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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA104/2018
[2018] NZCA 427

BETWEEN	MARK ARONA Appellant
AND	THE QUEEN Respondent

CA255/2018

BETWEEN	PETER JOHN CHAMBERS Appellant
AND	THE QUEEN Respondent

Hearing: 30 August 2018

Court: Miller, Mallon and Gendall JJ

Counsel: N M Dutch for Appellant Arona (CA104/2018)
C G Tuck and TDA Harre for Appellant Chambers (CA255/2018)
S K Barr for Respondent

Judgment: 12 October 2018 at 11.30 am

JUDGMENT OF THE COURT

A Mr Chambers' application for an extension of time to appeal is granted.

B Mr Arona's appeals against conviction and sentence are dismissed.

C Mr Chambers' appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] The appellants were convicted after trial of sexually violating a woman on 19 October 2017. Mr Chambers was convicted of raping her, and Mr Arona of unlawful sexual connection by penile penetration of her mouth. Each was further convicted as a party to the other's offence. The Crown case was that she was so grossly intoxicated as to be incapable of consent. The defence case was that she was not grossly intoxicated and participated willingly. The men were each sentenced to eight and a half years' imprisonment.[1]

[2] Both men appeal against conviction. They say that they ought to have been able to lead evidence of the complainant's behaviour with other men on another occasion, because that explained her allegation on this occasion that she was intoxicated. Mr Chambers abandoned an allegation of trial counsel error.

[3] Mr Arona also appeals his sentence, saying that penile penetration of the mouth is intrinsically less serious than rape. He also says that the sentencing Judge failed to give weight to a cultural report tendered under s 27 of the Sentencing Act 2002.

[4] Mr Chambers' appeal is out of time. His counsel explained that he could not file the appeal in time because he was investigating an allegation of trial counsel conduct, which this Court explained in *R v Clode* could help justify a delay.[2] In the absence of Crown opposition we accept the explanation and grant the necessary application for an extension of time.

The facts

[5] The appellants work in the dance music industry as disc jockeys and promoters. Their preferred genre is hip-hop. The complainant was on friendly terms with them and had once worked with Mr Arona. At Mr Arona's invitation, she attended a concert in which they performed on 21 May 2016.

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1 *R v Arona* [2018] NZDC 1608.
2 *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 at [30].

[6] After the concert she and the appellants, with others, returned to the appellants' hotel. A considerable amount of alcohol was consumed during the evening and she had one puff of a cannabis "blunt" which was described in evidence as being around the size of a cigar. The Crown case was that the complainant was not a regular cannabis user and she was badly affected by the combined intoxicants, unable to move but able to hear and feel some things around her.

[7] The following narrative rests on the findings made by the trial Judge at sentencing. The complainant found herself in one of the hotel rooms with no clothes on, face down into a pillow and her hips pulled up. She heard Mr Chambers say "I've wanted this pussy for a long time." He was having vaginal intercourse and she could do nothing about it. He was also heard to say "Look what I can do to her bro and she's not even flinching." This appears to be a reference to Mr Chambers putting his finger in her anus. She heard Mr Arona say "Good girl."

[8] She was manhandled onto her back, where Mr Chambers had sex with her in the missionary position and Mr Arona was putting his erect penis into her mouth. He pushed his penis in so far that she was unable to breathe, causing her to dry retch and vomit. He was heard to say words to the effect that he liked it when she made that choking sound. He was holding her head and she heard "Cum on her face." He did ejaculate on her face and stomach. Mr Chambers ejaculated into her vagina.

[9] When she woke in the morning at 8.00 am she was naked. Mr Chambers was lying next to her in bed and Mr Arona was asleep on the second bed in the room. She had her period and found that the tampon she had inserted the night before was gone. She dressed and accepted a ride home from Mr Chambers.

[10] Over succeeding days the complainant messaged Mr Arona and Mr Chambers about what had happened. She began by saying that she was piecing memories of the evening together. She asked what had happened after she "smoked that thing" and said that she was "grounded again". She spoke of having flashbacks of two guys and said she had woken naked. She accused them of taking advantage of her intoxicated state. Initially the men admitted nothing, but they then admitted that they both had sexual relations with her but said that she was an active participant. Calls between her

and each of the men were recorded. Notably, Mr Arona acknowledged that there had been a "threesome", that she had smoked the blunt and that she was "wasted". There was also evidence that the men had conferred with one another about what to say to her.

