

**NOTE 1: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS  
OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL  
JUSTICE ACT 1985.**

**NOTE 2: AN ORDER HAS BEEN MADE IN THE DISTRICT COURT ON  
13 NOVEMBER 2012 PERMANENTLY SUPPRESSING THE NAME AND  
IDENTIFYING PARTICULARS OF THE APPELLANT IN CA799/2012**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA799/2012  
[2013] NZCA 678**

BETWEEN E (CA799/2012)  
Appellant

AND THE QUEEN  
Respondent

**CA451/2012**

BETWEEN KRISHNA GUBBALA  
Appellant

AND THE QUEEN  
Respondent

**CA177/2013**

BETWEEN FRANK PETRUM NGAROPO  
Appellant

AND THE QUEEN  
Respondent

Hearing: 14 October 2013

Court: O'Regan P, Randerson and Harrison JJ

Counsel: P H B Hall QC and K H Cook for E  
J H M Eaton QC and K H Cook for Gubbala and Ngaropo  
A Markham and A Van Echten for Respondent

Judgment: 19 December 2013 at 3:30 pm

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## JUDGMENT OF THE COURT

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- A All three conviction appeals (CA799/2012; CA451/2012; and CA177/2013) are dismissed.**
- B Mr Gubbala's sentence appeal in CA451/2012 is also dismissed.**
- C Counsel are to confer urgently and file a memorandum no later than 20 December 2013 as to the date from which E's sentence of home detention is to resume.**
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## REASONS OF THE COURT

(Given by Randerson)

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## **Introduction**

[1] These appeals were heard together because they raise two issues of general importance in criminal trials:

- Should juries be warned about the risks of relying on the demeanour of a witness in assessing credibility?
- What factors are relevant to the exercise of the discretion to allow the videotaped evidence of a complainant in sexual cases to be replayed during the jury's retirement?

[2] These issues are the principal grounds of appeal against conviction in all three appeals. The appellant E and Mr Ngaropo have formally abandoned their appeals against sentence. Mr Gubbala maintains his appeal against sentence.

## **The facts in outline**

*E*

[3] E was convicted following a District Court jury trial on three counts of indecent assault of a girl under 16. The complainant was E's stepdaughter, then aged 13 years.

[4] The Crown case was that on the evening of 30 December 2009, E was watching television with the complainant and her younger brother. After the younger child had gone to bed, E put his arm around the complainant and fondled her breast. After the complainant went to bed, E entered her bedroom where he rubbed her leg and then fondled her genitalia. She rolled over and faced the wall, whereupon E pulled up her t-shirt and kissed her on the back. The complainant told her mother about what had happened on the following morning.

[5] The defence was that none of these things happened.

[6] During the jury's retirement, they requested the replaying of a videotape of the complainant's evidence (which had been presented as her evidence-in-chief).

After discussion with counsel, the Judge agreed to this and also read to the jury the entire transcript of the complainant's oral evidence. The Judge also gave the jury a further brief summary of E's defence. He did not give any direction to the jury about the assessment of the complainant's demeanour or how the demeanour of the witness might be used to assess her credibility.

[7] E challenges his convictions on the grounds that:

- (a) There was no warning by the Judge about the risks of the jury relying on demeanour when assessing the complainant's credibility.
- (b) The risks were such that the video should not have been replayed.
- (c) There was no proper balancing of the prejudicial effects of repeating the complainant's evidence.

*Mr Gubbala*

[8] Mr Gubbala was found guilty following a District Court jury trial on one count of sexual violation by rape and two of indecent assault. He was acquitted of a further count of doing an indecent act. He was sentenced by the trial Judge, Judge Treston, to an effective term of eight years imprisonment.<sup>1</sup>

[9] Mr Gubbala was employed as a caregiver at a community home for people with intellectual disabilities and mental health issues. The complainant, Ms P, lived at the home in full-time care. She has intellectual deficits and also suffers from bi-polar disorder and incontinence.

[10] On the morning of 3 November 2009 Ms P was in her bathroom when Mr Gubbala entered the room. According to Ms P, Mr Gubbala pulled his penis out of his pants and rubbed it on her leg. He then pressed his hand inside her pyjama pants and rubbed her genitalia. When she returned to her bedroom, Mr Gubbala followed her inside and pulled down the blinds. He then pulled her pyjama pants down and raped her on the bed. He told her to have a shower and she did so.

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<sup>1</sup> *R v Gubbala* DC Auckland CRI-2010-090-4672, 5 July 2012.

[11] Later the same day, Ms P complained to another caregiver and she was medically examined that evening. Swabs were taken from Ms P's genitalia and subsequent forensic testing revealed the presence of semen. DNA testing revealed a partial male profile that corresponded with Mr Gubbala's DNA, with a statistical probability of one million million. These results strongly suggested that the DNA on the vaginal swabs originated from Mr Gubbala.

[12] Mr Gubbala denied the offending alleged. Expert witnesses called by the Crown were challenged as to the swabbing process and the risk of contamination of samples. The defence also pointed to the possibility of the complainant having access to Mr Gubbala's underwear and to a tissue or towel as possible sources of his semen.

[13] In his summing-up, the trial Judge directed the jury, inter alia, that the demeanour of a witness could be a valuable aid in judging his or her reliability and credibility. No specific direction was given as to how to treat the expert evidence or on the question whether the complainant had a motive to lie.

[14] Mr Gubbala challenges his convictions on three grounds:

- (a) The failure by the Judge to direct on the risks of considering demeanour as part of an assessment of the complainant's demeanour.
- (b) The failure to give a direction on the expert evidence called by the Crown.
- (c) The failure to give a direction in relation to motive to lie.

*Mr Ngaropo*

[15] After a jury trial in the District Court, Mr Ngaropo was found guilty of one count of injuring with intent to injure, one count of threatening to kill, one count of kidnapping, and one of sexual violation by unlawful sexual connection (anal intercourse). He was acquitted of a further count of sexual violation by rape.

[16] Mr Ngaropo and the complainant, Ms W, had been in a relationship for over a year. Their relationship was characterised by extreme but consensual sexual practices. In July 2010, the relationship ended. Ms W said she was concerned by increasing violence on Mr Ngaropo's part. On 15 July 2010, Mr Ngaropo arrived at Ms W's address despite her objections. That night and over the following two days, Ms W engaged in rough sexual activity, to which she said she had reluctantly consented. However, at the end of this period, Ms W's account was that Mr Ngaropo forcibly subjected her to anal intercourse to which she did not consent. In the course of this, she said Mr Ngaropo put her into a martial arts hold and subjected her to considerable physical violence. At one point, Ms W convinced Mr Ngaropo to let her go. She ran outside to get help but was dragged back inside again by Mr Ngaropo who threw her on the ground and subjected her to further serious physical violence.

[17] Mr Ngaropo gave evidence at trial. He denied any violence on this or any other occasion and said that the sexual activity had been consensual.

[18] In his summing-up, the trial Judge, Judge Doherty, gave directions to the jury on the issue of demeanour. The correctness of those directions is the sole ground relied upon by Mr Ngaropo to support his appeal against conviction.

### **The demeanour issue - submissions**

[19] We will deal with the two main issues raised at a level of general principle before addressing the individual cases.

[20] The first issue relating to the demeanour of witnesses is common to all three appeals. This topic was addressed by Mr Eaton QC on behalf of Mr Gubbala and Mr Ngaropo. His submissions were adopted by Mr Hall QC on behalf of E.

[21] The essence of the submission made on behalf of the appellants is that it is

now well recognised by researchers and the courts that the demeanour of a witness can be an unreliable guide to the credibility of that witness.<sup>2</sup> While acknowledging that demeanour may have some relevance in assessing credibility, it is submitted that this should not be a determinative or dominant consideration. It is said that any direction by a Judge inviting the jury to have regard to demeanour ought to be accompanied by a clear warning of the risks in doing so.

