

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANTS NAMED OLIVIA AND KIRSTEN IN THIS JUDGMENT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011 AND S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF PERSON NAMED M IN THIS JUDGMENT REMAINS IN FORCE.

ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE COMPLAINANTS NAMED JENNIFER, KATE AND ANNA IN THIS JUDGMENT.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE PERSON NAMED VERONICA IN THIS JUDGMENT.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA746/2014
[2016] NZCA 293**

BETWEEN **ALISTAIR STUART LYON**
 Appellant

AND **THE QUEEN**
 Respondent

Hearing: 7 March 2016 (further submissions received 10 March 2016)

Court: Winkelmann, Peters and Collins JJ

Counsel: D P H Jones QC and K L Blackmore for Appellant
 A Markham and J Murdoch for Respondent

Judgment: 29 June 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeals against conviction and sentence are dismissed.

B Order made prohibiting publication of names, addresses, occupations or identifying particulars of complainants named Jennifer, Kate and Anna in this judgment.

C Order made prohibiting publication of name, address, occupation or identifying particulars of the person named Veronica in this judgment.

REASONS OF THE COURT

(Given by Winkelmann J)

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[1] Following a jury trial in the Auckland District Court before Judge Collins, Mr Lyon¹ was found guilty of a range of sexual and drug-related offences.² Following trial but before sentence, Mr Lyon also pleaded guilty to counts of unlawful possession of a pistol and firearm, contrary to ss 45 and 50 of the Arms Act 1983. He was sentenced by Judge Collins for the totality of this offending to 15 years' imprisonment with a minimum period of imprisonment of eight years.³

¹ "Alistair" appears to be the correct spelling of Mr Lyon's Christian name as that is how he defines himself in his affidavit filed in support of this appeal. However, we note that spelling differs from the indictment where his Christian name is spelt "Alister".

² *R v Lyon* DC Auckland CRI-2012-004-3519, 19 December 2014 [Sentencing notes]. Mr Lyon was found guilty of two charges of sexual violation by unlawful sexual connection, one charge of detention without consent with intent to have sexual connection, three charges of inducing the provision of commercial sexual services by promising to supply the class A controlled drug methamphetamine, two charges of receiving commercial sexual services from a person under 18 years, three charges of supplying methamphetamine, one charge of offering to supply methamphetamine, one charge of supplying a class B controlled drug, and two charges of offering to supply a class B controlled drug.

³ At [27]–[28].

[2] Mr Lyon appeals against conviction in respect of most of the charges of which he was convicted.⁴ He says that counsel who represented him at trial, Mr Mark Ryan, failed to do so competently. It is alleged:

- (a) Counsel failed to obtain proper instructions so that Mr Lyon's defence could not be properly advanced at trial.
- (b) Counsel failed to follow the instructions he did have: he failed to advance defences Mr Lyon wished advanced, failed to cross-examine adequately in light of those defences and failed to call defence witnesses.
- (c) Counsel's conduct of the defence rendered it impossible for Mr Lyon to give evidence, notwithstanding that Mr Lyon had insisted he wished to give evidence. These circumstances together with Mr Ryan's forceful advice compelled Mr Lyon's decision to not give evidence.

[3] The appeal against sentence is brought on the ground that the sentence is manifestly excessive and that no minimum period of imprisonment should have been imposed, and as an alternative argument, that the term of the minimum period of imprisonment was excessive.⁵

[4] We received evidence for this appeal by way of affidavits from Mr Lyon and his usual solicitor, Mr Richard Phillips. The Crown filed affidavits from trial counsel, Mr Ryan, and his junior at trial, Ms Ives. Mr Lyon, Ms Ives and Mr Ryan were cross-examined before us.

⁴ He does not appeal against conviction on counts 3, 11, 18 and 22: offering to supply, or actual supply of methamphetamine; and counts 23 and 25: offering to supply a class B controlled drug. Neither does he appeal against the Arms Act convictions (which were laid in a separate indictment but addressed at the same sentencing as the drug and sex convictions). He accepts he is guilty of these charges.

⁵ Mr Lyon's prosecution was commenced prior to the commencement of the second stage of the Criminal Procedure Act 2011. The appeal therefore falls to be determined under pt 13 of the Crimes Act 1961.

Background

[5] Mr Lyon is a wealthy individual. It is not at issue that he was, prior to his conviction and imprisonment, a heavy user of methamphetamine. The Crown case focused on events occurring during the time he lived in an inner city hotel, Rainbow Hotel, and later in a multi-level apartment building he owned in central Auckland called Artisanz. At the heart of the Crown case was the allegation that Mr Lyon targeted vulnerable young women who were users of methamphetamine, exploiting their need for that drug to obtain sexual services from them. Mr Lyon's co-accused was a young woman, M, who the Crown said operated as his self-styled "pimp" using her contacts to obtain young women for Mr Lyon's purpose.⁶

[6] Five complainants gave evidence at trial. Mr Lyon was convicted in respect of offending against each of them. We call the complainants Jennifer, Kirsten, Olivia, Kate and Anna. These are not their real names as the complainants are entitled to name suppression, or are the subject of name suppression orders.⁷ The detail of the offending for which Mr Lyon was convicted is as follows.

Jennifer: counts 18 (supply of methamphetamine) and 19 (under-age prostitution)

[7] Jennifer began working as a prostitute and using methamphetamine when she was 13 to 14 years of age. In 2011, when she was 15, M introduced her to Mr Lyon. Mr Lyon provided Jennifer with methamphetamine, they had sexual intercourse and she performed oral sex on him. He also paid her in cash for these services. At trial Jennifer's evidence was that she told Mr Lyon's son, Blake, and Mr Lyon that she was 18.

Kirsten: counts 9 (inducing prostitution by promising to supply a controlled drug), 11 (supply of methamphetamine) and 12 (sexual violation)

[8] Kirsten was also introduced to Mr Lyon by M when she was 15. Kirsten's evidence was that she agreed with M to have sex with Mr Lyon for cash and methamphetamine, but she had no intention of going through with the sex. She visited Mr Lyon's apartment on a number of occasions in 2011 and consumed drugs

⁶ M's name is suppressed.

⁷ See Criminal Justice Act 1985, s 139; Criminal Procedure Act 2011, s 203; and [116] below.

offered by Mr Lyon and others. Mr Lyon became annoyed when it was apparent she would not “do anything” for the drugs and he stopped giving them to her. On one occasion, when she was affected by methamphetamine, Mr Lyon stood over her and forced her to perform oral sex on him (count 12: sexual violation). She returned to the apartment on a later occasion and the appellant grabbed her hand and placed it on his genitals, but she pushed him away and left. Kirsten said she told Mr Lyon she was 18.

Olivia: counts 6 (abduction) and 8 (sexual violation); also count 5 re “Veronica” (inducing prostitution by promising to supply a controlled drug)

[9] Olivia described herself as a friend of Mr Lyon. In early 2011 she was with him in an Auckland hotel and arranged for a prostitute named Veronica to come to the hotel and “do a job” with Mr Lyon for money and methamphetamine. All three consumed methamphetamine. After the sexual activity, Mr Lyon accused the women of stealing money from his wallet.