[11] Both men gave evidence at trial. Their account at trial was that the complainant had initiated oral sex with Mr Arona when Mr Chambers briefly left the room and continued when he returned, and then later initiated consensual sex with Mr Chambers when the two awoke in the morning. The jury verdict on party liability indicates that they rejected this account. The men both accepted that she vomited in a bucket.

The s 44 application

[12] Before trial the appellants moved for leave to adduce evidence of the complainant's sexual experience with other men. Her behaviour on that unrelated occasion was said to be strikingly similar to this one. The evidence is that of another woman, M, who says that she and the complainant went to a hotel room after a concert in 2015 and there the complainant had sex with two men after consuming alcohol and cannabis. Next morning the complainant told M that she felt a little embarrassed. She messaged a friend who had evidently been there, apologising for being "way too drunk", saying she was "trying to piece the night together" and could not "remember a whole lot" after being at a bar. She did not complain of sexual assault.

[13] The appellants proposed to lead evidence that the complaint's behaviour after the 2015 incident went to her veracity on this occasion. Their theory was that the complainant is a woman who is prone to participate in group sex then experience shame and blame intoxication afterward.

[14] Judge Mabey dismissed the application, reasoning that the 2015 text messages went to the complainant's veracity but were not substantially helpful; further, their admission would necessarily require that evidence be led of her sexual experience with other men on that occasion:[3]

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[3] *R v Arona* [2017] NZDC 21789.

> [19] It is a serious stretch of that text messaging to suggest that it actually supports a contention that she is lying somehow to justify what went on the night before. It might be that she was not drunk and can piece the night together. It might be that [the female witness] is on the money when she says that everyone was sober and having a thoroughly good time, but to introduce the text messages in support of a contention that they are untrue and therefore the Facebook messaging is untrue in support of a consent defence is not substantially helpful under the veracity rules. In any event to get the text messaging in there would have to be evidence of prior sexual conduct with other men. The heightened relevance test would have to be satisfied and it is not by a very long margin.

The case for admissibility of the 2015 incident

[15] Mr Dutch, who appeared for Mr Arona, led this part of the argument for the appellants. He argued that Judge Mabey was wrong in his veracity reasoning; and further, that circumstances changed at trial. Armed with Judge Mabey's ruling, the Crown was able to and did lead unchallenged evidence on three matters:

(a) First, evidence was led to explain what the complainant meant when she told Mr Arona before the 2016 incident that after "last time I went to your tour I grounded myself for a year." This was a reference, the appellants say, to her grounding herself after the 2015 incident. She referred to it again the day after the encounter with the appellants, asking in a Facebook message what happened after she "smoked that thing" and adding "I'm grounded again". In evidence she explained the 2015 incident by saying that "we had a really fun all-nighter."

(b) Secondly, evidence that she was unused to cannabis, though she had consumed it during the 2015 incident, and so was affected by the small amount she smoked during the 2016 incident.

(c) Thirdly, evidence that she was "not a one-night stand kind of girl".

This last statement was made during a recorded phone conversation with Mr Chambers. The Crown did not seek leave under s 44 of the Evidence Act 2006 to lead this evidence. As the Judge noted, the defence evidently chose not to seek to have

it ruled out in advance either.[4] The evidence having come in, the trial Judge ruled that defence counsel could not cross-examine in rebuttal under s 44(4).[5] Counsel did not invite the Judge to give the jury any directions about it and it was not mentioned again.

[16] The appellants' case is that the 2015 incident went to veracity. The complainant's behaviour after that occasion showed that she lied about her capacity to consent. The evidence ought to have been led to rebut the otherwise natural inference that she would not willingly engage in group sex on this occasion.

