

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

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

**CA162/2013  
[2014] NZCA 494**

BETWEEN	ROBERT FRANK STEVENS Appellant
AND	THE QUEEN Respondent

Hearing:	1 September 2014
Court:	Ellen France P, Asher and Clifford JJ
Counsel:	D G Young for Appellant J M Jelas for Respondent
Judgment:	8 October 2014 at 10.45 am

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**JUDGMENT OF THE COURT**

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- A     The application for an extension of time to appeal is granted.**
- B     The application for leave to adduce new evidence is dismissed.**
- C     The appeal against conviction is dismissed.**
- D     The appeal against sentence is allowed. The sentence of 16 years imprisonment is quashed and a sentence of 14 years and six months imprisonment is substituted.**

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**REASONS OF THE COURT**

(Given by Ellen France P)

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### Introduction

[1] The appellant faced trial on 12 counts of sexual violation by unlawful sexual connection upon a male complainant spanning a period when the complainant was aged between 13 and 25 years. He was discharged under s 347 of the Crimes Act 1961 at the end of the Crown case on one count, was acquitted of two counts and convicted on the remaining nine counts. The appellant was sentenced by the trial Judge, Judge Sharp, to a term of 16 years imprisonment.<sup>1</sup> He appeals against conviction and sentence. The notice of appeal was filed slightly out of time but, there being no opposition, we grant an extension of time to appeal.

[2] The conviction appeal raises issues about a number of aspects of the trial including: the admission of what is termed counter-intuitive evidence from Dr Suzanne Blackwell, a clinical psychologist; the approach taken by trial counsel; and aspects of the prosecutor’s conduct. The sentence is challenged on the basis that the starting point was manifestly excessive and that insufficient credit was given to various mitigating factors.

[3] We set out the background and then deal with the various issues raised on the conviction appeal before turning to the appeal against sentence.

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<sup>1</sup> *R v Stevens* DC Auckland CRI-2009-004-25587, 15 February 2013.

## **Background – the Crown and defence cases**

[4] The Crown case was that when the complainant was aged 13 to 14 years he approached the appellant for some casual work. The appellant, who was at that time in his late 40s, ran a limousine business and the complainant started washing cars for him. The Crown contended that from an early point in their relationship, beginning at a time when the complainant was under 16 years of age, the appellant sexually violated him in a variety of ways including oral and anal sex, the latter involving on occasions the use of a dildo.

[5] The Crown advanced its case on the basis that the complainant was a vulnerable young man who lacked a father figure in his life and had reading and writing difficulties. Against this background, the appellant assumed the role of a stepfather to the complainant. In that context, the Crown said that the appellant sought to normalise the sexual abuse and then built up a relationship of trust with the complainant.

[6] The Crown case was that the complainant was so affected by the years of grooming that he did not feel he could confide in anyone about what was occurring. This state of affairs remained unchanged until, in 2008, the complainant was involved in an accident which resulted in head injuries. Around that time the complainant rebuilt his relationship with his mother and then, towards the end of 2008, confided in her.

[7] The defence case was that no sexual activity occurred before the complainant turned 16 years of age. It was accepted that sexual activity of the type described by the complainant did occur after the complainant was aged 16 but that this was consensual. The defence said that the sexual activity between the two men stopped after their relationship became one of friendship rather than a sexual relationship. The appellant gave evidence to this effect.

[8] The defence attacked the complainant's veracity in a number of ways. In particular, the defence called evidence about a car crash in Auckland over which there was a Disputes Tribunal hearing concerning an insurance claim. The Disputes Tribunal found that the complainant, who said he was in Dunedin at the relevant

time, was the driver of the car involved in the crash which occurred in Auckland. The defence also called evidence from Nigel Tracey, one of the other passengers in the car. Mr Tracey identified the complainant as the driver of the car.

[9] The defence also sought to challenge the complainant's veracity by reference to his numerous heterosexual relationships and difficulties he had in recalling dates. In addition, the defence called evidence from other witnesses to support the appellant's evidence as to the complainant's age at the time the sexual activity between the two commenced.

[10] We need to say a little more about the incidents giving rise to the various counts. We base this account on the Crown evidence at trial.

### **The incidents giving rise to the charges**

[11] The first count was a single incident of sexual violation involving oral sex. To put that in context, the complainant told the jury that soon after he started work the appellant would squeeze him on the shoulders and grab his backside. The complainant then described an incident which occurred in the lounge of the appellant's home not long after the complainant commenced working for the appellant. The complainant said the appellant gave him a beer. The two went into the lounge. The evidence was that the appellant turned the television on and began flicking through the channels before stopping on a channel playing pornography involving male and female participants. The two sat on a couch and the complainant said the appellant started rubbing him in the crotch area, put his hand there, undid the complainant's fly and started sucking the complainant's penis. The complainant said the appellant did this despite the complainant trying to push him off. After this incident ended, the complainant's evidence was that the appellant told him that no one needed to know, "it's just our thing".

