

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA550/2009
[2010] NZCA 545**

BETWEEN	OWEN HARWOOD Appellant
AND	THE QUEEN Respondent

Hearing: 11 November 2010
Court: Stevens, Gendall and Cooper JJ
Counsel: C J Tennet for Appellant
N P Chisnall for Respondent
Judgment: 23 November 2010 at 4.15 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Gendall J)

[1] The appellant was convicted after trial in the District Court at Manukau on 24 June 2009 of eight counts of sexual offending against a young girl. They comprised five of sexual violation by rape, one of attempted sexual violation by unlawful sexual connection, one of indecent assault on a girl under the age of 12 and one of indecent assault upon a young person. He was sentenced to an effective term of 16 years' imprisonment on the lead charges of sexual violation by rape, together

with concurrent terms of eight years' imprisonment for attempted sexual violation, seven years' imprisonment for indecent assault on a girl under 12 and five years' imprisonment for sexual conduct with a young person. District Court Judge Treston imposed a minimum period of nine years' imprisonment.

[2] This is an appeal against conviction and sentence.

Background

[3] The offending related to one complainant, a young relative of the appellant, born in 1994. The allegations span that period from when she was between the ages of about six and 14, from March 2000 until August 2008. Over the same period the appellant was aged between 17 and 24. The complainant's evidence was that multiple acts of rape and indecent acts occurred. Although it was sometimes intermittent nevertheless it escalated as she became older. The offending ended when the appellant attempted to sexually violate the complainant, then aged 14, who resisted, took refuge with other family members and complained.

[4] The appellant was then interviewed and denied any offending, insisting that no sexual contact of any kind had occurred between him and the complainant. In that interview with a police officer the appellant said that he had first had sex when he was aged about 19 or 20, and at the age of 17 he was "pretty much a virgin [himself] so [he] wouldn't even know how to".

[5] At about the time the complainant made allegations it seems she was concerned that she might have been pregnant. Her evidence was that the appellant when he penetrated her on multiple occasions had never used a condom. As a result of this concern she underwent tests, which were negative. In the course of her cross-examination by the appellant's trial counsel (not appeal counsel) she was asked about those tests. The exchange was as follows:

Q. Now when you – shortly after you spoke to your friend and your school counsellor and then the police you had some blood tests undertaken didn't you?

A. Yes.

- Q. And those blood tests confirmed that you weren't pregnant?
- A. Um, yes.
- Q. And those blood tests also confirmed didn't they that you had no sexually transmitted diseases?
- A. I don't know I haven't seen them.
- Q. Sorry?
- A. I haven't seen my blood tests results.

[6] Trial counsel then wanted the medical records to be shown to the complainant. Crown counsel objected. The records were not made by the complainant and she had not seen them. The objection was dealt with by the Judge in the absence of the jury. In the course of that hearing, defence counsel said that he wished to cross-examine the complainant as to her having, or not having, a sexually transmitted infection (STI). The Judge said the defence was that there was no sexual contact at all between the appellant and the complainant,¹ and further:²

Any question directed to her as to her condition as to having or not having a sexually transmitted disease, a fortiori, must refer to the sexual experience of the complainant with a person other than the defendant.

[7] The Judge ruled that any proposed question would be a breach of s 44(1) of the Evidence Act 2006 and he did not grant permission for the defence to ask her that question. The Judge further stated in his ruling:³

It is clear that no evidence in the circumstances of the defence can be given in accordance with the section in relation to the complainant's condition in relation to a sexually transmitted disease, because, a fortiori again, that must relate to the sexual experience of the complainant with a person other than the defendant.

[8] The appellant did not give evidence or assert at any stage at trial that he had a STI. But that was because trial counsel was said to have been prevented from exploring the issue because of the Judge's ruling. Evidence was called on behalf of the defence from members of the appellant's and complainant's family as to peripheral matters relating to the complainant's behaviour, times during which she

¹ *R v Harwood* DC Manukau CRI 2008-057-1762, 22 June 2009 at [2].

² At [4].

³ At [7].

visited the appellant's house, and generally to the effect that nothing untoward was noticed.

[9] The defence, as presented in counsel's closing, came down to challenging the veracity and reliability of the complainant. This was on the basis that it was extremely unlikely that over that period there had been several hundred rapes by an adult of a young girl, as the complainant alleged, without independent evidence, complaint, or indeed anyone noticing.