[22] In response, Ms Markham for the Crown acknowledges the increased judicial recognition of the potential fallibility of demeanour assessments and agrees with counsel for the appellants that there may be some benefit in modifying the traditional directions on this subject along the lines suggested by the Canadian Judicial Council (the details of which we discuss below). Nevertheless Ms Markham submits that the more traditional directions given on the subject of demeanour do not amount to misdirections and that a failure to give a warning of the kind advocated by the appellants does not amount to a miscarriage of justice.

### **Demeanour directions - discussion**

[23] It is trite that our criminal justice system depends essentially on oral testimony. The jury plays a critical part as the sole judge of all factual issues arising in a trial.<sup>3</sup> A critical part of that task is the assessment of the credibility and reliability of witnesses. This can be a difficult task and it is therefore vital that any directions given by Judges on these topics should be carefully considered and adapted as necessary in the light of any soundly-based research on this topic.

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<sup>2</sup> Marcus Stone *Instant Lie Detection? Demeanour and Credibility in Criminal Trials* (Berkley Books, New York, 1986); Hazel Genn "Assessing Credibility" (2011) 11 *Tribunals Journal* at 17; Ian R Coyle *How Do Decision Makers Decide When Witnesses Are Telling The Truth And What Can Be Done To Improve Their Accuracy In Making Assessments Of Witness Credibility?* (The Criminal Lawyers Association of Australia and New Zealand, April 2013); Lord Bingham "Assessing Contentious Eyewitness Evidence: Judicial View" in Anthony Heaton-Armstrong and others (eds) *Witness Testimony, Psychological, Investigative and Evidential Perspectives* (Oxford University Press, Oxford, 2006); William C Liedtke "Demeanour" (1991) 76 *Cornell L Rev* 1075; Max Minzner *Detecting Lies Using Demeanor, Bias, and Context* (Jacob Burns Institute for Advanced Legal Studies, Working Paper No 218, December 2007).

<sup>3</sup> We refer only to jury trials in this judgment but the assessment of credibility and reliability is also a critical function for a judge sitting without a jury.

[24] We start our discussion by a consideration of what constitutes demeanour. Writing extra-judicially, Lord Bingham has described demeanour as:<sup>4</sup>

... [the witness's] conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises [the witness's] mode of giving evidence but does not appear in a transcript of what [the witness] actually said.

[25] We add that demeanour also includes the personality or character of a witness. Given the breadth of what may be embraced by the concept of demeanour, we do not think it helpful to speak of “body language” as some traditional jury directions have done.

[26] Lord Bingham went on to refer to passages from observations made by three experienced trial judges. We will refer to two of them. First, Lord Devlin has said:<sup>5</sup>

The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.<sup>6</sup>

[27] Second, the observations of Mr Justice MacKenna:<sup>7</sup>

I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

[28] Lord Bingham went on to refer to the additional difficulties of assessing credibility of a witness giving evidence through an interpreter. He concluded:<sup>8</sup>

To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.

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<sup>4</sup> *Assessing Contentious Eyewitness Evidence: Judicial View*, above n 2, at [18.12].

<sup>5</sup> At [18.13].

<sup>6</sup> P Devlin *The Judge* (Oxford University Press, Oxford, 1979) at 63.

<sup>7</sup> B McKenna “Discretion” (1974) IX (new series) *The Irish Jurist* 1 at 10.

<sup>8</sup> At [18.18].



[29] Cultural or ethnic issues may also give rise to wrong conclusions in a jury's assessment of demeanour. For example, in some cultures, it is regarded as impolite or discourteous to look directly at another person when conversing. If a jury were to conclude from the averted gaze of a witness from that culture that the witness was not telling the truth, that conclusion would be unjustified.

*Relevant authorities*

[30] The demeanour issue has been discussed by this Court on several occasions. In *R v Munro* it was recognised that tone of voice, pauses, gestures and facial expression could all assist in conveying meaning.<sup>9</sup> But this Court cited with approval the decision of the High Court of Australia in *Fox v Percy* in which the majority commented that, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of the appearance of witnesses.<sup>10</sup> Accordingly, judges, both at trial and on appeal, have limited their reliance on the appearance of witnesses and based their conclusions, as far as possible, on contemporary materials, objectively established facts and the apparent logic of events.

[31] This Court in *Munro* went on to make the following points:<sup>11</sup>

- Assessments of credibility are hampered by the highly artificial setting of the courtroom.
- Behaviour cues often thought to be associated with lying, such as posture, head movements, shifty eyes or gesturing do not necessarily indicate dishonesty or lack of credibility.<sup>12</sup>

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<sup>9</sup> *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [73] and following.

<sup>10</sup> *Fox v Percy* (2003) 214 CLR 118 at [31] per Gleeson CJ, Gummow and Kirby JJ.

<sup>11</sup> At [79] and [80].

<sup>12</sup> See, for example Marcus Stone "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" (1991) Crim LR 821 at 829.

- Studies have shown that witnesses who appear confident and open and have a good memory for peripheral detail are more likely to be believed, whether or not they are truthful.<sup>13</sup>
- Unsavoury and unattractive witnesses are less likely to be believed and vice versa.<sup>14</sup>
- Another potential pitfall in relying on the demeanour of a witness is that some research has shown that many or even most people believe they are making accurate judgments about whether a witness is telling the truth even though they are not. Professor Paul Ekman has gone so far as to say:<sup>15</sup>

Our research and the research of most others has found that few people do better than chance in judging whether someone is lying or truthful.

[32] Several decisions of this Court since *Munro* have discussed this topic. In *E (CA113/09) v R (No 3)*<sup>16</sup> the Court observed that “the dangers of relying on demeanour to assess credibility are now well documented”.<sup>17</sup> And in *Sateki v R*, a Divisional Court said that “demeanour is a notoriously unreliable means of assessing credibility”.<sup>18</sup> We would not endorse the expression “notoriously unreliable” but would prefer to say that there are risks inherent in relying on demeanour alone to assess credibility. Finally, in *S (CA749/2012) v R* this Court referred to the “well-recognised dangers” in assessing credibility through demeanour.<sup>19</sup> We discuss this case and *Stanley v R* below in considering the need for a jury direction to warn of these risks.<sup>20</sup>

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<sup>13</sup> Citing Peter McClellan “Who Is Telling The Truth: Psychology, Commonsense and The Law” (2006) 80 ALJ 655 at 660.

<sup>14</sup> *R v Munro* was considered by the Supreme Court in *Owen v R* [2007] NZSC 102 but did not comment on the demeanour issue.

<sup>15</sup> Paul Ekman *Telling Lies* (Berkley Books, New York, 1986).

<sup>16</sup> *E (CA113/09) v R (No 3)* [2010] NZCA 544.

<sup>17</sup> At [75] citing Aldert Vrij *Detecting Lies & Deceit: Pitfalls and opportunities* (2nd ed, John Wiley & Sons, Chichester, 2008) at 124.

<sup>18</sup> *Sateki v R* [2011] NZCA 239 at [28].

<sup>19</sup> *S (CA749/2012) v R* [2013] NZCA 350 at [27].

<sup>20</sup> *Stanley v R* [2012] NZCA 462.

[33] These concerns are not new. As long ago as 1987, the Privy Council observed:<sup>21</sup>

It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; ...

[34] Two points emerge from the authorities. First, the risk is not so much placing reliance on demeanour evidence per se. Rather, the real risk arises through considering demeanour evidence in isolation from other evidence and relevant factors. Second, the assessment of credibility is closely linked to reliability and where both are at issue they should be approached in a similar way.