[12] Count 2 was a single incident of sexual violation involving penetration of the complainant's anus. The complainant said this happened a week or two after the first incident and again occurred at the appellant's house. Another man, Paul Chaney, was present. Pornography was playing on the television. The complainant's account was that Mr Chaney and the appellant took their penises out and started "wanking".

The appellant, on the complainant's evidence, said: "Guys do this all the time, they just like to keep it quiet." The complainant said the appellant told him he could do the same thing. There was some oral sex before the appellant rolled the complainant over and on the complainant's account forced his penis into the complainant's anus.

[13] Count 3 was a single incident of sexual violation involving brief anal penetration. The complainant said this incident occurred in a hotel at which the appellant, the complainant and another man were staying whilst on a road trip in the South Island. By the end of the trial, at least, there was no dispute that the road trip took place in early April 1998. By that point, the complainant was aged 16 years.

[14] The appellant was acquitted of count 4, a further count of sexual violation but this time involving an allegation of anal penetration by another man in a house to which the complainant said he had been taken by the appellant.

[15] Count 5 involved a single count of penile penetration by the complainant of the appellant. Counts 6 and 7 were representative charges of sexual violation involving anal penetration by the appellant. The complainant said this happened on many occasions. Counts 8–10 were all representative charges of sexual violation involving anal penetration by an object, a dildo.<sup>2</sup>

[16] The appellant was acquitted on count 12. The complainant said that this was the last occasion of any sexual activity between the two and that it involved anal sex after the complainant ate some marijuana cookies that the appellant had baked.

[17] To put the issues on the appeal in context, we need to say a little more about the evidence before the jury of heterosexual activity on the part of the complainant. That included, for example, evidence about sexual intercourse occurring which involved the complainant, a woman and another man. The complainant said he was aged between 15 to 16 years of age at the time. The woman was called by the defence to challenge the complainant's evidence about when this incident occurred. The complainant also admitted a sexual liaison with a teacher at his school when he was aged 17. The teacher was in her mid 20s. Nigel Tracey gave evidence for the

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<sup>2</sup> The appellant was discharged under s 347 of the Crimes Act 1961 on count 11.

defence confirming the relationship with the teacher. In addition, there was evidence of a relationship with a woman which continued for a six year period from the time when the complainant was in his early 20s.

[18] The complainant also spoke of the appellant inviting him and others to come to the appellant's house where there was a female stripper. There was a raffle which the complainant won and as a result had sex with the stripper. He discovered that the appellant had a two-way mirror system set up in his home so that he could watch this type of activity.

[19] The admission of this evidence appears to have reflected the defence challenge to the veracity of the complainant. There was a pre-trial ruling permitting cross-examination of the complainant on these matters which is not the subject of appeal.<sup>3</sup>

### **Issues on the conviction appeal**

[20] The issues arising in relation to the conviction appeal can be dealt with by addressing the following matters:

- (a) Was the evidence of Dr Blackwell "substantially helpful" as required for the admission of expert evidence under s 25 of the Evidence Act 2006?
- (b) Has a miscarriage of justice arisen because of the failure to challenge Dr Blackwell's evidence particularly that relating to the Stockholm Syndrome?
- (c) Has a miscarriage arisen because of the failure to call evidence from Daniel Bishop confirming that the complainant was the driver of the car involved in the accident in Auckland?

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<sup>3</sup> Any non-compliance with s 44 of the Evidence Act 2006 would be in the appellant's favour.

- (d) Did trial counsel err in his remarks to the jury in closing submissions?
- (e) Was there prosecutorial misconduct?
- (f) Were counts 2 and 6 duplicitous? and
- (g) Was the verdict unreasonable?

[21] We deal with each question in turn.

### **Admissibility of Dr Blackwell's evidence**

[22] Dr Blackwell gave evidence on four topics, namely, delay in reporting sexual abuse, grooming, the continuation of the relationship between a victim and his or her alleged abuser, and revictimisation. Dr Blackwell explained that her evidence was designed to correct misconceptions that might be held about the behaviour of those who had been sexually abused.

[23] The relevant part of the Judge's summing-up was as follows:

[58] And Dr Blackwell was called to help you understand how sexual relationships such as the one that developed between these two men can exist and how they can become quite paternalistic; where, and how, these relationships start.

...

[61] ... Her evidence is what is called, in law, "counter intuitive evidence" and it's called to help juries, in sexual cases such as this, understand some matters which have been commonly shown to the subject of quite great misconception, such as why people who are victims of sexual abuse might delay in reporting it, such as how they allow themselves to be groomed for sexual misconduct and how people accused of sexual misconduct with younger people go about grooming; she said that it was a gradual process.

