

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

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

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA797/2013
[2014] NZCA 632**

BETWEEN R (CA797/2013)
Appellant

AND THE QUEEN
Respondent

Hearing: 17 November 2014
Court: French, Asher and Clifford JJ
Counsel: J C Gwilliam for Appellant
S K Barr for Respondent
Judgment: 19 December 2014 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce fresh evidence is dismissed.

B The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Mr R was convicted of various sexual offences following a jury trial in the District Court at Tauranga.

[2] The trial Judge, Judge Rollo, sentenced him to 14 years and nine months’ imprisonment with a minimum period of imprisonment of seven and a half years.¹

[3] Mr R now appeals both his convictions and his sentence.

¹ R v [R] DC Tauranga CRI-2012-070-3720, 27 November 2013.

Background

[4] The complainant (M) was the daughter of Mr R's partner. M was born in 1997.

[5] The offending was alleged to have occurred over a four year period when M was aged between nine and 13 and when she and Mr R were staying in the same house at various addresses. Exactly what period of time was spent at what address and when is the subject of some dispute. At trial, it was agreed that:

- (a) Between 8 June 2007 and 30 December 2010, M's mother was a tenant of a property in Hamilton (the first address).
- (b) Between 14 May 2007 and 29 September 2011, Mr R was a tenant of a different property in Hamilton (the second address).
- (c) During their time in Hamilton, Mr R and M's mother (with M) regularly stayed at each other's houses.
- (d) Between 1 January 2011 and 4 May 2011, Mr R, M and her mother resided at a property in Te Puke (the third address).

[6] The first two counts in the indictment related to sexual abuse alleged to have taken place at the first address. The Crown case was that Mr R commenced his sexual abuse of M at the first address when he came into her bedroom one night and tried to have sexual intercourse with her. That was the basis of count one, assault with intent to commit sexual violation. Following that incident, Mr R allegedly persisted with the abuse, coming into M's bedroom frequently at night and touching her in her genital area. Count two was accordingly a representative charge of doing an indecent act on a young person.

[7] Touching of the genital area was also alleged to have taken place at the third address (count three – a representative charge of doing an indecent act on a young person), where the abuse progressed to digital penetration (count four – a representative count of sexual violation).

[8] According to M, the second address was the scene of a significant incident. Mr R found her in bed with her boyfriend (L). There was an altercation and L fled the house. The following night Mr R allegedly raped M. This incident was the basis of count five (rape).

[9] The Crown case was that Mr R raped M a further five to 10 times in Hamilton and/or Te Puke, resulting in count six – a representative charge of rape.

[10] The offending stopped when M went to live with her aunts around 13 July 2011 and disclosed the offending to them.

[11] When interviewed by the police, Mr R denied any wrongdoing. His defence at trial was that nothing of a sexual nature had ever taken place between him and M.

Grounds of the appeal against conviction

[12] Counsel Mr Gwilliam submitted there had been a miscarriage of justice warranting a retrial. He based that argument on:

- (a) the cumulative effect of numerous alleged trial counsel errors (the principal ground of appeal);
- (b) the trial Judge's refusal to allow cross-examination of M and L regarding the full extent of their sexual relationship; and
- (c) fresh evidence from a police document examiner.

Alleged trial counsel errors

Defence theory of the case

[13] Mr Gwilliam submitted that trial counsel failed to adopt a proper defence theory and failed to obtain proper instructions from Mr R as to how the defence should proceed at trial.

[14] In support of that allegation, Mr R has filed an extensive affidavit. In the affidavit he claims he had little contact with trial counsel before the trial and was denied the opportunity to review the Crown evidence properly and go through his defence in detail with trial counsel.

[15] Trial counsel's time sheets and contemporaneous file notes, however, tell a different story. They show that trial counsel was diligent in pre-trial preparation and did obtain proper instructions. We do not accept Mr R's claims, which are also inconsistent with his expressions of gratitude to trial counsel during the trial for all he had done.

[16] As regards trial counsel's alleged failure to develop a defence theory, Mr Gwilliam submitted that in cases such as this one, where it is the uncorroborated allegation of the complainant against the blanket denial of the defendant, it is essential for defence counsel to develop a proper theory of the case. A simple denial is not sufficient. Defence counsel needs to drill down further into the facts and develop a strategy to elicit why the allegations have been made, what prompted them and what would undermine their credibility.

[17] We agree it is important for the defence to develop a proper theory of the case. But insofar as this submission and related criticisms are based on the premise that all trial counsel did in this case was tell the jury the allegations were false, the criticisms are incorrect and unfair.