*Is a warning about reliance on demeanour invariably required and, if so, what form should it take?*

[35] We are not persuaded that a warning should invariably be given to juries about the risks of relying on demeanour to assess credibility. This topic was the subject of a discussion paper issued by the Law Commission in 1997.<sup>22</sup> This recognised the dangers in assessing truthfulness by reference to demeanour alone,<sup>23</sup> particularly when the fact-finder is confronted with a witness belonging to a different culture.<sup>24</sup> However, the Commission doubted whether such a provision would serve a useful purpose, noting that any such warnings would need to be case-specific.<sup>25</sup>

[T]he Commission doubts that such a provision would serve a useful purpose. In the first place, the question of a warning can be addressed only according to the circumstances of each case. Secondly, an evidence code is unlikely to provide an effective framework for correcting cultural perceptions within the legal system.

[36] Ms Markham properly acknowledged that the Australian Law Reform Commission reached the opposite conclusion, recommending that the court should

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<sup>21</sup> *Attorney-General of Hong Kong v Wong* [1987] 1 AC 501 (PC) at 510.

<sup>22</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP 27, 1997).

<sup>23</sup> At [117].

<sup>24</sup> At [117].

<sup>25</sup> At [119].

warn the jury “that the witness’s demeanour is unlikely to assist in evaluation of evidence and that they should be cautious in drawing conclusions from their observations of demeanour of the witness”.<sup>26</sup> However, we note that the Evidence Act 2006 does not include a requirement for any warning of this type despite requiring warnings on issues such as the reliability of a witness giving identification evidence.

[37] The New Zealand authorities to date have not supported the proposition that a warning is invariably required when the demeanour of a witness is at issue. In *Stanley v R*,<sup>27</sup> this Court dismissed an appeal brought on the basis that the Judge should have directed the jury about the dangers of relying on demeanour. The case was rather an extreme example since the complainant cried during much of her testimony which lasted for one and a half days. The Court did not consider that the circumstances of the case required any specific warning and dismissed the appeal. The Court also rejected a submission that the Court should endorse a direction from the United Kingdom Crown Court Bench Book.<sup>28</sup>

[38] The Supreme Court dismissed an application for leave to appeal from the Court’s decision in *Stanley* and, in doing so, agreed that the directions required in any given summing-up should be approached on a case-specific basis. The Supreme Court also considered it to be significant that defence counsel had not sought a demeanour direction and did not complain about its absence.<sup>29</sup>

[39] Finally, we note that jury research conducted in New Zealand in 1999 suggested that reasonable confidence could be placed in the ability of a jury to assess credibility on a broader basis, not limited to issues of demeanour or body language. The research conducted by Warren Young, Neil Cameron and Yvette Tinsley concluded in part:<sup>30</sup>

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<sup>26</sup> Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) at [10.54].

<sup>27</sup> *Stanley v R*, above n 20.

<sup>28</sup> *Crown Court Bench Book: Directing The Jury* (Judicial Studies Board, March 2010) at Ch 17.

<sup>29</sup> *Stanley v R* [2013] NZSC 2 at [3].

<sup>30</sup> Warren Young, Neville Cameron and Yvette Tinsley *Jury Trials in New Zealand: A Survey of Jurors* (October 1999) at 102–105.

In all but three of the [31] cases where the verdict was based essentially or partly on assessment of the credibility of the parties directly involved, jurors all indicated that they assessed the credibility of the evidence carefully from both the content of the evidence and the way in which the witness acted in the jury box. Witnesses who seemed to be frank, forthright and genuine and who gave consistent evidence were believed and were generally relied upon ...

In contrast, witnesses who contradicted themselves, were defensive or evasive or became annoyed with cross-examining counsel, were generally regarded with suspicion and as a result frequently disbelieved ...

In four [of 48] trials one or more jurors specifically mentioned that they assessed credibility at least in part by reference to the body language.

... In determining whether [witnesses] should be believed or disbelieved, jurors in the main were prepared to look at all of the surrounding evidence, including any reasons there might be for their lies or contradictions.

... Overall therefore, in a substantial majority of trials, juries as a whole appeared to weigh up the reliability of testimony in the light of other evidence; to take lies and contradictions into account in assessing credibility without placing undue weight upon them; and to reach a balanced assessment of the evidence as a whole.

[40] The research also indicated that juries were aware of cultural differences and the effects that might have in the assessment of evidence.<sup>31</sup>

Jurors ... gave no indication that they approached those issues in a monocultural or biased way. They were generally conscious of the possibility of cultural differences and tried to take them into account in assessing the evidence.

[41] We conclude that a warning about the risks of relying on the demeanour of a witness when assessing credibility is not invariably required. To adopt this approach would tend to deprive juries of the accepted benefits of seeing and hearing the witnesses; it would risk juries interpreting the Judge's direction as an invitation to disbelieve the witness or to place little weight on his or her evidence; and it would restrict the ability of the trial judge to tailor a direction appropriate to the circumstances of the case.

[42] But we do agree that in light of the known potential for misinterpretation of visual or oral cues given by a witness, some modification is appropriate to the more traditional jury directions on demeanour. These have tended to focus mainly on the

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<sup>31</sup> At [106].

importance of the jury's assessment of demeanour as a "valuable aid" in assessing whether a witness can be regarded as truthful and have not usually included any warning about the risks of doing so.

[43] In particular, we consider that two points should generally be conveyed to the jury in some form. First, the assessment of the credibility and reliability of a witness should be broadly based, taking into account the evidence as a whole and such of the factors we shortly describe as may be relevant to the case. Second, demeanour may properly be taken into account but is best not considered in isolation. Rather, demeanour should be considered as one factor in the broader assessment.

[44] In making the wider assessment we agree with Lord Bingham that the following factors are relevant both in relation to the credibility and reliability of the evidence of a witness:<sup>32</sup>

- (a) The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred.
- (b) The internal consistency of the evidence of the witness.
- (c) Consistency with what the witness has said or deposed on other occasions.
- (d) The credit of the witness in relation to matters not germane to the litigation.

[45] To this list, we would add:

- (e) The inherent plausibility of the evidence of the witness (does it make sense?) and,
- (f) Where appropriate, consistency with any contemporaneous documentary evidence.

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<sup>32</sup> *Assessing Contentious Eyewitness Evidence: Judicial View*, above n 2, at [18.10] citing Richard Eggleston *Evidence, Proof and Probability* (Fred B Rothman & Co, Littleton, Colorado, 1978) at 155.

[46] We stress the importance of tailoring the jury direction to the circumstances of the case. That will depend to an extent on the points made by counsel in their closing addresses, the relative importance of demeanour in the particular case and the existence or otherwise of other factors which might in the circumstances assume greater importance in the overall assessment.

[47] For example, the demeanour of a witness may be far less important in a case where there are substantial internal inconsistencies in the evidence of the witness or with his or her prior statements.

[48] On the other hand, in a “she said/he said” type of case, demeanour may assume greater importance in the absence of other factors such as inconsistency or any inherent implausibility. Counsel may also have given prominence to demeanour in their addresses. In such a case, the judge may consider it appropriate to draw on the suggestions made by the Canadian Judicial Council:<sup>33</sup>

[10] What was the witness’s manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.

[49] If the judge considers a direction along these lines is appropriate in the circumstances, then it is important to tailor this to the specifics of the case rather than applying it in a formulaic manner. One suggestion is to deal with this issue in the context of counsel’s closing addresses on this topic. This should ensure that any such direction is tied to the specifics of the case. If in doubt on this issue, judges may wish to raise with counsel before summing up whether a demeanour warning is required and, if so, what form it should take.