The case on appeal

First ground – the appellant's STI

[10] In support of his appeal, the appellant initially said that he had a STI at all relevant times and therefore it was necessary for his defence for trial counsel to have been able to explore whether the complainant had a similar condition. If she did not have a STI, then it enabled an argument as to the unlikelihood or impossibility of there being sexual contact between him and the complainant as she had described. Consequently, that reflected substantially upon her credibility. The contention was that the Judge deprived the appellant of the opportunity to present a viable defence, by not allowing the question in cross-examination.

[11] For the purposes of the appeal hearing, the appellant filed affidavit evidence to the effect that on 29 October 2002 he attended the Manukau Sexual Health Centre and tests diagnosed that he had gonorrhoea and chlamydia (being STIs) for which he was treated with an antibiotic. Further, the appellant asserted that he had STIs virtually throughout that period until trial. The only other medical evidence referred to a medical test obtained during the appellant's trial when he went to a clinic and was told he had chlamydia.

[12] It appears that in about 2008 when the complainant was aged 14, and after the complaint was made, when genital swabs were taken of her for an unrelated purpose, they did not display any positive condition of a STI. The appellant contended that it

was crucial that she have been able to be asked about that given what, he says, was his infected condition.

[13] The timeframe of the counts in the indictment, on which the appellant was found guilty, relate to between the months of March 2000 and 2002 (individual and representative counts of rape); March 2000 and May 2005 (indecent assault); March 2006 and August 2008 (indecent assault); December 2007 and May 2008 (unlawful sexual connection through oral/genital contact); and January 2007 and August 2008 (three individual rapes).

[14] When the appeal was first called, it became clear that this Court could not properly deal with the substantive ground of appeal without there being evidence. The reasons were first, as to the appellant having a STI at any relevant time, and secondly, as to the likelihood of transferability of any relevant STI following unprotected sexual intercourse between the appellant and the complainant. This is recorded in a Minute of this Court dated 31 May 2010. An adjournment was granted in order that an opportunity be given for evidence, if available, to be presented.

[15] That evidence was from the appellant and that of an expert venereologist and consultant in sexual health at Auckland Hospital Dr P J Say. The appellant's evidence is that:

- (a) Following sex with a woman in about November 1998 he “picked up chlamydia and gonorrhoea” but did not seek treatment because he was “young and immature and just wanted to ignore it”;
- (b) Between 1999 and 2001 as a result of a sexual relationship with a woman he “passed these STIs onto her. I found out when she told me in 2001”;
- (c) He had treatment at the Auckland Health Centre on 21 October 2002 and annexed a laboratory service report as to test results being “positive” for chlamydia for which he was given medication but

which he did not take as he preferred to later use condoms and had no follow-up for his condition.

- (d) His relationship with his then partner ended in January 2006 when he formed a new relationship. That partner “found out she had chlamydia” when she was in hospital in October 2007. He said that during the relationship “I still had a pretty good idea that I was suffering from these STIs but had just ignored it and was not that concerned about it”.
- (e) When the appellant’s trial had begun in 2009 he went to a clinic, was diagnosed with chlamydia and received medication and annexed a laboratory report, which records “positive” for chlamydia.

[16] The evidence obtained from Dr Say is pivotal. She reviewed documents which included the indictment, summary of facts, video transcript of the complainant, the appellant’s statement to the police, the complainant’s medical records, the appellant’s laboratory results on the two occasions in 2002 and 2009 and other material. She produced a detailed report, and her conclusions are:

The possible explanation for the complainant testing negative six years later include:

- (1) No sexual contact occurred at the time the defendant was infected.
- (2) Sexual contact occurred at the time the defendant was infected but –
 - the nature or frequency of the contact was such that transmission was unlikely
 - transmission did not occur as not every contact leads to transmission.
- (3) Sexual contact occurred at the time the defendant was infected and the complainant was indeed infected but –
 - the infections have spontaneously resolved due to time, intermittent anti-biotics and immunity.
- (4) The laboratory tests taken on the complainant in 2008 were falsely negative.

In summary, the information that the defendant tested positive for Gonorrhoea and Chlamydia in 2002 and the complainant tested negative in 2008 are not able to assist in establishing whether sexual contact between the defendant and the complainant ever occurred.