[17] The appellants do not argue for the general proposition that a previous group encounter can go to the reasonable belief in consent of other men on another occasion. They say rather that she did consent and participated actively in sex but now regrets it and is blaming intoxication. They submit that the 2015 incident went directly to the trial issue (capacity to consent) here and they ought to have been permitted to exploit its close nexus to the allegations against them. Specifically:

(a) the facts of the 2015 incident were strikingly similar, pointing to a propensity to have group sex then regret it and blame intoxication;

(b) the defence was precluded from exploring what the complainant meant by being grounded "again"; and

(c) the complainant was permitted to give evidence that she was unused to cannabis, which supported her claim that she had become grossly intoxicated, and she could not be challenged by reference to her previous admission in 2015.

[18] The Crown's response is that the 2015 evidence is not probative at all, and certainly not to the heightened standard required by s 44. There is nothing in the 2015 evidence to suggest that she was lying on that occasion; she did not say that the sex was non-consensual or complain about the men involved; her behaviour is consistent with her simply being embarrassed. On this occasion she complained the next day,

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4 *R v Arona* [2017] NZDC 23252 at [2].
5 At [3].

saying she must have blacked out and was getting flashbacks. The "grounded again" comment points naturally to having drunk to excess on a previous occasion but says nothing about sex, and the complainant did not say she never used cannabis, nor was the defence precluded from asking about that. The defence did ask her about how much she had had to drink. The "not a one-night stand kind of girl" comment was made in response to Mr Chambers asking whether she positively gave consent when she had sex with other men. The Crown did not suggest that group sex was intrinsically abnormal in the appellants' world. Ultimately, no miscarriage can have resulted. The recorded conversations between the men, and between them and the complainant, show they knew she was intoxicated to the point of memory loss.

The test

[19] In *Best v R*, the Supreme Court explained how courts should respond to attempts to use allegedly false prior complaints by complainants in trials for sexual offending.[6] The starting point is that evidence of consent to previous unrelated sexual activity is unlikely to provide any logical support for a suggestion that a complainant consented to the sexual activity at issue (and indeed, as William Young J noted in *B (SC12/2013) v R*, likely fails the s 7 relevance test).[7] The evidence must have some meaningful and direct bearing on the issues at trial.[8]

[20] If, as in this case, it is alleged that sexual activity took place on the prior occasion, then both ss 37 and 44 of the Evidence Act 2006 are engaged. The person seeking to adduce the evidence must satisfy the judge that the evidence is substantially helpful for purposes of s 37. Where the proposition is that a previous false complaint goes to veracity, there would need to be an evidential foundation suggesting possible falsehood.[9]

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6 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

7 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [122(c)]. See also *Morton v R* [2013] NZCA 667 at [107] and [109].

8 See for example *Leighton v R* [2013] NZCA 102, (2013) 26 CRNZ 187.

9 *Best v R*, above n 6, at [64].

[21] Substantial helpfulness also depends on how clear it is that the previous complaint was false and how easily that might be established. The more evidence needed the more likely that what will result is a "trial within a trial".[10]

[22] Evidence that would be admissible under s 37 is not necessarily admissible under s 44, which sets a broader test and expresses it in stronger language:

> [66] … where evidence is held to be admissible under the heightened relevance test under s 37, this would not automatically mean that it would be of "such direct relevance to the facts in issue" that it would be "contrary to the interests of justice to exclude it" in terms of s 44(3). Section 37 has a heightened relevance test but the "substantial helpfulness" is assessed in relation to a person's veracity. The s 44 test is conversely broadly directed to the trial as a whole and in stronger terms. Whether the s 44 test is met will have to be separately considered in the context of the case as a whole and in light of the policy behind s 44.

[23] Further, the policy behind s 44 may lead the court to limit the ambit of any evidence admitted under s 37 and s 44.[11]

Was the 2015 incident admissible?

[24] We accept that M's evidence and the 2015 messages together have some bearing on the complainant's veracity. M's evidence is to the effect that the complainant engaged in consensual sex and admitted being embarrassed about it, and the messages indicated that she may have been excusing herself to a friend who was there at the time by claiming to have been more intoxicated than she was.

[25] We do not accept, however, that the evidence is substantially helpful under s 37. The 2015 evidence is not sufficiently probative of the proposition that she lied about being intoxicated on this occasion. There is an essential distinction; assuming she did have group sex in 2015, she did not claim that it was non-consensual despite being embarrassed about it. There is nothing in the 2015 messages to that effect.

[26] Further, it is not clear that the complainant did lie about her condition in 2015. The argument rests on M's evidence about her condition. It can be expected that, if

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[10] At [72]–[74].
[11] At [67].

the evidence was admitted, then there would be a dispute as to how intoxicated the complainant was, necessitating further evidence and cross-examination on the circumstances of the 2015 incident.

[27] Nor do we accept that in the absence of the 2015 evidence the jury were left with an incomplete and unfair picture. The circumstances of the alleged offending did not require that the jury be given a fuller account of her statements that she had previously grounded herself and was grounded again. These statements did not invite the jury to draw adverse inferences against the appellants. They do suggest that she regretted her behaviour in some way, but the obvious explanation is that she felt she had drunk too much.

[28] Even if we had found the evidence substantially helpful, it would not meet the heightened standard imposed by s 44(1). Section 44(1) is engaged because the evidence would necessarily include M's account that the complainant had sex with other men on another occasion. Counsel did not suggest that it would have been possible to limit the ambit of the evidence to her intoxication. Mr Dutch argued rather that the sexual evidence was essential to explain the point about intoxication. This leads us to note that his submissions make plain that the appellants also want to show that she has a propensity to engage casually in group sex. That is plainly illegitimate.[12]

[29] For these reasons we conclude that evidence that the complainant had sex with other men in 2015 and later spoke of being too drunk on that occasion was not admissible at trial.

The cannabis evidence

[30] As noted, the complainant asked in her communications with the appellants what happened after she smoked cannabis the evening before. Mr Dutch submitted that, at trial, the Crown submitted it was the cannabis that incapacitated her, although she had had at least ten drinks by her own admission. He made two distinct points about this:

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[12] *Morton v R*, above n 7, at [107] and [109].

(a) this evidence justified admission of her sexual behaviour with other men in the 2015 incident because, in the 2016 incident, the complainant had only a puff of a cannabis cigarette and the Crown case was that she was not familiar with the drug, but M's evidence was that she smoked it on the evening of the 2015 incident; and

(b) the prosecutor misused an agreed s 9 statement about the effects of cannabis by suggesting it showed she might have lost her cognition and motor faculties for a time but then recovered sufficiently to recall what happened to her.

[31] The principal evidence about the cannabis was that of Steven Koopu, who was at the concert and accompanied a group including the appellants and the complainant to the appellants' hotel. He explained that he was smoking a blunt, which is cannabis in a cigar-like casing. There is no evidence that the blunt contained any other drug. He saw the complainant smoke from it once. The complainant herself said that she took a "toke" from it and immediately felt nauseous and faint, and fell back. In one of the calls with Mr Arona afterward she said that she does not smoke. She was not asked in cross-examination whether she had smoked cannabis previously.

[32] The s 9 statement recorded that:

> 26. Cannabis cannot easily be classified as a sedative or stimulant since it can have different effects in different people and its effects generally vary over time. Its main psychological and behavioural effects are euphoria and relaxation, an impairment of perception and cognition, and loss of motor coordination. The extent to which an individual experiences all or any of these psychological or behavioural effects is dependent on a range of factors.
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> 27. Tetrahydrocannabinol (THC) is the active constituent of cannabis. Blood THC levels produced by smoking a cannabis cigarette and the rate at which the levels decrease vary widely between individuals and are dependent on a number of factors. These factors include frequency of use, smoking technique and experience, and the size and potency of the cannabis cigarette.
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> 28. Subjective symptoms of cannabis intoxication usually peak 10 to 15 minutes after smoking cannabis and last about 1.5 to 4 hours.

[33] In closing the prosecutor made the following statements to the jury about the complainant's use of cannabis:

> Going back to the blunt. It was clearly the marijuana that looked like a cigar that we now know is called a blunt, that caused her to be incapacitated. We know from the section 9 admissions on the toxicology that cannabis can cause the impairment of cognition and a loss of motor coordination and we know the symptoms of cannabis usually peak around 10 to 15 minutes after smoking cannabis and last for anywhere between 1.5 to four hours. That's paragraph 26 to 28 in the admission document.
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> This is relevant as to the initial effects of the drug smoked by someone who wouldn't ordinarily smoke it and it is relevant to the implausibility of her then being able to be cognisant of what occurred immediately thereafter and over the period Elijah Neblett said the room was shut up while what we understood, what he understood was a threesome had occurred.
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> So what I'm saying, ladies and gentleman, is that even at that time when she's falling backwards and she has that immediate effect what the admission document from the toxicology tells you is that it is unlikely that she would then become cognisant, that her motor coordination would come back and that she would have that, a regain of her cognition. Because the peak from the use of cannabis occurs 10 minutes to 15 minutes after the use. So if that's her effect at the beginning there is a peak of the effects of the cannabis around the 10 to 15 minute mark and the effects remain for another hour and a half to four hours thereafter.

[34] The short answer to Mr Dutch's first submission is that s 44 did not stand in the way of the complainant being cross-examined about prior cannabis use and contradicted if she denied ever having used it. Evidence of her cannabis use at the time of the 2015 incident could have been led without also adducing evidence of sexual experience with other men. It was not done. Mr Dutch did not suggest that this omission in itself caused a miscarriage.

[35] So far as the second submission is concerned, we accept Mr Barr's submission that the prosecutor made permissible use of the statement, which established that the effects of cannabis vary with the person, and the complainant's evidence that the cannabis caused her to be incapacitated. Mr Arona's counsel made suggestions to the contrary, saying there was no evidence that a puff of cannabis could have the effect that she claimed.

The "not that kind of girl" statement

[36] This evidence also went to the admissibility of the 2015 incident. Mr Dutch submitted that the Crown was permitted to lead evidence that the complainant was not a one-night stand kind of girl but the defence was not permitted to show that she had engaged in a one-night stand with two men in 2015.

[37] We consider that the Judge was correct to refuse counsel permission to introduce the 2015 incident in response to this evidence. As noted, she made the statement during a phone call with Mr Chambers. She said it in response to an evidently unintentional implication from Mr Chambers that she was promiscuous. It was not led by the Crown at trial to show that a one-night stand was out of character for her.

[38] We do accept that the statement was inadmissible and ought to have been excised from the audio recording of the call that was played to the jury, along with the question from Mr Chambers that elicited her response. That having been overlooked, however, the proper course was not to allow the defence to explore the 2015 incident. The proper course was to instruct the jury to ignore the evidence. This was not done. Counsel did not ask and the Judge evidently did not think it necessary. As noted, it was not mentioned again during the trial. This point indicates that the evidence did not assume the significance at trial that it is now said to have.

Other matters

[39] Mr Dutch complained that the Crown made unfair use of phone records.

[40] The context is that a call between the complainant and Mr Arona was left out of the schedule of calls and messages produced at trial. The complainant deposed to an angry call from one of the appellants at a specific time and Mr Arona's counsel used the schedule in cross-examination to show that no call was recorded at that time. In re-examination the prosecutor had her produce a schedule disclosing the omitted call, which was from Mr Arona.

[41] Mr Arona was cross-examined in an attempt to show that he knew that the complainant's evidence about the call was correct but nonetheless instructed his counsel to put it to her that she had made it up. Mr Dutch submitted that the cross-examination was improper.

[42] We do not consider that anything turns on this. Speaking generally, it was not wrong to question Mr Arona about the narrative that counsel had put to the complainant on his behalf. In this case it would have been better had the prosecutor not done so. The omission of the call from the schedule was due to an error by the police. But Mr Arona said that he had no idea his lawyer was going to challenge the complainant about the call, and there the matter was left.

Conclusion: no miscarriage of justice

[43] We are satisfied that evidence of the complainant's sexual experience with other men in the 2015 incident was inadmissible and leave to adduce evidence of it was properly refused pre-trial. Although the incident was mentioned generally at trial, it was not used in such a way as to justify adducing the evidence of M about the incident. The trial was fair.

