA95/2014) v R* [2015] NZCA 171, leave declined in *D (SC 60/2015) v R* [2015] NZSC 119; *K (CA665/2014) v R* [2015] NZCA 566, leave declined in *K (SC 133/2015) v R* [2016] NZSC 26; and *Gurran v R* [2015] NZCA 347, leave declined in *Gurran v R* [2016] NZSC 1.

[49] We agree that subsequent to *CT v R* at least some of these matters would be addressed, and, in light of *CT v R*, should have been addressed by the Judge. But we do not consider it has occasioned a miscarriage.

[50] First, the Judge has alerted the jury to the difficulty Mr Prasad faced. This was not put conditionally — rather, the Judge directed the jury "they might think" Mr Prasad could have been able to refute the allegations in a more positive way.

[51] Second, it is instructive to note the Judge observed the defence had not suggested any specific prejudice or difficulties. We consider this points to the key factor in the case. These were allegations of abuse within the family setting. The available witnesses, who all testified included the three complainants and their mother or grandmother, as well as Mrs Prasad and her two daughters who grew up with the complainants.

[52] In the particular case we have no sense the delay has had any significant impact. There were, of course, occasions where witnesses referred to an inability to recall detail, but each was able to present their core evidence, and also speak of opportunity (or lack thereof) for the offending to occur. There is no basis to consider this evidence would have been particularly different if the trial had occurred nearer the time of the alleged offending.

[53] Third, the defence was not one of reliability (other than a passing reference to substance abuse). Inconsistency and gaps in the complainants' evidence were attributed not to error but to fabrication and collusion. This is similar to *Oquist v R* and *K (CA665/2014) v R*, in which the absence of an adequate warning was not taken to have caused a miscarriage.[18] This is because the lapse of time is not relevant to the proposition that the complainant is deliberately giving incorrect evidence. We do not suggest the mere fact the defence is fabrication or collusion obviates the need for a s 122 warning; other features such as the hindered ability to advance a defence still apply.[19] But the task at this point is to assess whether a miscarriage has occurred and the nature of the defence is relevant to that. We note also that events motivating the

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18 *Oquist v R* [2015] NZCA 310 at [59]; *K (CA665/2014) v R*, above n 17, at [64].
19 *CT v R*, above n 6, at [49].

alleged fabrication were able to be established because of the availability of all the relevant witnesses, as already discussed.

[54] Finally, we are satisfied no specific prejudice has been identified. The written submissions identified without elaboration the absence of DNA and the death of three witnesses. However, we were not satisfied any of those matters was an impediment. We make the same observation, without expanding on it, in relation to a matter raised orally at the hearing, namely access to the defendant's work records from his time at the Ford motor company.

[55] The credibility of the complainants was in issue in this case, and that was a matter emphasised in the successful appeal in *L v R*.[20] However, it is necessary to consider in what way the credibility is in issue, and here it was very much a case of alleged false evidence. It was not a suggestion of error, mistake or confusion, but of a concerted effort to falsely accuse.

[56] For these reasons we conclude the deficiencies in the s 122 direction do not constitute a miscarriage of justice.

(b) Failure to put defence case

[57] There is nothing in this. Neither case was summarised extensively but the summing-up was not unbalanced and there is no basis to consider the jury were unclear on the key matters. The jury would have known the defence was a denial the conduct happened and that considerable emphasis was placed on inconsistencies as pointing to a general lack of credibility in each of the complainants.

[58] Lead trial counsel (not Mr Phelps) raised this issue of not putting the defence with the Judge following the summing-up. However, Mr Phelps confirmed for us that no specific matters were identified as needing to be added. If indeed essential points, rather than detail or nuances, have been missed, it must be that counsel can readily identify them for the Judge. If not, then doubt must exist as to their centrality.

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[20] *L v R*, above n 16, at [29]–[31].

[59] The three key planks of the defence, as identified on appeal, were that there was limited opportunity to offend, the subsequent conduct of the complainants was inconsistent with their allegations and there were inconsistencies and flaws in each of the complainants' accounts. We accept the Judge did not specifically address the first two, but focused on the third. However, it must be observed the key planks now identified on appeal were not articulated in that way in the closing address of the defence.