[50] Any specific warning of this type should be in addition to the more general directions on assessment of credibility and reliability as discussed at [43]–[46] above.

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<sup>33</sup> *Model Jury Instructions in Criminal Matters* (Canadian Judicial Council, 2004) at 103.

## **Demeanour directions - summary**

[51] We summarise briefly the main points of this judgment in relation to demeanour directions:

- (a) The identified risks of undue reliance on the demeanour of a witness largely arise through considering that factor in isolation from the wider assessment of credibility and the associated but distinct issue of reliability.
- (b) Two points should normally be conveyed to the jury in some form about the assessment of credibility and reliability. First, any such assessment should be broadly-based, taking into account the evidence as a whole and such of the factors described at [44] and [45] above as may be relevant to the case. Second, the demeanour of a witness may properly be taken into account but is best considered as part of the broader assessment.
- (c) A specific warning about the risks of relying on the demeanour<sup>34</sup> of a witness when assessing credibility or reliability is not invariably required.
- (d) Whether a specific warning or direction is needed about the risks associated with the assessment of demeanour, will depend on the circumstances of the case. It may be prudent for the judge to confer with counsel about this before summing up (see the discussion at [46]–[49] above).
- (e) If a warning is given, then the judge may wish to draw on the suggestions made by the Canadian Judicial Council (quoted at [48] above) but no particular form of words is needed and it is vital that any directions on this topic are tailored to the circumstances of the case.

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<sup>34</sup> Some brief explanation of the term ‘demeanour’ should be given – see [24] and [25] above.



- (f) If a demeanour warning is given, it is still important that the more general points referred to in (b) above are also conveyed to the jury.

**The replaying of the complainant's videotaped evidence after the jury's retirement**

[52] As noted, the second main issue (the replaying of the complainant's videotaped evidence after the jury's retirement) is relevant only to the appeal by E. On his behalf, Mr Hall's submission in outline is that the overriding consideration in the exercise of a trial judge's discretion to replay the videotape is fairness. Any reinforcement of such a vital part of the Crown evidence by allowing the replay must be fairly balanced by corresponding reinforcement of the cross-examination, other relevant evidence, and the defence case generally. And, if a demeanour/credibility evaluation is indicated by the replayed evidence, a case-specific demeanour warning should be given to ensure proper balance and trial fairness.

[53] In the present case, Mr Hall submits that the approach adopted by the Judge fell short in the respects summarised at [7] above. Mr Hall placed particular reliance on the recent decision of the Divisional Court in *S v R* in which convictions were set aside on the grounds that insufficient steps were taken by the trial judge to ensure fairness and balance for the appellant.<sup>35</sup> In particular, the Court found that:

- In the particular circumstances of that case, a specific warning was required against determining the complainant's credibility solely on the basis of her demeanour but was not given; and
- Although the trial judge had reminded the jury to consider the whole of the evidence, no steps were taken to ensure that the jury actually read the cross-examination of the complainant available in the transcript of evidence and the judge did not refer to the defence case.

[54] Ms Markham accepted on behalf of the Crown that a trial judge has a discretion to allow a replay of the complainant's video evidence and that it is important to ensure there is a proper balancing of the defence case. This is to

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<sup>35</sup> *S (CA749/2012) v R*, above n 19.

counter the potential for the Crown case to be reinforced by the repetition of the complainant's evidence at a critical stage of the trial.

[55] However, she invited the Court to review aspects of *S v R*. In particular, she expressed concern on behalf of the Crown on three main issues. First, she submitted that, to the extent that the judgment might be viewed as suggesting a judge should inquire of the jury about the reason for its request, there may be a risk of breaching jury confidentiality. Second, she questioned the apparent assumption that the jury's assessment of demeanour would unfairly reinforce the Crown case. Third, she submitted that the Court was entitled to rely on the jury complying with the trial judge's direction to consider all of the complainant's evidence and any other evidence in the case relevant to their assessment.

### *Discussion*

[56] The giving of evidence-in-chief by videotape has had statutory authority for many years.<sup>36</sup> It has been the almost invariable practice to allow evidential videos or DVD's of young complainants in sexual cases to be played to the jury as the evidence-in-chief of the witness. It has been recognised at least since the Practice Note in *R v Rawlings* in the United Kingdom that a judge has a discretion whether to accede to a request by a jury after retirement for the complainant's video to be replayed.<sup>37</sup>

[57] In earlier times, although a transcript of the complainant's video was normally available to the jury, a transcript of the remainder of the complainant's evidence (cross-examination and re-examination), and the other evidence in the trial was not generally available to the jury. All this changed some time ago. It is routine for juries to have available a transcript of the entire oral evidence given at the trial as well as other documentary assistance. This has had two main benefits. First, the task of the trial judge is simplified because it is no longer necessary for the judge to read to the jury the transcript of the complainant's oral evidence after the video is replayed. Second, the jury has ready access to all the other evidence in the case as well.

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<sup>36</sup> See Evidence Act 1908, ss 23D–23E and now Evidence Act 2006, ss 103–107.

<sup>37</sup> *R v Rawlings* [1995] 1 WLR 178 (CA).

[58] The authorities on this subject were comprehensively discussed in *S v R* and it is unnecessary for us to repeat the analysis undertaken in that case. It is sufficient to say that:

- The trial judge retains a discretion to refuse a jury request for the replay of the complainant's video, but such requests are normally granted.<sup>38</sup>
- If the jury requests the video to be replayed during retirement, it is generally to be assumed, in the absence of contrary evidence, that the jury wishes to review the manner in which the complainant gave his or her evidence. That is so because the jury has a full transcript of what was said.
- The replaying of the video has the potential to reinforce the Crown case but it is not to be assumed that this will necessarily occur. It is equally possible that the jury may be persuaded that the complainant's account is untrue or that there is a reasonable doubt in that respect.
- It is vital in order to ensure fairness that the trial judge directs the jury about the importance of considering all of the complainant's evidence (including cross-examination and re-examination) as well as any other evidence they consider to be relevant to their verdicts. How this should be done in the individual case depends on the circumstances as we discuss further below.
- Whether the Judge needs to go further and whether some form of demeanour warning is also required will also depend on the specifics of the case.

*The decision in S v R*<sup>39</sup>

[59] We propose to discuss aspects of *S v R* but we make it clear immediately that we make no criticism of the outcome. Rather, we intend to address the concerns

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<sup>38</sup> *R v Cunningham* [2008] NZCA 569 at [33].

<sup>39</sup> *S (CA749/2012) v R*, above n 19.

raised by Ms Markham as a matter of the general approach appropriate in future cases.

[60] The first issue relates to inquiries about the reasons for the jury's request and possible impact on the confidentiality of jury deliberations. We do not view anything in *S v R* as suggesting a judge should make inquiries of the jury as to the reasons for its request. Lest there be any doubt about this, we confirm that judges should not inquire into the jury's reasons. To do so could risk disclosure of the jury's deliberations which are to be kept confidential. As this Court said in *R v Cunningham*:<sup>40</sup>

[21] For completeness, we should note that there was a question before us as to whether the Judge should have agreed to the request to see the video without an inquiry as to why the jury wanted to see it. *The Judge should not inquire generally into the reasons of juries for wanting to view a tape again.*

[22] However, it is permissible for the Judge, after attempting to answer a jury question, to inquire whether the response has met the jury's concerns, preferably ... by asking them to return to the jury room and to let the Judge know later if there are any matters of concern outstanding.

[61] The point was referred to with apparent approval in *ZZ (CA369/2011) v R*.<sup>41</sup>

[62] It would be permissible for a judge to ask the jury whether they wished to see any particular part of the video. However, any such request should be made in writing by the judge to avoid the risk of aspects of the jury's deliberations being disclosed in open court.