[10] Through an associate, Mr Lyon subsequently arranged for Olivia to be brought to Artisanz (count 6: abduction). She was taken to the lower level of the Artisanz building, to a room referred to as the dungeon, where another associate assaulted her, forced her to remove her clothing and shackled her to a pole attached to a leather collar so she was unable to stand straight. She was taken to a room where Mr Lyon was sitting. Mr Lyon made her perform oral sex on him, she thought for a period of about two hours. She begged him to “fuck me and get over and done with”. He told her she looked beautiful when she was crying. She was given a spiked drink (Olivia could not recall by whom, and Mr Lyon was acquitted in respect of a count of stupefying), after which she fell asleep. She woke still attached to the device and was released by an associate some time later.

Kate: counts 21 (under-age prostitution) and 22 (supply of methamphetamine)

[11] In mid-2011 Kate was a 15-year-old runaway working as a prostitute. She was introduced to Mr Lyon at Artisanz by an older prostitute. Kate told Mr Lyon she was 17. Mr Lyon provided her with methamphetamine and they had sexual intercourse. Afterwards Kate told Mr Lyon her real age. She subsequently spent a

period of time living on and off at Artisanz providing sexual services to Mr Lyon: “I done heaps of jobs, I don’t know how much”. Mr Lyon was sometimes rough and forceful. Kate was paid in cash and methamphetamine. She was high on methamphetamine most of the time, sometimes provided by Mr Lyon. Mr Lyon also gave her “GBH” or “GBL” on one or two occasions.⁸

Anna: counts 2 (supply of a class B drug) and 3 (supply of methamphetamine)

[12] Anna had known Mr Lyon for some time before the events the subject of these charges. On the day in question, she met with Mr Lyon to sell him drugs. Later that day, she and a male friend visited him at a hotel room where others were present. The others offered her a pill which she was told was ecstasy, and GBL in a drink, which she consumed. She had not previously tried GBL and became very intoxicated and lost consciousness. When she awoke, her friend had left and she was kissing Mr Lyon on the bed, consensually. Mr Lyon held a methamphetamine pipe to her mouth, and he and a male associate mixed her a second GBL drink. She again lost consciousness, waking up in Mr Lyon’s bed. A female friend of hers collected her from the hotel room and took her to the police.

Remaining counts

[13] Mr Lyon was also convicted on other counts based on the content of text messages as follows:

- (a) On 3 October 2011, Mr Lyon agreed to supply “3 or 4 mls” of GBL to a woman named “Ange” (count 23).
- (b) On 1 November 2011, he texted a woman named “Ange” and said he had “90 mls of gbl that I want u to try for me” (count 25).
- (c) Between 8 and 9 October 2011, Mr Lyon texted M wanting her to arrange prostitutes to visit him at Artisanz. The Crown case was that the context of the messages made it clear that methamphetamine was part of the arrangement (count 26).

⁸ Class B controlled drugs.

On arrest

[14] Although Mr Lyon declined to be formally interviewed, he did speak to police when arrested on 29 February 2012. The allegations concerning Jennifer, Anna and Kirsten were put to him and also those concerning the unknown persons referred to in the text messages. Mr Lyon said:

There is nothing wrong with that [Anna] one. I did nothing wrong. I even called her mate to come up and see if she was okay ... She was the aggressor ... Like I said she was the aggressive one to me ... I was away getting a tattoo for one or two hours when I came back she was lying down on the curtain. I didn't take anything. Hotel staff supervised her friend's visit and she didn't want to leave. That can be verified by hotel staff.

[15] Mr Lyon said "there is no substance to any of the other complaints".

[16] The police officer explained the Prostitution Reform Act 2003 charges in relation to Kirsten and Jennifer, and the following exchange with Mr Lyon then occurred:

- Q. ... so what we are saying is that you gave [Jennifer] and [Kirsten] methamphetamine in payment for sex?
- A. I never paid them with drugs. I paid them cash.
- Q. Paid them cash to do what?
- A. [No answer].

Trial counsel incompetence: relevant principles

[17] It is common ground that when an appeal is based on trial counsel incompetence, the "ultimate question" is whether there has been a miscarriage of justice for the purposes of s 385(1) of the Crimes Act 1961.⁹ The inquiry is not into competence of counsel, but whether the verdict is unsafe through any deficiency in the trial, however caused. In *R v Sungsuwan* the Supreme Court set out the approach to be taken in appeals raising trial counsel error.¹⁰ That decision was summarised by this Court in *R v Scurrah*:¹¹

⁹ Counsel error is not in itself a ground of appeal under s 385(1). See *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70].

¹⁰ At [70].

¹¹ *R v Scurrah* CA159/06, 12 September 2006.

[17] The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is “yes”, this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.

[18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.

[19] This analysis will be sufficient to deal with most cases.

[20] But there will be rare cases where, although there was no error on the part of counsel (in the sense that what counsel did, or did not, do was objectively reasonable at the time), an appeal will be allowed because there is a real risk that there has been a miscarriage of justice.

[18] Mr Lyon’s complaints as to his trial counsel’s conduct entail allegations that he failed to take adequate instructions and failed to act on the instructions he did have. It is incumbent upon trial counsel to take instructions from their client as to the nature of the defence to be run, and as to whether or not the defendant will give evidence. It is the defendant’s right, and not that of their counsel, to determine the way in which the case should be run.¹² The obligation to take instructions is set out in r 13.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which states:

Informed instructions

13.3 Subject to the lawyer’s overriding duty to the court, a lawyer must obtain and follow a client’s instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

(Footnote omitted).

¹² *R v Kerr* CA504/99, 11 April 2000 at [22], citing *R v Accused* (CA78/88) [1988] 2 NZLR 385 (CA) at 390.

[19] Once instructions are obtained, counsel must then act in accordance with those instructions. This obligation is set out in r 13.13:

Duties of defence lawyer

13.13 A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must—

- (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and
- (b) put before the court any proper defence in accordance with his or her client's instructions—

but must not mislead the court in any way.

13.13.1 When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.

...

[20] In *Hall v R*, this Court described three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage: failure to enter a plea as directed, failing to allow a defendant to give evidence, and failure to advance the defence case based on the defendant's version of events.¹³ The second and third, failure to follow specific instructions as to whether to give evidence and failure to advance a defence based on the defendant's version of events, are at issue in this appeal. The Court in *Hall* accepted a Crown submission that, if counsel failed to follow instructions regarding less fundamental trial decisions, a miscarriage of justice will generally only arise if the decision was not one a competent lawyer would have made and if what occurred subsequently may have affected the outcome.¹⁴

¹³ *Hall v R* [2015] NZCA 403 at [65].

¹⁴ At [77].