[18] In our assessment, trial counsel did develop a proper defence theory of the case and present it to the jury. His cross-examination of M was effective. From it emerged a graphic picture of M's dysfunctional family background, her streetwise and wayward personality, her strong sense of entitlement, her resentment of Mr R for various reasons including his attempts to discipline her, her resentment at having to live in Te Puke and desire to return to Hamilton, her sense of grievance against her mother, her disapproval of her mother's relationship with Mr R, her knowledge that allegations of sexual abuse can result in the accused person being removed from the home and her knowledge of sexual matters from other sources. Trial counsel also

elicited the information that after making her allegations M continued to have contact with Mr R over a 12 month period, even living at the same address.

[19] Contrary to the criticisms made of him, it is clear that trial counsel did advance several good reasons for the jury's consideration as to why M might have fabricated the allegations.

[20] Our assessment that trial counsel did develop a proper defence theory of the case makes it unnecessary for us to consider all of the many criticisms advanced by Mr Gwilliam under this head. We restrict ourselves to addressing some of the main points and return to others in a separate section dealing with cross-examination of Crown witnesses.²

Approach to Mr R's drug dealing and convictions for dishonesty

[21] Mr Gwilliam was critical of trial counsel taking what he submitted was an unduly cautious approach to the risk of evidence about Mr R's drug dealing and his convictions for dishonesty being before the jury. In Mr Gwilliam's submission, trial counsel should have led evidence about Mr R's criminal activities to provide general background about the dysfunctional nature of the family.

[22] He also argued that such an approach would have provided context for the information about Mr R's drug dealing that did come out during the trial. M's mother stated in her evidence in chief that customers regularly came to the house to buy cannabis from Mr R. Mr Gwilliam argued that due to trial counsel's failure to expressly address Mr R's offending, that information remained unexplained and was not properly put in the context of the defence case.

[23] We do not accept those submissions. As submitted by Mr Barr, the strategy adopted by trial counsel was reasonable and open to competent counsel. Trial counsel was able to paint a graphic picture of M's dysfunctional family without

² The errors listed at the beginning of Mr Gwilliam's submissions on this point included a bald and unspecified allegation that trial counsel had failed to object to the leading of hearsay evidence. However, the point was not pursued in the body of the submissions or at the hearing. We therefore do not address it.

having to place emphasis on Mr R's criminal activities. The approach was also intended to minimise the risk of a prosecution challenge to Mr R's veracity should he elect to give evidence.

[24] As to the information that did come out, we are satisfied it would not have made a difference to the jury's decision if the drug dealing had been more directly addressed as part of the defence case. The drug dealing had only very peripheral relevance to the charges against Mr R, and we find it difficult to imagine any "context" trial counsel could have provided that would have altered the impression conveyed by the evidence.

Circumstances of disclosure

[25] Mr Gwilliam also criticised trial counsel for failing to explore the circumstances in which the first disclosure occurred.

[26] M's evidence was that she first told her Aunt P about the sexual abuse in response to the aunt asking M whether Mr R had been touching her. M subsequently wrote down the allegations in a letter for another aunt, Aunt H. The letter was produced as Exhibit 5. Aunt H then took M to the police station, where a formal complaint was made.

[27] Aunt H gave evidence at the trial but was not cross-examined by trial counsel.

[28] In Mr Gwilliam's submission, the following matters should have been explored:

- (a) whether M was under the influence of alcohol and cannabis at the time of the disclosure;
- (b) the differences between the handwriting in Exhibit 5 and in a note written by M at the police station (Exhibit 6); and

- (c) Mr R's belief that what may have triggered the complaint was collusion between M and Aunt H, who owed him money for cannabis.

[29] We do not agree that the failure to address these matters constitutes counsel error.

[30] There is no evidence other than Mr R's own hearsay account to suggest that M was consuming alcohol and cannabis at the time of the disclosure. He claims that Aunt P told him this but has not provided any evidence from Aunt P. In any event, as trial counsel points out in his affidavit, evidence as to M's intoxication would not have assisted the jury in determining whether the disclosures were true. The jury would have been just as likely to conclude that intoxication would have diminished M's inhibitions about telling anyone what had happened to her.

[31] Post-trial document examination of Exhibit 5 has vindicated trial counsel's acceptance at trial that M was its author.

[32] As regards the suggestion of collusion between M and Aunt H, trial counsel says he does not recall Mr R giving him specific instructions to advance this as the defence or part of the defence. He was aware that this was Mr R's belief but there was no evidential basis for it. In the view of trial counsel, it was not plausible and was not something he could responsibly have advanced at trial. We do not consider that counsel can properly be criticised for adopting that approach. We would add that had he raised the possibility of collusion, it would likely have undermined the other far more plausible reasons he did advance to suggest why M might be lying.

[33] Finally in this section, we address Mr Gwilliam's criticism that trial counsel failed to explore inconsistencies in the evidence as to the date the offending allegedly began. In particular, whether it commenced before or after a whāngai baby (Baby A) was brought into the family.