[63] As to Ms Markham's second criticism, we agree it is not necessarily to be assumed from the jury's request that the jury intends to determine guilt solely or mainly on the basis of demeanour. In *S v R* it was clear from the specific terms of the jury's request that they were very much focused on the complainant's demeanour in assessing her credibility. However, we accept Mr Hall's submission that it may be appropriate for the judge to direct the jury at least in the general terms we have discussed at [43]–[46] and, in cases where demeanour has emerged as an important issue, it may be necessary in some cases to give a more specific direction about

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<sup>40</sup> *R v Cunningham*, above n 38 (emphasis added).

<sup>41</sup> *ZZ (CA369/2011) v R* [2011] NZCA 662 at [11].

demeanour along the lines discussed at [48] and [49]. As noted, any such directions must be tailored to the specifics of the case.

[64] The final point raised by Ms Markham relates to how balance is to be achieved if the video is replayed. In general, we consider it is sufficient if the trial judge directs the jury about the importance of making sure they do not treat the complainant's video evidence in isolation from his or her cross-examination and re-examination and that they also have regard to all other evidence in the case that they consider relevant to their deliberations. We agree with counsel that it is not usually necessary for the transcript to be read out by the judge to the jury. As this Court held in *R v Oakden*:<sup>42</sup>

[30] Nor are we prepared to assume that the jury would have ignored the Judge's requirement that they consider the transcript of the oral hearing, the importance of which in terms of balance he made clear to them.

[65] We also note the observations of this Court in *R v Cunningham* that:<sup>43</sup>

[36] ... Balance is now more readily maintained as the jury has immediate and constant access to the entire record ...

[38] Juries should be treated as intelligent and competent to use the material provided to them. Where the judge's reference to the evidence, and the way in which various pieces of evidence connect to each other, has been general (as it was here) rather than detailed, it is unhelpful to proceed on the assumption that there has necessarily been prejudice to the accused. The fact of a general rather than specific judicial comment of reference in this context does not of itself indicate unfairness.

[66] We do not consider it will usually be necessary for the trial judge to remind the jury after the video has been replayed about the defence case except in general terms, particularly if the jury's request for the replay of the video is made reasonably soon after the defence closing and the judge's summing-up. In some cases, when a jury requests a replay of the complainant's video, it may be prudent for the judge to draw to the jury's attention particular parts of the transcript that have specific relevance and that should be weighed alongside the contents of the video evidence.<sup>44</sup> If necessary, counsel should be called upon to identify any such specific matters. However, a full-scale review of the defence case is neither necessary nor appropriate.

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<sup>42</sup> *R v Oakden* CA9/04, 10 November 2004.

<sup>43</sup> *R v Cunningham*, above n 38.

<sup>44</sup> *R v Cunningham*, above n 38, at [37].

It must be kept in mind that the jury will have already heard counsel's addresses and the judge's summing-up.

### **Replaying of the complainant's video - summary**

[67] In relation to jury requests for the replaying of the complainant's video during the jury's retirement:

- (a) The general principles are as set out in [58] above.
- (b) When such a request is made, judges should not inquire into the jury's reasons for the request ([60]–[62] above).
- (c) It may be appropriate for the judge to direct the jury at least in the general terms we have discussed at [43]–[46] above and, in cases where demeanour has emerged as an important issue, it may be necessary in some cases to give a more specific direction about demeanour along the lines discussed at [48] and [49] above.
- (d) In order to secure balance, it is sufficient in general if the trial judge directs the jury about the importance of making sure they do not treat the complainant's video evidence in isolation from his or her cross-examination and re-examination and that they also have regard to all other evidence in the case they consider relevant to their deliberations. It is not usually necessary for the transcript to be read to the jury by the judge (assuming that the jury has a transcript of the video interview and the other evidence given orally by the complainant to the court).
- (e) It is not generally necessary for the trial judge to remind the jury about the defence case after the video has been replayed but some specific points may need to be made in some cases (see [66] above).
- (f) It is not necessary or desirable for judges or counsel to suggest to juries when summing up or in their addresses that they may request to have the video replayed if they wish. That is best left for the jury to request of their own volition.

## **E's appeal**

[68] E's trial before Judge Butler and a jury commenced on 18 September 2012. It was a retrial, after his convictions in the first trial were set aside by this Court.<sup>45</sup> There was no suggestion in this Court's earlier decision that a demeanour warning was required. Rather, the convictions were overturned because the Judge had failed to give the jury the usual directions about balance after a partial replay of the complainant's video during the jury's deliberations. For reasons it is unnecessary to go into, the replay of the video was interrupted and was not completed.

[69] The retrial occupied four days commencing on Tuesday 18 September 2012. The bulk of the complainant's evidence-in-chief consisted of the complainant's evidential video made on 31 December 2009, the day after the indecent assaults she alleged. Some further evidence-in-chief was led orally and the complainant was then extensively and effectively cross-examined by defence counsel for one hour and 45 minutes. On the following day, defence evidence was called including that of the appellant.

[70] Counsel addressed the jury on the third day, the Judge summed up and the jury retired at approximately 3.00 pm. Towards the end of the day, the jury made a written request for the complainant's video to be replayed and then retired for the evening.

[71] The following morning the Judge discussed the jury's request with counsel. Judge Butler indicated to counsel that he intended to read the transcript of the complainant's supplementary evidence-in-chief, the cross-examination and re-examination. Mr Hall submitted that a careful and "arguably fact-specific balancing direction" was required and suggested that the Judge should highlight the points counsel had made in his closing address as part of the balancing exercise. The prosecutor agreed to a "degree of balance" and there was discussion about how aspects of Mr Hall's closing address could be summarised for the jury. Mr Hall mentioned that he had referred to which arm or hand the appellant had used in the

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<sup>45</sup> *ZZ (CA369/2011) v R*, above n 41.

first incident. However, he accepted it was not necessary to go into detail of that kind.

[72] The video was then replayed to the jury after which the Judge then read to the jury the entire transcript of the oral evidence given by the complainant (which occupied some 50 pages of the transcript). The Judge then addressed the jury in these terms:

[1] Look, I do not want to detain you longer, but there is one final aspect which I have to go through with you, just to ensure that this overall balance is kept in relation to the DVD interview and the evidence of [the complainant] which, as I have said to you, is the vital part of the Crown case. And when Mr Hall summed the case up for you yesterday he, among other things, talked about that DVD and made some submissions to you in relation to it.

[2] While he was talking, I was summarising, and when I summed the case up for you yesterday I summarised what I believed he had said in the closing address. I am now going to do a summary of the summary, because I am only going to concentrate on what I recall him saying about the DVD and the aspects that he submitted to you in relation to that.

[3] He said to you that her account on the DVD was jumbled and confused. He said that the account she gave had grown from what she had told her mother earlier in the morning, and that she got the sequence, such as the incident relating to the alleged back-kissing wrong, and the interviewer he said, Constable Bryce, had offered her inappropriate support and belief at the end of the interview. And he expanded on each of those themes, in particular saying that in relation to the DVD, once she had made that and from that point on there was no way back for her. She became what he called a hostage to the wheels of justice, and that there was no room in her mind to have second thoughts to admit the possibility of mistake or error. He said that her account on the DVD was unreliable, and that she had got it wrong, terribly wrong, in relation to the allegations she was making in respect of the accused. He said her account was confused, there were inappropriate interventions from the interviewer, and that she reconstructed her account as she went along.

[4] He said that he had counted the number of times she said, "I don't know," "I can't remember," and, "I think," and he said that those querulous answers or comments that she made related, in the main, to the allegations, not to the other factual things that she mentioned on the TV but when she was talking about the allegations themselves. That was when the, "I don't know," "I can't remember," and, "I think," came into play. He said that she clearly believes the allegations are true, and he said that if you analyse the DVD in the way that he had done, and submitted to you, that there was a quality of fantasy to it which defied sense and which defied logic.

