ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFING PARTICULARS OF APPELLANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY CONNECTED PERSON PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF ANY INFORMATION THAT IDENTIFIES, OR THAT MAY LEAD TO THE IDENTIFICATION OF JURORS PROHIBITED BY S 32B OF THE JURIES ACT 1981.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA533/2016
[2018] NZCA 109

BETWEEN	D (CA533/2016) Appellant
AND	THE QUEEN Respondent

Hearing:	1 March 2018
Court:	Brown, Brewer and Collins JJ
Counsel:	F E Guy Kidd for Appellant J C Pike QC for Respondent
Judgment:	20 April 2018 at 3.30 pm

JUDGMENT OF THE COURT

A The applications for extensions of time to appeal conviction and sentence are granted.

B The appeal against conviction is allowed in part. The convictions in relation to charges 4, 18 and 19 are quashed.

C The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] D appeals his convictions in relation to 41 charges of sexual offending against his daughter and two stepdaughters between 1999 and 2014. The charges included indecent assault and sexual violation by rape. The convictions followed a trial by jury conducted before Judge Ingram in the District Court at Whanganui. D was sentenced to 17 years' imprisonment with a minimum period of imprisonment (MPI) of eight years and six months.[1] At the hearing, Ms Guy Kidd, counsel for D in this Court, submitted that the sentence should be adjusted if we allowed the appeal in relation to only some convictions.

[2] The grounds of appeal can be reduced to the following six matters. We set them out in the order, and under the headings, in which we address them:

(a) Directions regarding demeanour.

(b) Representative charges.

(c) Fresh evidence.

(d) Juror disqualification.

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1 *R v [D]* [2016] NZDC 11300.

(e) Prejudicial evidence.

(f) Insufficient evidence.

Background

[3] D was in a relationship with the mother of the complainants, C1, C2 and C3. He was the father of C3. The complainants lived with their mother and D at various addresses in Whanganui. The jury considered 42 charges against D that alleged offending at these and other locations.

[4] The charges relating to C1 comprised:

(a) eight charges, including two representative charges, of indecent assault on a girl under 12 years of age;

(b) fifteen charges, including two representative charges, of indecent assault on a girl between 12 and 16 years of age; and

(c) one charge of unlawful sexual connection.

[5] The charges relating to C1 concerned events that occurred when she was aged nine and which continued until she was 14 years old. The charges including incidents of D touching her breasts, rubbing her vagina, rubbing his penis over her stomach until he ejaculated, blowing bubbles at her vagina when they were swimming and inserting his finger into her vagina.

[6] D was found not guilty of one of the charges concerning C1 that alleged indecent assault on a girl between 12 and 16 years of age. He was found guilty of all other charges relating to C1.

[7] The charges relating to C2 comprised:

(a) seven charges, including one representative charge, of unlawful sexual connection; and

(b) seven charges, including one representative charge, of rape.

[8] The charges relating to C2 concern, amongst other offences, D raping her on several occasions between 2001 and 2005. Specific incidents of this offending included on a mattress at one address, in her bedroom at another address, in a bedroom which C2 shared with another sister at a further address, and in a bedroom she shared with C3 and on her mother's bed at the same address. C2 was also raped in the lounge at one those addresses on the edge of a chair. D was convicted of all charges relating to C2.

[9] There was evidence in the trial that C2 had made complaints in 2005 that D had sexually abused her and that she had made a statement to the police to that effect at that time. There was also evidence D had made a statement in 2005 denying any offending against C2. These statements are relevant to three of the grounds of appeal.

[10] The charges relating to C3 comprised four charges of committing an indecent act on a young person. He was found guilty of these charges, which included incidents of D masturbating in front of C3 and putting his hand on her leg while watching pornography.

Application for an extension of time to appeal

[11] We note the appeal against conviction was filed approximately 70 days out of time. D says he had difficulties obtaining a lawyer. We grant D's application for an extension of time to appeal against conviction.

First ground of appeal: directions regarding demeanour

[12] In his opening address to the jury, Judge Ingram said:[2]

> … I invite you to watch carefully what's going on in the courtroom. How the witnesses give their evidence may assist you in deciding whether or not you accept their evidence as being accurate and reliable. …
>
> And I suggest to you that time spent concentrating on what's going on in the courtroom as the witnesses give their evidence will be time well spent. It may

2 *R v [D]* DC Wanganui CRI-2014-083-1107, 2 May 2016 (opening address) at [47]–[48].