[34] There is no question that there were inconsistencies in the evidence. M stated that the first incident occurred a couple of months after the family had been living at the first address and that Baby A was in the house at the time. Yet the family moved

into the address in mid to late 2007 and Baby A was born in December 2008. Baby A came to live with the family a few months after her birth.

[35] We accept that this is a matter that could have been explored further at trial. However, as it was, it would have been evident to the jury that M was confused and imprecise about dates. In our view, the fact M was unreliable on this type of peripheral detail is unlikely to have weighed heavily on the jury when assessing the reliability of the central allegations. This is particularly so having regard to M's age, the transient lifestyle of the family and, of course, the context of a defence of complete fabrication.

Cross-examination of Crown witnesses

Inadequate cross-examination of M

[36] Mr Gwilliam submitted that trial counsel failed to cross-examine M adequately on a number of matters that would have undermined her credibility and counteracted the image conveyed by her DVD interview – that of a demure, shy and embarrassed young girl.

[37] The matters Mr Gwilliam contended should have been raised and/or given more emphasis were:

- (a) M's use of alcohol and drugs;
- (b) her truancy;
- (c) her Youth Court history (M had been charged with robbery);
- (d) untruths told about absences from school; and
- (e) the circumstances of a Child, Youth and Family report about an incident involving M's mother.

[38] In Mr Gwilliam's submission it was important that M's dishonest and violent behaviour be put squarely before the jury. The failure to do so combined with the failure to cross-examine on the detail of the sexual abuse created a situation where M's lack of specificity could be explained away on the grounds of modesty.

[39] As explained in his affidavit, trial counsel made a strategic decision to limit the attack on M. In our view, contrary to Mr Gwilliam's submission, that was a reasonable strategy. We also disagree that the jury's overwhelming impression of M would have been of a demure young girl. Following the cross-examination of M, the jury would have been left in no doubt that M was a troubled, streetwise teenager who hardly ever attended school, who was sexually active, who used foul language and who had on occasion behaved violently towards her mother and vice versa. The jury also learnt that M had been in trouble with the police because it came out in cross-examination that she had been on bail. They also heard evidence from her mother that M acquired clothing by placing orders with shoplifters.

[40] In our assessment, the cross-examination achieved all it needed to do in order for trial counsel to be able to advance reasons why M might have fabricated the allegations. To have gone further would have carried with it a real risk of alienating the jury. There is also the further point that the jury might well have taken the view that the behaviours exhibited by M that Mr Gwilliam suggested should have been emphasised were just the sort of behaviours one might expect from a young girl being sexually abused.

[41] Mr Gwilliam placed significant weight on trial counsel's failure to explore a Child, Youth and Family report of concern involving M's mother and an incident that occurred in Te Puke. The report refers to M being punched by her mother and sustaining a bloody nose and some bruising. Mr Gwilliam attributed significance to the report on two counts. First, there is no reference in it to M being sexually abused. Secondly, Mr Gwilliam emphasised the fact that the incident occurred very shortly before M disclosed the offending to her aunts. Mr Gwilliam described the timing as being part of what should have been a key defence theory that it was M's resentment at having to live in Te Puke that resulted in her making the allegations.

[42] We do not understand this submission. In our view, there is no logical connection between M being assaulted by her mother and making false allegations against Mr R. It is not contended that M made up the allegations of sexual abuse to get back at her mother for the assault. The assault resulted in M being taken out of her mother's care in Te Puke and returned to Hamilton to live with her aunts. She had therefore already achieved her aim of returning to Hamilton before making the allegations.

[43] As to the lack of reference to the abuse in the report, the fact that M disclosed the abuse for the first time after she had moved away from her mother would not, in our assessment, have been likely to undermine M's credibility in the eyes of the jury. On the contrary, it might well have struck the jury as entirely understandable. M's mother, who was called by the Crown, told the jury she loved Mr R.

[44] Mr Gwilliam also criticised trial counsel for failing in cross-examination to "drill down in detail regarding the specific details of the sexual abuse alleged".

[45] However, such an approach would have carried obvious risks. And in this case, trial counsel had already elicited the admission that the "sorts of things" M was claiming Mr R had done to her were the sorts of things she and her boyfriend had done.

[46] In any event, the criticism is based on an incorrect premise that trial counsel failed to cross-examine M about any of the detail of the offending. In fact he did. Notably, he secured evidence that she was saying a grown man had leapt off the floor, onto the bed and landed on top of her (then aged 11) with his full body weight and all she said was "ouch". Trial counsel also established that M had exaggerated the number of occasions on which she had been abused.

[47] Finally, Mr Gwilliam submitted that in cross-examining M trial counsel placed undue emphasis on what was a trivial point, namely whether M and her boyfriend L were in her usual bedroom on the night they were discovered (as M claimed) or in another room (as L claimed). In Mr Gwilliam's submission, it was not

a significant issue upon which to attack M's credibility and far too much time was spent belabouring the point.

[48] We do not accept that submission. Trial counsel was seeking to establish that the room M was in was not her usual bedroom, but a room to which Mr R always wanted the door open so that he had a clear line of sight to the street for approaching customers.³ This was important because the Crown allegation was that the reason Mr R had entered the room in the first place was not to open the door, but to sexually abuse M (knowing it was her bedroom).

[49] We therefore consider that trial counsel's cross-examination of M was appropriate and effective.

Inadequate cross-examination of M's mother

[50] M's mother gave evidence for the Crown. However aspects of her evidence assisted the defence.

[51] Mr Gwilliam contended that trial counsel should have cross-examined M's mother on her criminal record to show generally that this was a family where dishonesty was prevalent. In his affidavit, trial counsel explains that he did not pursue this line of cross-examination because he considered that it would be counterproductive and would negate those parts of the mother's evidence that were of benefit to the defence.

[52] Trial counsel gives similar reasons as to why he chose not to cross-examine M's mother about her lying to the police regarding the incident in the Child, Youth and Family report and about her approaching the police to change her statement, both matters that Mr Gwilliam also contended should have been pursued.

[53] In stating that no useful purpose would have been served by such questions, trial counsel points out that he did cross-examine M's mother about the substance of

³ It appears that trial counsel may have misunderstood Mr R's instructions in that counsel also suggested the customers came to the window of the room in question, which was not correct. They came to the front door. For present purposes the misunderstanding is irrelevant.

the three issues she had told the police she wanted to change in her statement. On the information before us, the answers trial counsel elicited appear to have been more favourable to Mr R than the claims made by M's mother in her statement.

[54] We agree with the Crown that the decisions taken by trial counsel on all these points were legitimate tactical decisions. The course advocated by Mr Gwilliam would have carried obvious risks, not only of discrediting the mother completely but also of bolstering M's credibility by showing that she had in the past made a truthful allegation of offending against her by an adult family member.

[55] Mr Gwilliam also submitted that the cross-examination was deficient because trial counsel failed to put to M's mother that she had contacted him (trial counsel) to try to get M to recant her allegations. Trial counsel explains that he considered this an unwise line of questioning because it would only have highlighted M's persistence with her account despite pressure from an unsupportive mother. Again, we consider this was a legitimate tactical decision and not in the category of counsel error.

[56] In our view, two other criticisms of the cross-examination raised by Mr Gwilliam are also unfounded. One relates to information (whether Mr R ever wore trousers with zips) that trial counsel could not have known. The other criticism is based on the erroneous premise that the evidence that it is said should have been elicited (the mother's personal beliefs about the allegations) would have been admissible. It must in any event have been obvious to the jury that M's mother did not believe M. She would surely have been unlikely to say she loved Mr R if she really thought he had raped her daughter.

Inadequate cross-examination of L

[57] M's boyfriend L was a Crown witness and in Mr Gwilliam's submission there were key matters that trial counsel should have put before the jury through cross-examination of him. In particular, it should have been brought out that M never confided in L about the sexual abuse despite their intimacy and despite the fact that according to M's evidence, Mr R threatened he would get her pregnant and blame L.

[58] We do not accept that the failure to cross-examine L about these matters amounts to counsel error. The jury were aware of the delay in making the disclosure and the fact it was not made to L. The assumption that a 13 year old girl who felt shame in discussing the abuse would be likely to confide in a teenage boyfriend if the allegation were true is also debatable. Further, M's evidence was that Mr R threatened to harm L if she disclosed the abuse.

[59] Mr Gwilliam also submitted that trial counsel should have explored with L the circumstances in which M disclosed the offending to her aunts, L being present. As Mr Barr for the Crown pointed out, however, there is no affidavit evidence from L to suggest that any such questioning would have been fruitful for the defence. For the reasons discussed above at [30], we are not persuaded that the absence of cross-examination on this topic is significant.

Failure to cross-examine Aunt H

[60] According to Mr Gwilliam, the failure to cross-examine Aunt H was "a significant omission on the part of trial counsel". Mr Gwilliam submitted Aunt H should have been questioned about the following matters:

- (a) the writing of Exhibit 5;
- (b) why she took M to the police station rather than Aunt P;
- (c) what she (Aunt H) said to M; and
- (d) the allegation that she was colluding with M over a cannabis debt.

[61] We have already addressed (d) at [32] above.

[62] As to the writing of Exhibit 5, Mr Gwilliam relied on evidence from handwriting experts obtained after the trial revealing indentations of other handwriting by M on the note. Aunt H did not, however, say that the note had been written in front of her (as assumed by Mr Gwilliam in his written submissions) and trial counsel of course did not know about the indentations.