[60] This is not to criticise the closing but to observe the Judge's task is not to impose a structure or extract a list of points that counsel has not clearly put. That is why we emphasise that if counsel raises the matter when invited following the summing-up, specific strands that have been overlooked should be identified so the Judge has a fair opportunity to consider if recall of the jury is required.

[61] The defence closing here could fairly be described as dense in the sense of containing a lot of detailed points. They were legitimate points to advance and no doubt individual members of the jury noted any that struck a chord. We do not agree, however, the Judge's summation of the defence case was inadequate because it did not repeat them. We accept other points could have been identified by the Judge, but repeat that counsel should have identified them for him. We consider the main plank, inconsistency in evidence and evolving stories as evidence of untruth, was satisfactorily highlighted.

(c) Incorrect propensity direction

[62] The propensity evidence in issue is the testimony of each complainant. It was left to the jury that the pattern and similarities in the age of the girls and the circumstances in which they came into contact with Mr Prasad could be used on a cross-propensity basis if the jury were satisfied such a pattern existed. The appellant submits the defence submission concerning the lack of pattern in the various offending was not adequately put.

[63] The common characteristics identified by the Judge in the summing-up were the complainants' ages, their relationship to Mr Prasad, the circumstances of the offending (being visits to the Prasads' house) and that the "offending" was of a

similar type. As can therefore be seen, propensity was left on a broad level, invoking in effect the coincidence of three girls complaining of similar conduct happening to them at around the same stage of their lives, and all while staying with Mr Prasad.

[64] The Judge noted the defence to this proposition as being that there were no relevant similarities and that the issue of collusion was key. He then went on to discuss defence counsel's submission on motive and the complainants' opportunity to "line up their stories". The jury were told to satisfy themselves there had not been collusion before considering the propensity aspect.

[65] When one looks at defence counsel's closing address very little time was spent on propensity — two paragraphs in total. The one matter raised by counsel and not repeated by the Judge was a submission that the nature of the sexual conduct was different because, unlike the others, A's allegation involved intercourse. It is hard to see that the defence was thereby disadvantaged. Had the Judge repeated this submission, he may have felt obliged to point out the obvious flaw, which is that, taking one step back from the specific sexual act, the three witnesses all consistently speak of significant non-consensual sexual activity by Mr Prasad against young girls. We consider allowing the submission to sit without comment was not unfavourable to the defence.

[66] Finally, for completeness, we note the Crown submission that the summing-up was incorrect in one aspect and thereby unduly favourable for the defence. The jury were directed, incorrectly, that they must find the charges in relation to one complainant proven before employing propensity reasoning. The correct position is that if each complainant fits the pattern, each may provide legitimate support for the other.[21] There is no need to single one out.

[67] The conviction appeal is accordingly dismissed.

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[21] *Te Rito v R* [2013] NZCA 147 at [35].

Sentence appeal

[68] It is common ground that the lead offence is the rape of A. It is, however, contended that a starting point of eight to nine years was appropriate, rather than the 10 years and six months' adopted by the Judge.[22]

[69] We consider the debate to be of little moment. The Judge added only one year for the offending against J and B, who were at the time only seven or eight years old. The offending against J involved numerous examples of ejaculation in her mouth. However one analyses the case, a combined starting point of 11 years and six months for that sort of offending, plus the rape of a six year old, plus sexual offending on a third young girl, is far from excessive. We recognise the offending against J and B occurred when lower sentencing levels applied,[23] but still consider, by reference to cases such as *Davies v R*, that the combined starting point is well within range.[24]

[70] The sentence appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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22 *R v Prasad*, above n 2.

23 The oral sex offending against J would now be charged as sexual violation by unlawful sexual connection, which attracts a maximum penalty of 20 years. For these purposes, it must be sentenced as indecency and subject to a maximum penalty of 10 years. See *R v R (CA244/04)* CA244/04, 2 November 2004 at [22]; *R v B (CA41/07)* [2007] NZCA 292 at [34].

24 *Davies v R* [2011] NZCA 546, [2012] 1 NZLR 364.