> give you some impressions that may assist you with your task of deciding where the truth lies at the end of the trial.

[13] Ms Guy Kidd submitted that this aspect of Judge Ingram's opening address encouraged the jury to reach conclusions based on witness demeanour. In this respect, she submitted the opening address was contrary to the warning given by the Supreme Court in *Taniwha v R*, in which that Court said:[3]

> [T]he 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 …

[14] Ms Guy Kidd also submitted that the errors in Judge Ingram's opening address were compounded when the prosecutor, in his closing address, emphasised the demeanour of C2.

[15] In his summing-up Judge Ingram instructed the jury that:[4]

> The demeanour of witnesses can be over-stressed but one of the things that we do in our everyday lives is look at what people say and how they say it. Do they answer spontaneously? What was the body language? Do they physically react in a way you would expect? In each case you have got to look not just at what was said but what other evidence there was which helps to assess the accuracy and reliability of the witness's evidence and you need to test each witness's evidence against the yardstick of human nature and commonsense. Does a witness have a good reason for saying what they did? Does it make sense? Is it consistent with the rest of the evidence? Do the other witnesses or independent facts or documents support or confirm what that witness has said? Did the witness make concessions when a concession was justified? One of the indications of honesty and integrity can be a willingness to admit a mistake or make a concession. These are all factors for you to consider weighing the competing contentions in the context of all the evidence you have heard and you will need obviously to make a decision about the credibility of the witnesses here.

[16] Ms Guy Kidd drew our attention to the third and fourth sentences in this passage, and passages later in the summing-up when Judge Ingram said the following while summarising the competing arguments of the prosecution and defence concerning the credibility of the complainants:[5]

> At least part of the defence has to be that these girls are just flat lying. There is no room for mistake or anything else here, this is a set of deliberate lies

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3 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [47].
4 *R v [D]* DC Wanganui CRI-2014-083-1107, 12 May 2016 (summing-up) at [120].
5 At [165]–[167].

> being told by all three of them. It may help you to replay at least a portion of one, two, three, four, five videos. There is a whole lot of videos there. I am not going to suggest to you which ones you should look at.
>
> The Crown suggest that you should look at [C2's] 2005 video. It is entirely a matter for you whether you want to see any of them at all. You may not want to watch the whole video, you might want to watch a little portion of it and you might well be able to identify from the transcripts that you have portions of the video that you think may help you in reaching a decision about these big picture questions. It is a matter for you entirely, but certainly if I was in your shoes I would be thinking about those things and I would be thinking about having a look at a portion of those videos again to see whether or not there is something in the defence claim that these are liars concocting a story and trying to sell it to you or whether indeed these are genuine complainants who have suffered at the hands of [D], because in the end it is the sort of thing that you are going to have to decide.
>
> So those are my suggestions to you in relation to how you approach your task.

[17] The essence of Ms Guy Kidd's submission in relation to this ground of appeal was that, in his summing-up, Judge Ingram compounded what she submitted was an error in his opening address by inviting the jury to make decisions based upon the demeanour of the complainants, and in particular, the demeanour of C2. Ms Guy Kidd also submitted that any ameliorating effect of that part of the Judge's summing-up we have set out above at [15] of this judgment was undone when he later made the statements we have set out above at [16].

[18] When assessing the appropriateness of Judge Ingram's opening address and his summing-up, it is important to consider the full context in which the remarks in question were made. Judge Ingram clearly told the jury that the demeanour of a witness was just one element that they should consider when assessing that particular witness's credibility. He also explicitly cautioned the jury not to jump to conclusions based entirely on how a witness reacted. When all of Judge Ingram's directions on demeanour are considered, it is apparent he properly cautioned the jury not to solely rely on demeanour when assessing the credibility of the complainants' evidence. This approach was consistent with the tenor of the Supreme Court's observations in *Taniwha v R* about the need for a jury to avoid decision-making based solely upon a complainant's demeanour.[6] The approach adopted by Judge Ingram in this case is also in line with what this Court has previously said, namely that "demeanour may properly

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6 *Taniwha v R*, above n 3, at [44]–[47].

be taken into account but is best not considered in isolation. Rather, demeanour should be considered as one factor in the broader assessment".[7]

[19] When we assess all the directions given by Judge Ingram we are satisfied that he did not err in the way submitted by Ms Guy Kidd and that no appealable error of law occurred in the way in which he directed the jury in relation to the demeanour of the complainants.