[63] Aunt H had given evidence in chief about what she said to M. Mr Gwilliam has not provided any affidavit evidence from her for the purposes of the appeal. Accordingly there is no foundation for a suggestion that any further questioning would have been likely to produce favourable answers for the defence.

[64] In those circumstances, it cannot be said that the failure to cross-examine Aunt H amounted to counsel error occasioning a miscarriage of justice.

Failure to cross-examine police officers

[65] The Crown called three police officers to give evidence. According to Mr Gwilliam, trial counsel should have cross-examined the officers on the following issues:

- (a) the 10 month gap between M's evidential interview and the police interviewing Mr R;
- (b) the fact Mr R turned up to the police station voluntarily on the day he was interviewed;
- (c) M's demeanour (crying and reluctant to speak) when she first arrived at the police station to make her complaint;
- (d) whether there was any pressure placed on M by the aunts who accompanied her to the police station; and
- (e) a note on the police file made three days before M's evidential interview about M being reluctant to speak.

[66] In our assessment, the failure to cross-examine on these issues does not amount to counsel error.

[67] One of the officers had explained the reasons for the 10 month delay in his evidence in chief. The reasons had nothing to do with the truth or otherwise of M's allegations. Again, Mr Gwilliam has not provided any foundation to suggest that had

the officers been asked about the aunts or M's demeanour the answers would have been fruitful for the defence. On the contrary, such questions would have carried the real risk of damaging answers. In any event, the officers would not have been entitled to speculate as to the reason why M was crying.

[68] The jury were already aware from the evidence of one officer that M was reluctant to speak and also aware from the playing of the DVD of Mr R's police interview that he had come in voluntarily.

[69] In our view, there is no merit in any of these criticisms.

Failure to object to leading questions

[70] Mr Gwilliam submitted that trial counsel failed to object to the prosecutor asking leading questions of L.

[71] It is correct that the prosecutor did ask L leading questions, but in the absence of any prejudice to the defence (and none was identified) we do not accept that the failure to object amounts to counsel error warranting appellate intervention.

[72] Mr Gwilliam further contended that trial counsel should have objected to the prosecutor being allowed to refresh L's memory by reference to a statement L had made to the police. He argued an objection was required because L did not recall making the statement. However the notes of evidence show that while L did not initially recall making the statement, he did recall doing so following questions from the Judge.

Failure to call Mr R to give evidence

[73] Mr R did not give evidence.

[74] In his affidavit, he claims that he always strongly wanted to give evidence and fully expected to do so. This is not, however, consistent with trial counsel's file note of an attendance the month before the trial, which we are satisfied records Mr R as being undecided about giving evidence.

[75] According to trial counsel, the decision as to whether or not Mr R would give evidence was left open until the time came to make the election at trial. Counsel had prepared an extensive brief of evidence in case Mr R did elect to give evidence. At the close of the Crown case, counsel conferred with Mr R, who signed the following statement:

I, [Mr R], charged with several “sexual” offences, and to take my trial before judge and jury on 16th October 2013, at Tauranga, have had discussions about whether I will or will not give evidence at trial. My lawyer ... has advised me of my options, ie that I may give evidence if I wish to do so, but, that I am not under any obligation to do so. I have made a DVD statement to the Police as part of the related investigation. I have decided that I will/not give evidence personally at my trial. My lawyer’s advice was that in his opinion I should not give evidence personally.

[76] Mr R admits signing the statement but claims trial counsel “forced” him to do so. We do not accept that claim. Nor do we accept Mr Gwilliam’s submission that the die was already cast because of s 92 of the Evidence Act 2006 (obligation of cross-examiner to put the case to relevant witnesses) and the way trial counsel had cross-examined the Crown witnesses. It would still have been possible for Mr R to give the evidence he now claims he wanted to give.

[77] Nor in our view can trial counsel be criticised for advising Mr R against giving evidence. Mr R had an extensive history of criminal convictions for dishonesty and had given what trial counsel reasonably considered to be a good explanation in his police interview. That material was already before the jury. Giving evidence would have carried real risk. Having observed Mr R giving evidence ourselves, we consider it unlikely Mr R would have made a favourable impression on the jury.

[78] In our view this is clearly a case where because of an unfavourable outcome, a defendant now regrets his decision not to give evidence. However that is not a tenable ground of appeal.

Failure to call other witnesses

[79] Mr R contends in his affidavit that he wanted to call his mother and sister to give evidence and that trial counsel failed to do so. The mother and sister have

sworn affidavits detailing the evidence they would have been able to give had they been called. It is said they would have provided independent evidence of the dysfunctional nature of M's family, the dishonesty prevalent throughout the family, queries M's family had raised regarding M's veracity and evidence that would tend to contradict M's veracity, such as observations of her interactions with Mr R and her conduct towards him after making the allegations.