[24] The appellant says that Dr Blackwell's evidence was only relevant to counter-intuitive behaviours of a child, not those of an adult. Because the majority of the offences in this case were said to have occurred when the complainant was older than 16 years, the appellant submits that Dr Blackwell's evidence was largely irrelevant. On this basis, the submission is that the evidence was not "substantially

helpful” and therefore inadmissible. There is an associated criticism of the Judge’s directions because Judge Sharp did not caution the jury to keep in mind that Dr Blackwell’s evidence was targeted at children not adults. Indeed, it is said that the Judge did the opposite.

[25] For a number of reasons we do not consider there is any merit in this challenge to Dr Blackwell’s evidence or to the Judge’s directions. The first point to note is that Dr Blackwell defines a “child” as a person up to the age of 17–18 years. On this definition, the majority of the offending was within that age bracket,<sup>4</sup> and the evidence could properly be regarded as substantially helpful in the sense required.<sup>5</sup>

[26] Secondly, Dr Blackwell’s evidence in relation to three of the four topics she covered related to both children and adults. For example, in terms of delay in reporting, Dr Blackwell discussed reasons for delay by children and by adults. It was the discussion of grooming that was limited to children.<sup>6</sup>

[27] Finally, it is plain that Dr Blackwell’s evidence dealt with a progression or continuum of offending from childhood to adolescence. The Judge in a ruling just prior to the start of the trial dealing with a defence challenge to the admissibility of Dr Blackwell’s evidence expressed it in this way:<sup>7</sup>

[40] In my view her proposed brief actually quite ably addresses the situation where any abuse or sexual relationship occurred with a complainant as a child and an accused but then progresses on into adulthood, whereas here the situation is of alleged sexual abuse upon a child which has continued into that child’s subsequent adulthood. I can see no reason to distinguish Dr Blackwell’s counter-intuitive evidence, and as I say it seems to me to be covered by her brief in any event.

[28] The Judge directed a refining of Dr Blackwell’s brief and it was cut back. Against this background, we see no merit in the submission that the Judge erred in not explaining that Dr Blackwell’s evidence related only to children.

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<sup>4</sup> Of the 11 remaining counts at the time of the jury deliberation, counts 1, 2, 4, 6, 8 and 10 all included periods when the complainant was under the age of 16 years. As we have noted, the complainant was aged 16 at the time of the road trip referred to in count 3.

<sup>5</sup> See *Robinson v R* [2014] NZCA 249 at [26], citing *Mahomed v R* [2010] NZCA 419 at [35] and *Platt v R* [2010] NZCA 43 at [39].

<sup>6</sup> We accept the discussion of adults in the context of the part of the evidence relating to revictimisation was more limited.

<sup>7</sup> *R v Stevens* DC Auckland CRI-20090-004-25587, 26 March 2012. The word “whereas” appears to be an error.



## New evidence in relation to the Stockholm Syndrome

[29] In the context of her evidence about complainants remaining in a relationship with their alleged abuser, Dr Blackwell discussed the Stockholm Syndrome. This part of Dr Blackwell's evidence began with a discussion about child and adult sexual assault victims having a dependent relationship with those who abuse them and continuing to do so. She said that traumatic bonding theory sought to explain why adults remain with those who rape or sexually assault them. Victims in these circumstances, she said, may have "very close but unhealthy relationships with their abusers". Dr Blackwell's opinion was that over time the powerless individual becomes "increasingly dependent on the dominant abuser".

[30] Dr Blackwell went on to say:

This phenomenon has also been referred to as the Stockholm Syndrome. For example, hostages have put up bail for their captors and expressed wishes to marry them or have sexual relationships with them. Abused children often cling to their parents and resist being removed from home. Beaten spouses may form intense attachments to their abusers and people who are abused as children are particularly likely to become involved in abusive relationships as adults.

...

... these theories, Stockholm Syndrome or traumatic bonding, have been applied to the relationships between hostages and captors, relationships between prisoners and torturers, abusive relationships of couples including domestic violence and abusive relationships between children and adults in relation to child physical and sexual abuse. So people might wonder why a physically or sexually assaulted person would remain in a relationship but that they do is consistent with the available research. And this phenomenon of people remaining in relationships or repeatedly returning to the relationship has also been noted in the research and is also consistent with my experience.

[31] As Ms Jelas for the Crown properly accepted, in her discussion of the Stockholm Syndrome, Dr Blackwell went too far. We consider that what occurred here shows the importance of ensuring that this type of evidence is relevant to the situation and does not extend beyond what is necessary to meet the potential misconceptions in the case.<sup>8</sup> That said, we do not consider that the admission of the

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<sup>8</sup> *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [31]; *M (CA23/2009) v R* [2011] NZCA 191 at [24] and [32]; and *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 at [59]–[60].

evidence here has given rise to a miscarriage. The thrust of the appellant's challenge is that his trial counsel, Mr Leary, should have examined Dr Blackwell about this part of her evidence and should have obtained expert evidence to assist him in doing so.