Second ground of appeal: representative charges

[20] The second ground of appeal concerns charges 14 and 15, which related to C1, and charges 37 and 38, which related to C2. Those charges were four of the six charges that were presented as representative charges.

[21] Charge 14 alleged that:

> Between the 12th day of April 2002 and the 12th day of April 2005 at Wanganui [D] indecently assaulted a girl of or over the age of 12 years and under the age of 16 years … by touching [C1] underneath her clothing around her chest area.
>
> (On occasions other than those identified in charges 16 and 23)

[22] Charge 15 covered offending said to have occurred in Whanganui during the same timeframe as charge 14, but alleged that D touched C1 "underneath her clothing on the outside of her vagina. (On occasions other than those identified in charges 19 and 24)".

[23] Charge 37 alleged that:

> Between the 10th day of March 2001 and the 1st day of May 2005 at Wanganui [D] sexually violated [C2] by having unlawful sexual connection with her by the introduction of his finger or fingers into her genitalia.
>
> (On occasions other than those identified in charges 25, 27, 28, 31, 33 and 35)

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7 *E (CA799/2012) v R* [2013] NZCA 678 at [43].

[24] Charge 38 alleged that:

> Between the 10th day of March 2001 and the 1st day of May 2005 at Wanganui [D] sexually violated [C2] by raping her.
>
> (On occasions other than those identified in charges 26, 29, 30, 32, 34 and 36)

[25] The challenge to the framing of charges 14 and 15 is that they were "overly broad and inappropriate in a case where … [C1] had identified addresses at which she said this offending had taken place, even where specifics of the incidents could not be recalled". Ms Guy Kidd submitted that the incidents covered by the representative charges should have been "broken down into separate charges of a representative nature in relation to each of the addresses at which [C1] alleged indecent assaults on her had occurred".

[26] A similar submission was made by Ms Guy Kidd in relation to charges 37 and 38. She submitted each of those charges was overly broad as they alleged the offending occurred "at Wanganui" during a four-year period.

[27] We do not accept the submissions advanced on behalf of D in relation to this ground of appeal. In *K (CA106/2016) v R*, this Court summarised the principles concerning the use of representative charges when it said:[8]

> … [R]epresentative charges will be appropriate where a continuing course of conduct is alleged, but the prosecution evidence does not enable particulars to be given of discrete instances of offending.
>
> However, where a number of specific incidents or transactions or courses of conduct are included in the same count, there is a risk that all jurors will be satisfied of the proof of one, but not necessarily the same one. While a jury may arrive at the same point by different reasoning, they must be agreed on the factual basis on which they find a defendant guilty. Without such agreement there is no common foundation for the verdict.

And later:

> Such a risk can be avoided in either of two ways. First, the outcome can be prevented by framing a discrete representative charge for each geographical location at which offending is said to have occurred. It can then properly be inferred for any particular representative charge that a jury is unanimous as to the location of the offending.

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8 *K (CA106/2016) v R* [2016] NZCA 543 at [7]–[8] and [17]–[18] (footnotes omitted).

> Secondly, the risk can be averted if the Judge directs the jury that they must all be in agreement that the same incident occurred before reaching a verdict of guilty.

[28] In a similar vein, this Court in *Gamble v R* quashed convictions entered in respect of a single representative count of indecent assault that covered both digitally penetrating the complainant and rubbing her breasts. This Court held:[9]

> There are two difficulties with the first count that can only have resulted in justice miscarrying for Mr Gamble at his trial on that count. The first is the risk that some jurors may have found Mr Gamble guilty because they were satisfied that he rubbed the complainant's breasts through her clothing. Others may have been in reasonable doubt about that, but sure that Mr Gamble digitally penetrated the complainant. Others might have been satisfied that both types of indecent assault occurred. The Judge's directions to the jury were not sufficiently tailored to the case to avert this risk. So the majority of 11 jurors may well not have agreed even that a particular type of indecent assault occurred.

[29] In the present case, Judge Ingram explained the requirements of a guilty verdict in relation to a representative charge in the following way:[10]

> [F]or someone to be convicted under our law all 12 of you must agree on the incident which has led to the charge before the Court. This is a hybrid charge which covers a number of incidents and it would not be sufficient if some of you thought, "Well I accept it happened at [one address] but not at [another]," and so half of you accepted the [one address] and half accepted [another], all 12 of you would not be agreed about a particular incident, so I need to emphasise to you all 12 of you would need to be agreed on a specific incident in relation to the representative charges …

[30] Question 6 of the jury question trail relating to charges 14 and 15 read as follows:[11]

> Are you able to agree on one or more specific incidents you are all satisfied occurred?

[31] The first question the jury asked was:

> Can you please clarify question 6 on the representative charges particularly the word "specific"?

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9 *Gamble v R* [2012] NZCA 91 at [40].

10 Summing-up, above n 4, at [19].

11 The jury question trail relating to charges 37 and 38 included an identically worded question, although it was numbered question 5 for each of those charges.

[32] Judge Ingram answered that question in the following way:

> "Specific" in the context of this case means specific address or location within the date range. That is all that needs to be — that you need to be clear on.

[33] We interpret Judge Ingram's answer to mean that the jury were instructed that before they could convict D on any representative charge, all 12 members of the jury needed to be satisfied beyond reasonable doubt that the alleged offending occurred on at least one occasion between the dates specified in the charges, at one location within the geographical area identified in the charge.

[34] The instructions that the Judge gave the jury and his answer to their question were correct. We can see no basis for the submission that the jury were left in doubt as to what was required of them before they could convict D on the four representative charges that were the focus of this ground of appeal.

[35] For this reason, we dismiss the second ground of appeal.

Third ground of appeal: fresh evidence

[36] D seeks to adduce "fresh evidence" relating to C3. The evidence in question is a letter and a Father's Day card D received from C3 in 2015 and affidavit evidence from W, a person who had a relationship with D.

[37] The letter contains references to C3 missing D "heaps" and her belief that it "sucks" D could not be with her on her 16th birthday or that she could not be with him on his 50th birthday. In her letter, C3 said, "I wish I could see you and that all of this shit would blow over" and ends with "[h]ugs and kisses. Lots of love from your Daughter".

[38] The affidavit from W says that C3 told her over the telephone, before trial, that C3 wanted to change her statement and that on another occasion C3 had told her she wanted to see D and drop the charges.

[39] Ms Guy Kidd properly accepts that none of the evidence that D now wishes to rely upon is "fresh" because it was either in D's possession before trial or could reasonably have been obtained by him before trial.

[40] Applying the approach to "fresh evidence" set out by the Privy Council in *Lundy v R*,[12] we are satisfied that the letter and Father's Day card sent by C3 to D, and the statements attributed to C3 by W, do not undermine the safety of the convictions in respect of the charges relating to the complaints made by C3.

[41] The statements attributed to C3 are not inconsistent with her having suffered sexual abuse. Children may continue to demonstrate affection and love for their abusers. Nor is it uncommon for victims of sexual abuse to express frustrations about the criminal justice processes and want prosecutions to be brought to an end. We are satisfied that if C3 had been cross-examined about the contents of her letter, and the statements attributed to her by W, the jury would have reached exactly the same conclusions it did. No miscarriage of justice was occasioned by the absence of the "fresh evidence" at the trial.

Fourth ground of appeal: juror disqualification

[42] One of the Crown witnesses was Detective Sergeant Gleeson, whose unchallenged evidence concerned the police interview with D in 2005, following C2's complaints that D had sexually abused her. Approximately two hours after the commencement of the trial, one of the jurors, T, informed the Judge that he knew Detective Sergeant Gleeson. The Judge then brought T into chambers and asked him questions in the presence of counsel. T explained that he knew Detective Sergeant Gleeson very well. They were friends at primary and secondary school, they played rugby together after they had left school, they had socialised together and Detective Sergeant Gleeson was listed in T's cell phone as a friend. The Judge then asked T:

> Right. By the sound of that it's going to be pretty hard for you to put that relationship aside when you are assessing his evidence, is that right or not? What do you think?

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[12] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

T replied:

> Um, I don't really know to be honest with you.

[43] After further discussions about the relationship, the Judge then asked T the following questions:

> Okay. Well just, I've got to ask you straight forwardly and get you to give me an answer. What do you reckon, is he, is your knowledge of him going to make any difference to your assessment of his evidence, bearing in mind you may be asked to say that what he's said is not reliable either because it's not true or because he's made a mistake? That's the kind of issue that arises with a witness. You know if someone says that about him, are you prepared to accept that and put it in the mix or do you think your prior relationship is going to affect your assessment of this man?

T replied:

> [I]t would not affect my assessment.

[44] The Judge then heard brief submissions from counsel, in the presence of T. The Crown prosecutor indicated he was "a little uncomfortable" about T remaining on the jury. However, it appears defence counsel advised, after receiving instruction, that he was content for T to remain on the jury. After defence counsel advised the Judge of his position, the Crown prosecutor informed the Judge that if defence counsel and his client were content then he, the Crown prosecutor, did not have an issue with T remaining on the jury.

[45] The Judge then sought and obtained an assurance from T that when it came to his assessment of Detective Sergeant Gleeson's evidence he would treat him like any other witness.

[46] Ms Guy Kidd submitted that the procedure followed by Judge Ingram was not consistent with the procedure, as explained by this Court in *R v N (CA373/04)*, that should be followed by a trial judge upon receiving a communication from a juror.[13] That procedure includes the following:[14]

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13 *R v N (CA373/04)* (2005) 21 CRNZ 621 (CA).
14 At [19].

…

(3) Where, as in this case, the concern goes to the possible disqualification of a juror, it will normally be appropriate for the Judge to question the juror. This will usually be done in Chambers but again with counsel and the accused present … It would not normally be appropriate to have any member of the jury in Court other than the juror in question … It would not be appropriate during such an interview for counsel to ask questions of the juror although counsel may raise matters which they would wish the Judge to deal with.

(4) At the conclusion of the interview, the juror should not immediately return to the jury room but should wait with a Court officer in some other room while counsel are given the opportunity to make submissions to the Judge as to the action that should be taken on the information given by the juror. What then follows will depend upon the decision reached by the Judge after hearing those submissions.

…

[47] Mr Pike QC, counsel for the Crown in this Court, properly accepted that it was wrong for T to be present in chambers while counsel were asked to make submissions or comments about him remaining on the jury. Counsel should not be constrained when making submissions about the suitability of a juror remaining on a jury and should not have to make submissions about the appropriateness of a person continuing on a jury in his or her presence.

[48] In this case, however, the only counsel who appeared to express any misgivings about T remaining on the jury was the prosecutor and he appeared to change his stance once he realised that defence counsel had no objection to T remaining as a member of the jury.

[49] In the present case, Detective Sergeant Gleeson's evidence was uncontroversial. He was not cross-examined. His evidence was of a pro forma nature and related only to the fact that D had previously been interviewed by the police in relation to the allegations made by C2 in 2005.

[50] Had there been anything contentious in Detective Sergeant Gleeson's evidence, or if any issue about his credibility had been raised, then we may well have had concerns about the appropriateness of T remaining on the jury.

[51] While we are concerned about Judge Ingram having required counsel to make submissions in the presence of T about the appropriateness of him remaining on the jury, we are not satisfied those errors constituted a miscarriage of justice, particularly as both counsel agreed there was no issue with T remaining on the jury.

[52] Accordingly, this ground of appeal fails.

Fifth ground of appeal: prejudicial evidence

[53] The fifth ground of appeal concerns the admissibility of three pieces of evidence that Ms Guy Kidd submitted were prejudicial and inadmissible. It was her argument that the admission of one or more of these pieces of evidence caused a miscarriage of justice.

Reference to prior prison sentence

[54] The first of the three pieces of challenged evidence concerned part of the transcript of two interviews conducted with C1. Those transcripts had been edited before trial so as to delete two references C1 made during the course of her interviews to D having been imprisoned for a period of time. It transpired that one of those references was not in fact deleted from C1's DVD interview. The passage in question, which was played to the jury in C1's DVD interview, was as follows:

> [Q]: Mhm. Okay. Now, you did mention that there was a time that you felt really happy because he was away at that time …
>
> [C1]: Yep.
>
> [Q]: … that was in, um …
>
> [C1]: Prison.
>
> [Q]: … prison. So whereabouts were you living when he was away serving time?
>
> [C1]: I'm pretty sure we were at [one address] — this is another house …
>
> [Q]: Okay.
>
> [C1]: … when he got charged with it and then when he came back we were in [a different address].

[55] The prosecutor drew this incident to the attention of Judge Ingram in chambers. Judge Ingram commented:

> Someone will have picked that one up. Certainly all our ears pricked up when it went through. They will have picked it up all right. But I think it's counterproductive to mention it and if you are of the same mind?

To which defence counsel said:

> That's my inclination at the moment, Sir, and if it changes I will take it straight to you Sir.

[56] No directions were given by Judge Ingram to the jury that they were to disregard any references to D having spent time in prison. Nor would it appear that either counsel requested such a direction. Instead, Judge Ingram gave the jury the directions on prejudice and sympathy in the following passages:[15]

> … You must reach your decision uninfluenced by prejudice or sympathy. You cannot allow your decision to be influenced in any way by feelings of prejudice against or sympathy for the defendant or any of the complainants or any of the witnesses, anyone involved in the case.
>
> …
>
> Now, some of the evidence that came before you suggests that [D] may not have been a man of particularly good character in some respects. … His standards of behaviour around his daughter and step-daughters may not meet with your approval. It is important, ladies and gentlemen, however, that you focus on the task in hand. You are not here to determine whether or not [D] is a nice fellow. Simply because he may have done some things or lived a life that you disapprove of does not mean that he is guilty of the charges that he faces. You must not decide his guilt or innocence simply on the basis that you think he is the kind of person who might do this sort of thing. Instead you assess whether the evidence proves his guilt to the required standard.
>
> …
>
> … You cannot decide the case simply based on prejudice or dislike of [D]; you have to look at each charge, weigh the evidence on that charge in its context and determine guilt or innocence on the relevant reliable evidence.

[57] This Court has, on previous occasions, said that inadvertent references to a defendant having been previously imprisoned did not necessarily require the jury to

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15 Summing up, above n 4, at [5], [85] and [116].

be discharged or even that a specific warning be given to disregard the evidence in question. It has been observed that in such cases "'least said' is a sound approach".[16]

[58] In this case, the trial Judge, after hearing submissions from counsel, decided that it may be counterproductive to draw attention to the inadvertent evidence. That approach was reasonably available to Judge Ingram and was consistent with the approach taken by this Court in *McMaster v R*. This is territory that is not amenable to hard and fast rules. Each case must be assessed by the trial judge taking into account all surrounding circumstances. This is a matter in which trial judges are required to navigate difficult territory after taking into account submissions from counsel. We see no appealable error in the approach taken by Judge Ingram in the circumstances of this case.

Reference to previous complaint and use of illicit substances

[59] As previously noted, C2 made a complaint to the police in 2005 in which she alleged she had been the victim of serious sexual offending by D. Her DVD interview relating to that complaint was in evidence, as was D's statement made in 2005 in which he denied any wrongdoing. In that statement, D referred to an even earlier complaint made by C2 and the fact that he had gone "to court and it got thrown out because [he] actually hadn't ever been around at the time she'd said it happened".

[60] Ms Guy Kidd said the reference to an earlier complaint by C2 was inadmissible and the fact the jury heard of that complaint was an error that could have given rise to a miscarriage of justice.

[61] We are satisfied that no miscarriage of justice arose through the jury having heard of C2's earlier complaint against D. We accept the evidence of that earlier complaint was not relevant to the issues before the jury. The reference was, however, fleeting, not repeated, not referred to by counsel in closing submissions and possibly reflected more on the credibility of C2 than being prejudicial to D.

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16 *McMaster v R* [2009] NZCA 393 at [50]; see also *Edmonds v R* [2015] NZCA 152 at [26].

[62] In his 2005 interview, D had also said "I used to sniff glue back then. My memory's not too good".