The police interview of the appellant

[17] The second ground of appeal, although not strenuously pursued, related to the appellant's interview by a police officer. The evidence was that he denied the allegations, and in cross-examination, the officer agreed that those denials were strenuous. The appellant was adamant that he had not had any sexual contact with the complainant. The trial Judge had read a full transcript of the interview and noted that the Crown did not propose to adduce the statement in evidence because it was not inculpatory, but was exculpatory.

[18] Trial counsel sought to have the statement admitted, and although he accepted it was self-serving he wished to have parts of it before the jury. In particular the portion where (it was asserted by the appellant's former counsel) the appellant "offered a DNA test" in response to an allegation of pregnancy. Counsel contended that what was said was inconsistent with guilt and admissible. The transcript of the interview records in fact the exchange with the appellant:

Q. she was concerned that she was pregnant and so she thought the last time I had sex was with was with Owen.

A. Yeah, I, no, I've never ever touched her like that.

Q. Mm?

A. Only as my, as my [relative] like.

Q. Mm?

A. I, I love her and stuff but never ever touched her in those ways.

Q. So if we were to look at it objectively if, if she becomes pregnant, so if, if she is pregnant, if when we have a look at it's not going to be hard to see whose baby it is with DNA testing?

A. Yeah, yeah well you know I've got nothing to worry about, cos I know it's not me.

Q. Okay. Not you?

A. Yeah.

Q. Alright, to be fair to you she's now discovered that she's not pregnant okay so that that worry is over but that's pretty unusual for someone when they –

A. Yeah, yeah.

....

[19] The Judge ruled that the evidence of the interview was inadmissible other than to the extent of the appellant's denial of any offending. He said it was wholly exculpatory and that s 35 of the Evidence Act did not make it admissible, unless the appellant gave evidence so that s 35(2) or (3) became engaged. The Judge ruled that the statement was inadmissible and could not be referred to by defence counsel in cross-examination of the interviewing officer.

Discussion

[20] The first ground of the appeal challenging conviction, made by the appellant's former counsel, Mr Heaslip, was that the Judge erred in refusing to permit evidence being elicited from the complainant as to her not having a STI. He contended that the Judge failed to take into account that the complainant "did not have any STIs at all for the relevant period but that the [appellant] did" and the Judge failed to recognise the importance of that evidence being before the jury. That naturally presupposes that the complainant would have said she had not had that condition. It also presupposes that the appellant was to give evidence that he did have a STI.

[21] The second ground advanced by Mr Heaslip was that the Judge erred in refusing to permit the jury to hear of the appellant's "offer of a DNA test", or otherwise his response to questions regarding the complainant's allegation.

[22] In summary, the submission was that the Judge prevented the appellant from offering an effective defence in terms of s 8(2) of the Evidence Act.

The grounds advanced in argument

[23] When the appeal came to be argued, and after the affidavit evidence had been filed, the appellant's new counsel, Mr Tennet, somewhat refined the original submissions. He said that the question of cross-examination on matters relating directly or indirectly to the sexual experience of the complainant, prohibited under s 44 without leave, could be put to one side. The essential question was whether a miscarriage of justice might have arisen because the real issue was not in front of the jury because of the way the trial developed. His submission was that the real issue was whether evidence of the absence of any STI suffered by the complainant (if given), together with evidence of the appellant as to his diagnosis of having had at some time a STI (if given), may have led the jury to question the reliability and credibility of the complainant because of the "inherent unlikelihood" of her remaining disease-free.

[24] But as the Court had earlier observed,⁴ rather more than that was needed. As a consequence, the evidence of Dr Say was obtained. Mr Tennet accepted that this might have provided a problem for the appellant. That is because, although he was tested in 2002, the complainant was not tested until 2008 and she was not tested at the times relevant to the allegations of sexual contact. Nevertheless, Mr Tennet's argument was that there was relevant material which ought to have been placed before a jury to be assessed by it as the fact finding body, and because that did not occur there was a risk of a possible miscarriage of justice.

[25] As to the second issue, namely what was said to be an offer by the appellant "to undergo a DNA test" Mr Tennet adopted the earlier written submissions of Mr Heaslip. He accepted that under s 21 a defendant who does not give evidence may not offer an exculpatory hearsay statement. He said that this was not an absolute bar and the offering of a blood sample should have been before the jury, so as to be assessed as part of the appellant's overall consistent denial.

⁴ It is the Minute of 31 May 2010 referred to at [14] above.

The s 44 issue – cross-examination of “other” sexual contact

[26] As is apparent from the transcript, the questioning of the complainant, to the stage that it reached, did not in fact engage s 44 of the Evidence Act. Defence counsel was endeavouring to elicit from the complainant that she had never had a STI. She could have said “yes” or “no”. But she was not asked that. She was asked what her blood tests recorded. The objection that she could not be cross-examined on medical records made by another was well-founded. They could well have been proved by other means.

[27] It is not apparent from the transcript of the exchange in chambers, and the Judge’s ruling, that counsel made it clear to the Judge what in fact he was seeking to do. If, as the Judge says was the case, the defence wished to cross-examine the complainant as to her “having or not having a sexually transmitted disease”, then that would have afforded two possible answers. The Judge was correct in one respect that, given the defence position, questions directed as to the complainant having a STI might point to her having sexual experience with another if the answer was “yes”.

[28] But the fact that a complainant did not have a STI is not a fact that points to sexual experience with another and s 44 does not prevent such a question being put – that is, “you have not had STI at any time?” Rather it says that no question can be put, or evidence given as to the presence of STI. That did not mean that evidence could not be called on that point, namely that the complainant in fact had no STI. That would not have infringed the section. It could easily have been done by defence counsel introducing the medical records in the proper way through the proper witness. They were not covered by privilege, and were simply records of laboratory tests or a diagnosis. But they would have meant nothing without more relevant information. The appellant himself would have had to give evidence as to what he said was his STI status at any relevant time. He may then have been cross-examined about that and the fact that it was only on two occasions many years apart that he was tested. But that issue never arose.

[29] If this was to be the defence strategy then it seems that trial counsel had to approach the matter by squarely putting it to the complainant that the appellant had a STI and would give evidence to that effect. She could then have been asked whether she had any similar condition. That would have been permissible. If she had said she did not (as appears to be the case), or such could be established in other evidence, the appellant would then have had to have given evidence and expert opinion evidence called as to the transferability of the condition. He may have faced rebuttal evidence from the Crown on that issue.

[30] Mr Tennet's position was that whilst there was no serious error by trial counsel, this line of defence could and should have been pursued. The appellant must have been alive to the possibility of such an approach, which is apparent from the attempted questioning of the complainant and the fact that during the trial the appellant himself underwent a medical test. Mr Tennet accepts, however, that to pursue the defence the appellant would have had to have given evidence and some expert or other opinion evidence adduced as to the significance, if any, of the complainant at some point testing negative to a STI and the appellant, at other times, testing positive.

The evidence of the expert venereologist

[31] That leads us to the evidence of Dr Say that Mr Tennet had to obtain. Without some expert medical opinion to support the proposition that the defence wished to advance, a jury would have been directed not to speculate, and that there was no evidence as to the likelihood of cross-infection arising from the evidence of the complainant and appellant.

[32] Mr Tennet correctly accepts that any evidence of the appellant on this point would not be new and "fresh" because it was available at the time. Likewise, the evidence of Dr Say is not new or "fresh" because it too could easily have been obtained at the time.⁵

⁵ *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71.

[33] But the end test is not “freshness” and the matter comes back to the issue of whether, overall, something may have gone awry in this trial so that the safety of the verdict might be impugned because of a possible miscarriage of justice, however caused. That is, the trial should have proceeded so as to enable this evidence to be adduced. Mr Tennet’s argument accords with what was said in *R v Sungsuwan*:⁶

Counsel error is not itself a ground of appeal under s 385(1). The inquiry is not into the competence of counsel but whether the verdict is unsafe through any deficiency in the trial, however caused. Where, as here, the basis of the ground of appeal is that relevant and admissible evidence was not called (whether because it was not reasonably available at trial or because counsel did not choose to call it), the effect of its absence will have to be assessed. The context may include the cogency of the evidence not called, the other evidence at trial, any additional evidence likely to have been elicited in response had the evidence been called, and any risk to the defence in calling the evidence.

Cogency of Dr Say’s evidence

[34] Crucial to any consideration of “fresh” or new evidence is its cogency or prospective weight. In *Wallace v R* this Court said: ⁷

Despite these contextual factors, we consider that the critical factor in relation to the “fresh” forensic evidence in this case is the cogency of what is sought to be advanced. That cogency must be of an order that the verdict of the jury in this trial – correctly arrived at on the evidence before it – should be set aside and a new trial held.