[32] We can say immediately that the appellant did not instruct Mr Leary to obtain expert advice so there is no issue of Mr Leary not following instructions. We had affidavit evidence from the appellant and from Mr Leary and both were cross-examined on this aspect. The appellant confirmed that he gave no instruction in this respect to Mr Leary but left it to Mr Leary's expertise. The appellant and Mr Leary agree they did discuss the possibility of engaging an expert, Professor Felicity Goodyear-Smith, but the appellant said he essentially accepted Mr Leary's advice that engaging Professor Goodyear-Smith was not a profitable enterprise given that her evidence in this area had been discredited on an earlier occasion. Mr Leary also said that the appellant refused to pay for an expert. We do not need to reach any view on the latter point, which is disputed by the appellant, because, as we now explain, the expert evidence before us does not materially advance matters.

[33] The appellant has filed evidence from Dr Caleb Armstrong, a consultant psychiatrist. Dr Armstrong relevantly says:

... it would seem worthwhile for the defence to ask whether the Stockholm Syndrome is an extreme form of traumatic bonding and whether it is associated with particular situations, for instance, whether there is usually an element of threatened or actual violence or captivity.

[34] He deposes that this line of question would have "allowed the Court to understand that traumatic bonding occurs in a continuum of seriousness and that it may or may not be related to the specific case at hand". Dr Armstrong accepts that the syndrome is "usually" defined as a captive "forming a strong affection or even love for their captor". He accepts also there is no universally accepted definition of the Stockholm Syndrome. Accordingly, he does not debunk Dr Blackwell's evidence on this point, rather, the best that could be said is there might have been a debate about where on the continuum the present case fell. In that respect, it is relevant that

Dr Blackwell emphasised that it was not her place to give evidence about the specific case and that matter was reinforced by the Judge.

[35] The appellant in this context is critical of the Judge's response, in summing up, to defence counsel's closing. Judge Sharp said this:

[64] Now there is just one matter that I need to correct. In his closing address Mr Leary, when talking about the psychologist, mentioned that in the context of grooming behaviour that the psychologist, Dr Blackwell, had talked of "Stockholm Syndrome" which, of course, was a syndrome that was known to happen between captor and hostage.

[65] I just want to correct the impression that he might've given you about that because, in fact, when she talked about Stockholm Syndrome she was not talking about grooming behaviour she was talking about traumatic bonding, as I recall it – otherwise called, on some occasions, Stockholm Syndrome. And she said that it was known (and the studies had revealed) that it could take place – it could occur between, for example, an alleged perpetrator of sexual abuse and a victim, it could be between the two partners to a domestic violence relationship, it could indeed be between a hostage and captor. But what it's all about is that – and this is a theory – the powerless individual in the relationship becomes increasingly dependent on the dominant abuser.

[36] We have noted that Dr Blackwell's evidence should not have gone as far as it did. That said, the point being made by the Judge was essentially to highlight the theoretical nature of the evidence. Further, on the evidence, there was a distinction in terms of the research between grooming and traumatic bonding. In the circumstances of the case, the directions were appropriate.

[37] Finally, the importance for the jury of issues of consent, particularly when the complainant was a young adult, were squarely before the jury.

### **Evidence from Daniel Bishop**

[38] The argument under this heading is that trial counsel erred in failing to call evidence from Daniel Bishop about the driving incident because Mr Bishop's evidence would have further eroded the complainant's veracity. To put this aspect in context, the defence proceeded on the basis that there were five men in the car at the time of the accident that led to the insurance claim considered in the Disputes Tribunal. Those men were Nigel Tracey, Benjamin Hopewell and his brother, Samuel, Daniel Bishop and the complainant. As we have indicated, the defence

called Nigel Tracey and he gave evidence that the complainant was the driver. The defence also had the Disputes Tribunal's decision in evidence as an exhibit. The complainant was also cross-examined on the basis that he was lying when he said he was in Dunedin on the day of the car accident and not in Auckland. In addition, there was some relevant cross-examination of the complainant's mother.

[39] The adjudicator in the Disputes Tribunal decision recorded that he had heard from the complainant who said he was in Dunedin at the time of the accident. The adjudicator also recorded having heard from Nigel Tracey whose evidence was that the complainant was driving as the sober driver. The adjudicator referred to statements from Benjamin Hopewell and Samuel Hopewell supporting Mr Tracey's version. The adjudicator recorded in the decision that he preferred Mr Tracey's version and did not accept that the complainant was in Dunedin as he had said. On the balance of probabilities, the adjudicator concluded that the complainant was the driver of the vehicle involved in the accident.

[40] Mr Bishop in his affidavit filed on the appeal describes attending a concert in Auckland on 6 February 2008 with some friends and the complainant. He says that, when they went to the concert, Nigel Tracey was driving the car. However, he deposes that the complainant drove the group home, he presumed because the complainant was the "least drunk" of the group. The car was involved in an accident. He said he did not think anything further about this until a few years later when he got a call from a lawyer or a private investigator about it. He also said he was happy to make the statement although he did not want to be "personally involved".

[41] The appellant said in his evidence before us that he left it to Mr Leary to call as many witnesses as he thought necessary to prove the point so there is no suggestion that Mr Leary departed from his instructions.

[42] Mr Leary in his evidence explained that he obtained the Disputes Tribunal decision and thought he could rely on that especially as the decision also referred to the statements from the Hopewell brothers. Mr Leary says he rang Mr Bishop in Nelson. Mr Bishop told him he was so drunk he could not remember whether or not

the complainant was the driver of the car. Mr Leary also told us that his conversation with Mr Bishop was confirmed by the notes of the police officer who had spoken to Mr Bishop prior to trial. Mr Leary advised us that Mr Bishop also told him that he did not want to get involved.

[43] We accept Mr Leary made these enquiries. Although there are no notes of his discussion with Mr Bishop, Mr Leary's recollection of Mr Bishop's approach is consistent with the notes of the police officer and with Mr Bishop's acknowledgement that he had been drinking. In these circumstances, there cannot be any criticism of Mr Leary's decision not to call Mr Bishop.

[44] The appellant emphasises that Mr Bishop may have been ready to confirm that, despite the complainant's evidence, the complainant was in Auckland not in Dunedin as he had said. However, given Mr Bishop's admittedly drunken state it was appropriate for Mr Leary to conclude that what he had was the best evidence and sufficient to challenge the complainant's credibility. There can be no criticism of that assessment. In essence, the challenge to the complainant's veracity was well made via the evidence of both Mr Tracey and the decision of the Disputes Tribunal. This matter was squarely put before the jury as the appellant himself recognised when he gave his evidence. His perspective, at least then, was that the complainant had been "caught ... out on many, many lies. ... with my barrister asking him questions, he's caught out on many lies, yes. ... not driving Nigel's car in the crash for one".

### **Trial counsel's observations in closing**

[45] The appellant is critical of some remarks made by Mr Leary in his closing for the defence. The argument is that the emphasised passages in the excerpt we set out below undercut the defence theory that the complainant was a willing participant in experimental homosexual acts. Mr Leary said this:<sup>9</sup>

Now, that being so, we can only sit back in wonderment and say, well, there are people in life who like to experiment and get into other situations and that is exactly what I believe has happened here because he wasn't just content with ravaging any woman he could get his hands on, as Mr Brooks

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<sup>9</sup> Emphasis added.

described this morning, he went a little further and did a little experimenting in what you might call the “gay” area of life. *Now there’s nothing wrong with that. Gay is a situation that we’ve been living with for decades. Society tolerates it, it changes the law to suit it and, at the end of the day, there is no crime in being gay because we recognise it. We may not involve ourselves in it quite naturally but, at the end of the day, we accept it as people of the world.*

Now, if we proceed on from there, we get into a situation where he’s leaving his school and all the rest of it and you might well think, well, why does this situation persist between an older and a younger man? That’s the big question, it really is. *Here’s a big strapping fellow, he gets into some sort of what we’d call inappropriate behaviour. I’m not going to go through all the terminology that you don’t like to listen to. Let’s just call it inappropriate, because we don’t need to do that. Let’s be decent about it.* And, he gets into this situation. He has every opportunity in the world to walk away from it. That’s the big question. *Sure, inappropriate behaviour and here is a chap coming up in April to the South Island. Who’s the quickest guy to get in a car? It’s [the complainant].*

[46] Ms Jelas for the Crown accepted that the passage beginning “We may not involve ourselves in it” may have briefly portrayed an adverse opinion, held by Mr Leary, to homosexual activity. The passage was however very brief and needs to be seen in its context. The thrust of these remarks is directed against the complainant. Further, the import of the passages is that just because the jury might not like hearing about the complainant’s activities, such activities happen and should not be held against anyone. Mr Leary was faced with a difficult situation. He had a client who, as Mr Leary said in his evidence in this Court, had little understanding of the impact on the jury of what Mr Leary called his “self-damage” because of his “obdurate view of matters sexual”. In these passages Mr Leary is doing his best to get the jury on side, albeit the passage we have identified was unwise.