[80] Trial counsel says he does not recall receiving specific instructions to call Mr R's mother and sister as witnesses.

[81] It is not necessary to resolve that conflict because in our assessment it is unlikely they could have added anything useful to the defence case. The fact that M's mother had a serious drinking problem and the dysfunctional nature of M's family were already in evidence. So too was evidence that M continued to live in the same household as Mr R after the allegations were made. The belief of various family members about the credibility of M's allegations is irrelevant, while evidence that Mr R's family observed nothing untoward in the interactions between M and Mr R would have been of limited value.

[82] In her affidavit, Mr R's sister says that she does not recall Mr R ever wearing jeans or other types of trousers other than track pants. The relevance of this is that in re-examination M gave evidence that when Mr R tried unsuccessfully to rape her, she heard the zip of his trousers. This was not something M had said before and so was not something that trial counsel could have foreseen. Mr Gwilliam submitted trial counsel could have cross-examined M's mother about it, but in the absence of any instruction from Mr R about the clothing he habitually wore, the criticism is unsustainable.

[83] In any event, even if we were to view this as fresh evidence (rather than counsel error), we are satisfied it would not have affected the outcome. Mr R's sister did not live in the same town and could only say that on the occasions she saw her brother he was wearing a tracksuit. There is no evidence from M's mother as to what she would have said had she been asked the question.

Agreeing to statement of facts that was misleading and prejudicial

[84] At trial, the jury were provided with an agreed statement of facts that listed the tenancies held by Mr R and M's mother over the period 2007 to 2011.

[85] Mr Gwilliam did not challenge the accuracy of the document, but said it was prejudicial and misleading because where the parties were residing at different times during 2007 to 2011 bore no relationship to the legal tenancies. In his submission, it was an error for trial counsel to agree to admission of the statement.

[86] However, although Mr R claims he was not living with M during the whole period of the indictment, he does accept that during the period he lived at each listed address with M. The agreed statement did not purport to assert at which points in time each of the parties was living at each of the various addresses. Further, there was evidence from M, her mother and Mr R's police interview as to the various movements of the family members between the houses. The jury would not have been left with a false impression. Rather, their overall impression is likely to have been that the family moved around a great deal.

Conclusion on counsel error

[87] We are satisfied that none of the matters raised, whether viewed individually or collectively, affected the outcome of the trial. The defence was adequately put to the jury. An appellant is not entitled to rerun the case in hindsight because he made decisions that he now regrets and did not get the outcome he wanted.⁴

Judge's ruling under s 44 of the Evidence Act

[88] Section 44 of the Evidence Act states:

44 Evidence of sexual experience of complainants in sexual cases

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

⁴ *R v Scurrah* CA159/06, 12 September 2006 at [17]–[20]. See also the comments made by this Court recently in *Tranter v R* [2014] NZCA 602 at [47]–[60].

- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
-
- (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

[89] In this case, the Judge orally granted trial counsel leave to question M about the night she was discovered by Mr R in bed with L. The Crown did not oppose this and led evidence in chief from M that she and L had had sexual intercourse that night. This was to provide context for the chain of events that allegedly took place that night and the following night, in particular the threats made by Mr R that he would get M pregnant and blame L. The Crown theory of the case was that because of the discovery that M was sexually active, Mr R felt emboldened to escalate the abuse.

[90] In cross-examination, trial counsel asked M whether that was the first time she had had sex with L and then sought to ask her about another occasion. Counsel was stopped by the Judge and, following an in chambers discussion, the Judge issued a formal ruling.⁵ In the ruling he recorded that the intention of the leave he had granted was to limit cross-examination to the events of the one night.

[91] On appeal, Mr Gwilliam submitted that the Judge was wrong to prevent counsel from cross-examining M about the extent of her relationship with L. In his submission, the evidence was directly relevant to the facts in issue for four reasons:

- (a) to determine the closeness of their relationship and therefore question why she had not bothered to tell L about the threats;
- (b) to provide further evidence about M lying regarding the relationship;

⁵ *R v [R]* DC Tauranga CRI-2012-070-3720, 17 October 2013.

- (c) to undermine the appearance M had given that she was naive in sexual matters, did not like to talk about sex and felt shame even referring to her body parts; and
- (d) to obtain details of M's sexual experience, which would have undermined her version of the alleged abuse by Mr R.

[92] We do not accept those submissions.

[93] The jury were aware that at the age of 13 M had engaged in consensual sexual activity with her boyfriend. It is therefore unlikely that they would have regarded her as naive in sexual matters. Further, as previously mentioned, trial counsel was able to establish that M would have been able to draw on her sexual experience with L to provide sexual detail for the allegations against Mr R. Under cross-examination M also admitted that previously she had falsely denied having sex with L that night. Additional information would have added nothing.

[94] It would in our view have been quite wrong for the Judge to have allowed any further questions about M's previous sexual experience. We agree with his ruling.

Fresh evidence

[95] Apparent differences in the handwriting of Exhibit 5 (the letter to Aunt H) and Exhibit 6 (the note written at the police station) prompted Mr Gwilliam to have the documents examined by an expert. Mr Gwilliam was primarily concerned that M may not have been the author of both as she claimed. Questions were raised by the expert and the Crown then arranged to have the documents examined by a senior police document examiner.

[96] The upshot was that it is now common ground that M is the likely author of both.

[97] The examination by the police expert did, however, reveal differences in pressure as between the two documents as well as indentations suggesting that M may have written out notes or a rough copy of Exhibit 5. The indentations read:

Started in Halberg didn't (end) until I moved to antyz house (was in te puke and emerson) So it started 3 years ago but I was scared of family Shamed about everything like I looked like the bad one but now I no Im nt nw the reall thing that is pissing me of is I thought that my mum would really be glad that I [obliterated] said something but what it looks like 2 me is she thinks it's a big joke

[98] Mr Gwilliam submitted that this is fresh evidence and that it points to issues regarding the circumstances in which the initial disclosure was made, such that there is a real possibility a miscarriage of justice has occurred. He submitted that if this evidence had been before the jury it would have impacted significantly on the circumstances surrounding the credibility of M's evidence.

[99] We agree that the evidence could not with reasonable diligence have been obtained by defence counsel at trial and that it is credible. However we do not accept that it raises the real prospect of a miscarriage of justice. Apart from the reference to "3 years", the indentations are consistent with M's evidence at trial. In those circumstances, the fact she may have had two attempts at writing the letter is not a matter to which any significance can realistically attach. The same is true of the differences in pressure.

[100] We therefore dismiss the application for leave to adduce fresh evidence.

Outcome of appeal against conviction

[101] In our view, none of the grounds of appeal advanced are sustainable.

[102] The appeal against conviction is accordingly dismissed.

Appeal against sentence

Sentencing in the District Court

[103] Judge Rollo identified the aggravating features of Mr R's offending as being the following:⁶

- (a) M was a vulnerable child, aged between nine and 13 years.
- (b) It was a long period of offending.
- (c) There was a gross breach of trust, Mr R being M's de facto stepfather.
- (d) There was a significant degree of premeditation and grooming.
- (e) M suffered significant emotional and psychological harm as a result of the offending.

[104] In light of those aggravating factors, the Judge said he agreed with counsel that the offending fitted within rape band three of *R v AM*.⁷ The starting point range in that band is 12 to 18 years' imprisonment. The Judge took as his starting point a period of 14 years and nine months' imprisonment.⁸

[105] The Judge said that starting point took into account the following factors:⁹

- (a) There were five rapes in total.¹⁰
- (b) Indecent touching and digital penetration of M's genitalia and vagina had occurred on many occasions.
- (c) The initial assault was a shocking occurrence for a young victim and a sudden betrayal of her expectations of protection by Mr R.

⁶ *R v [R]*, above n 1, at [5]–[6].

⁷ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁸ At [12].

⁹ At [14]–[16].

¹⁰ In evidence M had said she was raped five to 10 times in total. The Judge took the lower figure, applying s 24 of the Sentencing Act 2002.

(d) The duration of the offending was around four years.

(e) The fear and concern of M over that period was not to be underestimated, as evidenced by her victim impact statement.

[106] Having assessed Mr R's culpability as high and noted that there were no mitigating factors, the Judge went on to impose sentences on each of the charges. These can be conveniently summarised in a table:

Count	Offence	Place	Dates	Sentence
1	Assault with intent to commit sexual violation	Hamilton	8 June 2007–31 December 2010	3 years
2	Indecent act (representative)	Hamilton	8 June 2007–31 December 2010	5 years
3	Indecent act (representative)	Te Puke	1 January 2011–4 May 2011	3 years
4	Sexual violation by digital penetration (representative)	Te Puke	1 January 2011–4 May 2011	8 years
5	Rape	Hamilton	1 July 2010–31 December 2010	14 years 9 months
6	Rape (representative)	Hamilton and/or Te Puke	1 July 2010–13 July 2011	14 years 9 months

[107] All sentences were concurrent.

[108] The Judge concluded by granting the Crown's request for the imposition of a minimum period of imprisonment.¹¹ The Judge said he was satisfied given the scale of the offending, the fact Mr R continued to deny responsibility, the necessity for him to be held accountable and the necessity for deterrence, denunciation and protection of the public that a minimum period of imprisonment was warranted. The Judge then directed that there be a minimum period of imprisonment in relation to counts five and six of seven years and six months' imprisonment.

¹¹ At [27].

Grounds of the appeal against sentence

[109] On appeal, Mr Gwilliam submitted that the sentence was manifestly excessive. In support of that submission, he advanced the following grounds:

- (a) The starting point was too high in terms of the culpability factors in *R v AM*.
- (b) Insufficient recognisance was taken of the fact that Mr R has no previous convictions for sexual offending
- (c) The Judge erred in determining the length of time over which the offending took place.
- (d) The minimum period of imprisonment imposed was excessive.

[110] Mr Gwilliam argued that correctly analysed the offending fell within band two of *R v AM* and not band three, and that a starting point of between 10 and 12 years should have been adopted.

[111] Mr Gwilliam developed that submission by assessing the culpability factors identified in *R v AM*. He emphasised the absence of any evidence M was given alcohol or drugs specifically to groom her for sexual offending, the absence of any additional violence or physical harm, the fact there was only one victim and the fact that although M was young she was not totally innocent. Mr Gwilliam also suggested that the significant psychological harm described by M in her victim impact statement needed to be tempered by reference to the fact that she had also been subjected to considerable abuse as a result of her general upbringing. Finally, Mr Gwilliam submitted that the Judge overstated the period of the offending.

Our assessment

[112] Of the various matters raised by Mr Gwilliam, the only one in our view worthy of argument is the period of the offending. As mentioned above, M gave evidence that the initial assault (the occasion on which she was first abused) took

place at the first address and that Baby A was living with the family at the time. If that is correct, it means the earliest the offending could have started was in mid to late 2009. In turn that would mean the period of the offending could only have been between 18 months and two years, instead of the four years assumed by the Judge. During the relevant period, M would have been aged between 11 and 13 years.

[113] However, even assuming that the offending spanned 18 months instead of four years, it is not in our view tenable to suggest that the offending falls within band two of *R v AM*, as suggested by Mr Gwilliam. The Court in *R v AM* in fact described cases involving repeated rapes of one or more family members over a period of years as being the “paradigm case of offending” within band *four*, with offending involving children attracting starting points at the higher end of that band.¹² The range in band four is 16 to 20 years’ imprisonment. In this case, the Judge placed the offending in band three. It needs also to be borne in mind that counts five and six were the lead offences and that the revised period only affects count two.

[114] We have reviewed a number of comparator cases, including *Abraham v R*, which involved facts very similar to those in the present case.¹³ In *Abraham*, the appellant was convicted of two representative counts of rape involving one victim aged between 10 and 12 years. The offending had occurred over a period of nearly two years. It began with the appellant having the victim touch his penis and progressed to sexual intercourse (occurring on at least eight occasions in addition to one attempt). This Court upheld a starting point of 15 years’ imprisonment.

[115] *Abraham* and the other cases suggest that even if the period of offending in this case were reduced to 18 months, it would make little or no difference. Any adjustment to the sentence would constitute tinkering.

[116] As for the absence of previous convictions for sexual offending, correctly analysed that is simply the absence of an aggravating factor, not a mitigating factor.¹⁴

¹² At [109].

¹³ *Abraham v R* [2012] NZCA 521. See also *M (CA838/2012)* [2013] NZCA 193; *Z (CA586/2012) v R* [2012] NZCA 607; *R v Minnis* CA242/06, 23 November 2006; *Stevens v R* [2014] NZCA 494; *R v Petera* [2013] NZHC 2170; *Triggs v R* [2012] NZCA 543; and *R v VH* [2013] NZHC 2463.

¹⁴ *R v Miers* (1994) 11 CRNZ 307 (CA) at 313.

Having regard to his lengthy criminal record, Mr R was not entitled to a discount for previous good character.

[117] We also do not accept that the Judge was wrong to impose a minimum period of imprisonment. Contrary to Mr Gwilliam's submission, it is clear from the sentencing notes that the Judge did address the factors set out in s 86(2) of the Sentencing Act 2002. We note too that in *R v AM* this Court said that the imposition of a minimum period of at least half the nominal sentence is very routine in cases of sexual offending against children.¹⁵

[118] The final point made by Mr Gwilliam was that although the Judge purported to impose a minimum period of imprisonment of 50 per cent of the finite sentence, he in fact imposed one of greater than 50 per cent. Fifty per cent of 14 years and nine months is seven years and four months (rounded down), not seven years and six months.

[119] The usual practice of this Court is to correct mathematical errors by sentencing judges even if that results in only a modest reduction in the sentence. However, we are not satisfied the Judge did make an error. The Judge did not say that he was imposing a 50 per cent minimum period. That figure was only mentioned in a summary of the Crown position.

[120] The appeal against sentence is therefore also dismissed.

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¹⁵ At [156].