[44] Generally, we are satisfied that there has been no miscarriage of justice. The Crown had a strong case. The evidence of calls and messages after the incident tended to confirm the complainant's account and show that the appellants knew she was in no condition to consent to sex.

Mr Arona's sentence appeal

[45] Judge Cameron found that the offending, for both men, fell into rape band two from *R v AM (CA27/2009)*.[13] Aggravating factors were vulnerability and an element of breach of trust, the two offenders, and emotional harm to the victim. He adopted a starting point of eight and a half years' imprisonment for the rape. The oral sexual violation warranted an uplift of 12 months. He reduced the sentence by 10 per cent for previous good character. There was no remorse or any other mitigating factor.

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13 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [98]–[104].

The sentences imposed were seven and a half years' imprisonment for the rape (Mr Chambers as principal and Mr Arona as party) with a cumulative 12 months for the oral sexual violation.[14]

[46] The Judge noted that a s 27 report had been provided for Mr Arona, who is Cook Islands Māori. He stated that:[15]

> I have read that and taken it into account to the extent that I can. I comment that to a large extent it focuses on the defendants denying that there was non-consensual activity with the victim and so in that respect it is of little assistance. It does highlight the success of both of the defendants in the music industry, including Mark Arona's many community-based initiatives to help young people in a variety of ways such as promoting them as musicians.

Offending not intrinsically less serious

[47] Mr Arona's first ground of appeal was that the starting point was too high. He ought to have been placed in the unlawful sexual connection bands, at the bottom of band two or top of band one. The appropriate sentence was four years for the oral sexual violation with an uplift of three years for being party to the rape.

[48] We do not accept this submission. We make two points about it. First, it is based on the premise that penile penetration of the mouth is less serious than rape. As Mr Barr submitted, that is not how the *AM* bands were constructed. The rape bands apply to penile penetration of the mouth or anus.[16] Second, both men were involved in all of the offending. In our opinion the Judge was right to find them equally culpable.

[49] We consider the sentence was well within the available range for this offending. There were two offenders. They took advantage of an intoxicated woman. The degree of violation found by the Judge and summarised at [7]–[8] above was serious.

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14 *R v Arona*, above n 1, at [23] and [31]–[35].
15 At [19].
16 *R v AM (CA27/2009)*, above n 13, at [65].

The s 27 report

[50] Mr Dutch submitted that while the Judge relied on the report for details of Mr Arona's work helping others in the music industry he did not otherwise consider Mr Arona's cultural background in a meaningful way. It ought to have reduced his culpability. The Court ought to have taken into account the over-representation of Māori and Pasifika people in the criminal justice system.

[51] We turn to the report itself. It was prepared by Laurence and Denis O'Reilly, whose practice is called Matau Cultural Annotators. It was prepared for both appellants. As noted, Mr Arona is of Cook Islands Māori descent. His mother is from Aitutaki and his father from Rakahanga Manahiki. He is of the Takitimu waka and he affiliates to Ngati Taane ki Rarotonga. Mr Chambers is of mixed Māori and Pākehā descent but identifies as Māori. As he has not appealed his sentence, we focus on what the report has to say about Mr Arona.

[52] The report begins by noting the systemic over-representation of Māori in our criminal justice system.[17] It states that Māori are four to five times as likely to be apprehended, prosecuted and convicted than non-Māori, and that Māori are seven times more likely to receive a custodial sentence upon conviction than non-Māori. This is reflected in substantial losses of wairua for Māori that "cannot be measured" and which have "resulted in significant psychological trauma".

[53] However, the report does not offer those systemic institutional failings as a direct explanation for Mr Arona's offending. Rather, it attributes the offending to a different cultural context, that of "the sub-culture called hip hop." It suggests that through hip hop disenfranchised and alienated Māori cope with the traumas just identified, and that in consequence the boundaries "between right and wrong … have become blurred for these two young men".

[54] We observe in passing that when the report was written Mr Arona was aged 40 and Mr Chambers 46.

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[17] See the comprehensive discussion in *Solicitor-General v Heta* [2018] NZHC 2453 at [40]–[42].