[47] In addition, the jury was directed in the usual way to put aside any sympathy or prejudice in their deliberations. We are satisfied that no miscarriage arises from these passages.

[48] We interpolate here that the appellant did not pursue arguments made in the written submissions about Mr Leary’s failure to cross-examine the complainant on all matters. We do not therefore need to address this aspect. We note for completeness Mr Leary’s explanation in his affidavit which was that the appellant

went “off script” and in the course of cross-examination offered, in effect, propensity evidence about himself.

### **Was there prosecutorial misconduct?**

[49] There are two aspects relied on under this heading. First, the appellant says that the prosecutor incorrectly tried to link Dr Blackwell’s evidence to the facts of the particular case. The relevant comment from the prosecutor in closing was as follows:

Now the Crown case is, and always has been, that this offending started when [the complainant] was aged either 13 or 14 years of age. The Crown case is that just as Dr Blackwell spoke of, [the complainant] was groomed from a very young age to be both sexualised by Bob Stevens, to get him to a point where he trusted and actually loved and cared for Bob Stevens so that this abuse was allowed to essentially continue right through his formative years if you like.

[50] We agree with Ms Jelas that the submission in this respect reflects a minor departure from this Court’s directions in *M (CA23/2009) v R* that Dr Blackwell’s evidence not be linked to the particular circumstances of a complainant.<sup>10</sup> However, viewed in context, we do not see this comment as giving rise to a miscarriage. As we have noted, Dr Blackwell in her evidence emphasised that she was unable to comment on the specifics of the case and her evidence was reinforced in this respect by the Judge’s directions to the same effect.

[51] The second aspect of criticism of the prosecutor relates to another remark she made in closing. The appellant says this was prejudicial and designed to emotively influence the jury. The passage in issue is as follows:

Mr Stevens said to you yesterday that he was bisexual. He said that he liked men and women and he said, and we’ve heard of course from his friend today that he was understood to be homosexual. The Crown case is that his preference actually, his sexual preference is not with consenting males but with young males, males below the age of 16. In this case [the complainant] 13, 14 and that he is essentially a man that grooms young vulnerable people, in this case [the complainant]. That he creates a climate in which he essentially is able to manipulate them and then continue to abuse them really until they see what’s going on as we’ve heard with [the complainant].

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<sup>10</sup> *M (CA23/2009) v R*, above n 8, at [49].

[52] The Crown accepts that the use of the word “them” was unhelpful as suggesting more than one victim but Ms Jelas submits that the remarks were qualified by the reference to the complainant. We agree. Further, we accept the submission from Ms Jelas that this was just one brief passage in the context of a longer address and a lengthy trial so there is no risk that it would have resulted in the jury engaging in an emotive reasoning process. In addition, as we have noted, the Judge gave the standard directions on the need to avoid sympathy and prejudice. The Judge also directed the jury to determine the charges on the evidence and the question trail directed the jury towards a permissible reasoning process.

[53] In the appellant’s written submissions there was some criticism also of questioning by the prosecutor referring to “sex toys”. We agree with Ms Jelas that this was not inappropriate in the context of this trial. It was not objected to and there was no apparent embarrassment of the appellant when questioned in this way.

### **Counts 2 and 6**

[54] The appellant argues that there was duplicity between counts 2 and 6 of the indictment. As we have noted, count 2 was a specific count of sexual violation by anal penetration and count 6 a representative count of the same conduct over a period that included the time during which count 2 was said to arise. The appellant’s submission relates in part also to his criticism of the Judge’s answer to jury questions. The submission is that the answer to the questions would have left the jury with the impression that the dates at which the offending was alleged to have occurred were not relevant.

[55] It was made clear to the jury that count 2 related to a specific incident, that involving Mr Chaney. However, the Judge did not expressly direct the jury that, in considering whether they were satisfied that at least one incident as alleged occurred in respect of count 6, they had to rely on an incident other than that covered by count 2. The issue is whether we can, in these circumstances, be confident the jury has not relied on the count 2 incident in convicting on count 6. We consider that when all of the relevant material is taken into account, the jury would have been clear that they could not look at the Paul Chaney incident in relation to count 6.



[56] The first point to note is that in closing, the prosecutor made it clear that count 2 only related to the Paul Chaney incident. Count 6 was only referred to in general terms.

[57] In summing up, the Judge made it clear that in the context of a representative charge the jury had to be satisfied beyond reasonable doubt that the alleged offending occurred on at least one particular occasion. The Judge also made it clear that the jury was required to consider the counts separately. As we have noted, count 2 was characterised as the incident when Mr Chaney was present at the appellant's house. It was also made clear that the defence was that this incident did not happen because there was no sexual activity between the appellant and the complainant before the latter turned 16 years of age. The Judge directed the jury that they had to be satisfied that this incident did occur. It was also made plain that count 6 related to the occasions (over 30 in number) when, on the complainant's account, the same sexual activity had occurred. It was of course not disputed that this sexual activity had occurred on numerous occasions. The difference between the parties was the age of the complainant at the time of some of the sexual activity and whether or not the activity was consensual.