[5] So that is it. Would you like to continue your deliberations please? If I call you back it will be because counsel will have told me that I have missed something in all this but if I do, I do.



[73] Importantly, defence counsel did not suggest that there should be a demeanour warning and made no complaint to the Judge after the further directions to the jury were given.

[74] The jury retired again at 1.13 pm and returned its verdicts at 3.47 pm that day after the Judge had given a *Papadopoulos* direction at 2.30 pm. The verdict on the first count (relating to the indecent touching in the lounge) was unanimous. There were majority verdicts on the two counts of indecent assault alleged in the bedroom.

[75] Mr Hall's first submission was that the jury should have been warned by the Judge about the risks of relying on the complainant's demeanour when assessing her credibility. We have already rejected the proposition that a warning of this nature is invariably required whether as part of the judge's summing-up or, more specifically, when the complainant's video is replayed to the jury during deliberations. The question is whether the circumstances of E's trial required such a direction.

[76] Apart from the obvious point that experienced defence counsel did not seek any such direction or complain about its absence, we accept Ms Markham's submission that the issue of the complainant's demeanour did not loom large in the trial. In particular, defence counsel made it clear in his closing address that the appellant was not suggesting that the complainant was deliberately lying or that she had an agenda to deliberately hurt the appellant. As defence counsel put it:

... I'm saying and suggesting to you that, somehow, she got it into her head that [the appellant] had sexually molested her. Now whether that was as a result of vivid dreams, confusion, or some other mechanism, alcohol, prednisone, we'll never know, but she has convinced herself that something happened, it's a real belief ...

[77] Essentially therefore the issue of the complainant's credibility did not arise. On the defence case, she was an honest but unreliable witness. Rather, the contest was between the reliability of the conflicting accounts given by the complainant and the appellant.

[78] The issue of demeanour was scarcely touched upon in the closing addresses. In the Crown's closing, the only reference to the complainant's demeanour was a suggestion that she gave her evidence in "a dignified and measured way". For his

part, defence counsel accepted that the complainant “comes across as a lovely girl and now a young woman.” He went on to say that “I’m not going to suggest that impression is deceptive or wrong in any way.” Rather, the essence of the defence was to throw doubt on her reliability by suggesting that she was confused or mistaken; she might have succumbed to vivid dreams or even hallucinations; she had been taking prednisone for a rare kidney disorder; she had been given a cider; she was tired because of other activities during the day; and the family dynamics might have contributed to her belief that she had been sexually molested.

[79] Mr Hall also suggested to the jury that, in approaching the evidence, the jury should use their combined wisdom and experience of the ways of the world; they should ask themselves whether the evidence made sense; was the evidence of a particular witness consistent in itself and with external facts; were reasonable concessions made when called for or did the witness hold steadfast to a proposition which might be wrong? We observe that these factors are very reminiscent of the approach recommended by Lord Bingham we have discussed above.

[80] Mr Hall went on to suggest to the jury that the complainant’s evidence was highly inconsistent. The only observation made with specific reference to demeanour was that the complainant might have been a little bewildered, she was very fidgety throughout the interview, was sometimes a little tearful, and at other times, she was laughing perhaps inappropriately or nervously. But, overall, counsel suggested, her account was jumbled and confused.

[81] In support of his submission that the complainant’s account was confused and unreliable, Mr Hall highlighted how many times the complainant had said she did not know or could not remember; some of her evidence was vague and she was said to have had a “complete flip flop” on the order of the bedroom assaults. Some parts of her evidence were simply wrong by reference to other evidence. Mr Hall summarised this part of his address in these terms:

So I suggest there is a major concern over [the complainant’s] reliability and accuracy and I suggest to you that she is actually not recalling a real event. She’s had some disturbance in the night and she believes that some sort of sexual assault occurred. It’s all too vague, too confusing, [too] uncertain. Certainly no foundation for guilty verdicts.

[82] Not surprisingly given the approach taken by counsel on both sides, the Judge did not give any specific directions about demeanour evidence in his summing-up. He reiterated defence counsel's clear advice to the jury that the complainant's honesty was not at issue. And, he briefly mentioned Crown counsel's observation about her evidence having been given in a dignified and measured way. Other than that, the Judge faithfully reiterated all the points of significance raised on each side and in particular those raised on the appellant's behalf.

[83] Given that the entire focus of the appellant's defence was to suggest that the complainant was an honest but unreliable witness, we are satisfied that no warning needed to be given by the Judge about the risks of relying on demeanour evidence. Tellingly this never occurred to experienced defence counsel as being necessary at the time of trial.

[84] We can dispose briefly of Mr Hall's remaining points. Given that the complainant's demeanour was not at issue, there was no basis upon which the Judge ought to have declined the jury's request to have her video replayed. Again, no objection to this course was taken at the time of trial.

[85] The final point was that there was a lack of balance with resulting unfairness in the way in which the Judge addressed the jury after the video had been replayed. It was suggested that the Judge ought to have reminded the jury about a range of matters relied upon by the defence. Counsel produced a list of some nine detailed items which it was said should have been mentioned.

[86] We do not accept counsel's submission. The Judge went to the trouble of reading out the entire transcript of the complainant's oral evidence including, importantly, the lengthy cross-examination by defence counsel occupying some 37 pages. The jury could not have been in any doubt about the detail of the appellant's defence and, of course, they had the full transcript of the oral evidence given by the complainant and all the witnesses including the appellant. As well, the Judge summarised some of the key points made on the appellant's behalf, Mr Hall having acknowledged that it was unnecessary for the Judge to go into great detail.

[87] We are satisfied that the Judge was not required to do more than he did in the circumstances of this case. Indeed, we consider he went to greater lengths than were required. We also conclude that the absence of a demeanour warning was not capable of giving rise to a miscarriage of justice.

[88] It follows that E's appeal against conviction must be dismissed.

### **Mr Gubbala's appeal**

#### *Appeal against conviction*

[89] We have outlined at [8]–[13] the general background to this appeal and the grounds on which Mr Gubbala's three convictions have been challenged. The dominant feature of our consideration of this appeal is that there was an overwhelming Crown case. Three features stand out:

- The complainant made an immediate complaint to another caregiver on the day of the alleged offending and was medically examined that night.
- There was no dispute that the appellant's DNA was found in the introitus area of the complainant's genitalia.
- The appellant's suggestion (raised for the first time at trial) that the presence of the appellant's DNA could possibly be explained on the basis that the complainant had worn (or had contact with) the appellant's underwear was utterly implausible. In particular, the Crown called evidence that a search by a police officer of the complainant's bedroom on the day of the alleged offending did not reveal the presence of any underpants belonging to the appellant and there was no evidence that any of his underpants were missing.

[90] The appellant did not give evidence at trial but his video interview by the police was played to the jury. He denied the offending and, when confronted with the DNA evidence, said words to the effect that it was impossible that his DNA could have been found in the complainant's genital area. The defence at trial focused on

the underwear explanation; the possibility of contamination of the sample arising from the taking of swabs by the doctor who examined the complainant and a submission that the complainant's account of what happened was inconsistent and lacked credibility or reliability.

[91] In closing the case for the Crown, the prosecutor naturally relied strongly on the matters we have already described at [89] above. It was submitted that the jury could believe the complainant's evidence which it was said had been both consistent and reliable. The prosecutor did not rely on the demeanour of the complainant but suggested that she had "no axe to grind with Mr Gubbala."

[92] In closing the case for the defence, experienced counsel Ms Dyhrberg concentrated on the matters we have already outlined; reminded the jury that the onus of proof remained on the Crown throughout and that the appellant was not obliged to give evidence or to prove his innocence; dwelt on inconsistencies in the evidence and suggested ways in which there could have been an innocent transfer of the appellant's semen or some form of contamination of the samples taken by the examining doctor.

#### *The demeanour issue*

[93] Defence counsel observed that the complainant was much more distressed when dealing with her medical problems and the need to wear nappies than she was when discussing the allegations she made against the appellant. It was suggested that, by comparison, the complainant was "unemotional, casual, detached" when she spoke of those matters. It was also suggested that, when the complainant had spoken to her caregiver on the day in question that she was in a good mood and seemed happy. The jury was invited to use their commonsense in assessing her credibility.

[94] Judge Treston was the trial Judge. On the demeanour issue, the Judge said:

[5] When you consider the oral evidence, take into account not only what has been said but how it has been said, because how you assess the demeanour of a witness can be a valuable aid in judging his or her reliability and credibility. And I think as both lawyers have said, you carry out this sort of process all the time. We all do in our ordinary lives. We meet people in all sorts of different contexts. We make snap judgements, if you like, or

quick assessments of whether the people we are dealing with, either socially, in business or whatever, are people who are worthy of belief and capable of belief, and you do that by using your common sense and your experience of life. Just because you are in a jury box in a courtroom, it is no different. You apply the same sort of tests to the witnesses in assessing their reliability and credibility.

[95] Mr Eaton submitted that the direction failed to alert the jury to the recognised dangers of relying on demeanour evidence to assess credibility; the direction failed to take into consideration any cultural or ethnic considerations (the appellant is an Indian); and the Judge was wrong to suggest that credibility assessments could involve “snap judgements”.

[96] We are not persuaded that this case called for a warning about the risks of relying on demeanour to assist the complainant’s credibility. First, the issue of the complainant’s demeanour was not relied upon by the Crown. To the extent that demeanour was mentioned, it was the defence who relied upon it. It cannot be a valid ground of appeal for an appellant to argue that the judge should have warned of the dangers of relying on demeanour evidence when the accused relied on the complainant’s demeanour as supporting his case. Second, we accept Ms Markham’s submission that the issue of the complainant’s demeanour did not assume any great importance in the trial. Rather, the focus was on the consistency (or lack of it) in the appellant’s account and attempts to explain away the damaging DNA evidence. Third, in the context of this trial, we are satisfied that no risk of a miscarriage of justice arose through the alleged failure in the Judge’s direction.

[97] Ms Markham properly acknowledged the reference by the Judge to “snap judgements” and “quick assessments” in the context of a credibility direction was unfortunate. We agree, but for the reasons already elaborated, we do not consider this slip could, in context, give rise to any risk of a miscarriage of justice.

#### *Expert evidence direction*

[98] The next point raised by Mr Eaton was that the Judge ought to have given a direction on how the jury should treat the expert evidence called by the Crown from the examining doctor and ESR witnesses who gave evidence about the DNA analysis. Mr Eaton referred to this Court’s decision in *R v Flaws* for the proposition

that it will generally be appropriate to instruct a jury about how to treat expert evidence.<sup>46</sup> He acknowledged, however, that the giving of an expert evidence direction is not an immutable rule and that the failure to give such a direction does not automatically lead to a miscarriage of justice.<sup>47</sup> He submitted that, although the defence did not contest that the swabs taken from the complainant were examined and found to contain semen matched to the appellant, it was nevertheless very much in dispute as to whether this was a consequence of sexual contact or some form of contamination or innocent transfer.

[99] We accept Ms Markham’s submission that a direction on expert evidence was not required in the present case. Given the admissions made at trial that the DNA found in the introitus area of the complainant’s genitalia was that of the appellant, the only expert evidence related to the defence theory of inadvertent contamination. This in turn relied on various concessions made by the Crown’s experts as to the “possibility” of transference of semen into the complainant’s vagina. This was not an issue of undue complexity beyond the ordinary understanding of the jurors. And, it depended on the jury accepting as possible the highly implausible proposition about the appellant’s underpants. No direction on this topic was sought by the experienced trial counsel. No complaint was made after the summing-up. As well, the Judge gave the usual direction emphasising that it is the jury’s responsibility to decide all questions of fact and that the jury decides what evidence to accept and what to reject.

[100] We are satisfied that this ground of appeal is not established.

#### *Motive to lie*

[101] The final issue raised by Mr Eaton relates to the absence of a direction in relation to motive to lie. Counsel referred to the decisions of this Court in *R v T*<sup>48</sup> and to *R v E*<sup>49</sup> for the proposition that, where the prosecutor has sought to bolster the complainant’s credibility by reference to the absence of a motive to lie, the

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<sup>46</sup> *R v Flaws* (1998) 16 CRNZ 216 (CA) at 219.

<sup>47</sup> *R v Guild* CA219/04, 11 October 2004 at [77] and *Oh v R* [2012] NZCA 111.

<sup>48</sup> *R v T* [1998] 2 NZLR 257 (CA).

<sup>49</sup> *R v E* (CA308/06) [2007] NZCA 404, [2008] 3 NZLR 145.

summing-up needs to be clear that regardless of the absence of evidence of motive, the onus of proof remains on the Crown throughout.

[102] At trial, defence counsel spoke very briefly about motive. She asked the question why somebody would make anything up? She pointed out that the Crown does not have to prove motive and concluded this part of her address in these terms:

So you put motive to one side on behalf of both, Crown and defence. It simply is too hard in this case to show why.

[103] We are satisfied that the principles discussed in the cases cited are not engaged in the present case. The Crown did not rely on the absence of motive to lie. The defence, in cross-examination, suggested that the complainant may have made up the allegations because she disliked the residential home and because the appellant had told her off and that they had argued. But, as already noted, the appellant's trial counsel eschewed any reliance on motive to lie and invited the jury to put that subject from their minds. We also note that, in his summing-up, Judge Treston repeatedly reinforced the onus of proof as lying on the Crown throughout. Finally, there was no suggestion by defence counsel at the time that such a direction should be given.

[104] Mr Gubbala's appeal against conviction is dismissed accordingly.

#### *Sentence appeal*

[105] The appellant was sentenced on 5 July 2012 to eight years imprisonment.<sup>50</sup> The Judge considered that the offending fell within the middle range of band 2 as described in *R v AM*.<sup>51</sup> He adopted a starting point of nine years imprisonment. The Judge saw the vulnerability of the complainant as the main aggravating factor relating to the offending. He accepted there were mitigating circumstances relating to the appellant. These were that, at the age of 63, the appellant had not previously offended; the offending was out of character and the appellant had some degree of ill health as well as some special dietary requirements. To reflect those matters, the Judge reduced the starting point of nine years by 12 months to arrive at the final

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<sup>50</sup> *R v Gubbala*, above n 1.

<sup>51</sup> *R v AM* [2010] NZCA 114.



sentence of eight years imprisonment. No minimum period of imprisonment was imposed.

[106] The only challenge to the sentence was in relation to the discount for the appellant's personal mitigating factors. It was submitted that the deduction amounted to 11 per cent and that a discount closer to 20 per cent was appropriate.

[107] We accept that the appellant was entitled to recognition for his previous good character, which was supported by his lack of previous convictions and a number of testimonials. The Judge recognised this and also made an allowance for the appellant's medical issues. However, these were self-reported as Ms Markham observed. Mr Gubbala told the probation officer that he had high cholesterol, heart palpitations and experienced shaking from time to time. He said he had low sugar levels and a spinal cord problem. He also experienced pain in his neck, lower back and shoulders.

[108] The discount for personal mitigating factors is very much a discretionary matter for the sentencing judge. In this case, Judge Treston had the advantage of seeing the appellant at trial and was in a good position to judge what was appropriate to allow for the mitigating factors. We are not persuaded that the discount allowed was too low or that, considered in the round, the final sentence was manifestly excessive. As Ms Markham pointed out, band 2 of *R v AM* covers a range of sentences of seven to 13 years and a higher starting point might have been justified given the complainant's vulnerability and the appellant's serious breach of trust as her caregiver.

[109] Mr Gubbala's appeal against sentence is dismissed.

### **Mr Ngaropo's appeal against conviction**

[110] We have outlined the general circumstances of Mr Ngaropo's case at [15]–[18] above.

[111] The sole ground of Mr Ngaropo's appeal against conviction is that a miscarriage of justice occurred by material misdirection on credibility and reliability.

It was an unusual case because it was common ground that the complainant and the appellant had engaged in extreme sexual practices during the currency of their relationship. It was accepted that these activities had occurred consensually. The Crown case depended on the complainant's evidence but also on independent evidence including text messages, diary entries and attendances at family violence sessions. As well, the Crown was permitted to adduce propensity evidence about earlier violence in the relationship.<sup>52</sup> In relation to the index offending, a neighbour gave evidence describing redness around the complainant's neck and eyes and a police doctor who examined the complainant gave evidence of red swelling of the jawline and tenderness around the complainant's scalp. A genital examination two days later revealed injury to that area.

[112] The appellant gave evidence denying the offending. He said that he and the complainant had engaged in prolonged consensual sex. The complainant had then become angry and aggressive during the course of a discussion over her earnings as an escort or masseuse and a possible complaint to Social Welfare regarding benefit entitlements. He denied using any physical violence but admitted that, after she had left the house for the first time, he had brought her back to the house. After that, he said she was free to leave. He maintained that all sexual activity between the two was consensual and that there was no criminal assault.

[113] Mr Eaton submitted on Mr Ngaropo's behalf that the main issue at trial was undoubtedly the credibility and reliability of the complainant and the appellant. He was critical of the summing-up by Judge Doherty. In particular, it was said that the Judge's summing-up on the issue of demeanour and assessment of credibility was flawed in several respects. The Judge said:

[38] I am not going to teach you to suck eggs and there is no particular formula I can give you about the assessment of evidence. Because we do it every day, we look, we think and our mind cogitates along, we weigh things up and we make decisions every second virtually. You will be influenced not only by what was said but how it was said. The demeanour of witnesses can be overstated but it is 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, for example, what was the body language? Do they physically react the way that you would expect of a person telling the truth? But in this case, as in every other case, you have also got to look not just at what was told to you

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<sup>52</sup> This evidence had been admitted following an appeal to this Court.

by a particular witness but what other evidence there was. Was there extraneous evidence?

[39] And while I am not going to teach you to suck eggs, the advice that I can give you is that perhaps you should test each witness' evidence with whether you think it accords with human nature or common sense, as the lawyers said. Does a witness have good reason for saying what they said they did? Do they make concessions when a concession was clearly called for because one of the indications of honesty and integrity is often a willingness to admit a mistake or to admit that a concession need be made? Do other witnesses or other independent facts support or confirm what that witness says and that is a factor you will need to apply in this case I suggest. For instance the Crown says that the complainant's evidence is corroborated in certain ways, for example, the findings of the clinical examinations and the opinions of Dr Healey, the demeanour of the complainant, Ms Withington, as described by the neighbours together with what she said soon after the incident when she was talking to Mrs Carr.

[114] Mr Eaton submits that this direction was inadequate on a number of grounds:

- There was no clear warning of the inherent dangers of relying on demeanour evidence in assessing credibility.
- There was a positive direction that the jury should have regard to demeanour.
- A demeanour assessment was a straightforward, commonsense assessment.
- No guidance was given on how the jury should respond to questions such as “did the witness answer spontaneously” and “what was the body language ...?”
- The reference to demeanour assessments being made “in our everyday lives” was not a useful analogy and conflicted with the research about the risks in reliance on demeanour evidence.
- There was no direction such as Mr Ngaropo's deafness nor his cultural or ethnic origins (he is Maori) and how those factors might impact on the way the witness presented.

## *Discussion*

[115] There can be no doubt that the appellant's trial involved a direct conflict between his evidence and that of the complainant. The Crown and defence both submitted through counsel that the issue was whether the complainant's evidence was credible and reliable. Yet, once again, a review of counsel's closing addresses shows that the demeanour of the complainant received little or no attention. Rather, the focus was on the other factors which it was submitted went to the issue of the complainant's credibility and reliability.

[116] Prominent amongst these other factors were suggestions that the complainant's evidence was inconsistent not only internally but also with text messages which, it was said, showed that the complainant was content to continue the relationship with the appellant. Defence counsel also urged the jury to apply their common sense. For example, was it really open to conclude that the complainant refused consent to the sexual activity complained of when she had spent the prior 36 hours engaging in sexual activity with the appellant which she admitted had been consensual? And, if the complainant's allegations were true, why did she not mention this to the police when first interviewed?

[117] We have found nothing in the transcript of the prosecutor's closing address to suggest that demeanour was relied upon. The closest the prosecutor came to speaking on this subject was a suggestion that the complainant's evidence had a "real ring of truth to it". It made sense. It was said that she was candid; truthful; had not tried to minimise the nature of her sexual relationship with the appellant; she had made concessions; her tone was of someone who was trying to help someone she loved, someone who had a real problem; and she did not have an "axe to grind". In our view, none of these matters relate to demeanour. They do not relate to non-verbal matters such as visual cues. Rather, the prosecutor was simply inviting the jury to draw conclusions from what the complainant said.

[118] In his closing address, defence counsel made no reference to demeanour. Certainly, he suggested that the complainant had fabricated her account but he did not rely on demeanour to support that submission.

[119] We conclude that this case did not require the Judge to give any direction about demeanour since it did not assume any prominence in the trial. It follows that Mr Eaton’s principal submission that a demeanour warning was required cannot succeed.

[120] Nor do we see any merit in the submission that the direction given was in error. Indeed, although the Judge suggested the jury could take into account the demeanour of the witnesses, he specifically directed the jury that the issue of demeanour could be overstated and invited them to consider the issue of credibility more widely. He directed the jury to look at what he called “extraneous” evidence (by which it is clear that the Judge was referring to other evidence in the case); he invited the jury to test the evidence of each witness by asking whether it accorded with human nature or common sense; he suggested that they should also consider whether concessions were called for and made as appropriate; and he directed the jury to consider whether the evidence of other witnesses or other independent facts supported or confirmed what the witness said.

[121] Far from being a flawed direction, the Judge’s summing-up is entirely consistent with our conclusion that the demeanour of a witness should not be considered in isolation from the broader matters we have described.

[122] In the light of our assessment, none of the other matters raised by Mr Eaton are material. For example, no one raised the issue of the appellant’s deafness nor his cultural or ethnic origin as an issue in the case. And the reference to application of common sense was appropriate given the particular examples the Judge gave, which accord with many of Lord Bingham’s points as we have earlier discussed.

[123] Mr Ngaropo’s appeal against conviction is dismissed.

### **Formal result**

[124] All three conviction appeals (CA799/2012; CA451/2012; and CA177/2013) are dismissed. Mr Gubbala’s sentence appeal in CA451/2012 is also dismissed.

[125] E was sentenced to seven months home detention but his sentence is automatically suspended by the filing of his appeal. It will be necessary for that sentence to be resumed promptly but we are conscious of the proximity of the Christmas vacation. Counsel are to confer urgently and file a memorandum not later than 20 December 2013 as to the date from which E's sentence of home detention is to resume.

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