[63] Judge Ingram ruled that evidence was inadmissible unless D gave evidence and said in effect that his memory was better than that of the complainant. This was exactly what happened later in the trial. D's references to the use of illicit substances, and their impact on his memory, therefore became relevant.

[64] In any event, Judge Ingram, in his summing-up, gave a specific warning about the evidence that D had used drugs in the past. He said:[17]

> … It seems that he took some kind of drugs something more than 10 years ago, maybe as many as 18 years ago. … It is important, ladies and gentlemen, however, that you focus on the task in hand. … Simply because he may have done some things or lived a life that you disapprove of does not mean that he is guilty of the charges that he faces.

[65] In these circumstances, we are satisfied no miscarriage of justice arose. The evidence was relevant and was properly dealt with by the trial Judge in his directions.

Reference to family violence

[66] The evidence of K, a niece of D's former wife, was read by consent. Her brief of evidence included the following statement:

> I have known that there have been [many] family violence issues in this family and I'm aware that [S] who is the eldest of the children left to go to Australia to get away from it all.

[67] Ms Guy Kidd submitted that the reference to "many family violence issues" was particularly prejudicial.

[68] On our reading of K's evidence, however, it is very uncertain as to who was implicated by her suggestion of "family violence issues in this family". When read in context, the comments could also have referred to R, who was the father of C1 and C2.

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[17] Summing-up, above n 4, at [85].

[69] In any event, the comment in issue was not repeated or referred to again. It was not so prejudicial as to influence the outcome of the trial. Judge Ingram's general directions about sympathy and prejudice, which we have set out above, were sufficient to diminish any adverse impact that the comments in question may have had.

Sixth ground of appeal: insufficient evidence

[70] Charge 4 was an allegation that D had indecently assaulted C1 by touching her on her chest area on about 22 April 2000.

[71] Mr Pike acknowledged that the evidence did not support this charge as C1's evidence was that D pulled up her shirt and rubbed his penis on her stomach. This conduct formed the basis of charge 6.

[72] We are therefore satisfied there was no evidence to support charge 4 and the conviction in relation to that charge is quashed.

[73] Charges 18 and 19 alleged indecent assaults against C1 when she was between 12 and 16 years of age. The charges alleged D was in a swimming pool with C1 and blew bubbles at her vagina and also rubbed her vagina inside her togs.

[74] The issue is whether there was evidence C1 was aged between 12 and 16 at the time of these incidents.[18]

[75] The evidence of C1 was that she was aged either 11 or 12 when the offending occurred. This was consistent with C2's evidence that she was nine or 10 years old when the offending occurred. C1 is two years older than C2.

[76] In these circumstances, there is too much uncertainty about whether or not C1 was aged between 12 and 16 when the incidents that formed the basis of charges 18 and 19 occurred. Accordingly, we quash D's convictions in relation to charges 18 and 19.

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[18] The relevant provision was amended in 2005, after these incidents had occurred, to remove the requirement to prove that the victim was over the age of 12 at the time of the offending.

Appeal against sentence

[77] The notice of appeal was confined to appeals against convictions.

[78] In the hearing before us, Ms Guy Kidd submitted that if we allowed D's appeals against convictions in relation to some of the charges, then we should readjust his sentence.

[79] We have treated Ms Guy Kidd's submission as an application for leave to appeal the sentence out of time, and we have granted that application in order to deal with the merits of the submission that the sentence should be adjusted.

[80] The three conviction appeals that have been allowed all involved indecent assaults. While every indecent assault on a young child is serious, in the overall context of D's offending, the three charges in respect of which his appeals have been allowed have no impact on the sentence imposed upon D.

[81] The most serious offending involved the multiple rapes of C2. They were particularly disturbing rapes of a vulnerable young girl by a person who abused his position of trust.

[82] The sentence imposed by Judge Ingram was appropriate for the offending against C2 and the other convictions that we have upheld. There is no need to adjust the sentence to reflect the three successful appeals against conviction.

Result

[83] The applications for extensions of time to appeal conviction and sentence are granted.

[84] The appeal against conviction is allowed in part. The convictions in relation to charges 4, 18 and 19 are quashed.

[85] The appeal against sentence is dismissed.

Solicitors:
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