[58] The relevant part of the question trail on count 6 recorded as follows:

Not in dispute:

On many occasions after [the complainant] turned 16 years of age (19 October 1997), Bob Stevens penetrated [the complainant's] anus with his penis.

6.1 Are you sure that on at least one occasion between 19 October 1994 and 18 October 2003 Bob Stevens intentionally penetrated [the complainant's] anus with his penis?

If "yes" go to Question 6.2.

If "no" find Bob Stevens "not guilty" and go to Count 7.

[59] The jury asked some questions in the course of deliberation about counts 1 and 2 which are relevant to this aspect of the appeal. What occurred is recorded in the Judge's bench notes. Judge Sharp notes that midway through their deliberations the jury asked a question about counts 1 and 2 "indicating that they may have agreed that the acts in question occurred, but not within the timeframes mentioned". The

Judge then records that, after discussion with counsel, it was agreed there were some unanswered questions which the Judge should discuss with the jury before directing them. Those questions were whether, in respect to both counts 1 and 2, the jury was agreed that the incident in question occurred and had then answered the questions as to lack of consent. The Judge goes on to record as follows:

[3] With respect to count 1, the jury indicated that they were in agreement, that the act alleged had happened and that it was non-consensual. With respect to count 2, the jury indicated that they have not agreed whether the act had occurred, let alone whether it was non-consensual. After receiving those answers, I asked them to retire and I discussed the matter again with counsel.

[60] The Judge notes that the Crown's submission was that the dates were not an essential element of either count. Mr Leary took the opposite view. He said the dates were an element because the Crown had "hung its hat right from the beginning, on the complainant being between the ages of 13 and 14 when he began working for Mr Stevens and when the first act of a sexual nature occurred with him". Judge Sharp then states:

[6] I disagreed and I have therefore brought this jury back in and directed them that if they are satisfied that the act alleged in count 1 occurred and that it was non-consensual, then they should find Mr Stevens guilty of that charge, but I asked them to retire to consider count 2 more fully and in particular, ignoring the date frame for the time being, to consider whether the Crown has proved that the incident in question occurred and whether it was non-consensual.

[7] In that instance, I indicated that I would give them a further direction. That further direction may be slightly different from the direction that I have given in respect to count [1], depending upon the decision that I make as to possible duplicity which is an argument that Mr Leary has run between count 2 and count 6.

[61] In her next bench note, the Judge records a second communication from the jury indicating, in line with the Judge's earlier direction, that they had completed the whole of the question trail for count 2 and found the defendant guilty. Once again, the Judge stated the jury was unclear as to when the incident occurred and whether it actually fell within the timeframe specified. The jury was concerned as to whether that lack of certainty affected the decision.

[62] The Judge stated as follows:

[2] I have already heard argument from counsel about that particular matter. It was, and remains my view, that provided all of the elements of the offence were proved beyond reasonable doubt, the age of the complainant and therefore the timeframe specified not being elements of the offence, they could bring in a verdict of guilty on this charge. I note for the record that Mr Leary was opposed to such a direction ... however I consider that the law requires a verdict of guilty to be entered under the circumstances and I direct that that jury do so when they return to Court.

[3] I also asked them before in fact I gave them that direction to clarify that they now accepted that the incident referred to in count 2, that is of an unlawful sexual connection ..., was the one that allegedly took place in the company of one Paul Chaney. They indicated that they were all agreed that it did. The relevance of that question and answer was because count 6 is an identical charge except for the last date that is referred to within the body of the charge but is a representative count in respect of what [the complainant] said were approximately 30 incidents of a like nature.

[63] Judge Sharp was satisfied that there was no duplicity because count 2 charged a discrete incident whereas count 6 charged a number of incidents of the same nature but not involving Mr Chaney. The Judge gave the jury the following, further direction on this point as follows:

Count 6 alleges pretty much the same count 2 did which is the intentional penetration of [the complainant's] anus with Bob Stevens' penis. I just want to be sure that you understand that the difference between count 2 and count 6 is that count 6 deals with all of what the complainant said were the 30 or so other occasions when this act occurred, he says non-consensually, whereas count 2 dealt with the one separate incident when Paul Chaney was involved. Right, so you understand that? Good, thank you.

[64] Although the Judge did not explicitly direct the jury to avoid considering the Paul Chaney incident when deciding on count 6, our view is that the jury would have been under no illusion as to their task. That is because of the repeated emphasis on count 2 being the Paul Chaney incident in contrast to the other occasions. Further, the Judge's final direction made the point that the count 6 incidents were the "other" occasions in contrast to the "separate" Paul Chaney incident. This direction, while it does not go as far as it could, does emphasise that count 6 relates to "other" occasions and not the one "separate" incident reflected in count 2. There is accordingly no duplicity.

### **Unreasonable verdicts?**

[65] The appellant contends that the complainant was unreliable and that, as a result, the verdicts were unreasonable. Two points are made. First, the complainant struggled to remember dates and expressed difficulty in remembering sequences of events. In addition, his veracity was in issue. Secondly, the appellant points to evidence to suggest that the nature of the relationship between the appellant and the complainant changed in the later years. It seems to be suggested this goes to the complainant's veracity and informs the question of consent.

[66] A verdict will be unreasonable if, having regard to all of the evidence, the jury could not reasonably have been satisfied beyond reasonable doubt that the defendant was guilty.<sup>11</sup>

[67] There was sufficient evidence from the complainant on which the jury could be satisfied that the appellant offended in the manner alleged. The matters raised by the appellant were matters for the jury to consider and weigh up. We are also satisfied that the competing arguments about whether that evidence should be accepted were appropriately placed before the jury.

### **Other matters**

[68] We add that in oral argument the appellant made something of an observation made by the complainant in evidence to the effect that the appellant had brought him a motorbike and he owed the appellant money for this. The complainant said:

... for that, and to get the bills down so that I had to do help – I had to help him get his rocks off. And to get my bill down more, I'd have to perform that with him.

[69] The appellant argued this evidence had some implications for the issue of consent. Ms Jelas is however correct that it was never the defence case that some of the sexual activity took place for money. Rather, the argument was that it was fully consensual. There was no suggestion of any incentive of this sort. In these circumstances, we see no merit in the appellant's argument. We add that there was

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<sup>11</sup> *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5] and [17].

no challenge to the Judge's directions on consent and no suggestion the defence case was not properly put.

### **Conclusion – conviction appeal**

[70] For these reasons, the application for leave to adduce new evidence is declined.<sup>12</sup> Having considered the various matters raised by the appeal, we are satisfied the conviction appeal should be dismissed. We order accordingly.

### **Sentence appeal**

[71] The Judge in sentencing the appellant saw the offending as placed appropriately at the top of rape band three of *R v AM (CA27/2009)*.<sup>13</sup> Band three encompasses starting points in the range of 12–18 years imprisonment. The Judge adopted a starting point of 16 years imprisonment. In doing so, Judge Sharp identified the following aggravating features of the offending: premeditation; the vulnerability of the complainant; the harm to him; the degree of violation; and the breach of trust. The Judge concluded that there were no mitigating features and imposed a sentence of 16 years.

[72] In the sentence appeal, the appellant says that the appropriate starting point is within the region of 13 years imprisonment and that discounts should have been made to recognise the appellant's personal mitigating factors to take the end sentence to one of 10 years imprisonment.

[73] In terms of the aggravating features, the appellant accepts that the duration of the offending is relevant but submits that within that period the incidents were somewhat intermittent. Further, the appellant submits that he tried to do good at times and that there was less vulnerability as the complainant grew older. It is also suggested that the full circumstances of the offending give rise to a likelihood of a

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<sup>12</sup> See *Witehira v R* [2011] NZCA 255 at [36]–[37] relating to the admission of new evidence in cases where allegations of trial counsel incompetence are made. As to the admission of new evidence generally see *R v Bain* [2004] 1 NZLR 638 (CA) at [18]–[27]; *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34]; *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

<sup>13</sup> *R v Stevens*, above n 1, at [21]; *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

mistaken belief in consent on the part of the appellant in relation to a substantial amount of the offending.

[74] In supporting the sentence imposed, Ms Jelas emphasises the lengthy period of the offending and the significant psychological impact of it on the complainant. In terms of a discount for mitigating features, the submission is that none of these factors were particularly compelling. It was therefore open to the Judge to reach the view that no discount was necessary.

[75] The particularly aggravating feature of this offending is its scale, continuing for approximately 12 years. However, in setting the starting point towards the top of band three we consider there has been an overlap between the aggravating features identified by Judge Sharp. In our view, correctly analysed, the offending is in the middle of band three. Fifteen years is the appropriate starting point.

[76] As to the mitigating features, we accept the appellant's submission that some credit should have been given for previous good character. The appellant was in his 40s when this offending commenced and there was some material supporting the submission a modest discount was appropriate. We do not consider the Judge has erred in not giving credit for any of the other factors identified; none were compelling. A discount of six months is appropriate.

[77] For these reasons, the appeal against sentence is allowed. The sentence of 16 years imprisonment is quashed and a sentence of 14 years and six months is substituted.

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