

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPTION OR IDENTIFYING PARTICULARS OF APPELLANT
PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.**

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

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF ANY COMPLAINANTS/PERSONS
UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS
PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA561/2014
[2016] NZCA 235**

BETWEEN	T (CA561/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	5 April 2016
Court:	Stevens, Asher and Williams JJ
Counsel:	G L Turkington for Appellant M J Lillico for Respondent
Judgment:	31 May 2016 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
 - B The appeal against sentence is dismissed.**
 - C Order prohibiting publication of name, address, occupation or
identifying particulars of appellant pursuant to s 200 of the Criminal
Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] T appeals his conviction on 29 charges, including 14 counts of assault with a weapon, seven counts of assault on a child, threatening to kill, injuring with intent to injure, assault with intent to injure, male assaults female, possession of an offensive weapon, sexual violation by rape, sexual violation by unlawful sexual connection, and indecent assault on a girl under 12. The complainants were his wife, stepchild and four children. He also appeals the sentence of 17 years' imprisonment imposed on him on the grounds that this was excessive.¹

Background

[2] The primary complainant was his former wife with whom he had lived for about 10 years, from 1997 to about 2008. She had a child from a prior marriage and they had four children together. There was continuous violence during the marriage against his wife's daughter and his children, and both physical and sexual abuse against his wife.

[3] In relation to his wife, the charges on which T was convicted were as follows: first, a representative charge of sexual violation by rape, alleged between 1 September 1997 and 31 December 2009; second, a representative charge of sexual violation by unlawful sexual connection, alleged between the same dates; third, a representative charge of assault with a broom as a weapon, alleged between 1 June 1997 and 31 December 2009; fourth, a representative charge of male assault female, alleged between 19 March 2003 and 31 December 2009; fifth, a representative charge of possession of an offensive weapon in circumstances which showed an intention to use it, alleged between 1 September 1997 and 31 December 2009; sixth, an assault using a broom as a weapon; seventh, threatening to kill the complainant; eighth, injuring the complainant with intent to injure her; and ninth, assaulting the complainant with intent to injure her.

¹ *R v [T]* DC Hutt Valley CRI-2013-032-609, 17 September 2014 [Sentencing notes].

[4] In relation to T's stepdaughter the charges were as follows: first, indecent assault at a time when she was under the age of 12; second, a representative charge of assault with a belt as a weapon, alleged between 3 April 1998 and 31 December 2009; third, a representative charge of assault with a shoe as a weapon, alleged between 3 April 1988 and 31 December 2009; fourth, a representative charge of assault with a curtain rod as a weapon, alleged between 3 April 1998 and 31 December 2009; fifth, a representative charge of assault on a child under the age of 14 years, alleged between 19 March 2003 and 31 December 2009. sixth, assault using a plastic table as a weapon; seventh, assault using an electrical cord as a weapon; and eighth, assault on a child under the age of 14 years.

[5] The indecent assault charge arose from T requiring his stepdaughter to place her foot against the area of his groin and rub it against his penis, over his clothing. At the trial she said she thought she was about seven years old when that happened.

[6] In relation to T's eldest daughter the charges were: first, a representative charge of assault using a broom as a weapon, alleged between 12 August 1999 and 31 December 2009; second, a representative charge of assault using a belt as a weapon, alleged between 12 August 1999 and 31 December 2009; third, assault on a child under the age of 14 years; and fourth, assault using a broom as a weapon.

[7] In relation to T's second eldest daughter the charges were: first, assault on a child under the age of 14 years; second, a representative charge of assault using a broom as a weapon, alleged between 18 September 2000 and 31 December 2009; third, a representative charge of assault using a belt as a weapon, alleged between 18 September 2000 and 31 December 2009; fourth, a representative charge of assault using a shoe as a weapon, alleged between 18 September 2000 and 31 December 2009; and fifth, a representative charge of assault on a child under the age of 14, alleged as between 19 March 2003 and 31 December 2009.

[8] In relation to T's son the sole charge was one representative charge of assault on a child under the age of 14 years between 19 March 2003 and 31 December 2009.

[9] In relation to T's youngest daughter the charges were two representative charges of assaulting a child under the age of 14 years, alleged between 9 October 2004 and 31 December 2009, once by hitting her in the face and once by throwing her on a chair.

[10] T and his wife separated in late 2007 or early 2008, although they lived together briefly after that before finally separating in 2009. In 2010, T's wife wrote a book detailing her life, including details of the acts of violence committed by T. No complaint was made by her at this time.

[11] In 2012 T's stepdaughter went to live with her biological father for the first time and disclosed many incidents of physical abuse in her childhood. A formal complaint was laid at that stage. Thereafter her mother and siblings all also made complaints.

[12] T was interviewed by Police in February 2013, and was subsequently charged with the offending detailed above. He was convicted of 29 charges by a jury, following a two week trial before Judge Butler at the Hutt Valley District Court. He was acquitted of three other charges. One other charge was discharged by the Judge during trial.

Grounds of appeal

[13] T appeals against his convictions for all charges on three grounds:

- (a) The Judge erred in failing to give a propensity direction to the jury;
- (b) The Judge erred in failing to provide a reliability warning under s 122 of the Evidence Act 2006; and
- (c) The use of representative charges was unfair, in particular for the rape and unlawful sexual connection charges, as the allegations were too general and covered a lengthy time span.

The propensity direction

[14] Mr Turkington for T submits that the Judge should have given a propensity direction and failed to do so. The direction should have been to the effect that just because the jury was satisfied that the defendant was guilty of one charge, they should not assume guilt for any of the remaining charges. Nor should they infer that because T had certain personality characteristics he was more likely to have committed the offences. Because all of the charges were heard together, there was a risk, it was submitted, of illegitimate reasoning by the jury.

[15] Mr Turkington relied on the statement of the minority in *Mahomed v R*:²

A propensity evidence direction is required where the Crown is:

- (a) relying on propensity reasoning and in doing so is invoking ideas about coincidence or probability; and/or
- (b) the evidence involves aspersions on the character of the appellant in respects not directly associated with the alleged offending.

As well, a propensity evidence direction should be given where, without it, there is a danger that the jury will not realise the relevance of the evidence in question or there is some particular risk of unfair prejudice associated with the evidence.

[16] It was recognised in *Mahomed v R* evidence can fall both within the definition of “propensity evidence” under s 40 of the Evidence Act 2006 and also be part of a general narrative or part of the evidence that establishes the relationship between the defendant and the complainant. Because of this, the minority did not consider that a propensity direction would be required in all circumstances where propensity evidence was admitted and before the jury because the use of such evidence would not usually be reliant on ideas about coincidence and probability.³ Where evidence that falls within the definition of propensity evidence is not led primarily in reliance on coincidence or probability reasoning, “a specific direction may well not be required”.⁴ It was also noted that in New Zealand in the past,

² *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [91].

³ *Mahomed v R*, above n 2, at [90].

⁴ At [92].

particular directions were not usually given or seen as a requirement in relation to evidence of misconduct by the defendant towards the victim.⁵

[17] It is therefore critical in analysing whether a propensity direction was required to understand first the basis upon which the Crown put its case to the jury.

[18] At no stage did the Crown in its opening or closing invoke propensity reasoning, or submit there was evidence showing on T's part a tendency to act in a particular way or have a particular state of mind. There was no traditional similar fact reasoning put to the jury.

[19] It was not explained directly to the jury why the charges were being heard together. However, it can be safely assumed that this would have been obvious to the jury. It would have been impractical and irrational from the jury's perspective for each complainant to have a separate trial, as there was a continuous story to be told over the 10 year period with interlinking movements and events. The family history and how it functioned over that period were part of an on-going story. To fracture that story into individual trials would have meant that there could be no full understanding of the background to the alleged offending and the nature of the family relationships. In cases of this type a full understanding of the context can be critical to appreciating the nature of the violent and abuse conduct alleged. This is often described as relationship evidence.

[20] Importantly the Judge said at the beginning of the trial:

In effect we're conducting 33 separate trials at the same time because you must determine each count or charge in the charging document on the basis of the evidence which relates to that charge, and you must do that separately in respect of each charge and come to a separate decision. Mr Foreperson, at the end of the trial you'll be asked for 33 verdicts. They, of course, can be all the same or different, according to the verdict which you have reached. To reach your verdicts you have to isolate the evidence which relates to each charge, and the issues of law as I explain them to you, which are relevant to each of the charges.

⁵ At [93].

[21] In *Perkins v R* the appellant faced a number of charges of sexual violation by rape and assault with a weapon against his former partner.⁶ At trial the jury heard evidence concerning violence against the children of the family (although no charges were filed in respect of those matters) as well as violence against the former partner. This Court noted that it was important to the Crown case to show a general atmosphere of violence in the household.⁷ This set a background for what the Crown claimed was the complainant's unwilling acquiescence to sex, who on past experience knew that if she declined she would be assaulted. It was stated by the Court:⁸

So also where violence erupts in the familial context the underlying family dynamics are relevant to explain why and in what context alleged incidents occurred, and the effect of them. This may be particularly so where the violence is across the board in a family, and/or when there is sexual abuse. In this respect as was stated in the minority decision in *Mahomed*:

So in cases of alleged intra-familial sexual abuse, a victim may be unable to give a coherent account of what happened and why without discussing the underlying family dynamics.

[22] It was also stated:⁹

This is not propensity evidence that falls within the category of orthodox similar fact evidence. Rather it is what is sometimes called relationship evidence. The evidence is allowed in not because of the similarity between what is alleged by way of background and the actual offending (although there are similarities) but rather because otherwise the complainant's evidence as to the alleged offending which is the subject of charges will be necessarily incomplete and perhaps not comprehensible from the point of view of the jury. It was said of relationship evidence in *R v MacDonald*:

The relevance of the relationship evidence in terms of its narrative significance was obvious – so obvious that the point went without saying. In that context we do not think it matters that the Judge did not explain this to the jury. He certainly did make it clear to the jury that they had to focus on the period covered by the charge.

[23] In *KM (CA249/2013) v R*, where various sexual acts against two sisters were alleged, no propensity ruling was sought at trial and on appeal the defence conceded that there was no reliance on propensity evidence.¹⁰ However, the defence argued that the references to considering the sisters “together” warranted a propensity

⁶ *Perkins v R* [2011] NZCA 665.

⁷ At [26].

⁸ At [21] (footnote omitted).

⁹ *Perkins v R*, above n 6, at [27] (footnotes omitted).

¹⁰ *KM (CA249/2013) v R* [2014] NZCA 120.

direction. It was held by this Court to be sufficient for there to be a direction in relation to the various charges that they be treated as separate trials and dealt with individually, as the references to the sisters together did not create a risk of propensity reasoning.¹¹

[24] Similarly in this case, the jury could not have adopted propensity reasoning without going beyond the directions of the Judge and the structures that they had to comply with. The jury was given a strong warning that they were not to be influenced by emotion and anger against a particular person. They would have nevertheless legitimately understood, through the relationship evidence, that this was a family where violent conduct by T was accepted by family members.

[25] The nature of the question trails presented to the jury required them to go through each charge and consider the individual components relating to that charge. The Crown in closing went through each individual charge and set out how it sought to prove its case. The Judge also went through each individual charge and explained to the jury how the Crown had to prove each particular element of that charge, going through the elements.

[26] It is also to be noted that at the end of the summing up the Judge returned to the topic of separate trials and said this:

You must determine each charge on the basis of the evidence that relates to that charge. That means you must consider each charge separately and come to a separate decision about it. To do that you have to isolate the evidence and the issues of law which are relevant to each charge. Mr Foreperson, you'll be asked for separate verdicts on each charge at the end of the trial, and you can, of course, reach different verdicts on different charges. In effect, we are conducting 32 separate trials^[12] at the same time.

[27] The jury acquitted T of three charges: a representative charge of assaulting his wife with a steel bar, a representative charge of assaulting his wife with a glass vase, and a representative charge of sexually violating his wife by rape. This suggests, following the Judge's directions, the jury carefully considered each charge

¹¹ At [21]. See also observations to similar effect in *T (CA871/2012) v R* [2015] NZCA 83 at [30].

¹² One charge having been withdrawn by the Judge since the beginning of the trial.

on the evidence and did not utilise impermissible propensity reasoning between the charges.

[28] The difficulty in the Judge giving a propensity direction in this case would have been that the Judge would have had to ask the jury to refer to a proposition favouring the Crown that the Crown had not itself put. As noted by the Court of Appeal in *KM (CA249/2013) v R*, there is no authority requiring the Judge to give a propensity direction without such an issue being raised.¹³ While such a direction could have been given, we are satisfied in the circumstances it was open to Judge Butler to do what in fact was done, and give a direction that each charge should be considered as a separate trial and that prejudice or dislike of the defendant had to be put to one side, without going further. For these reasons we conclude that the Judge was not required to give any further direction in relation to the evidence that fell within the definition of propensity evidence.

[29] Mr Turkington also argued that there were various comments made by the Crown prosecutor which obliquely called into play propensity reasoning. We do not propose dealing with his careful submissions on this point separately, as it forms part of the wider argument concerning whether propensity reasoning was wrongly used. The prosecutor did at times make general remarks about the character of T that were not directly associated with the alleged offending. The allegations of his temper, violence and alcohol use were all part of the individual cases against him in relation to the abuse charges. However, prosecutor's references did not rely on coincidence or tendency reasoning. For the reasons stated above, no propensity direction was necessary.

[30] Mr Turkington also submitted that the Crown's references to a book that T's wife wrote after the offending about violent abuse in their relationship warranted a propensity direction. However, the book was not propensity evidence. The fact that the book was written by the complainant was not put forward to show any particular pattern of behaviour by T. It was referred to by the Crown to show that there was a consistency between what she wrote and what she now said had happened, which might assist the jury in assessing her credibility. This is clear from the references to

¹³ *KM (CA249/2013) v R*, above n 10, at [19].

the book in the Crown's closing. The prosecutor referred to the book as showing how unlikely it was that all the complaints were made up, given the book was written in early 2010, stating: "It's clear that that book was a therapeutic process for [T's wife] and not a vendetta I say to get the defendant convicted of offences". At every point that the book was mentioned, the consistency of the complainant's statements was linked to it.

[31] The Judge in his summing up stated:

The only relevance of the book and the contents is to show there was a consistency about what she wrote and what she now says happened to her. That may be of assistance to you in assessing her credibility, that is whether you believe her or not.

[32] The book was therefore clearly put forward as a prior consistent statement under s 35 of the Evidence Act, with a direction from the Judge limiting its use to that issue. No propensity ruling was necessary.

[33] This ground of appeal is therefore rejected.

Failure to give adequate s 122 direction

[34] The trial took place before the release of the Supreme Court judgment of *CT (SC88/2013) v R* which discussed when warnings under s 122 of the Evidence Act should be given.¹⁴ No reliability or other warning was sought by counsel at the trial, and no warning was given.

[35] Mr Turkington submitted for T that *CT* required a s 122 direction, given that there were events at issue in the trial that took place more than 10 years prior to the hearing. He submitted that at the very least there should have been an acknowledgement that T's own memory, and thus his ability to mount a successful defence, may have been compromised by the passage of time. Mr Turkington, relying on *CT*, submitted that evidence could be unreliable for the purposes of s 122(2)(e) for reasons other than the effect of delay on the memory of the complainant.¹⁵ All that T could effectively say in response to the allegations is that

¹⁴ *CT (SC88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465.

¹⁵ At [49].

they did not happen. Mr Turkington also relied on *Tranter v R*, where a retrial was ordered where counsel sought a s 122 direction and an inadequate one was given.¹⁶

[36] Under s 122(2)(e) of the Evidence Act, whenever evidence is given about conduct of a defendant that allegedly occurred more than 10 years previously, the Judge must consider warning the jury of the need for caution in accepting the evidence and deciding what weight to give it. In *CT* it was made clear that a lengthy lapse of time between the conduct and the evidence at trial may raise reliability concerns that bear on the fairness of the trial. The Court observed that cases of long delayed prosecution will almost always give rise to a risk of prejudice.¹⁷ The Supreme Court held that it was not always appropriate to leave it to counsel to point out the risks associated with such evidence. The warning should have the imprimatur of the Judge.¹⁸ On the facts of *CT* there had been a particular discrepancy between the complainant's statements to the Police and her evidence at trial. A new count of rape had been added during the trial. It was held that a direction ought to have been given mentioning the effect of time on memory for both the complainant and the appellant, and that the general warning given by the Judge was inadequate.¹⁹

[37] We accept that in this case the passage of time was significant, although not as significant as in *Tranter*.²⁰ There, this Court allowed an appeal where the sexual offending had dated back to 1982, and a limited s 122 direction had been given. Prejudice to the appellant was said to have resulted not only from the impact of time on memory, but also to the loss of specific contextual details.²¹ There were particular issues with the layout of the house, a burn to the appellant's foot and an alleged theft of jewellery.

[38] In this case there were no circumstances indicating that T was not able to obtain evidence to defend himself because of the delay. It was essentially a "he said, she said" situation. The documentary evidence that did exist supported the defence

¹⁶ *Tranter v R* [2014] NZCA 602 at [19]–[21].

¹⁷ *CT (SC88/2013) v R*, above n 14, at [26] and [51].

¹⁸ At [50].

¹⁹ At [55].

²⁰ *Tranter v R*, above n 16.

²¹ At [22].

contentions, insofar as Plunket records and other extraneous evidence indicated no abuse in the family. As well, although the book written by T's wife documented allegations of violence suffered by the family at T's hands, it made no mention of rape charges in any way. This was relied on by the defence to support its case of fabrication.

[39] T had given strong and, on its face, credible denials of the allegations in his Police interview. He did not give evidence. T's defence was based on fabrication. It was not based on the fabrication of a particular event on a particular date at a particular location, but rather based on the proposition that his wife was lying on all the charges involving her. The defence was at least in part also based on the theory that the children had unconsciously adopted what their mother had said or written in her book, with examples given in closing about their choice of words indicating that they were repeating a story from their mother.

[40] Unlike the position in *Tranter*, no s 122 direction or any general reliability direction was sought by counsel.²² Given that the defence was of fabrication and of T's wife coaching her children, we do not consider that the giving of a warning under s 122 would have materially contributed to different verdicts. In the end the case came down to whether there was a reasonable doubt that the complainants were lying in relation to any of the specific charges. The jury clearly did find a reasonable doubt existed in relation to some charges. We consider that this case is different from *Tranter* in that the passage of time was not as long, there were not specific issues of contested detail where memory was critical, and no warning was sought by counsel.

[41] This is not to say that it would not have been best practice for the Judge to have given a warning in terms of s 122 about the difficulty that arises with the passage of time when broad allegations must be refuted by the defence. However, we are not satisfied that a warning might reasonably have made a difference to the outcome. It has not been suggested to us that T has been disadvantaged in any specific way by the loss of contextual details. It has not been shown that there has

²² *Tranter v R*, above n 16, at [16].

been a miscarriage of justice arising from any failure to give a s 122 warning. This ground of appeal does not succeed.

Representative charges

Generally

[42] Mr Turkington submitted that the nature of the representative charges for rape and unlawful sexual connection were too general and made the trial unfair. The first was a representative charge of sexual violation by rape over a 12-year period in the lower North Island, and the second for sexual violation for the same period and area by unlawful sexual connection. These were intended to cover T's wife's evidence about on-going episodes throughout this period of non-consensual sex. She described repeated occasions where she was forced to give T oral sex and he would then proceed to rape her by forced sexual intercourse. She only mentioned one occasion specifically, which occurred at one of two addresses in Palmerston North, and she remembered this because he had said to her that if she did not give him oral sex properly he would go into her daughter's room.

[43] Mr Turkington relied on the principles set out in *Dryden v R*,²³ *Walker v R*,²⁴ and *Mason v R*,²⁵ to the effect that where particular acts of alleged offending can be sensibly charged separately this should be done. This is because there is otherwise a risk that a jury might wrongly find guilt because it is sure that some offending has occurred, but is unsure about any particular act having been proven. Alternatively there may be a risk that all jurors are satisfied that one allegation has been proved, but not necessarily the same one.²⁶

[44] At the time of the offending, s 329 of the Crimes Act 1961 applied. It provided:

329 Contents of counts

- (1) Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed

²³ *Dryden v R* [2013] NZCA 232 at [10]–[23].

²⁴ *Walker v R* [2012] NZCA 520 at [47]–[53].

²⁵ *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [9]–[13].

²⁶ *Dryden v R*, above n 23, at [14].

either some crime therein specified or, except where the indictment contains a count specifying a crime for which an offender may be proceeded against only by indictment, some offence therein specified that is punishable by imprisonment for a term exceeding 3 months; and for the purposes of this section and of sections 330 to 344 of this Act the term “crime” shall be deemed to include any such offence as aforesaid.