First alleged failure of trial counsel: failure to take proper instructions

[21] Mr Lyon contends that his counsel did not take adequate and appropriate instructions from him. For Mr Lyon, Mr Jones QC submits that while Mr Ryan may have devoted many hours to meeting his client, he failed to obtain detailed instructions of the type needed to defend Mr Lyon against multiple charges involving multiple complainants. He did not prepare a brief of evidence, and the written material he did prepare wrongly recorded those instructions he had been given. As a consequence, the cross examination of Crown witnesses was inadequate or inconsistent with the defence Mr Lyon wished to run. This compromised Mr Lyon's ability to give or call evidence in accordance with that defence, and he was thereby deprived of his rights to a defence and a fair trial.

Factual background

[22] Mr Ryan was instructed in early 2012 and met with Mr Lyon in April of that year. The initial meeting took place in a ward at Auckland Hospital, where Mr Lyon was being treated for a medical condition. Mr Ryan recorded the contents of this initial discussion in a letter dated 13 April 2012, which he delivered by hand to Mr Lyon at a second meeting. The instructions recited are clearly of a very preliminary nature. They record that Mr Lyon faced 22 charges in relation to allegations of serious sexual and drug offending and that:

Your instructions to me are that the allegations are not true and you intend to defend these charges to trial.

I explained to you that the majority of the charges are extremely serious and if convicted on all of the allegations you would be likely to face a sentence of between 15 and 20 years imprisonment.

[23] In June 2012, Mr Ryan engaged a private investigator to undertake factual inquiries for Mr Lyon. The private investigator, Mr Dick, interviewed and prepared statements for several potential witnesses. He met Mr Lyon on at least two occasions.

[24] Over the next two and a half years, Mr Ryan was active in representing Mr Lyon in various bail applications and other pre-trial applications. Mr Ryan and Mr Lyon had numerous meetings. Mr Ryan visited Mr Lyon in prison, and at a

rehabilitation facility where Mr Lyon was resident for a time, and the two regularly met at Mr Ryan's office on the weekend. But no brief of evidence was prepared for Mr Lyon, and why that is so is at issue in this appeal.

[25] From police disclosure, Mr Ryan and Mr Lyon were aware that the Crown was having difficulty in obtaining some complainants' cooperation. Some complainants had amended their account of events from the statements originally provided to police. This included Olivia, whose complaint was the subject of the most serious charges. In her new statement she said that new facts had come to light and she wished to make a formal statement that:

... Mark Lyon had no knowledge or did not premeditate my presence at Artisans on that particular day and thought at the time that I was paying a social visit and not put in that situation under duress.

...

My initial recollection of events was blurred by the drugs and I had initially put Mark Lyon at the forefront of everything thinking he had premeditated my capture but on reflection and facts that have come to light I know that it was [an associate] who captured and tied me up in chains.

I realise now that Mark Lyon was not aware that I had been punched or forced into submission and I was already by that time completely under the influence of several drugs. It was [an associate who] actually tied me up and put me in straps. Mark Lyon entered the scenario when I was already tied up and thought it was like an apology for the missing money. I did not voice any objection to Mark as I was incapable of it due to the cocktail of drugs that was consumed ...

[26] Mr Lyon says he was provided with a copy of this new statement and emailed it through to Mr Ryan.

[27] Mr Lyon acknowledged receipt of a further letter from Mr Ryan entitled "Confirmation of instructions for trial" and dated 26 September 2014, which we refer to as the September letter of instructions. In that letter, Mr Ryan explained the content of the indictment noting that the evidence against Mr Lyon was constituted principally of the evidence of the complainants, which could be the subject of challenge in cross-examination. Mr Ryan recorded his instructions which can be summarised as follows:

1. Mr Lyon denied the allegations.

2. The essence of the defence position was that the complainants, excluding Anna, were all prostitutes. They were arranged by M to visit Mr Lyon at the Artisanz apartments, and each was aware that they were visiting him for the sole reason of providing him with a sexual service.
3. All sexual contact was consensual.
4. No sexual relations were obtained through provision of drugs.
5. Mr Lyon did not provide drugs to the complainants.
6. Mr Lyon's defence in relation to the allegations of receiving commercial sexual services from people under the age of 18 was that he stipulated to M that girls she provided for sexual services were to be over the age of 18 years.
7. As to the alleged offending against Anna, any drugs provided to her were provided by other people. Mr Lyon did not stupefy her, and everything that occurred with her was consensual. The letter records that Anna has provided an affidavit to the defence saying that she consented to all activities, that the drugs consumed were provided by other people, and that Mr Lyon was not present when she consumed the drugs. That affidavit had earlier been filed in court in support of an application for severance.
8. As to the complainant Olivia, Mr Ryan referred to her new statement¹⁵ "confirming that it was not you who was involved in the allegations that she complained to the Police about" and continuing, "[i]n essence [Olivia] resiles from the statement she provided to Police in March 2012."

¹⁵ The relevant parts of which we have set out above at [25].

[28] The letter also detailed how the defence planned to undermine the credibility of the complainants, the strategy to be pursued to suggest a motive for them to lie, and the potential to call defence witnesses.

[29] In relation to the charges in the indictment arising from the text messages, Mr Lyon's instructions were that the text messages had been taken out of context. Mr Ryan said:

This means that it may become important for you to give evidence at trial. I am always reluctant to call an accused to give evidence at trial due to the inherent risks that are present namely as soon as I finish asking you questions you are then subjected to cross examination from the Crown and I cannot control the cross examination or the answers you give.

However in relation to the Counts alleging offences derived from the text messages it may be that you have no option but to give evidence despite the risks.

This is something that we will need to monitor and discuss in depth during the trial.

[30] Mr Ryan was involved in a High Court trial which significantly overran its time estimate, taking it close to the beginning of Mr Lyon's trial. Mr Ryan's evidence was that regardless of timing, the trial preparation was completed adequately and he continued to meet Mr Lyon regularly.

[31] The trial began on 8 October 2014. On that day Mr Ryan gave Mr Lyon a letter confirming his instructions in relation to the four Prostitution Reform Act counts. We call this the third letter of instructions. By his signature, Mr Lyon acknowledged he had been advised that the four counts were strict liability offences which meant the Crown did not have to prove he knew that the complainants were under the age of 18. In order to defend them, he would have to raise a defence of due diligence or absence of negligence, the standard of proof for which was the objective standard of a reasonable person. That meant that to pursue the defence he would need to give evidence advising of the steps he took which had led him to believe, mistakenly, that the complainants were over 18.

[32] Mr Lyon acknowledged he understood he had two options: the first, to plead guilty to the four counts of receiving commercial sexual services from a person

under 18. Alternatively, to continue defence of the charges with the knowledge he would need to give evidence to satisfy the jury on the balance of probabilities that he took reasonable steps to ensure he was complying with the law. He confirmed he was aware of Mr Ryan's strategy that it might be beneficial to his defence of the more serious charges to continue to defend the Prostitution Reform Act charges. This strategy would give the jury something to find him guilty on as opposed to pleading guilty to those charges, and removing that potential for the jury. By his signature Mr Lyon confirmed that he instructed Mr Ryan to continue with his defence of these charges on the grounds of due diligence.