[35] This Court discussed the principles in *R v S (CA64/06)*,⁸ referring to *Bain v R*, and emphasised that the preliminary evaluative function is for the appellate court, even though the ultimate answer is for a jury. But the Court said:⁹

If this prior scrutiny by the appellate court was not to take place, just about every appeal would be flooded with further evidence applications. In simple terms, what we have to ask ourselves is how a jury might reasonably have responded to this additional information, if such it is.

[36] If the evidence is cogent, in the sense that if given at trial it might have had some effect on a reasonable jury, it will be admitted. So it comes down to the expert opinion evidence of Dr Say. Its admissibility would have been governed by s 25 of

⁶ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [7] per Elias CJ.

⁷ *Wallace v R* [2010] NZCA 46 at [52].

⁸ *R v S (CA64/06)* [2007] NZCA 243.

⁹ At [51].

the Evidence Act. It is admissible if the jury would be likely to have obtained substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding. For the purpose of considering this aspect, it is necessary to assume that there was evidence that the complainant tested negative to any STI in October 2008 and that the appellant gave evidence along the lines contained in his affidavit.

[37] It is not sufficient that the evidence of Dr Say might have some relevance, rather it must be substantially helpful to the jury. The short point is whether Dr Say is able to give any definitive, or even tentative, opinion that might have assisted the jury.

[38] The content and thrust of Dr Say's evidence was that there were too many variables, with four factors at least in place, so as to prevent any positive view. Reviewing the overall thrust of the proposed expert evidence it seems to us that it would have been most unlikely that the defence would have been able to obtain any assistance from the evidence. Further, it could not have been substantively helpful for the jury. No other expert evidence has been advanced to support the proposition that the fact that the complainant tested negative to STIs in 2008 (assuming that is the case) raised a reasonable doubt that there had been sexual contact between her and the appellant, who had tested positive in 2002 and again in 2009.

[39] That Dr Say's evidence would not have been able to help the appellant is sufficient to dispose of the point of cogency so as to meet the third test enunciated in *Bain v R*. It is not sufficiently cogent to have made a difference. The defence was not thwarted in pursuing this line of defence. But if it had done so and called this expert evidence, the appellant would also have had to have given evidence. That may have carried risks in itself (especially as in his interview with the police officer he said that he was "just about 20" or "I would have been 19" when he first had sexual intercourse).¹⁰ Also, if the appellant had given evidence, it would have been open for the Crown to call rebuttal evidence from Dr Say, so as to help the jury

¹⁰ Which did not accord with his affidavit that he "picked up" STI following sex in November 1998 (when he would have been aged 15).

understand that a mere claim by the appellant to having a STI was not a factor pointing to the conclusion that the complainant was inventing her evidence.

[40] No possible miscarriage of justice arose through either the Judge's ruling preventing counsel pursuing a possible line of defence (which it did not) or the failure of the defence to do so.

The exculpatory statement

[41] We do not consider the Judge's exclusion of what the appellant had said in his interview that he would take a DNA test led to any possible miscarriage of justice. Such a comment added little of consequence to the strenuous denials of offending given by the appellant in that interview. It was not a question of s 35 of the Evidence Act being relevant because that relates to previous consistent statements where a witness gives evidence and that was not the case. Nor does s 21(1) apply to prevent an accused offering his own hearsay statement in evidence (that is, in his support) in the proceeding, because this statement was not hearsay. If offered, it was not to prove the truth of its content, but rather to prove that in fact that is what the appellant said.

[42] We think the Judge was incorrect in expressing the view that this part of the statement was clearly inadmissible under the Evidence Act and therefore could not be referred to in cross-examination of the interviewing officer because neither s 35 nor ss 21(1) or 23(1) applied. The Judge's reference to the principles in *R v Treacy*¹¹ and as they were applied in *R v Ram*¹² reflects a misunderstanding because those cases and principles related to situations where an accused's statement was held to be inadmissible for procedural irregularities and other reasons and could not therefore be put to an accused on any basis for cross-examination. The difference here is that the inadmissibility of an accused's exculpatory hearsay statement arises because of the content and nature of the statement. There may well be occasions where exculpatory, non-hearsay, statements (obviously instances of denial of offending) can be given in evidence. It will all depend upon whether an accused is

¹¹ *R v Treacy* [1944] 2 All ER 229.

¹² *R v Ram* [2007] NZCA 166, (2007) 23 CRNZ 444.

endeavouring to have put before the jury, not on oath, his hearsay exculpatory statements or explanations as matters of direct evidence without having to give them on oath or be subject to cross-examination.

[43] Here, the comments were simply additional assertions consistent with denial of offending. Whilst on one view of the matter it could have been submitted to the jury that they might not have been made by an innocent person, nevertheless there is force in the Judge's view that the questions sought to be put to the officer could not have relevance to the guilt or innocence of the accused, but simply relate to the force of his denials. As we have said, the comments add little to the complete denials. Even if the Judge ought to have permitted that brief comment of the appellant at that part of the interview to have been given, it would not in our view have made any difference or added to the significance of the appellant's denials. We do not think that excluding reference to it could have possibly led to any miscarriage of justice.

Sentence appeal

[44] Whilst *R v AM (CA27/2009)*¹³ provides new guidelines for rape and sexual violation by unlawful sexual connection, those guidelines are only to be applied to sentencing taking place after 31 March 2010. This was subsequent to the sentencing of this appellant. Nevertheless, the guidelines simply built upon prior appellate authority. This was very serious offending, which unquestionably would have come within rape band four under *R v AM*, attracting a starting point of between 16 and 20 years' imprisonment. Under *R v Proctor*, repetitive offending against a young family member over an extended period of time attracts a range of between 13 and 19 years.¹⁴ Examples of sentences upheld by this Court for serious protracted sexual offending against young girls in a family situation include *R v I*¹⁵ (starting point 17 years with a sentence of 16 years' imprisonment and a ten year minimum period of imprisonment); *R v Kolio*¹⁶ (starting point 17 years with a sentence of 15 years'

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

¹⁴ *R v Proctor* [2007] NZCA 289.

¹⁵ *R v I* [2009] NZCA 101.

¹⁶ *R v Kolio* CA219/01, 1 November 2001.

imprisonment); *R v T*¹⁷ (starting point 16 years with a sentence of 12 and a half years' imprisonment and a seven year minimum period of imprisonment).

[45] In this case the crimes against the complainant began when she was of a tender age between six and eight, committed by a supposedly trusted, much older relative. Counsel contended that there had been some argument by the appellant as to the number of rapes that had occurred over that extended period, so that it was open to the Judge to conduct a disputed facts hearing to arrive at an assessment of the number of rapes. This did not occur, but the simple fact is the Judge heard all the evidence at the defended hearing. He was entitled to reach the conclusion that he did, namely that there had been grave offending over a long period of time and it was clear that on his assessment of the evidence he found there were multiple rapes. It was not necessary for the Judge to determine precisely the number of rapes that occurred which, given the representative charge, would not have been possible.

[46] In fixing a starting point of 18 years, the Judge factored into the process the multiple number of offences and their nature, apart from the crimes of rape. Mr Tennet contended that the Judge should have fixed a lower starting point because of the youth of the appellant at the time when the offending commenced. The crimes spanned a period when he was aged approximately 17 to 24 years. That, however, appears to have been the reason, and the only reason, why the Judge reduced or discounted the starting point by two years to reach a final lead sentence of 16 years' imprisonment. The appellant had 34 previous convictions, although none for sexual offending. These included two for assaulting a female and one for assault with intent to injure, for which he had been sentenced to terms of imprisonment. The starting point was at the top of the available range but not outside it, and the sentence of 16 years' imprisonment for grave sexual offending such as this cannot be said to be manifestly excessive. It is a significant sentence but consistent with somewhat similar cases and cannot be disturbed.

[47] Mr Tennet also challenges the nine-year minimum period of imprisonment, imposed by the Judge as to reflect society's abhorrence and provide appropriate deterrence and denunciation. Mr Tennet accepts that a minimum period of

¹⁷ *R v T* [2008] NZCA 539.

imprisonment was required but contends that nine years is too long. The appellant was assessed at a high risk of re-offending in his 20s and has significant previous convictions. The circumstances of the offending were sufficiently serious within the provisions of s 86 of the Sentencing Act 2002 to entitle the Judge to exercise his discretion not only to impose a minimum period of imprisonment but one of that length.

[48] We are not disposed to interfere with the sentence or minimum period imposed and the sentence appeal is dismissed.

Result

[49] The appeals against conviction and sentence are both dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent