

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

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

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

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

**I TE KŌTI PĪRA O AOTEAROA**

**CA159/2018  
[2018] NZCA 628**

|         |                             |
|---------|-----------------------------|
| BETWEEN | C (CA159/2018)<br>Appellant |
| AND     | THE QUEEN<br>Respondent     |

Hearing: 27 November 2018

Court: Winkelmann, Ellis and Whata JJ

Counsel: B J Hunt for Appellant  
J A Eng for Respondent

Judgment: 21 December 2018 at 11 am

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**JUDGMENT OF THE COURT**

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**A The appeal against conviction is dismissed.**

**B The appeal against sentence is allowed in part. The minimum period of imprisonment is quashed.**

**C      Order prohibiting publication of the 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 Whata J)

[1]      C was found guilty on multiple charges of sexual violation and indecent assault of his step daughter, B. He now appeals against conviction and sentence. He claims the trial miscarried because of trial counsel error, the judge made a factual error in the summing up and the verdicts on Charges 1–4 were unreasonable. He also says the sentence of 15 years and six months’ imprisonment was manifestly excessive. A minimum period of imprisonment (MPI) of eight years was imposed.

**Background**

[2]      C met B’s mother, T, in late 2010. They moved into C’s home at X Street in 2013, having stayed there from time to time before then. This included a period when only B lived with C at this address. On B’s account, the offending commenced when she was 11 or 12. C took emotional control of her life and isolated her from friends and family. The offending, she claims, involved groping her breasts,<sup>1</sup> grabbing her bottom,<sup>2</sup> digital penetration,<sup>3</sup> oral sex<sup>4</sup> and multiple rapes.<sup>5</sup> It included incidents in a spa pool<sup>6</sup> and during a trip to Auckland to see a Taylor Swift concert.<sup>7</sup> The offending continued after they moved to Y Street in October 2014. This later offending allegedly

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<sup>1</sup> Charge 1 (representative).

<sup>2</sup> Charge 2 (representative).

<sup>3</sup> Charge 3.

<sup>4</sup> Charges 5 and 6 (both representative).

<sup>5</sup> Charges 4, 7 (representative) and 14.

<sup>6</sup> Charges 8 and 9 (both representative).

<sup>7</sup> Charge 10.

included digital penetration<sup>8</sup> and rape at Y Street;<sup>9</sup> masturbation in a car,<sup>10</sup> oral sex,<sup>11</sup> and rape while on a trip to Queenstown.<sup>12</sup> B also says C gave her cannabis.<sup>13</sup>

[3] At trial, B gave evidence about each of her allegations. In closing, the prosecution emphasised the evident credibility of her detailed account of the offending. The prosecution accepted B did not complain about the offending at the time, but attributed this to C's controlling behaviour. The prosecution noted the consistency between B's evidence and her mother's evidence on important matters, including C's controlling behaviour. It was put to the jury that B's failure to complain, and minor inconsistencies in B's evidence, were "red herrings".

[4] C denied it happened. His trial counsel, Mr Westgate, told the jury that the "red herrings" were in fact "red flags". He highlighted the complete absence of any contemporaneous complaint by B to her mother, her father, her counsellors and the lawyer in her biological parents' custody proceedings. He pointed to the "timing of things" and highlighted that she did not have to live with C, but nonetheless chose to for a time. He said the evidence did not show she was isolated by him. He said her mother did not notice anything wrong with B. He referred to the Taylor Swift concert allegations, noting that C had nothing to do with organising that trip and that there was Facebook evidence suggesting B was looking forward to going with C. He also referred to B's "13 sessions" with a counsellor and emphasised there was "not a hint that [C] was worried about that". Sessions with another counsellor were also said to (in short) debunk the idea that B was isolated and/or C controlled her.

[5] Mr Westgate identified several apparent weaknesses in B's account, highlighting, among other things, matters not mentioned in her interview, inconsistencies with proven facts, internal inconsistencies — including as to timing, and the inherent implausibility of some allegations, for example an alleged rape in a spa a few metres from B's mother. The credibility of testimony by B's friend about

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<sup>8</sup> Charge 11 (representative).

<sup>9</sup> Charge 12 (representative).

<sup>10</sup> Charges 13 (representative) and 18.

<sup>11</sup> Charges 15 and 17.

<sup>12</sup> Charges 16 and 20.

<sup>13</sup> Charge 19.

C's controlling behaviour was also seriously doubted, as was the evidence of a former workmate about inappropriate comments allegedly made by C.

[6] Judge Crosbie's summing up was fulsome. It included, among other things, multiple references to B's evidence and detailed examination of each of the charges. No direction errors are claimed by C. Error of fact is however claimed in relation to one of the rape charges, Charge 12. On B's evidence, this rape took place at Y Street. But the Judge's summing up wrongly suggested it occurred while they were still resident at X Street and happened in a spa.

[7] The jury found C guilty on 14 of the charges, including 6 charges of sexual violation by rape. He was acquitted on charges relating to alleged sexual offending in Queenstown.

#### **Trial Counsel error**

[8] The first ground of appeal is trial counsel error. Ms Hunt alleges multiple problems with Mr Westgate's trial performance. But only three raise the prospect of miscarriage:

- (a) Mr Westgate did not adequately prepare for trial;
- (b) Mr Westgate did not follow instructions; and
- (c) Mr Westgate did not properly advise C about whether he should give evidence.

[9] C, Mr Westgate, and junior counsel, Ms Neugebauer gave evidence about these claims. C's evidence-in-chief is largely irreconcilable with the accounts given by both Mr Westgate and Ms Neugebauer in terms of trial preparation, advice and instructions.

[10] We now turn to each complaint under this heading.

### *Adequacy of preparation*

[11] Ms Hunt complains that C never had a proper opportunity to review the evidence, including the evidential video interviews (EVIs) and B's medical information, prior to trial. She also notes there are no records of advice given, or records of what was reviewed or instructions received. No briefs of evidence were prepared.

[12] We agree that the trial preparation was not a model of its kind. As noted by this Court in *Hall v R*, a defendant's factual instructions should be recorded in a signed brief of evidence unless there is a good reason not to.<sup>14</sup> Nevertheless, we are satisfied preparation for trial was adequate. First, Mr Westgate sent the disclosure documents to C for his review on 8 November 2016 more than 12 months prior to trial. This afforded C ample opportunity to review the disclosure materials and to understand the claims made against him for taking advice and giving instructions. There were then four meetings in the week prior to trial, running for two to four hours each. They were sufficient to prepare for trial. Relevantly, B's EVI was a relatively straight-forward narrative of the alleged offending, and C's defence was always, and remains, that it did not happen at all. This was not a case where matters of fine-grained detail on each of the charges needed to be explored and then put to the complainant at trial.

[13] Second, while the record of advice and instructions is sparse, there are notes from one of Mr Westgate and C's pre-trial meetings, the contents of which clearly set the frame for the defence theory that subsequently emerged at trial. We return to this file note below at [20].

[14] Third, it is clear from the conduct of the case that Mr Westgate adequately prepared for trial, including by reviewing B's EVI and her medical notes with C. To illustrate, matters of detail explored in cross-examination and later in closing must have come from a good understanding of the disclosure materials and from discussion with C. For example, there is close cross-examination about (among other things):

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<sup>14</sup> *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [95], referring to the Ministry of Justice *Practice Standards for Legal Aid Providers* (October 2011) at [5.4].

- (a) the timing and location of key events;
- (b) inconsistencies in B's account;
- (c) her relationship issues with her mother;
- (d) B's mental health issues;
- (e) persons C and B met while in Auckland at the time of the Taylor Swift concert, or while in Queenstown (including his daughter and son-in-law);
- (f) where they went while in those locations; and
- (g) other minutiae, including conversations C had with B's employer and who else lived with them at Y Street over the relevant period.

[15] It is also evident to us that the acquittals in relation to the Queenstown charges can be linked to cross examination about specific details of the Queenstown trip that must have been identified through pre-trial briefing. Accordingly, we reject this complaint.

*Failure to follow instructions*

[16] As stated in *Hall*, there are three fundamental decisions on which trial counsel's failure to follow specific instructions will generally give rise to a miscarriage: plea, electing whether to give evidence and to advance a defence based on the defendant's version of events.<sup>15</sup> Further, in an appeal based on failure to follow instructions on fundamental matters, the focus is on whether, as a matter of fact, there was a failure to do so.<sup>16</sup>

[17] C says he instructed Mr Westgate to cross-examine B about:

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<sup>15</sup> At [65].

<sup>16</sup> At [77].

- (a) her motivation to lie (because she was jealous of C's daughter and/or her younger brother, M);
- (b) her pornography addiction; and
- (c) her diary — which C claims said nothing about the alleged offending.

[18] C says he also instructed Mr Westgate to call him as a witness together with his mother, daughter, and son-in-law. C complains he did none of these things.

[19] Mr Westgate, supported by Ms Neugebauer, largely refutes these claims. He says, in short, all of C's ideas were discussed, a plan of action agreed and then adopted. The plan was to focus on B's lack of contemporaneous complaint even though she had ample opportunity to do so. He also says that the risks associated with examining B's motivation to lie and her pornography addiction were discussed with C, who agreed these matters should not be explored.

[20] We also reject this complaint. The available notes from pre-trial meetings support Mr Westgate's account that C was well briefed and the trial strategy adopted was based on clear instructions derived from a detailed review of the disclosure materials. The notes refer to B having "happily stayed with me at [X] street," that "there was no issues", but C "became aware [B] was being bullied and telling lies and not behaving". Mr Westgate noted that B "had issues lying" and her "mother was happy for [C] to keep an eye on her." The notes also record "there were times when I did take her phone off her", but "it was never for too long". C was "aware that [B] had counselling", there "were lots of opportunities to tell people", and "she was happy to go away with me alone." The notes conclude with the following: "refer to video", "straight denial" and "won't give evidence".

[21] The defence at trial clearly followed this narrative, logically culminating in an election by C not to give evidence. That election is then recorded in a note signed by C on the third day of trial which states:<sup>17</sup>

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<sup>17</sup> Ms Hunt developed a theory that there may have been two notes recording this instruction, both this one and one on 'brown' paper as per Ms Neugebauer's evidence. Whatever the significance of this (which is unclear to us), we think it likely there was only one record of election.

I [C] having been advised not to give evidence, confirm I will not do so.

[22] We also prefer Mr Westgate's and Ms Neugebauer's consistent accounts of the advice given to, and the instructions given by C, as markedly more credible and plausible than C's evidence that they are mistaken or lying. C's actual and apparent acquiescence throughout the trial to Mr Westgate's defence strategy (including not giving evidence), is entirely consistent with the fact that clear, cogent advice was given to C and that Mr Westgate acted on his instructions following that advice. Conversely, there is simply no cogent reason for both Mr Westgate and Ms Neugebauer to be "mistaken" or "lie" about C's instructions given C's alleged counterfactual involved an obviously flawed defence strategy based on C's fragile credibility, an improbable jealousy theory and a young girl's pornography addiction.

[23] As Mr Westgate noted in his affidavit, questioning B about both her jealousy motive and an alleged pornography addiction carried with it clear risks that outweighed any potential benefit of such cross-examination. Cross-examination on motive opened the possibility that B might say she was motivated to protect her little brother, M. Cross-examination on a pornography addiction might invite an allegation that C introduced her to pornography. It is plausible, and we think very likely, that Mr Westgate advised C about these risks and as transpired at hearing, a defence strategy carrying these risks was rejected by trial counsel and by C.

[24] In this regard, exemplifying the risks associated with exploring B's motives, at one part of the cross-examination, Mr Westgate questioned B about "cutting" herself and suggested to her that there was "a whole lot of stuff going on in your life that had nothing to do with sexual abuse at the hands of the defendant". She responded:

There certainly were things going on in my life but the worst thing going on in my life certainly was the sexual abuse.

*Failure to properly advise about giving evidence*

[25] C says he was never properly advised about whether he should give evidence. At most he recalls a very brief discussion after closing, which culminated in him signing a brown piece of paper recording an election not to give evidence. For reasons already expressed, we seriously doubt the credibility and plausibility of this narrative.



In addition, C contradicted his evidence in chief and accepted under cross-examination:

- (a) Mr Westgate told him the “pros and cons to a defendant of giving evidence”;
- (b) On the day before trial started, Mr Westgate said he was concerned that if [C] gave evidence he would “talk too much and overexplain under cross-examination”;
- (c) Mr Westgate advised him the prosecutor would “chew me up in about five minutes”; and
- (d) Mr Westgate told him “it’s generally better for a defendant not to give evidence if the Crown case isn’t going well because cross-examination of a defendant can help the Crown but that [C] would have to make a final decision when [C saw] how the Crown case goes”.

[26] While C remained steadfast that he was not properly advised, it is clear to us that he was carefully advised by Mr Westgate as to how he should approach his case and whether he should give evidence.

#### *Other issues*

[27] Finally, we reject residual complaints about Mr Westgate’s conduct of C’s defence. Mr Westgate openly acknowledged that there were matters raised by C that were not pursued by him and that he made the decision to not do so without recourse to C. For example, he did not cross-examine on B’s alleged diary. But this tactical decision was plainly open to a competent lawyer, as were the decisions not to pursue allegations of pornography addiction or a jealousy motive. The diary may or may not have existed and if it did Mr Westgate could not be sure it would have been helpful to C. There is also nothing in the apparent failure to oppose the amendment to the date range for Charge 14 (a rape on a teacher only day). No reason is given as to why this apparent failure is material to any verdict, other than to note that Charge 8 was dismissed. That is not a basis for a finding of miscarriage.

[28] Overall, it is clear to us that, in accordance with C’s key instructions, C’s most effective defence was put squarely to the complainant and left with the jury. This ground of appeal is dismissed.

### **Factual error**

[29] The second ground of appeal is based on factual error in the summing up. As noted above, the Judge wrongly described Charge 12 as a “spa” incident which took place while M was in hospital. The “spa” incidents occurred at X Street, and offending that occurred while M was in hospital took place at Y Street. C claims therefore the verdict on this charge is not safe.

[30] We disagree. The question trails identified the location of each of the charges, including Charge 9, which concerned the “spa” offending. In relation to Charge 12, the question trail was amended to strike through the words “the spa incident – [...] X Street, Dunedin”. Notably also, the question trail for Charge 12 refers to Y Street. Any confusion arising from the Judge’s summing up would have been dispelled by the corrections to the question trail.

### **Unreasonable verdicts**

[31] Charges 1–4 specify that the alleged offending occurred in the period 2012–2014.<sup>18</sup> They relate to the alleged breast groping and bottom touching, the first digital penetration and the first penile penetration. Ms Hunt contends Charges 1–4 could not, on the evidence, have taken place in that period. The jury verdicts were therefore unreasonable.

[32] We disagree. As stated by this Court in *R v Hughes*:<sup>19</sup>

The general rule of course is that the date of the offence as specified in the indictment is not material unless it is actually an essential part of the offence alleged.

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<sup>18</sup> This appeal ground as pleaded related to charges 1–4, 11, 13 and 17. The appeal in relation to the latter three were abandoned in argument.

<sup>19</sup> *R v Hughes* [1998] 1 NZLR 409 (CA) at 410; see also *P (CA84/2017) v R* [2017] NZCA 319 at [35].

[33] It was not contended before us that the precise date range in relation to Charges 1–4 was important to the defence at trial, or is important to the defence case now. Furthermore, the date range was never essential to the Crown case, and any mismatch between the alleged dates and the evidence about this offending does not give rise to miscarriage.

[34] Charges 1–4 relate only to the earliest offending in the sequence of the offending. We accept B expressed uncertainty in her evidence about the dates for this offending. She initially said she was 13 at the time (within the date range), but later said, “I was 12” and “it all started when I was 11 or 12”. This puts the date range for Charges 1–4 between 2010–2011 (not 2012–2014). B, however, was very clear about the context of this offending, including the first penetration. She clearly remembered earlier incidents of groping, while in the lounge when she was “11 or 12”. She said the first penetration occurred on “one of those nights I was staying at his and mum was out at Taieri”, and “we were in his room”.

[35] Accordingly, it was always available to the jury to acquit on Charges 1–4 in light of the uncertainty as to timing. Conversely, it was also plainly open to the jury to find on the evidence this early offending, in fact, occurred even though the precise dates of that offending were unclear. The verdicts therefore were not unreasonable.

## **Sentence**

[36] Judge Crosbie fixed sentence at 15 years and six months’ imprisonment for the lead rape charges, together with a minimum period of imprisonment (MPI) of eight years.<sup>20</sup> His start point for sentence was 17 years, having identified the offending as a “paradigm” band four case.<sup>21</sup> He discounted this by 10 per cent to account for totality. The Judge was not prepared to make a good character discount.

[37] Ms Hunt claims the start point was manifestly excessive, submitting that the offending falls within the middle of band three of *R v AM*, and the Judge should have fixed the starting point at 15 years’ imprisonment, with a 10 per cent discount for

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<sup>20</sup> *R v [C]* [2018] NZDC 5154 at [33].

<sup>21</sup> At [30]–[31], referring to *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

totality and a discount of 10 per cent for good character. She further contends the Judge should not have imposed an MPI, and there was nothing in the decision to show why the Judge was satisfied standard parole conditions were insufficient to fulfil the purposes of accountability, denunciation, deterrence or protection.

[38] We are satisfied the starting point adopted by the Judge was not wrong. This was very serious sexual offending against a young, vulnerable girl over several years. The nature, scale and duration of the physical and emotional violation sits at the top end of band three and the bottom end of band four of *R v AM*. The Judge's summary of the offending, not challenged on appeal, compels that conclusion. He said:<sup>22</sup>

- (a) Charges 1 and 2 involved repeated acts of groping her breasts and bottom when she was aged between 12 and 15. The charges 3 and 4, the first penetration incident involved digital penetration and rape of [B] when she was aged 12. Charge 5, oral sex by her on you on about five occasions at [X] Street when she was aged between 12 and 15. Charges 6 and 7, oral sex on [B] and rape of her at least twice a week between February 2012 and October 2014, a period of two and half years. [B's] evidence was, "Almost every night for a six week period after [M] was born", which the Crown suggests is about 270 occasions.
- (b) Charge 9, on the evidence 10 acts of rape in the spa at [X] Street when aged between 12 and 15. Charge 10, an act of rape at Auckland when away at the Taylor Swift concert when [B] was 14. Charges 11 and 12, oral sex on her and rape of her every two weeks while at [Y] Street. The Crown suggests that means some 32 occasions. Charge 13, repeated acts of masturbation by her of you when she was aged 15 at various locations around Dunedin in the car. Charge 14, rape of [B] at the age of 14 after giving her candy while she was home from school. Charge 17, forcing her at the age of 15 to perform oral sex on you while walking the dog at night.

[39] We also agree with the Judge that a discount for good character is not warranted or, if one were to be given, it would be small. This is not an isolated lapse in judgment in an otherwise blameless life. Moreover, the prospect of rehabilitation while C continues to deny the offending appears slim. The starting point was therefore within range.

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<sup>22</sup> At [7].

[40] Ms Hunt's submissions on the MPI are however cogent. As Ms Hunt noted,<sup>23</sup> the *R v AM* bands have the principles of accountability, denunciation, deterrence and protection built in. While, as we have said, this is very serious offending, we do not consider the usual parole conditions are insufficient to meet those principles, bearing in mind that C will need to satisfy the Parole Board that he should be released at the earlier dates. We are also mindful that this is C's first sentence for offending of this kind. His rehabilitation remains a primary consideration and should be encouraged, even though he presently denies the offending.

### **Result**

[41] The appeal against conviction is dismissed.

[42] The appeal against sentence is allowed in part. The minimum period of imprisonment is quashed.

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

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>23</sup> Citing *Nicholson v R* [2018] NZCA 352 at [22].