[55] Just what this blurring of boundaries means is expanded upon in the rest of the report. The authors explain that aspects of hip hop culture might be seen as "misogynistic and offensive". The authors quote men who are a part of that culture:

> It's a known thing "sex or drugs". The girls follow where the gear is. Neither party is innocent. It's an unspoken thing.
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> But you know that is the environment and its nothing we can do. We just try to avoid. We do avoid as much as possible. There is plenty of offerings of multiple types of drugs. But like I said I don't do drugs. I'm very much a family man. But I'm also human so when someone is offering to give you oral sex, um, I felt, yeah.
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> Men think with their cocks — I did that night. I allowed that to happen.
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> (Footnotes omitted.)

The last two paragraphs quoted were from an interview between the report writers and Mr Arona himself.

[56] The report goes on to suggest that what occurred between the appellants and the complainant is reflective of "a polyamorous lifestyle" which is normal in the industry. It contrasts the Crown narrative at trial with the appellants' explanations of what happened:

> The complainant is placed somewhere on a continuum between, at one end, as the prosecutor put it, a "rag doll", affected by alcohol and cannabis, and, at the other end, as advanced by the then defendants, a seductress ready to engage sexually with the two stars of the show she has attended.
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> The prisoners contend that the complainant has experienced a form of "buyer's remorse" fuelled by a mix of bitterness about not being cast in a further hip hop video and a psychological "neediness".

[57] Finally, the report ends with a commentary on the #metoo movement:

> The pendulum of public opinion has swung from "looking the other way" to a witch hunt state where any male in the entertainment industry is fair game for accusation.
>
> The counter narrative is mild by comparison. However, there are voices that call for less hype and more balance.

[58] We agree with the Judge's observation that the report rests largely on the appellants' denials. Their claims that the incident was consensual and normal in the music industry were positively unhelpful, pointing to absence of both

understanding and remorse. The Judge was right to discount these comments to the extent they were incompatible with the jury verdicts and contrary to his own findings of fact. They also convey the impression that the authors see their role as that of advocates for the appellants, which detracts from the authority of such a report.

[59] Apart from its failure to acknowledge that the appellants actually committed the offences, the report does not establish a nexus between Mr Arona's cultural background and the offending that might mitigate his culpability.[18] As recently explained in *Solicitor-General v Heta*, s 27 rests on the premise that systemic deprivation affecting Māori generally is traceable to linkages between that deprivation, the offender and the offending.[19] There may be cases in which the linkage appears self-evidently from the circumstances of the offence and the offender. This is not one of those cases. Some evidence, not necessarily elaborate, was needed to establish the connection.[20]

[60] We will assume in the report's favour, for present purposes only and expressly without deciding, that hip-hop is a sub-culture that objectifies women and so is capable of explaining conduct of this kind. But as Mr Barr submitted, this report does not show that Mr Arona's offending is attributable to systemic social deprivation experienced by Māori. Indeed, it makes no attempt to do so. It is not apparent that he was affected by deprivation or that, if he was, deprivation led him to hip-hop.

[61] The last point to be made about the report is that sentencing for some offences may be dominated by considerations such as denunciation, victim impact and community protection, reducing and perhaps eliminating any discount for culpability on cultural grounds.[21] In this case a woman made vulnerable by gross intoxication was sexually violated by two men in an especially callous and degrading way. Those features of the offending must inevitably dominate sentencing.

[62] We note for completeness that the report also identifies a number of personal mitigating factors, such as the efforts that Mr Arona has made to help other musicians

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[18] *Fane v R* [2015] NZCA 561 at [46].
[19] *Solicitor-General v Heta*, above n 17, at [49].
[20] At [50].
[21] At [57]. See for example *R v Rakuraku* [2014] NZHC 3270; and *R v Eruera* [2016] NZHC 532.

in their careers. In this respect the report was valuable. We need not go into what it says about these factors since the Judge did take them into account by giving a 10 per cent discount for good character and Mr Arona did not criticise his decision in that respect.

Result

[63] Mr Chambers' application for an extension of time to appeal is granted.

[64] Mr Arona's appeals against conviction and sentence are dismissed.

[65] Mr Chambers' appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent