NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA234/2016
[2018] NZCA 158

BETWEEN	WAYNE WILLIAM SMITH Appellant
AND	THE QUEEN Respondent

Hearing:	17 April 2018
Court:	Williams, Wylie and Thomas JJ
Counsel:	F E Guy Kidd for Appellant I R Murray for Respondent
Judgment:	18 May 2018 at 2.00 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] In August 2013, Mr Smith was tried in the District Court at Dunedin before Judge J E Macdonald and a jury. Mr Smith was found guilty and convicted of sexual conduct with a young person aged under 16 (x 5),[1] sexual violation by unlawful sexual

[1] Crimes Act 1961, s 134(3).

connection (x 3)[2] and sexual conduct with a child under 12 (x 1).[3] He was acquitted on four counts which alleged that he performed indecent acts. Mr Smith was subsequently sentenced by Judge Macdonald on 17 September 2013 to a term of seven and a half years' imprisonment.[4]

[2] All charges related to the same complainant — E.

[3] Mr Smith appeals against his convictions. He alleges that there has been a miscarriage of justice, arising out of the following:

(a) juror misconduct;

(b) a failure by the trial Judge to give a warning regarding demeanour;

(c) an absence of evidence to support the first count of indecent assault; and

(d) inadequate directions by the trial Judge in relation to count four, which was a representative indecent assault charge.

[4] The notice of appeal was filed nearly three years out of time. It is dated 24 May 2016. It was initially alleged that there was trial counsel error. In August 2016, Ms Guy Kidd, who now acts for Mr Smith, but did not appear for him at trial, filed a memorandum seeking to substitute a new ground of appeal — namely miscarriage of justice arising from juror misconduct. The memorandum advised that this would be the sole ground of the appeal and that trial counsel error would no longer be pursued.

[5] Ms Guy Kidd then filed an application seeking the appointment of independent counsel or a private investigator to investigate and interview a juror or jurors. That application came before this Court and it was declined by a majority.[5] Mr Smith then applied to the Supreme Court seeking leave to appeal this Court's decision declining

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2 Crimes Act, s 128(1)(b).
3 Crimes Act, s 132(3).
4 *R v Smith* DC Dunedin CRI-2012-012-2315, 17 September 2013.
5 *Smith v R* [2017] NZCA 93.

Mr Smith's application. The Supreme Court declined the application for leave.[6] It considered that it was premature and that Mr Smith should first proceed with his appeal in this Court. The Court indicated that should the appeal be dismissed, Mr Smith could apply again for leave, including on the ground that an investigation should have been ordered.[7]

[6] In February 2018, Ms Guy Kidd filed a further memorandum. She advised that Mr Smith wished to proceed to an appeal hearing on the basis of the juror misconduct allegation, and that he also wished to advance arguments there had been a miscarriage of justice arising out of the three additional matters noted at [3(b)–(d)] above. The appeal has proceeded on this basis.

[7] The appeal was filed well out of time, but an application was granted extending time.[8] We do not need to revisit that issue.

[8] The prosecution was commenced by informations filed prior to the commencement of the Criminal Procedure Act 2011. Accordingly, the appeal provisions in the Crimes Act 1961 govern this appeal.[9]

Background

[9] Mr Smith played a mentoring role to E. Mr Smith was involved in the Scouting movement and he introduced E to Scouts.

[10] E began attending Scouts with Mr Smith at around the time of his 11th birthday. The Scout meetings took place on Thursday evenings. E was generally picked up by Mr Smith, taken to Mr Smith's house for dinner, and then to the Scout meetings.

[11] In his evidence, E said that he was sexually abused in various ways by Mr Smith, mostly in connection with Scouting activities. He said that at Mr Smith's request, he would touch Mr Smith's penis. He asserted that this occurred on a number of occasions, both in Mr Smith's car and at Mr Smith's home address. He also alleged

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6 *Smith v R* [2017] NZSC 109.
7 At [4].
8 *Smith v R*, above n 5, at [5]–[7] and [30].
9 Criminal Procedure Act 2011, s 397(2).

that Mr Smith repeatedly touched his penis at Mr Smith's home, and that Mr Smith kissed him on the mouth on a number of occasions. It was further alleged that Mr Smith sexually violated E at Mr Smith's home, and that this occurred on a number of occasions and in different ways. There were allegations of Mr Smith performing oral sex on E. E also said that he was made to perform oral sex on Mr Smith "a couple of times". There was also an allegation that Mr Smith inserted either his finger, or a piece of soap, or both, into E's anus on a number of occasions.

[12] All of these various allegations were the subject of representative charges and Mr Smith was convicted on each of them.

[13] There were also a series of specific incident charges:

(a) First, E alleged that he was abused on a trip to visit the Air Force Museum in Christchurch. The allegation was that Mr Smith touched E's penis while they were staying in a motel.

(b) Secondly, E alleged that he was abused on a trip to Middlemarch, when he and Mr Smith stayed in a tent. He alleged that Mr Smith touched his penis and smacked his bottom.

(c) Thirdly, E alleged that Mr Smith touched his penis during a visit to Waiora bush, where they also stayed in a tent.

Mr Smith was acquitted on each of these specific charges.

[14] The last specific incident was said to have occurred around the time of the Warbirds over Wanaka Airshow in 2012. E alleged that Mr Smith touched his penis while he was at Mr Smith's home. Mr Smith was convicted on this charge.

[15] E asserted that Mr Smith used to bribe him by purchasing gifts for him, including model aircraft. The Crown case was that these gifts were given to him to buy his silence and to convince him to allow the offending to continue.

[16] Eventually, E could no longer keep matters secret and he told his mother what had been going on. This disclosure occurred in May 2012 and the alleged offending was reported to the police. Mr Smith was approached by the police approximately a week later. He claimed that he had been blackmailed by E for up to a year, and that he had purchased model aeroplanes for E under the threat that false sexual abuse allegations would be made if he did not comply. The following day, Mr Smith left a message saying that he wanted to speak to the police officer again. During a subsequent phone conversation, Mr Smith said that E's older brother was the one putting E up to his false complaints.

[17] Both Mr Smith and his wife gave evidence at trial. Mr Smith denied the abuse, but largely resiled from the blackmail allegation. Both Mr Smith and his wife claimed that there had been no opportunity for any of the offending to have occurred.

[18] Against this background, we turn to consider each of the grounds of appeal.

Juror misconduct

[19] Mr Smith asserts that the jury became aware that he was initially proposing to call good character evidence at trial. He did not in the end do so. He argues that the jury drew adverse inferences as to his character as a result.

[20] As noted, Mr Smith has sought an order that an appropriate person be appointed to make enquiries of a juror or of the jurors generally. That application has been declined by this Court.[10] Ms Guy Kidd accepted that this ground of appeal cannot be advanced further, in the absence of those enquiries. She could not advance any further submissions on this issue. As a result, there is no material before us suggesting that there was any juror misconduct and this ground of appeal must be dismissed.

Demeanour direction

[21] E's evidence-in-chief was given by way of two pre-recorded DVD interviews, supplemented by further examination-in-chief via CCTV. The first DVD interview

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10 *Smith v R*, above n 5.

was in May 2012. E was just over 13 years of age at the time. The second DVD interview was just under a year later. At the time of trial, E was 14 years of age.

[22] In his closing address, the Crown prosecutor referred to E's demeanour when he gave evidence. He suggested that there were eight matters the jury might "want to make a note of". He stated as follows:

> … What the Crown says ultimately, and this is another point, probably about the fourth or fifth is when you look at his demeanour, the way he tried to answer the questions, he was honestly someone given his age, trying to do the best and of course with the passage of time, details can blur and fade to a degree can't they? We all know that and that's where common sense and life experience and that's where it's great we've got 12 of you because usually your common sense, your life experience you go, yeah, sometimes detail does fade a bit but you also might think that sometimes you remember more after the event don't you as time goes on, things come back to you so there's, there's double edge really but it can be both I suggest. One thing I suggest you might look at is when he gave his evidence and when he was interviewed look how quietly spoken he is, how nervous he is at times talking about what's going on and remember the hand up to the mouth happening quite a bit, you might have seen that. What the Crown says is he, he wasn't someone trying to pull the wool over your eyes, he was someone doing his best and doing his best to describe at the end of the day, not a very pleasant experience you might think …

[23] Ms Guy Kidd submitted that the prosecutor was, in this passage, seeking to highlight the manner in which E spoke and his disposition, and suggesting that, from these mannerisms, the jury could conclude that E was telling the truth when he gave evidence. Ms Guy Kidd noted that the prosecutor also relied on the demeanour of E's mother to support the correctness of her account. She corroborated in part her son's version of events. The prosecutor, in his closing, said of E's mother as follows:

> … She's important I suggest here. You might think from her evidence she's forthright, she's a bit of a straight shooter you might think. She probably doesn't take any nonsense. She's someone I suggest who didn't seek the gilded lily here. She told us what happened …

[24] Judge Macdonald did not address demeanour in his opening remarks to the jury.

[25] In summing up, the Judge said the following:

> [11] When assessing credibility and reliability you will take into account the usual things, the demeanour of the witness may or may not assist you;

> whether a witness has been consistent in what he or she has said in Court as opposed to what might have been said out of Court or on some other occasion; issues as to where the evidence fits in with all the other evidence and whether it makes sense also comes into it. This, I guess, is where your own common sense and life experience comes into it. You must have regard to that when you make those decisions.

Later in his summing-up, Judge Macdonald referred to the Crown's closing address and said that:

> There is a description, I think, of [E] as a quiet sort of shy person who is perhaps vulnerable. I think that is what the Crown is trying to suggest to you.

He made no further or other reference to demeanour.

[26] Witness demeanour has been broadly described by the Supreme Court in *Taniwha v R* as follows:[11]

> [It is the witness's] conduct, manner, bearing, behaviour, delivery, inflextion; in short, anything which characterizes [the witness's] mode of giving evidence but does not appear in the transcript of what he [or she] actually said.

[27] The Supreme Court in *Taniwha* rejected the suggestion that juries should be instructed that witness demeanour is of no assistance in assessing credibility.[12] The Court accepted that demeanour may affect meaning and that it cannot be ignored.[13] It noted that where a witness gives evidence over a lengthy period, a fact-finder may be able to form a view about whether a witness is intelligent or unintelligent, well or poorly educated, clear-thinking or muddled and so on, and that in some circumstances, such assessments may be relevant to determining credibility and reliability.[14] It considered that demeanour can be relevant in other ways. It specifically noted that in a sexual case, a witness's demeanour when asked about intimate details of alleged offending may simply reflect embarrassment or difficulty in reliving a traumatic event.[15] The Court held that a demeanour direction will not

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11 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [28]; citing Lord Bingham "Assessing Contentious Eyewitness Evidence: A Judicial View" in Antony Heaton-Armstrong and others (eds) *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press, Oxford, 2006) 327 at [18.2].

12 At [41].

13 At [42].

14 At [42].

15 At [42].

invariably be required in a trial where witness credibility is in issue. It observed as follows:

> [43] Accordingly, we consider that there is no invariable requirement for judges to give demeanour warnings when summing up to juries in cases where credibility is at issue. Rather, we consider that the need for a warning should be assessed in each case. Whether a warning is required will depend upon the nature of the evidence in the case and the way the trial has unfolded. The key consideration for the Judge will be whether there is a real risk that witness demeanour will feature illegitimately in the jury's assessment of witness veracity or reliability. We must express a note of caution, however, given the risk that a jury will interpret a "tailored" direction as an expression of doubt by the judge as to the veracity of a particular witness or witnesses. Obviously, any direction should be formulated in a way that avoids this.
>
> [44] Given the difficulty in formulating tailored directions in a summing up that avoids the risk just mentioned, we consider that trial judges could usefully, as a matter of course where credibility is likely to be a major issue at trial, include in their opening remarks to the jury a brief statement about the approach the jury should take to assessing competing accounts from witnesses, as the Judge in the present case did. Such advice at the outset of a trial should reduce the risk of the jury construing the warning as being directed at specific evidence, which could unfairly devalue that evidence. Moreover, this advice may well be more helpful to jurors in advance rather than after they have heard all the evidence and are attempting to evaluate it as by that stage impressions based on demeanour may already have been formed. In addition, in a case where, because of the way the trial has developed, a judge thinks it necessary to say something about demeanour in summing up to the jury, a reminder of what he or she said in the opening statement may be sufficient (and relatively risk-free).
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> (footnotes omitted.)

The Court also noted as follows:

> [47] Two things follow from what we have said. First, the references that judges sometimes make to the help to be obtained from observing demeanour or body language when determining credibility are likely to be misleading and are better avoided, for the reasons explained above. Further, simply inviting the jury to use "robust common sense" in assessing conflicting evidence is unlikely to provide any real assistance and may positively mislead them. Second, there are various ways in which the risk of inappropriate reliance on demeanour by juries can be addressed in summing up. While there may be occasions where tailored demeanour directions are the only option, judges should always consider whether there are other options given the risks associated with such directions. If observations along the lines earlier discussed are made in the judge's opening remarks, it may well be possible to address any potential prejudice from inappropriate reliance on demeanour in a way that avoids risk by simply referring back to those observations.
>
> (footnotes omitted.)

[28] The Supreme Court's decision in *Taniwha* was released three years after Mr Smith's trial. However, it declares not only what the law is, but also what it was.[16] Further the Supreme Court substantially endorsed aspects of this Court's decision in *E (CA799/2012) v R* — in particular the need for a demeanour direction to turn on the facts of each case, including the use the parties make of a witness's demeanour, and, secondly, that demeanour directions that are tailored to the evidence of a particular case can risk unfairly devaluing a witness's evidence. [17]

[29] Ms Guy Kidd submitted that this was a case where credibility was the key issue for determination, and that given that the prosecutor relied on demeanour in closing, there was a real risk that witness demeanour might feature illegitimately in the jury's assessment of E and/or his mother's veracity and reliability. She submitted that a judicial warning was required and that no adequate warning was given. She argued that there was a risk that a miscarriage of justice had resulted, as a result of the jury making an illegitimate, demeanour based assessment of E and/or his mother's credibility.

[30] We disagree.

[31] First, we do not consider from the materials provided to us that E, or any other Crown witness, had a particularly striking demeanour that might have unduly distracted the jury from what was said. For example, there is no indication in the transcript that witnesses became distressed, by bursting into tears, or the like. Nor did counsel suggest this before us. As noted, the Supreme Court in *Taniwha* commented that the oral tradition of criminal trials assumes juries obtain some legitimate assistance from watching witnesses give their evidence.[18] Inevitably, jurors will notice how a witness presents. We accept that there is a risk that a jury may be distracted by a witness's demeanour if there is something striking about it, but there was nothing of that nature in E's demeanour.

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16 *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608 at [11]–[13]; and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) at 351.

17 *E (CA799/2012) v R* [2013] NZCA 678.

18 *Taniwha v R,* above n 11, at [41]–[42].

[32] Secondly, we agree with Mr Murray, for the Crown, that the prosecutor's reference to demeanour in his summing-up was brief. A jury may be distracted by over emphasis by a prosecutor of what can sometimes be quite ordinary elements of demeanour. But that is not what occurred here. In our judgment, the prosecutor was effectively saying no more than that E was quietly spoken, and that he was recalling difficult and unpleasant experiences. The reference to E's demeanour was not inappropriate and it was not unduly emphasised by the Crown. The case turned on credibility but demeanour does not seem to have assumed any great significance.

[33] Thirdly, we note that the Judge gave an appropriate direction to jurors, requiring them to put aside feelings of prejudice and sympathy. He stated as follows:

> [13] Now, it is important – indeed it is vital in all criminal jury trials and I guess particularly with cases involving allegations of sexual abuse that you do not decide the case on the basis of sympathy or prejudice either way. That is easy for me to say but I suspect in reality it is often far more difficult for juries to put into practice …
>
> …
>
> [16] The other aspect I should mention is that you may nonetheless feel sympathy or prejudice either way. You may feel sympathy for the complainant. You may have sympathy for his mother. On the other hand you may have sympathy for the accused. He is a man with no previous convictions. I am unsure what his age is but whatever age he has reached, he has no previous convictions and here he is before the Court on serious charges. That very fact in itself may give rise to feelings of sympathy for him and you may have feelings of sympathy for his wife. Now, all those reactions or emotional responses are entirely understandable but totally unhelpful when it comes to your task of assessing the evidence.
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> [17] You must then, as I say, put any feelings of sympathy or prejudice to one side, along with any preconceived notions as to what happens in these cases. You assess the evidence fairly and in a calm, logical and reasonable way. You owe that not only in fairness to the accused but also to the complainant and others involved in the case.

[34] This direction was orthodox and, as the Supreme Court acknowledged in *Taniwha*, such a direction reduces the risk that juries may place undue weight on demeanour. [19]

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[19] At [51].

[35] Finally, we agree with Mr Murray that any argument that undue weight was placed on demeanour is inconsistent with the verdicts returned. Mr Smith was acquitted on all but one of the specific charges. It is difficult to reconcile the acquittals with an argument that the jury was unduly influenced by E's demeanour.

[36] We do not consider that there is any risk of a miscarriage of justice from the Judge's limited demeanour directions.

Count one

[37] Count one in the indictment alleged as follows:

> The Crown Solicitor at Dunedin charges that [Mr Smith] between the 6th day of February, 2009, and the 6th day of February, 2011, at Dunedin, did an indecent act on [E], a child under the age of 12 years, by indecently assaulting him.
>
> *Particulars: The defendant inducing or permitting the complainant to play with his penis.*
>
> "Car incidents"

This was a representative count.

[38] The dates detailed in count one cover the period from his 10th birthday through to his 12th birthday.

[39] It was E's evidence that the offending occurred in Mr Smith's house and in his car when they went to Scouts on Thursdays.

[40] E's mother gave evidence that E started going to Scouts with Mr Smith after his 11th birthday. Mr Smith's evidence was that E was 11 years of age when he started Scouts. He said that boys are normally aged between 10 and a half and 11 when they start Scouts and, if a boy's birthday was in the early part of the year, he would become a Scout after a weekend known as Founder's Weekend, which is in late February. The effect of the evidence was that E commenced Scouts in late February 2010. This means that there was a period of just under a year when E was attending Scouts and which is covered by count one.

[41] Ms Guy Kidd submitted that there was no evidence from E alleging an indecent assault as particularised in a car over the relevant period.

[42] In his initial evidential video interview, E said as follows:

> Q Okay. Well tell me what you've come to talk to me about?
>
> A Um [Mr Smith] just playing with my doodle and stuff …
>
> Q Hm, hm. Well tell me more about what's been happening?
>
> A Um on a Thursday he'd come and pick me up and I'd just say um can we go to the model shop to get a plane or something and he said yeah but how are you gonna pay me back and that's when I'd say I had to do these things, yeah like play with his doodle and stuff, yeah.
>
> Q Hm, hm so um what else can you remember about that?
>
> A Um sometimes we did it in the car and sometimes we did it at his house. There was just a couple of times I think that we did it up in the bushes, yeah.
>
> Q Hm, hm and so um how many times has that happened?
>
> A I'm not sure but it's happened over a long period of time I'm not sure how long that would be either.
>
> Q Hm, hm.
>
> A Yeah.
>
> Q Hm, hm. So how old were you the first time?
>
> A I'm not sure.
>
> Q That it happened?
>
> A I'm not sure how it started but yeah.
>
> …

[43] E also said:

> Q … You've talked about him touching eh him playing with your doodle how many times do you think that's happened?
>
> A Um I think it probably was probably just about every time I think.
>
> Q Every time that?
>
> A I went to his house or whenever I saw him well not every time I saw him but um every time that I asked for stuff I think yeah.