Analysis

Failure to prepare a brief of evidence

[33] Mr Jones points to the absence of a brief of evidence in support of his argument that adequate instructions were not taken. He submits that the evidence establishes that Mr Lyon was prepared to provide a brief of evidence and that Mr Ryan simply failed to prepare one.

[34] Mr Ryan's evidence was that Mr Lyon was reluctant to provide a brief of evidence, a reluctance he ascribed to Mr Lyon's confidence that the complainants would not give evidence. Under cross-examination Mr Ryan said:

Mr Lyon never refused to provide a brief. Mr Lyon's position changed from being in a position to give an explanation to that of "I don't need to give an explanation. I don't want to give an explanation. These people aren't going to turn up".

[35] Mr Lyon rejects that account. He says that any information he had that the complainants would not turn up came from Mr Ryan. Mr Ryan had obtained the information from police disclosure. He points to an email dated 10 August 2012 in which he confirmed his own willingness to provide a brief of evidence to the private investigator, Mr Dick, subject to one further meeting with Mr Ryan. Mr Lyon said that it was at that additional meeting that he told Mr Ryan his defence in relation to Olivia was that he was not present when she was forced into the bondage device, and that he believed she consented to providing oral sex to him. Mr Lyon says he told Mr Ryan she had provided bondage services to him in the past. Mr Lyon says at that

point Mr Ryan effectively stopped him talking and told him they would “throw the book” at him if that was his account.

[36] Mr Ryan denies that discussion took place. He says the first time Mr Lyon told him about this account of events in respect of the offending against Olivia was during discussions around the time of the close of the Crown case.

[37] We address this issue more fully under the second ground of appeal. At this point we record that having heard both Mr Ryan and Mr Lyon give evidence on this issue, we prefer Mr Ryan’s account of events. We did not find Mr Lyon a credible witness. The evidence he gave was at times implausible and, as we come to, on occasion inconsistent with contemporaneous documentation. We find it implausible that counsel would stop Mr Lyon giving his explanation as Mr Ryan is alleged to have done. As the Crown submits, whether the defence was “consent” or “I wasn’t there” was of no concern to Mr Ryan.

[38] We also prefer Mr Ryan’s account that Mr Lyon was confident that the complainants would not turn up to give evidence, and that this is the explanation for his reluctance to prepare a brief of evidence. It is not in dispute that Mr Lyon had knowledge that two complainants had changed their account of events from those originally given to police. Nor does Mr Lyon dispute that he had contact with Olivia prior to her preparing an amended statement. Mr Ryan said he understood that an associate of Mr Lyon had organised the preparation of that statement.¹⁶

[39] Before us Mr Lyon denied that his associate approached Olivia on his behalf, or that his associate made the necessary arrangements to obtain the retraction statement. On Mr Lyon’s version of events his associate had nothing to do with the preparation of the new statement; someone called “Chris the hairdresser” organised it. Mr Lyon could not recall Chris’ surname.

[40] Mr Lyon’s evidence on this issue is again implausible. When asked who gave him a copy of the statement (he clearly had it, as he sent it on to Mr Ryan) he said,

¹⁶ There was some issue as to who told Mr Ryan that it was the associate who organised the preparation of the statement. Mr Ryan originally said he heard that from Olivia in evidence. When pressed, he said that if he had not heard it from her, he heard it from Mr Lyon.

“I think Chris the hairdresser but I don’t recall specifically”. But he could not explain why Chris, a person so little connected to him that Mr Lyon could not even recall his name, should involve himself in this way.

[41] Mr Lyon’s denial that his associate was involved is also undermined by an email from Mr Lyon to Mr Ryan in April of 2013. In that email, Mr Lyon asked if he and his associate could visit Mr Ryan, and requested a copy of Olivia’s statement to the police. Mr Lyon could not say why he asked for a copy of Olivia’s statement on that occasion, but he said that the purpose of the meeting was to get legal advice for his associate, because his associate faced a charge of possession of utensils. The difficulty with that explanation is that his associate was not arrested for that offending until 2014.

[42] We do not need to make any finding on whether Mr Lyon was involved in obtaining the amended statement for the purposes of this appeal. However, the fact that Mr Lyon’s evidence is implausible on this point, and inconsistent with contemporaneous records, is something we view as relevant to our assessment of his credibility and reliability as a witness.

[43] There was also other evidence before us as to his associate’s involvement in obtaining amended statements from Anna and Jennifer. We do not need to traverse those issues, or whether Mr Lyon or his associate were involved in obtaining those statements as the Crown alleged before us. Those issues are beside the point for the purposes of this appeal. It is enough to say that we prefer Mr Ryan’s account as to why no brief of evidence was prepared. We consider that Mr Ryan made adequate efforts to obtain a brief of evidence from Mr Lyon, but Mr Lyon did not cooperate.

Were instructions adequate?

[44] There is ample evidence that Mr Ryan devoted significant time to understanding the nature of Mr Lyon’s defence. It is common ground that Mr Ryan and Mr Lyon met many times as lawyer and client. Mr Ryan’s evidence was that the instructions recorded in the September letter of instructions were sufficient to enable him to conduct Mr Lyon’s defence against the background of all the information

Mr Lyon had provided in their numerous meetings, and were sufficient to lead Mr Lyon's evidence if he did indeed give evidence.

[45] The letter did not purport to be a full record of the information Mr Ryan obtained from Mr Lyon. It was clearly, in form, a summary of months, even years of discussion, but then there is no particular form which a record of instructions must take.¹⁷ While it is true the September letter of instructions does not comprehensively catalogue points on which witnesses are to be challenged, nor recite an extensive recount of Mr Lyon's version of events, it does map out a clear defence strategy — that all sexual contact between the complainants and Mr Lyon was consensual, that Mr Lyon did not at any time supply drugs in return for sexual favours, and that the complainants were lying.

[46] We reject the notion that this was a particularly complex trial. Although there were multiple complainants and charges, underlying this was a relatively simple narrative for both the Crown and the defence. We are satisfied that during the two and a half years of regular meetings prior to trial, Mr Ryan obtained from Mr Lyon a very clear set of instructions as to the basis upon which he was to defend each of the charges. As we come to, we consider that was reflected in the manner in which he conducted the defence case.

Was the September letter of instructions an incorrect record?

[47] Mr Lyon now says that although he signed the September letter of instructions acknowledging that those were his instructions, he must not have read it as carefully as he should have, because the letter does not accurately record his instructions. For example, he denies he instructed Mr Ryan that he asked all the girls if they were 18. He did not know that 18 was the relevant age as to the Prostitution Law Reform Act; he understood it was 16.

[48] He also says his instructions were not a blanket denial of all allegations. That was only his instructions in respect of the complainant Anna. In respect of Anna, he

¹⁷ *Hall v R*, above n 13, at [94].

told Mr Ryan he gave Anna methamphetamine, notwithstanding what is recorded in the instruction letter in respect of that.

[49] In relation to Olivia, Mr Lyon says he told Mr Ryan that he enjoyed a number of bondage sessions with her, and that on the night of her kidnapping he thought she had consented to sexual activity with him. He did not know she had been kidnapped.

[50] By way of explanation for his failure to correct what he now says is wrong with the letter, he says he was a habitual user of methamphetamine and affected by that drug most of the time.

[51] The difficulty with this account is that Mr Lyon signed the document acknowledging they were his instructions. There is no suggestion Mr Ryan rushed him with the documents. Mr Lyon himself admits he signed the documents after he had “taken away and read [them]”. Moreover, Mr Lyon had copies of the documents so he had ample opportunity to correct any error in the instructions recorded. There is no suggestion in the evidence that he attempted to do so.

Failure to obtain instructions during trial

[52] A final point made by Mr Jones under this heading is that when one complainant, Kirsten, gave evidence which did not match her statement to the police, Mr Ryan should have again obtained instructions from Mr Lyon. Kirsten had told police of two occasions of sexual violation by unlawful sexual connection. In evidence she mentioned only one, and another occasion on which Mr Lyon forced her to touch his penis. When he was cross-examined, Mr Ryan said he could not remember if he had sought additional instructions at that point.

[53] We do not see anything in this point. The transcript shows that Mr Ryan was able to use the change in Kirsten’s evidence to Mr Lyon’s advantage, through cross-examining her on her prior inconsistent statement. And there was no suggestion from Mr Lyon in his evidence given on this appeal that he would have provided instructions to pursue a different strategy in respect of this change in Kirsten’s account of events.

Second alleged failure of trial counsel: failure to follow instructions and to advance defences Mr Lyon wished to advance, including failure to adequately cross-examine in light of those defences

[54] Mr Lyon complains of Mr Ryan's conduct of the cross-examination of the complainants, and his failure to call defence witnesses.

Olivia

[55] Mr Lyon's criticism in relation to Olivia is based on his account he had told Mr Ryan that on the night in question Olivia had performed oral sex on Mr Lyon, but that it was consensual. At trial, Mr Ryan advanced an identification defence — that Olivia could not be sure that the person on whom she performed oral sex was Mr Lyon.

[56] On Mr Jones' submission, the identification defence contradicted Mr Lyon's instruction to Mr Ryan as recorded in the September letter. Mr Ryan had a copy of Olivia's amended statement. The instructions in connection with Olivia are based on that statement, which Mr Ryan accepted in evidence puts Mr Lyon in the room when Olivia was in the bondage device. Mr Jones submits moreover that identification was a farcical defence; it could not succeed as the two had known each other for years. It foreclosed the possibility of Mr Lyon giving evidence in his own defence that the oral sex did take place, but was consensual.

[57] Mr Lyon's evidence is that Mr Ryan came up with the defence himself, including the notion, which first appeared during his cross-examination of Olivia, that Mr Lyon was at the Rainbow Hotel at the time of the offending (relevant because the offending took place in the "dungeon" at Artisanz). Mr Jones says that Mr Ryan also failed to challenge critical aspects of Olivia's evidence: that she was not a sex worker, that she had not provided sexual services to Mr Lyon before, that Mr Lyon provided drugs as part of the payment for sexual services, and that Mr Lyon was already present in the room when she was taken into it. Mr Lyon also complains that Mr Ryan failed to cross-examine Olivia in respect of previous dishonesty offences recorded in her Child Youth and Family Services (CYFS) notes.

[58] Mr Ryan's evidence is that the first time Mr Lyon told him that Olivia performed oral sex on him on the night in question, and that he believed she had consented to it, was after the Crown closed its case. This was also the first occasion on which Mr Lyon mentioned prior occasions of consensual bondage sessions.

[59] Mr Jones points to the September letter of instructions as evidence that Mr Lyon had told him weeks before the trial that Olivia had consented to performing oral sex on him during the "dungeon" incident. While it is true that Mr Ryan clearly had Olivia's amended statement by this point, we do not see the September letter of instructions as supportive of Mr Lyon's account that he had instructed Mr Ryan his defence was consent. The letter only records that Olivia had provided a statement saying "it was not you involved in the allegations that she complained to police about". While Olivia's statement itself suggests that Mr Lyon was involved in the dungeon incident, and that Olivia did perform oral sex on him, it is of course Olivia's statement and not Mr Lyon's. Mr Lyon agreed during cross-examination that he did not go into detail about Olivia's statement with Mr Ryan. Mr Ryan remained firm in his evidence that Mr Lyon consistently denied he was involved in the events that night.

[60] Mr Jones also points to Mr Ryan's use of Olivia's retraction statement when cross-examining Olivia during a hearing convened during trial, but away from the jury, to enable the Judge to determine if she was a hostile witness (the hostile witness hearing). Mr Jones argues this is evidence that Mr Ryan understood that his instructions were consistent with the contents of that statement.

[61] Again, we think Mr Jones attempts to build too much on this. Mr Ryan used this statement during the hostile witness hearing to challenge the reliability of her original statement. The reliability of her original statement was relevant both as to whether she was a hostile witness, and, if she was, whether her original statement should go before the jury. The existence of a later inconsistent statement provided an opportunity to undermine the reliability of the original statement.¹⁸ But undermining the reliability of the original statement does not necessarily entail

¹⁸ Olivia dealt with Mr Ryan's cross-examination by asserting that the information contained in the later statement came from Mr Lyon. For the purposes of the trial, thereafter the statement was worthless. Mr Lyon does not now contend otherwise.

propounding the amended statement as reliable. We therefore do not see Mr Ryan's use of this statement in cross-examination as evidencing that Mr Ryan's instructions were to the effect Mr Lyon claims.

[62] Moreover, when Mr Ryan cross-examined Olivia during the hostile witness hearing, he did so in a manner consistent with the identification defence. There is no evidence that Mr Lyon protested that this cross-examination was not in accordance with his instructions. He had plenty of time to raise this with Mr Ryan as Olivia did not give evidence before the jury until the day after the hostile witness hearing. When she gave evidence before the jury, Mr Ryan again cross-examined her on the basis that she could not be sure that the person she performed oral sex on was Mr Lyon. Again, there is no evidence that Mr Lyon protested this line of cross-examination.

[63] Mr Ryan's evidence was that the first time consent was proposed as the basis for the defence was during a meeting that occurred around the time the Crown closed its case. Mr Jones submits we should conclude the discussion Mr Ryan describes did not take place. He says Mr Lyon's denial that it occurred is supported by the fact that others who attended the meeting, Ms Ives and Mr Phillips, did not describe a discussion about this change of instructions in their evidence.

[64] It is true that Ms Ives did not mention such a discussion in her evidence, but she was not asked about it. Her evidence was that she understood the defence strategy was first that Olivia would not turn up, and in the event she did, that Mr Lyon was not involved, "which essentially is what she'd said in the January statement".

[65] Mr Phillips was not present for the whole of the meeting. His evidence cannot therefore undermine Mr Ryan's account, or corroborate Mr Lyon's.

[66] To sum up this point, we prefer Mr Ryan's account of the instructions he received in connection with Olivia to that of Mr Lyon. We find Mr Ryan a credible witness and Mr Lyon's evidence generally unreliable. Mr Ryan's account is

supported by the fact that he conducted the cross-examination of Olivia on the basis of the identification defence without apparent protest from Mr Lyon.

[67] In light of our finding as to the nature of Mr Lyon's instructions to Mr Ryan as to how he was to defend the charges relating to Olivia, most of the criticisms of the failure to cross-examine Olivia fall away. As to the particular criticism that Mr Ryan did not cross-examine Olivia in relation to earlier offending recorded in CYFS notes, we are doubtful whether that evidence was admissible as sufficiently probative on the issue of veracity. The incidents were many years in the past. In any case, Mr Ryan knew that it was a hopeless path for him to pursue since the Judge had already refused leave to cross-examine in reliance on CYFS notes in relation to another complainant.

[68] Mr Jones complains that Mr Ryan did not challenge Olivia's evidence that drugs were part of the payment for Veronica's sexual services. But Mr Ryan did challenge that evidence.

[69] Given the instructions that he had, we think that Mr Ryan did as well as counsel could do with this witness:

- (a) he established she was a methamphetamine addict;
- (b) he obtained a concession from her that Mr Lyon was probably living at the Rainbow hotel at the time of the abduction, not at Artisanz, the scene of the offending; and
- (c) he obtained a concession from her that she accepted Mr Lyon had nothing to do with organising her abduction.

Kirsten

[70] Mr Lyon complains the defence run by Mr Ryan in connection with Kirsten was that she had consented to the conduct the subject of the sexual violation charge, and the forced touching of Mr Lyon's penis did not happen. Mr Jones submits this defence was inconsistent with Mr Lyon's instructions which were that no sexual

activity of any kind took place. Mr Jones says the CYFS notes supported this version of events and Mr Ryan should have cross-examined on those. He should also have made more use of prior inconsistent statements.

[71] Again, Mr Lyon's post-conviction account of his instructions to Mr Ryan is contradicted by the September letter of instructions. It is also contradicted by the text message which was produced in evidence, "Hey [Kirsten] Mark Lyon here sorry that I fell asleep I'm awake now and have money for you, regards".

[72] Mr Ryan conducted the defence on these counts effectively, and we consider in accordance with his instructions. He highlighted issues of character and behaviour which were relevant to Kirsten's credibility and reliability. He obtained evidence from her that she lied about her age and that she took drugs. He covered in cross-examination that Kirsten had made frequent visits to Artisanz after the alleged sexual violation. He also cross-examined her on prior inconsistent statements, while staying away from the incident she had described to police, but not described in her evidence, of a separate incident of sexual violation.

Jennifer

[73] Mr Jones complains that Jennifer was not challenged on her evidence that Mr Lyon promised to provide methamphetamine for sexual services. Mr Ryan did in fact challenge her evidence on this point. He also obtained a concession from her that she had told Mr Lyon that she was 18, and exposed inconsistencies between her evidence in court and the police statement.

[74] Mr Jones also says that Mr Ryan failed to call Mr Lyon's son Blake to rebut Jennifer's evidence that people passed methamphetamine around at Artisanz. But since, as Mr Jones concedes, the evidence was that Mr Lyon was not involved in this sharing of drugs when Blake was present, it is difficult to see the point of calling Blake.

Kate

[75] Mr Jones says that Mr Ryan failed to cross-examine Kate to establish a motive for her to lie. Although Mr Ryan put to her that she had not told Mr Lyon she was 15, Mr Ryan failed to attack her rejection of that proposition. Mr Jones says that Mr Ryan had ammunition to undermine this evidence, as in her initial police interview Kate did not claim to have told Mr Lyon her real age.

[76] The police had been unable to obtain a written brief from Kate. Cross-examining her therefore required careful judgment as counsel could not be sure just what she might say in response to questioning. At a point during the cross-examination the Judge raised with Mr Ryan (in the absence of the jury) what topics he planned to traverse with Kate. It is apparent from that exchange that Mr Ryan was concerned that without any sense of what this witness would say, cross-examining her was a fraught exercise. He told the Judge, in substance, that his strategy was to undertake only a limited cross-examination.

[77] Mr Ryan did explore some inconsistencies between her initial interview and the evidence Kate gave in court. However Kate responded that she had not told the full story in her initial interview; she was detoxing (from drugs) at the time and she was a bit scared to tell the full story. This not only undermined a defence strategy based on inconsistencies between her initial interview and her evidence in court, but was also a clear signal, we would have thought, that continuing to pursue this strategy could elicit more damaging evidence.¹⁹

[78] As to the notion that Mr Ryan should have put to Kate that she had a motive to lie, this is referred to as an aspect of the defence strategy in the September letter. But Mr Ryan had to be able to structure his cross-examination in accordance with his assessment of the witness. We have no doubt that a strategy of closing down opportunities for this witness to give more damaging evidence was the best strategy.

¹⁹ Counsel of course have to exercise judgment on matters such as cross-examination: *Hall v R*, above n 13, at [75]. Limiting the cross-examination of Kate as he did was such an exercise of judgment on Mr Ryan's part and not a proper basis for challenging counsel conduct.

Failure to call witnesses

[79] Mr Jones complains that Mr Ryan failed to call various witnesses for the defence. He does not however say that Mr Lyon instructed Mr Ryan to call these witnesses. In any case, in the absence of affidavits from these witnesses setting out the evidence they could have given, the complaints cannot be pursued.²⁰

Conclusion

[80] We conclude that Mr Ryan cross-examined each of these witnesses in a manner consistent with his instructions. In reaching this view we have compared the cross-examination of each witness with the September letter of instructions. But we also attach significance to the fact that there is no suggestion that Mr Lyon protested how his defence was conducted through the course of the Crown evidence. If Mr Ryan's cross-examination was inconsistent with his instructions we have no doubt, having seen Mr Lyon give evidence before us, that he would have raised the issue with Mr Ryan, and would have done so forcefully.

Third ground of conviction appeal: counsel's conduct of defence rendered it impossible for Mr Lyon to give evidence

[81] Mr Lyon says in his affidavit in support of this appeal that he was consistent in his instructions to Mr Ryan that he wanted to give evidence. When he and Mr Ryan discussed the Prostitution Reform Act charges, Mr Ryan's advice to him was that he was going to have to give evidence to defend them, and this is confirmed in the third letter of instructions. As to the other charges, he says "I was always going to give evidence in my mind".

[82] Mr Lyon says the advice not to give evidence was presented to him for the first time around when the Crown closed its case. He says his lawyer Mr Phillips was present at a meeting in which Mr Ryan and Ms Ives gave him an "ear bashing" about how he absolutely could not give evidence, advice he claims to have been shocked by. Mr Ryan's advice to him was that the Prostitution Reform Act charges were all gone as the complainants had all admitted telling him they were 18.

²⁰ *Hall v R*, above n 13, at [49] and [144].

Mr Ryan said the charges in relation to Anna (on which Mr Lyon was later convicted) were a non-event, or words to that effect, and that the Judge had mishandled compelling Olivia to give evidence, which would provide a basis for appeal. Mr Ryan told him he would just make matters worse if he gave evidence, that he would be “crucified” on cross-examination over the text messages, and possibly compromise any appeal rights he had.

[83] Mr Lyon acknowledges signing a document recording that he had discussed the issue of giving evidence with his trial counsel and Mr Phillips, and that, taking everything into account, he had made the decision not to give or call evidence. But he says he signed the document because he felt he really had no choice. Mr Ryan was adamant in his advice, and Mr Lyon was in a weakened state in the throes of drug withdrawal. He was in this state because he had been remanded in custody during the Crown case, cutting off his supply of drugs. He had also recently been admitted to hospital with chest pains.

[84] In his affidavit provided in support of this appeal Mr Phillips says he was present during one of the discussions between Mr Ryan, Ms Ives and Mr Lyon at the end of the Crown case. He said that while he did not recall the exact words used, he recalled Mr Ryan saying that Mr Lyon should not under any circumstances give evidence as the Crown would spend days cross-examining him over the text messages. He had said the advice was presented by Mr Ryan and Ms Ives, although primarily by Mr Ryan, as essentially a *fait accompli* and that Mr Lyon had no defence and no matter what he said in evidence he would be crucified. However Mr Phillips also said that it was not apparent to him at the time that the proposal that Mr Lyon not give evidence was a change in how Mr Lyon expected the trial to proceed.

[85] Mr Jones submits that the overall narrative of events is consistent with Mr Lyon’s claim that he was effectively forced into not giving evidence. The way the trial had been conducted precluded Mr Lyon giving evidence, because cross-examination had not been conducted in accordance with his instructions.

[86] Mr Ryan agrees that he told Mr Lyon there were significant risks in him giving evidence. He said he was concerned about Olivia's evidence in the hostile witness hearing, that the content of her amended statement was in substance supplied by Mr Lyon. Mr Ryan was also aware that one other complainant had told police that Mr Lyon's associate had paid her money to provide another statement. Mr Ryan stated that "I held grave concerns as to the potential for the appellant to give evidence and then be cross examined by the Crown on two assertions of perverting the course of justice by interfering with witnesses".

[87] Mr Ryan says it was at a meeting at the close of the Crown case in which he was told for the first time of Mr Lyon's account of the conduct in connection with Olivia. He told Mr Lyon no reasonable jury would accept a defence that Olivia was consenting or that Mr Lyon had reasonable grounds to believe she was consenting.

[88] We have already found that Mr Ryan conducted cross-examination during the course of the Crown case in accordance with his instructions, and that those instructions did not include the instruction that the sexual contact with Olivia was consensual.

[89] We also accept Mr Ryan's evidence that he did not have firm instructions from Mr Lyon throughout that he would give evidence. Mr Ryan's evidence in this regard is supported by the instructions he recorded in the September letter of instructions. Although Mr Ryan there recommended keeping the issue under review, he also recorded that generally he is very reluctant for defendants to give evidence.

[90] We do not consider that the third letter of instructions corroborates Mr Lyon's account that he always intended to give evidence. It records his acknowledgement that he was defending the Prostitution Reform Act charges for strategic reasons. Although he was likely to be convicted of them if he did not give evidence, defending them was a strategically smart thing to do as it could give the jury the option of convicting him of less serious charges, less serious than the sexual violation and abduction charges he faced.

[91] We are also not persuaded by the submission that Mr Lyon was somehow compelled into agreeing not to give evidence. He may not have liked how his case stood by the time the Crown closed its case, but that owed more to the strength of the Crown case than any conduct by his counsel. Mr Ryan had discharged his obligations to Mr Lyon up to that point and in accordance with his instructions. Mr Ryan gave Mr Lyon advice not to give evidence. It may have been firm advice, but it was still advice. Mr Lyon was not rushed into a decision. In fact, the discussion about whether he should give evidence started on Friday and continued on Monday so that Mr Lyon had time to reflect over the course of the weekend.

[92] Mr Lyon signed a letter acknowledging that the decision was his own and having seen Mr Lyon give evidence we have no doubt it was. He is an intelligent person with a forceful personality.

[93] The advice not to give evidence was good advice, we think the only advice that could have been responsibly given. Mr Lyon does not say what his defence would have been to the Prostitution Reform Act charges; as Mr Ryan said, he had done the best that could be done with that, securing concessions from two of the three complainants for those charges that they had told Mr Lyon they were 18. That was at least something Mr Ryan could work with in closing. Evidence from Mr Lyon that he thought the relevant age was 16 would have resulted in his inevitable conviction.

[94] As to the text message charges, Mr Lyon does not say how he would respond to those. Mr Ryan's evidence was that he had asked Mr Lyon for his explanation, the context he said would explain those text messages, but had not received it. Mr Lyon still does not provide that explanation in his affidavit in support of the appeal.

[95] There were also numerous text messages which could be brought to bear against Mr Lyon in his defence of the other charges. As Mr Ryan noted, the Crown had more than enough ammunition to use against him.

[96] In relation to the charges against Olivia, the evidence Mr Lyon proposed giving would have been hugely damaging. His account, set out in his affidavit, even

includes the detail that Olivia was crying during the incident and that he told her that she looked beautiful when she was crying. It is a chilling account and would only have assisted the Crown case.

[97] The charges arising out of the offending against Olivia were difficult charges to defend once Olivia gave evidence. As the Judge observed in sentencing, and as is apparent from the transcript, Olivia was a compelling witness. Moreover in defending the charge, Mr Lyon faced the formidable difficulty of a text message that he had sent to an associate:

About 12 months ago these girls [Veronica] and [Olivia] stole cash from my wallet and drugs to value \$8,500 ... [Olivia] spent some time in a dungeon [at] artisAanz until I was able to forgive her. [Veronica] hung herself two nights ago at the mangere hotel.

[98] This communication is not consistent with the defence Mr Lyon now claims he wished to run. But in closing, Mr Ryan was able to address the obvious difficulty for Mr Lyon created by this text by submitting that the text did not mean that Mr Lyon was present when Olivia was detained in the dungeon.

[99] Mr Jones submits that Mr Ryan gave incorrect advice that Mr Lyon would face cross-examination in relation to the pre-trial contact with two of the complainants. We agree it was certainly not inevitable that the Crown would have pursued this strategy. It already had a very strong case against Mr Lyon. But as Mr Ryan identified, it was possible that Mr Lyon giving evidence would open the door to the Crown pursuing these points in cross-examination.

[100] In all the circumstances this ground of appeal must also fail.

Appeal against sentence

[101] Mr Lyon appeals against his sentence on the grounds:

- (a) that the totality of the sentence was excessive; and
- (b) that no minimum period of imprisonment was warranted, or that if it was, the term was excessive in any event.

Sentencing notes

[102] Judge Collins reached an end sentence of 15 years' imprisonment in the following way:

- (a) He took as the lead charge what he characterised as the sexual violation of Olivia for the purposes of punishment.²¹ Having regard to the leading authority of this Court, *R v AM (CA27/2009)*,²² he adopted as the starting point for that offending 10 years' imprisonment.²³
- (b) As for the offending against Kirsten, also involving sexual violation, he said that if it stood on its own, it would have warranted a starting point of seven years.²⁴
- (c) He then grouped together what he described as a second category of offending (involving counts 3, 9, 11, 16, 18, 19, 21, 22, 23, 25 and 26) which all involved charges of supplying or offering methamphetamine, supplying or offering to supply a class B controlled drug, and the Prostitution Reform Act offences.²⁵ He said on a stand-alone basis, separate from the offending in relation to Olivia and Kirsten, this combined offending warranted a starting point of seven years imprisonment.²⁶
- (d) In relation to the third category of offending, the Arms Act charges, he adopted a starting point of two years imprisonment.²⁷

[103] Adding these figures together the Judge came to a starting point of 26 years. He said that was too high.²⁸ Standing back and looking at the totality of the offending, he concluded that a total end sentence of 15 years was an appropriate

²¹ Sentencing notes, above n 2, at [21].

²² *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

²³ Sentencing notes, above n 2, at [22].

²⁴ At [23].

²⁵ At [24].

²⁶ At [25].

²⁷ At [26].

²⁸ At [27].

starting point for the offending.²⁹ There were no mitigating factors in this case. Mr Jones does not contend otherwise.

[104] The Judge then set a minimum period of imprisonment of eight years which he said was required for the purposes of denunciation, deterrence and to protect the community.³⁰

[105] For Mr Lyon, Mr Jones argues that the starting point for the sexual violation of Olivia, if viewed as a stand-alone charge, was manifestly excessive. It is argued that the starting point should have been at the lower end of rape band 2 in *R v AM*, rather than sitting at the mid-way point for that band of offending.³¹ Although conceding that the offending against Olivia involved group attack, degradation of the victim and premeditation, it is argued that these are characteristics of offending in other cases which the Court of Appeal placed towards the lower end of rape band 2. The offending which the Court of Appeal placed at the higher end of rape band 2 has characteristics absent in this case such as physical assault and infliction of pain, stalking, multiple sexual violations and home invasion. It is also argued that the Judge mischaracterised the offending when he said that it occurred over a lengthy period.³² Earlier in his sentencing notes he said that it was unknown for how long the offending occurred.³³ It is therefore submitted that a starting point of eight years was appropriate for the offending against Olivia.

[106] Mr Lyon's offending against Olivia cannot properly be put towards the lower end of band 2. The aggravating features of this offending were extreme: abduction, group attack, and what we consider to be the sadistic restraint used to facilitate the sexual offending. This offending, as the Judge himself said, if considered as a stand-alone offence, could well have placed it at the higher end of band 2.³⁴ We also do not agree that the Judge mischaracterised the offending as occurring over a lengthy period. The entire ordeal for Olivia occurred over several hours.

²⁹ At [27].

³⁰ At [28].

³¹ *R v AM*, above n 22, at [98]–[104].

³² Sentencing notes, above n 2, at [21].

³³ At [9].

³⁴ At [22].

Totality principle

[107] Mr Jones submits that having regard to the requirements of s 85 of the Sentencing Act 2002, the requirement that cumulative sentences of imprisonment must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending, the end sentence of 15 years' imprisonment was manifestly excessive. Mr Jones refers to a recent case, *Robson v R*, in which this Court considered the totality of sentencing in relation to the sexual abuse of two complainants.³⁵ In that case the Court adopted a starting point of 13 years' imprisonment, after adopting 10 years' imprisonment as the starting point for the lead charge.³⁶

[108] In this case, Mr Jones submits that while Mr Lyon was found guilty of serious sexual offending against Olivia and Kirsten, the other charges against him were of a less serious nature, as evidenced by the far lower concurrent sentences for the offences that he received.

[109] *Robson* is not a useful comparator. The offending in that case was on a different scale and of an entirely different nature. As the Crown submits, Mr Lyon's offending spans four distinct areas of criminality: sexual violation, class A and B drugs, Prostitution Reform Act charges and Arms Act charges. We accept the Crown's submission that Mr Lyon's offending reflects a high degree of lawlessness and a sense of entitlement. His offending has had profound and long-lasting effects on the young complainants and their families. To the serious sexual offending against the two complainants, Olivia and Kirsten, must be added this litany of other offending for which Mr Lyon was also being sentenced. We have no doubt that a starting point of at least 15 years was appropriate having regard to the totality of the offending.

Minimum period of imprisonment

[110] Section 86 of the Sentencing Act 2002 states that a court may impose a minimum period of imprisonment, longer than the period otherwise applicable under

³⁵ *Robson v R* [2015] NZCA 609.

³⁶ At [55].

s 84(1) of the Parole Act 2002, if it is satisfied that that period is insufficient for any of the purposes set out in s 84(2). These purposes include denunciation of the offending and holding the offender accountable for their offending.

[111] Mr Jones submits that no minimum period of imprisonment was warranted. He says the sentencing Judge did not set out exactly how the minimum period otherwise applicable would be insufficient for the purposes of holding Mr Lyon accountable for his offending, denouncing his conduct, deterring him and other offenders from committing the same or similar offences, and protecting the community.

[112] Again Mr Jones refers to *Robson* to support his submissions. In that case, a minimum period of imprisonment of 48 per cent was imposed which Mr Jones contrasts with the approximately 55 per cent minimum period in this case.³⁷

[113] This argument is unsustainable. Mr Lyon's offending was serious and wide ranging. It was committed by a man who has an extensive history of previous offending. The pre-sentence report writer's assessment was that Mr Lyon was at a high risk of further offending. It cannot seriously be argued in the face of those facts alone that the period otherwise applicable under s 84(1) of the Parole Act would be sufficient for the purposes of deterring Mr Lyon, and protecting the community from him.

[114] We also consider for the purposes of denunciation and accountability that such a minimum period of imprisonment was necessary. Mr Lyon was sentenced to a lengthy term of imprisonment. That reflected the gravity of the offending. The minimum period otherwise applicable under s 84(1) of the Parole Act would be insufficient to denounce his conduct or hold Mr Lyon accountable for the harm done to the victims and the community by such grave offending.

Result

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

³⁷ At [59].

[116] We make an order prohibiting publication of the names, addresses, occupations or identifying particulars of the complainants named Jennifer, Kate and Anna in this judgment.³⁸ We are satisfied that the nature of the offending and the complainants' ages (now and at the time of the offending) support the making of a suppression order. The circumstances of all three complainants fall within the protective statutory purposes of s 139 of the Criminal Justice Act 1985/s 203 of the Criminal Procedure Act 2011. We are satisfied that we should order suppression.

[117] We make a further order prohibiting publication of the name, address, occupation and identifying particulars of the person named Veronica in this judgment.

Solicitors:
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Crown Law Office, Wellington for Respondent

³⁸ The other two complainants are entitled to automatic name suppression.