[45] In this case, with the one possible exception mentioned above, the offending was of the generalised type that might be expected to be covered by a representative charge. Inevitably the sexual abuse complaints could not be broken up into specific events at specific times and places because they occurred in a relatively regular and repetitive manner over a long time. Representative charges are now recognised as lawful in New Zealand. The enactment of the Criminal Procedure Act 2011 specifically recognises their validity in ss 17 and 20.

[46] Mr Turkington’s submission was that, if the Crown could not anchor the charge with some specificity as to time, place and circumstance where an act occurred then the trial was unfair. That was tantamount to a submission that representative charges should not be permitted.

[47] This is the position in Australia. The High Court of Australia has held that representative charges are at common law contrary to principle.²⁷ The rationale is that representative charges do not allow the defendant a sufficient ability to run a defence, and leave the risk that different members of the jury might reach different conclusions as to the particular incident within the broad period that they agree occurred. However, it is significant that every state of Australia has statutorily permitted charges that have all the features of representative charges in relation to sexual offending against children. In New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and Northern Territory, there are offences of maintaining or persisting in a sexual relationship with a child.²⁸ In almost all of these provisions there is language to the effect that, for instance, it is not necessary to prove the dates on which any of the unlawful sexual acts were

²⁷ *S v R* (1989) 168 CLR 266; and *KB v R* (1997) 19 CLR 417.

²⁸ Crimes Act 1900 (NSW), s 66EA; Crimes Act 1958 (Vic), s 47A; Criminal Code 1899 (Qld), s 229B; Criminal Code Act Compilation Act 1913 (WA), s 321A; Criminal Law Consolidation Act 1935 (SA), s 50(1) and (2); Criminal Code Act 1924 (Tas), s 125A; and Criminal Code Act 1983 (NT), sch 1, s 131A.

committed or the exact circumstances in which any of the unlawful sexual acts were committed.²⁹ It is clear that the state legislatures in Australia, at least, have seen some utility in representative-style charging where there is a clear pattern of sexual abuse across periods of time.

[48] In *R v Accused* (CA 160/92), this Court expressly disavowed the approach taken by the Australian Courts, saying:³⁰

... the practice is to specify in the count the period shown by the complainant's evidence and to allege a crime (eg rape or indecent assault) during that period. Any further available descriptive particulars of the alleged offence should be added, as has been done in the present case. To obtain a conviction the prosecution must then satisfy the jury beyond reasonable doubt that at least one criminal act of the description alleged was committed by the accused during that period. The trial Judge in *S v R* directed in that way and, with great respect to the High Court of Australia, we are unable to fault that direction unless further and better particulars were available, or there were features of that case distinguishing it from ordinary specimen charge cases in this field; or unless there is some special rule of Australian law which precludes specimen counts.

[49] To comply with s 329 of the Crimes Act, each count needed to be as specific as was “reasonably possible in the circumstances”, but the Court did not impose any base standard of specificity.³¹ A direction was required that the jury must be satisfied beyond reasonable doubt that on at least one occasion during the relevant period, there was an incident of the act specified in the charging document. However, where specific incidents of offending can be isolated amongst others, they must be the subject of separate charges.³²

[50] A subsequent Practice Note endorsing the practice was issued on 21 November 1994.³³ Given that representative charges were described in the 1992 case *R v Accused* (CA 160/92) as a “commonly followed” practice, they have evidently been in use for at least 25 years in New Zealand, and, based on comments in *R v P* (CA 184/99), possibly up to 32 years.³⁴

²⁹ Criminal Code Act 1924 (Tas), s 125A.

³⁰ *R v Accused* (CA 160/92) [1993] 1 NZLR 385 (CA) at 389.

³¹ At 391.

³² *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

³³ Chief Justice and Chief District Court Judge *Form of Indictment – Particulars of Sexual Offending* (21 November 1994).

³⁴ In *R v P* (CA 184/99) CA184/99, 2 September 1999 at [19], the Court commented that the practice has occurred in New Zealand for at least 15 years.

[51] It is acceptable practice for representative charges to be used where there is a pattern of offending and criminal acts and for an understandable and acceptable reason the complainant is unable to distinguish between them in terms of their dates and details. The position was summarised by this Court in *Walker v R*:³⁵

The principles relating to s 329 and the content of charges that can be taken from the cases are:

- (a) If particular acts of alleged offending can sensibly be charged separately without undesirably lengthening the indictment (overcharging), then that should be done.
- (b) Representative charges may be appropriate where there is a pattern of offending and criminal acts of a similar nature are alleged to have happened frequently and, for understandable reasons, a complainant is unable to distinguish between them in terms of their dates or details. In such cases, it would be artificial to characterise the conduct as separate offences because there is nothing in the evidence by which jurors might distinguish between one act and another.
- (c) On the other hand, repetitive acts which can be distinguished from each other in a meaningful way should be charged separately, even if they relate to more than one act of a certain class or character.

[52] As was noted in *Dryden v R* representative charges are most commonly used in the context of alleged sexual offending, where repetitive offending is alleged. It was observed:³⁶

Often the complainant may not be able to distinguish between, or identify, individual acts that would support separate charges. It is appropriate to use a representative charge in a case involving a continuous course of conduct because it would be artificial to characterise such conduct as constituting a series of separate offences. The jury may bring in a guilty verdict on a representative charge if they are sure the accused has committed at least one act of the type alleged during the period covered by the charge.

[53] Thus, representative charges will be appropriate where a continuing course of conduct is alleged, but the prosecution evidence does not enable particulars to be given of discrete instances of offending.³⁷ Care must be taken not to lengthen an indictment undesirably.³⁸

³⁵ *Walker v R*, above n 24, at [47] (footnotes omitted).

³⁶ *Dryden v R*, above n 23, at [16] (footnote omitted).

³⁷ *Gamble v R* [2012] NZCA 91 at [32].

³⁸ At [33].

This case

[54] It was clear in this case that the complainant was not able to recount any particular dates or locations in respect of the sex charges. In describing how T forced her to have sex, she stated:

It depends on the mood it could be...month...monthly, you know sometimes it was once a week sometimes it was longer...you know they were, they were sometimes they were close together and other times it was like ages...since the last time. Yeah.

[55] It is also clear that T's wife could not distinguish between the various sexual acts by providing dates, places or other details. If charges had been laid to reflect for instance each family home, this would have been artificial. The prosecution had no evidence distinguishing events relating to each particular home.

[56] Even in relation to the incident in which his wife recalled T's threat to go to one of the children's bedroom if his demands were not met, there was still no specificity as to time and place. His wife's evidence had also referenced the last incident occurring at Palmerston North, but again there were no exact dates and addresses. There was no sensible basis to distinguish the alleged offending in a meaningful way.

[57] There are a number of cases where representative charges have been used where offending ranged over five and six year periods have been used.³⁹ There are at least three cases where the periods were approximately nine or 10 years.⁴⁰ Here the alleged offending was over a 10 to 12 year period, and there was no principled way to break that up. It is clear that the representative charge concept was designed to accommodate precisely this scenario, despite the particular spread of the time and geographical locations in the current charges.

[58] Our view that the use of representative charges was permissible is influenced by the fact that although there is little geographic or temporal detail anchoring the complaints, T's wife was very specific about the particular nature of T's methods of

³⁹ See *G (CA883/10) v R* [2011] NZCA 395; *R v Welleans* [2015] NZHC 2263; *R v G* [2015] NZHC 2620; and *R v Wilson* [2015] NZHC 1603.

⁴⁰ *R v Seddon* HC Timaru CRI-2008-076-2301, 15 October 2009; *R v Langley* HC Wellington CRI-2008-078-250, 22 May 2009; and *R v Smith (Malcolm)* [2000] 3 NZLR 656 (CA).

abusing of her. There was therefore a level of detail, for example about the violence he employed against her, which could provide a basis for a meaningful cross-examination and to which T could respond by giving evidence if he chose to do so.

[59] It is significant that there was no objection to the representative charges prior to the trial or during the trial. While it is not a necessary prerequisite to a successful challenge to representative charges that objection be made to this prior to trial or during the trial, and there is no principle analogous to estoppel in assessing whether there has been a miscarriage of justice,⁴¹ it is still a factor of relevance that experienced counsel can be taken as not having perceived any particular prejudice or miscarriage of justice during the trial.

[60] Although the representative charges used in this case were broad, this type of charge is well-established practice in New Zealand and now expressly approved in statute. It enables charges to be laid when there has been a continuing pattern of behaviour over a prolonged period of time. In those circumstances nothing makes the use of representative charges inherently unfair when accompanied with the appropriate directions, as they were in this case. The alternative would be that an artificial focus on a particular day or place would have to be chosen for the charge, or charges would not be brought at all.

[61] Therefore this ground of appeal also fails.

The appeal against sentence

[62] The Judge imposed an end sentence of 17 years' imprisonment.⁴² He fixed a starting point of 15 years' imprisonment for the sexual offending against T's wife, based on the bands in *R v AM (CA27/2009)*,⁴³ and uplifted that sentence by two years to reflect the offending against the children.⁴⁴ He declined to impose a minimum term of imprisonment. It was submitted for T that the sentence was manifestly excessive and that a total sentence of nine years was all that was justified.

⁴¹ *Gamble v R*, above n 37, at [36].

⁴² Sentencing notes, above n 1.

⁴³ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

⁴⁴ Sentencing notes, above n 1, at [40].

[63] Mr Turkington sought to compare this case to *R v S* where a starting point of 15 years was fixed in relation to very severe sexual offending in a marriage over a 14-month period.⁴⁵ However, this offending was in total more serious because of its scale. The sexual offending lasted for approximately 10 years.

[64] When representative charges have been proven and the offender is to be sentenced, the Judge may not have a clear indication of the jury's assessment of the extent of the offender's culpability. In such a case Judges are required to reach their own conclusions on the issue of culpability when determining the sentence.

[65] In assessing that level of culpability in this case, all the offending involved elements of breach of trust, a vulnerable victim and premeditation. Mr Turkington submitted that those factors existed to a moderate degree. We accept that is a fair description. However, there were two further more serious aggravating factors.

[66] First, there was the violence which accompanied the sexual violations and rapes. T repeatedly assaulted the principal complainant using implements, and through those assaults established the regime of power over her which enabled him to carry out his sexual offending. The assaults included the repeated use of a broom and a knife. If separated from all the sexual offending, the assaults would in themselves constitute serious offending warranting a lengthy term of imprisonment.

[67] However, the most significant aggravating factor (and fifth aggravating factor overall) was the scale of the offending. There were multiple acts of unlawful sexual connection and multiple rapes. The way the Judge expressed it, offending occurred "often over the course of your 10 year marriage".⁴⁶ Even if they only took place once a month, they would, combined, number in the hundreds.

[68] Thus, for the sexual offending against T's wife we consider that the right band was band 3, the band fixed by Judge Butler.⁴⁷ He placed the offending near the top of band 3 and the bottom of band 4 in reaching the starting point of 15 years' imprisonment. Indeed, although we are content with the Judge's categorisation of

⁴⁵ *R v S* HC Tauranga, CRI-2010-070-4081, 23 April 2012.

⁴⁶ Sentencing notes, above n 1, at [27].

⁴⁷ Sentencing notes, above n 1, at [28].

the offending as being towards the top of band 3, it could have arguably been placed at the bottom of rape band 4, given the very extensive scale of the offending and the accompanying violence.

[69] On the facts of *R v AM (CA27/2009)* itself, the representative charges spanned from 10 December 1999 and 30 September 2006, a period of nearly seven years, and included sexual violation by rape, oral sex and inducing indecent acts (all committed against a grandchild of under 12 years) as well as other similar offences over a shorter period against two other young victims, also grandchildren.⁴⁸ He received a 17 year starting point, not challenged on appeal and accepted by the Court as “unimpeachable”.⁴⁹ Although the sexual offending in this case did not involve multiple child victims, T’s 17 year end sentence also reflects his on-going violence against his step-child and children, as well as the lengthy offending against his wife.

[70] We conclude that the Judge’s methodology, the end starting point and the overall sentence were the result of a correct application of the principles of *R v AM (CA27/2009)*. Any significantly lower sentence would not have adequately reflected T’s culpability. The appeal against sentence does not succeed.

Result

[71] The appeal against conviction is dismissed.

[72] The appeal against sentence is dismissed.

[73] To protect the identity of the complainants, we made an order prohibiting publication of name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

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Crown Law Office, Wellington for Respondent.

⁴⁸ *R v AM (CA27/2009)*, above n 43, at [128].

⁴⁹ At [148].