Q So how often would you be at his house?

A Every Thursday maybe I'd see him in the weekend. Sometimes I see him on Sunday 'cause he goes out to Nana's house and um sometimes I do as well.

Q Okay. So if you're at his house every Thursday um how often do you ask for stuff or?

A Um not every time maybe um oh I'm not sure but I did ask quite a few times I think hm.

Q Ok so um if (…)

A If, if I didn't ask for anything he wouldn't have done it but it was.

Q Hm hm.

A Yeah.

Q So out of um I don't know so if you go there every Thursday.

A Yeah.

Q Um how many times in a month or in six months would you have asked for things?

A Ah hm it just depends if I actually wanted anything or anything um I'm not sure sometimes it might be 10 sometimes it might be twice um I can't really

Q 10

A (…)

Q Or twice in what period of time?

A Um months (…) weeks Thursday ah, if that if it was a month it would probably be maybe, maybe 3 times. If I did ask sometimes he could've busy or something like that I'm not sure how many times it would be in a month.

Q Hm hm. Now you've talked about um why you were there on a Thursday tell me about that again?

A Um I was there 'cause I was going to Scouts and I was there to have tea so it was easier just to.

…

[44] E was further questioned as to when the offending started. His evidence was as follows:

Q … So when did all this stuff start happening with [Mr Smith] him?

A Oh I can't remember.

Q So how long have you been going to his house?

A Oh um oh a couple of years maybe I think.

Q Hm, hm so did it di (sic) was there anything that happened before you started going to his house?

A Ah I'm not sure.

[45] In his oral evidence, E was asked what he did in Mr Smith's car. He said that he would sit next to Mr Smith in the passenger seat, that he would pull his pants down, and that Mr Smith would play with his "doodle". He said that the car was stopped on these occasions. When he was asked where this happened, he said "sometimes behind the Scout Hall". When asked how often this had happened, he said "[m]aybe three times, four times". He then went on to say that he was not really sure about this — "[i]t was a couple of times, yeah". He was shown photographs of the Scout Hall and he confirmed that that was where he went to Scouts. He described a carpark behind the Scout Hall. He said that if there were other people behind the Scout Hall, they "wouldn't do it there". When it was put to him that it was "[o]nly behind the Scout Hall that things were happening in the car", he answered "yeah, I think it was, yeah".

[46] The link between the offending and the "asking for stuff" is, in our view, significant. This is because the Crown also called evidence from a Mr Cagney, the owner of a hobby shop. Mr Cagney produced receipt dockets relating to the purchase of two model aeroplanes, one purchase occurring on 24 September 2010 and the other on 17 October 2010. The invoices were produced as exhibits. There was no dispute at trial that the purchaser of the planes was Mr Smith.

[47] The dates of the receipt dockets are within the timeframe which was the subject of count one and they provide inferential support for E's generalised allegations of abuse, including abuse in Mr Smith's car behind the Scout Hall. Mr Cagney's evidence, and the receipts produced, suggest that the abuse started before E turned 12 years of age.

[48] We have considered all of the relevant evidence and the applicable legal test.[20] In our judgment the jury could reasonably have been satisfied to the required standard that Mr Smith was guilty of count one. This ground of appeal is also dismissed.

Counts four and 13

[49] Count four alleged as follows:

> The Crown Solicitor at Dunedin further charges that [Mr Smith] between the 6th day of February, 2009, and the 6th day of April, 2012, at Dunedin, did an indecent act on [E], a young person under the age of 16 years, by indecently assaulting him.
>
> *Particulars: The defendant playing with the complainant's penis.*
>
> "[Mr Smith's house] touching incidents"

Again, this was a representative count.

[50] Count 13 alleged:

> The Crown Solicitor at Dunedin further charges that [Mr Smith] between the 6th day of February, 2009, and the 6th day of April, 2012, at Dunedin, did an indecent act on [E], a young person under the age of 16 years, by indecently assaulting him.
>
> *Particulars: The defendant playing with the complainant's penis.*
>
> "Prior to Warbirds 2012 incident"

[51] Mr Smith was found guilty on both counts four and 13.

[52] Ms Guy Kidd asserted that there is a risk that the jury used the same incident as the foundation for the guilty verdicts on both counts.

[53] There was clearly evidence supporting the verdict in relation to count four. E described Mr Smith touching his penis not only in the car, but also at Mr Smith's house. As noted, E confirmed that this happened repeatedly over a lengthy period.

[54] E also described a specific incident as being "the last thing that happened". This incident was the subject of count 13 and it was referred to as the "[p]rior to

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[20] *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37.

Warbirds 2012 incident" in the indictment. It also occurred in Mr Smith's house. E described it in some detail and there was clearly evidence of this specific offending as well.

[55] It was admitted that the Warbirds over Wanaka air show commenced on 6 April 2012 and ran for three days, within but close to the end of the date range specified in count 13.

[56] We do not consider that there is any real prospect that the jury rejected E's evidence of repeated touching at Mr Smith's home, but nonetheless convicted him on count four based solely on the evidence of the specific incident in the home prior to the Warbirds 2012 incident.

[57] First, Judge Macdonald gave the standard direction to the jury that the counts had to be considered separately. In his question trail, he recorded as follows:

> 5. There are 13 counts in the indictment which must be considered separately. You do that by first isolating the evidence and the legal issues relating to the particular count that you are considering. You are required to return 13 separate verdicts.

This was supplemented in the summing-up. The Judge there said as follows (when discussing the question trail):

> [32] I have then mentioned separate counts. There are, as you will appreciate, 13 counts in the indictment. They must be considered separately and you do that by isolating the evidence and the legal issues relating to the particular count that you are considering and you reach a verdict on that material. You are required to return 13 separate verdicts and your verdicts may well be different. They do not have to be all the same. You could easily in this trial find the accused guilty on all 13 counts; equally you could find him not guilty on all 13 counts. All I am saying is it does not have to be the same. It could be different verdicts.

The Judge also gave the jury clear and standard directions as to the nature of the representative counts. Those directions were recorded in the question trail and supplemented by oral directions in the summing-up.

[58] The question trail did not give a separate trail for each count. Rather, it directed that the questions and directions in the question trail for a number of counts, including

counts four and 13, were the same as for count two — which also alleged sexual conduct with a young person.

[59] It would have been preferable for the Judge to have given the jury a discreet question trail for each count. Ideally, he should have made it clear to the jury that they could not rely on the separate incident alleged in count 13 when considering count four.

[60] Nevertheless, the verdicts returned make it clear that the jury did appreciate this. Mr Smith was convicted on all of the representative charges he faced. This must mean that the jury accepted E's evidence as to the ongoing and repeated sexual abuse by Mr Smith, including the abuse which was the subject of count four. The jury acquitted Mr Smith of all of the specific charges, with the exception of the specific offending which was the subject of count 13.

[61] We consider that it is extremely unlikely that the jury erred and took into account the count 13 offending when considering count four. There was evidence on which the jury could properly convict on both counts. The jurors were directed by the Judge to treat each count separately and to look at the evidence in relation to each count separately. While clearer directions could, and should, have been given, we are not persuaded that there was a miscarriage of justice and that counts four and 13 were conflated by the jury. This ground of appeal also fails.

Result

[62] For the reasons we have set out, none of the grounds of appeal are made out. Accordingly, the appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent