

**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  
AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF WITNESS K PROHIBITED BY S 204 OF  
THE CRIMINAL PROCEDURE ACT 2011.**

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

**I TE KŌTI PĪRA O AOTEAROA**

**CA370/2018  
[2019] NZCA 13**

BETWEEN	T (CA370/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	27 November 2018
Court:	Winkelmann, Ellis and Whata JJ
Counsel:	K J Beaton for Appellant JEL Carruthers for Respondent
Judgment:	20 February 2019 at 11.00 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. The sentences are quashed.**
- C Sentences are substituted as set out at [64]–[65] of this judgment. Leave is granted for T to apply to the District Court for home detention.**

**D Order prohibiting publication of the name, address occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.**

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**REASONS OF THE COURT**

(Given by Ellis J)

[1] T appeals against his convictions on four charges of sexual and violent offending, entered after a jury trial in the District Court at Timaru before her Honour Judge Maze in March 2018. He was found not guilty on two other charges of sexual offending. He had pleaded guilty to one charge of threatening to kill on the first morning of trial.

[2] On 21 June 2018, he was sentenced to three and a half years' imprisonment.<sup>1</sup>

[3] The complainant in relation to all charges was T's whāngai niece (and biological cousin), A, who was aged between 13 and 15 at the relevant time. T himself was aged between 19 and 20. T and the complainant were living in the same house at the time of the events in question.

[4] The thrust of Mr T's conviction appeal involves the proposition that the jury's mix of guilty and not guilty verdicts were inconsistent and that the guilty verdicts were otherwise unreasonable. T also appeals against his sentence.

[5] We begin by saying something about the charges themselves.

**The threatening to kill charge**

[6] Notwithstanding T's guilty plea to the threatening to kill charge, for reasons that will later become apparent, it is relevant to say something about it here. The summary of facts relating to this charge stated that:

On Friday the 18th of March 2016 around 2.20pm the defendant was at his home address ...

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<sup>1</sup> *R v [T]* [2018] NZDC 12607 [Sentencing notes].

The defendant was made aware from a family member that his niece had made a formal complaint to Police alleging that he had sexually assaulted her.

The defendant went outside and contacted the Police using the 111 system and said “I need you to come and get me, I am about to kill someone”.

Police arrived and he was subsequently arrested.

[7] It is unclear whether A was in fact in the vicinity at the time the telephone call was made; T later told police he did not know but assumed she was still at school (the call to police was made shortly before 2.30 pm).

[8] The police did, in fact, come and pick T up and he was interviewed (twice) shortly afterwards. The later evidential video interview (EVI), which was played at trial, relates both to the “threat” made during the 111 call and the allegations of sexual offending made by A, who had been interviewed just the day before. During the interview he denied any sexual offending against A. The summary of facts record that when T was asked about the 111 “threat”:

...the defendant stated it was his niece he wanted to kill as she had been saying things about him. He further stated he probably wouldn’t have killed her and would have just beaten her up.

### **The sexual charges**

[9] There were three separate alleged incidents which formed the basis of the charges of sexual offending laid against T.

#### *The first incident*

[10] The first incident was briefly described by A in her EVI. She said that in or around July 2014, A and T were watching a movie together on T’s bed. A said she fell asleep and woke to find T nibbling her ear, rubbing her leg, and squeezing her breast. A also said in her EVI that she didn’t “really remember much from that time” and, later in evidence, that she “didn’t think anything of it”.

[11] These allegations formed the basis for the first charge of doing an indecent act (charge one).

[12] It seems that as a result of a complaint made by A to a friend and other family members, T was asked to leave the home he shared with A and her family.<sup>2</sup> Police were not at that stage involved.

*The second incident*

[13] In approximately August 2015, however, T returned to live with A, her parents and siblings in a house on A Road. The second and third incidents were alleged to have occurred at that house.

[14] A's EVI statement about the second incident was that in or around August 2015, T entered A's room while she was having a nap. She woke to find him nibbling and licking her breasts and penetrating her vagina with his fingers. When she awoke and attempted to protest, T put his other hand over her mouth to stop her screaming.

[15] These allegations led to charges of doing an indecent act (charge two) and sexual violation (charge three).

*The third incident*

[16] The third incident was said to have occurred shortly before Christmas in 2015 when A was doing English homework in her room.<sup>3</sup> The adult occupants of the house (including T) had been drinking. A confirmed in her statement that her parents and five siblings were also at home, in rooms downstairs.

[17] A said that T entered her room, pushed her down on the bed, tried to take her clothes off, put his hands down her pants and touched her legs and vagina, put his fingers inside her vagina (scratching her with his fingernails), tried to get her to lick his fingers and to hold and suck his penis, and put his penis against her body including between her breasts and against her genitalia. She alleged that during the incident (which she estimated lasted between one to one and a half hours) T slapped her in the face, yelled at her, punched her in the sides causing bruising, hit her head against the wall, and pushed and squeezed her neck and throat leaving scratch marks.

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<sup>2</sup> In his own EVI, T denied that this was why he had left.

<sup>3</sup> This part of the evidence is slightly odd because A also said it was the school holidays.

[18] The third incident allegations resulted in one representative charge of male assaults female (charge four),<sup>4</sup> a charge of doing an indecent act (charge five), and a charge of sexual violation (charge six).

### **The evidence at trial**

#### *The first incident*

[19] As well as the account of the first incident contained in A's EVI:

- (a) A said under cross-examination that more had happened on that occasion and that she hadn't told the full truth to the interviewer.
- (b) Her friend K gave evidence that, some months after the incident, A had told her that she and T had been watching a movie together, that she had fallen asleep and that she awoke to find T on top of her and that she had been "raped". K said that A had said nothing about T nibbling her ear, rubbing her leg or squeezing her breast.
- (c) A's mother and sister both gave evidence that (moments after A had spoken to K) A had told them that T had "undone her buttons" on her top. Both witnesses said that A had said nothing to them about T nibbling her ear, rubbing her leg, and squeezing her breast (although A's sister said that A had said that T had touched her chest).

#### *The second incident*

[20] Under cross-examination A said that she could no longer remember the second incident very well, but confirmed that when she awoke, T was already nibbling and licking her breasts and had his fingers inside her. She said that he covered her mouth to stop her making any noise. She also accepted again that there had been a number of other family members home (and likely nearby) during the incident and that she had not told anyone about it.

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<sup>4</sup> Charge four was apparently framed as a representative charge because it covered a number of physical assaults said by A to have formed part of the third incident. While this seems to us to be an inapt and potentially confusing charging practice, nothing presently turns on it.

[21] There was no other specific evidence pertaining to the second incident.

*The third incident*

[22] Although those parts of A's EVI referred to at [16]–[17] above were consistent with the specific allegations which formed the basis of the three "third incident" charges, it is fair to say that her evidence was otherwise confusing on this topic. Much of her account suggested that the "third incident" acts she was describing had occurred numerous times. This can most conveniently be seen from the tenor of the account she gave when she was asked to write down what had happened on a piece of paper. She recorded:

First he would come into my room, usually it was around 11.00pm til 11.30pm. Then while I was sitting there he would come over to me and he would spend a few minutes asking me what I was doing. And then usually 10 minutes later he would be trying to undress me. Then when I couldn't get him off, he would take his own clothes off. This took about 20 minutes because I never gave in and never let him undress me. Now he will have me pinned down and he will be touching my body and he will be sticking his fingers in me. He would do this for what seems like 10 minutes, then if he wanted to he would make me touch his penis and play with it. I never wanted to. Then he would put his fingers in my vagina again and he would do that for a few minutes again. This all usually took an hour to an hour and a half. After he has finished with his fingers in my vagina he would take them out and he would push me off the bed and he would warn me not to say anything to anyone. I was too scared to do anything so I lay there. Sometimes he would come back in and do it again but most of the time it was a one-time thing.

[23] Under cross-examination, however, A was clear that there were only three incidents. There was the following exchange:

Q. So [A] I asked you to confirm that, it's your evidence isn't it that there were three incidents of sexual assault on you by [T]?

A. Yeah.

Q. And only three, correct?

A. Yep.

[24] Under cross-examination, A maintained what she had said about the level of violence used but denied that any noise would have been heard by others downstairs. She accepted that she had not shown anyone her bruises and scratches. She could not remember or explain some parts of her account including the allegation that she had

pain all over her body, how or why she came to be on top of the appellant as he rubbed his penis against her, or how long the incident lasted.

[25] Evidence relating to the third incident was also called from A's teacher (Y) and guidance counsellor (H) that, in March 2016:

- (a) A had disclosed to Y that her uncle "does stuff" to her that she did not like and that it had happened just before Christmas 2015 and had happened two times before; and
- (b) A disclosed to H that:
  - (i) her "Uncle S", who was 26 or 27 had been sexually and physically abusing her;
  - (ii) it happened "every now and then" and more than twice since she had moved to her current home, the last time being around Christmas; and
  - (iii) sometimes there was sexual intercourse.

### **The defence case**

[26] Consistent with the position taken by T in his EVI, the defence case was that nothing of a sexual nature had occurred between T and A. In her closing address, Ms Beaton emphasised on the inconsistencies in A's evidence, the implausibility of her accounts and the general lack of credibility of her evidence.

### **The verdicts**

[27] The jury acquitted T on charge one (the first incident).

[28] In relation to the second incident, the jury convicted T on charge two (licking breasts) but acquitted him on charge three (digital penetration).

[29] The jury convicted T on all three charges arising from the third incident.

## The conviction appeal

[30] As noted earlier, the conviction appeal is advanced on the basis that the jury's "not guilty" verdicts on charges one and three, and "guilty" verdicts on the remaining four charges were inconsistent and unreasonable given the evidence, and indicate an illegitimate compromise or a decision-making process gone awry.

### *Unreasonable and inconsistent verdicts: the law*

[31] At a general level, in *Owen v R* the Supreme Court confirmed that a verdict "will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty".<sup>5</sup> The Court endorsed the propositions articulated by this Court in *R v Munro*; namely that, when assessing a claim of unreasonableness:<sup>6</sup>

- (a) an appellate court is performing a review function, not one of substituting its own view of the evidence;
- (b) appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court (of which the assessment of the honesty and reliability of the witnesses is a classic example);
- (c) the weight to be given to individual pieces of evidence is essentially a jury function;
- (d) reasonable minds may disagree on matters of fact;
- (e) findings of facts are for the jury and appellate courts should not lightly interfere in this area;

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

<sup>6</sup> At [13], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.



- (f) an appellant who invokes (what is now) s 232(2)(a) of the Criminal Procedure Act 2011 must recognise that the appellate court is not conducting a retrial on the written record;
- (g) an appellant must articulate clearly and precisely the respect/s in which the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside;
- (h) where a verdict is based largely on credibility findings it is unlikely to be overturned unless there is contemporary evidence clearly contradicting the witness, or in cases of glaring improbability; and<sup>7</sup>
- (i) inconsistencies alone are unlikely to reach that standard.<sup>8</sup>

[32] The issues raised by conviction appeals brought specifically on the basis of allegedly inconsistent verdicts were subsequently addressed in more depth by the Supreme Court in *B (SC12/2013) v R*.<sup>9</sup> The plurality's judgment began its discussion by saying:

[66] The purpose of an inconsistent verdict argument is to show that a jury's guilty verdict is unreasonable and should be quashed. It invokes s 385(1)(a) of the Crimes Act (see now, ss 232(2)(a) and 240 of the Criminal Procedure Act 2011). As this Court held in *R v Owen*, a jury's verdict "will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty".

(Footnotes omitted.)

[33] After noting the conflicting objectives at play, the Court said:<sup>10</sup>

On the one hand, courts seek to uphold the integrity of the jury system. ... Courts will always be reluctant to conclude that juries have not acted consistently with their oaths. On the other hand, the courts' concern with doing justice may be engaged in respect of particular verdicts. Where they deliver multiple verdicts which are not capable of logical reconciliation, juries give some insight into their thought processes. Logically irreconcilable

<sup>7</sup> As explained by Glazebrook J in *R v Patel* [2009] NZCA 102 at [27].

<sup>8</sup> At [27].

<sup>9</sup> *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

<sup>10</sup> At [67] (footnotes omitted).

verdicts may indicate that the jury's thinking has gone awry in some fundamental way: in particular, the jury may have acted on a misunderstanding of the law or reached an illegitimate compromise. In such circumstances, a court may feel it necessary to intervene in order to ensure that justice is done, despite its respect for the jury's function in the criminal justice process. An obvious difficulty, however, is how a court can determine the basis for a jury's apparently inconsistent verdicts given that jury deliberations are protected from outside scrutiny.

[34] Next, the Court recorded the following general propositions from the decided cases:<sup>11</sup>

- (a) there is a distinction between cases involving legal inconsistency and those involving factual inconsistency;
- (b) factual inconsistency can arise either between verdicts involving the same accused or (less often) between verdicts involving different persons charged in connection with related events;
- (c) in relation to factual inconsistency arising from "guilty" and "not guilty" verdicts on multiple charges faced by one defendant, the test is one of "logic and reasonableness";
- (d) inconsistent verdicts may be held to be unreasonable "when the evidence on one count is so wound up with the evidence on the other that it is not logically separable";<sup>12</sup>
- (e) because there is a reluctance to conclude that jury verdicts are inconsistent, an appellate court will not usurp the jury's function by substituting its view of the facts for that of the jury if there is some evidence to support the verdict said to be inconsistent;
- (f) but any reasonable explanation for the difference between the two verdicts "must be found in the evidence properly used";<sup>13</sup>

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<sup>11</sup> At [68].

<sup>12</sup> *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [8].

<sup>13</sup> *R v O (No 2)* [1999] 1 NZLR 326 (CA) at 333.

- (g) equally, an appellate court “may conclude that the jury took a ‘merciful’ view of the facts upon one count: a function which has always been open to, and often exercised by, juries”;<sup>14</sup>
- (h) an appellate court will intervene where the different verdicts returned by a jury represent “an affront to logic and common sense which is unacceptable and strongly suggests a compromise of the performance of the jury’s duty”;
- (i) the obligation to establish inconsistency rests with the person challenging the conviction; and
- (j) where inconsistency is established, the court must make such consequential orders as the justice of the case requires.

[35] Later, the Court addressed the argument made for the appellant that, given the nature of the evidence, there had to be convictions on both counts or on neither — that it was an all or nothing case.<sup>15</sup> They said:

[83] A similar argument was accepted by the Criminal Division of the English Court of Appeal in *R v Dhillon*. There the Court observed that it was “notoriously difficult successfully to challenge a jury’s verdict on the ground that inconsistent verdicts have been returned”. To succeed there had to be a logical inconsistency in the verdicts which could not be explained by a line of reasoning reasonably available to the jury. *In sex cases where sexual incidents are alleged to have occurred on separate occasions, inconsistency will not arise simply because the jury accepted part of a complainant’s evidence but was not sure about other parts. It may be different, however, where the various offences are “simply different facets or acts in the course of a single sexual encounter”*. In those circumstances, the Court said:

... if the jury is unsure of the complainant’s evidence with respect to one count on the grounds that it may be unreliable or lacking credibility, it is likely to be more difficult than it would be with respect to chronologically separate encounters for a jury to be sure that the evidence on the other counts is reliable and credible.

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<sup>14</sup> *MacKenzie v R* (1996) 190 CLR 348 at 367.

<sup>15</sup> As the Court noted, this was, of course, directly contrary to the Judge’s instructions to the jury: *B (SC12/2013) v R*, above n 9, at [82].

[84] In *Dhillon*, as in the present case, several (in that case, five) sexual offences were alleged to have been committed in the course of a single sexual encounter. The appellant was convicted on two counts and acquitted on three. While no issue was raised by his acquittal on two of the counts, his acquittal on the third raised the question whether the guilty verdicts were logically consistent. The two counts on which he was convicted involved digital penetration of the complainant's vagina and sexual assault by touching the complainant's breasts. The count on which he was acquitted involved oral sex. The appellant admitted that the three incidents had occurred but said that they were consensual.

[85] The Court said that the jury's verdicts could only be explained on the basis either that:

- (a) the jury was unsure whether the oral sex had occurred but was sure about the other two acts; or
- (b) the jury considered that the complainant had consented to the oral sex but not to the other less serious acts; or
- (c) the jury considered that the appellant had a reasonable belief that the complainant consented to the oral sex but not to the touching of the vagina and breasts.

The Court rejected the first possible explanation, on the basis that no reasonable jury could have found that two of the incidents occurred but not the third. Counsel accepted that the second explanation was untenable. The Court rejected the final explanation. The evidence showed that the acts had occurred at the same time — indeed, it was not clear from the evidence whether the touching of the breasts had preceded the oral sex or vice versa. Moreover, neither the Judge nor counsel had suggested that the appellant might have had a reasonable belief in consent in respect of one act and not the other.

[86] Accordingly, the Court concluded that the verdicts were inconsistent. That did not necessarily mean that they were unsafe, however, and that the appeal should be allowed. The Court considered the possibility that, on the evidence, the appellant was unjustifiably acquitted of the oral sex charge rather than that he was unjustifiably convicted on the other charges. While accepting that there was some force in that proposition, the Court did not accept it. Noting that the verdicts were by a majority and had come after six hours of deliberation, the Court considered that there was a real risk that the jury had reached an illegitimate compromise and quashed the convictions.

(Footnotes omitted and emphasis added.)

[36] Unlike in *R v Dhillon*,<sup>16</sup> however, the Supreme Court concluded on the facts of the case before it that the verdicts there could be factually reconciled and were not inconsistent.<sup>17</sup>

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<sup>16</sup> *R v Dhillon* [2010] EWCA Crim 1577, [2011] 2 Cr App R 10.

<sup>17</sup> *B (SC12/2013) v R*, above n 9, at [90].

## *Discussion*

[37] It is quite clear that the Crown case against T was that there had been three discrete “incidents” of sexual offending. As noted earlier, A said in cross-examination that there were (only) three distinct occasions on which the offending had occurred.

[38] In her summing up, the Judge gave the jury relatively orthodox directions that witnesses can be wholly truthful, partially truthful or wholly untruthful and about credibility and reliability. She also directed the jury to consider each charge, and the evidence for each charge, separately — although it seems that the Judge herself may have regarded it as an “all or nothing” case.<sup>18</sup> The mix of verdicts delivered, however, demonstrate that the jury did not agree.

[39] There can be no doubt that the submission that the jury’s verdicts were inconsistent is at its strongest in relation to the two charges arising from the second incident. We acknowledge that charges two and three can fairly be seen as “simply different facets or acts in the course of a single sexual encounter” and thus that it may be easier to demonstrate that a split of guilty and not guilty verdicts are factually inconsistent (and unreasonable).<sup>19</sup>

[40] As summarised above, A’s evidence about charges two and three was that she awoke to find T licking and nibbling her breasts, and with his fingers inside her. She was clear that these acts were not temporally separate. So the question is whether the verdicts of “guilty” on charge two and “not guilty” on charge three can be said to be unreasonable because “the evidence on one count is so wound up with the evidence on the other that it is not logically separable”.<sup>20</sup> In other words, is there any reasonable evidential basis upon which the jury could have been sure that one of the “second incident” acts occurred but not the other?

[41] It is important to remember that the required focus is on the reasonableness of T’s *conviction* on charge two rather than his acquittal on charge three. Was there some

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<sup>18</sup> At [23] of her directions she said: “In theory, you could reach different verdicts on each, although, of course, [T] says the same to each of the allegations, ‘This did not happen.’”

<sup>19</sup> *R v Dhillon*, above n 16, at [42].

<sup>20</sup> See *R v Pittiman*, above n 12, at [10].

reasonable and logical basis on which (given the acquittal) the conviction can be explained?

[42] We set out the Crown's written submission on that question in full:

Being different verdicts in respect of acts said to have been committed by one person against another at the same time, they may appear at first glance to be somewhat inconsistent. There is, however, a rational explanation for them, which requires a return to the first incident. The jury may have largely believed the complainant in respect of the first incident but still found the appellant not guilty... Then, due to the similarities between the first and second incident, the jury may have believed the complainant when she said, in relation to the second incident, that she woke to find the appellant nibbling and kissing her breasts. They may have entertained some doubt, however, about her claim that the appellant had also managed to penetrate her with his fingers while she was asleep.

(Footnotes omitted.)

[43] The first aspect of this submission appears essentially to be that the jury may have considered that the evidence in relation to charge one sufficed (notwithstanding the acquittal on that charge) to establish a propensity to offend in that way, which somehow "tipped the balance" on charge two. We find that an unattractive proposition; such a reasoning process would, in our view, be illegitimate. There was no propensity direction.

[44] But the second aspect of the Crown submission does not invite such illegitimate reasoning. There was a potentially logical explanation for the jury's doubt about the penetration aspect of the second incident.<sup>21</sup> On the evidence it was open to them to think that, although something sexual had occurred between T and A on the second occasion, the digital penetration was an embellishment on her part. Equally, they may simply have thought that, over six months after the event, A's memory had conflated the second incident with aspects of the third, rendering her account of the earlier (as regards the penetration) unreliable. We are unable to conclude that the verdicts on charges two and three are demonstrably inconsistent.

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<sup>21</sup> We note that during her cross-examination of A, defence counsel had also raised a question as to the physical impossibility of T simultaneously penetrating A with his fingers and licking her breasts, while also covering her mouth with his hand. A's response ("He's got two hands") may or may not have quelled any doubts the jury had in that regard.

[45] We turn now to the “third incident” charges (charges four, five and six). This incident was the main focus of A’s EVI. We have summarised that and her evidence under cross-examination above.

[46] In seeking to establish that the evidence did not reasonably support the guilty verdicts on these charges, Ms Beaton emphasised that:

- (a) there was no evidence corroborating that the third incident occurred and, more particularly, that:
  - (i) no one else in the house heard anything despite A’s evidence that it was a prolonged assault in a modest sized home, in close proximity to the rest of the family; and
  - (ii) there was no evidence that anyone had seen any bruising or scratches on A afterwards;
- (b) A had made inconsistent statements about the incident, including in particular that:
  - (i) in her disclosure to H (the school counsellor) A referred to an uncle named “S” who was approximately 26 or 27 years old, and said that “sometimes” there was sexual intercourse;
  - (ii) two days later (in her EVI) A denied that intercourse had occurred, saying that T had never put his penis in her vagina;<sup>22</sup> and
  - (iii) elsewhere in A’s evidence, and her written statement to the school counsellor, she suggested that there had been multiple occasions of abuse which was at odds with her

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<sup>22</sup> In re-examination she was asked by the Crown Solicitor about her knowledge of what sexual intercourse is, and eventually confirmed “It’s when a guy puts his penis in a girl’s vagina”.

confirmation in cross-examination that there had been only three incidents in total.

[47] Without more, however, the absence of corroboration does not materially advance matters. There will often be no corroboration in cases of this kind and we do not accept the *absence* of evidence from others about hearing noises or seeing bruises assists much in terms of the unreasonableness threshold. And while we acknowledge that the evidence about the third incident (from A herself and from those to whom she had spoken) was not a model of consistency or clarity, we nonetheless consider that there was sufficient “core” evidence for the jury to reach the verdicts it did. There was, for example, a thread of consistency between her various accounts as to the key acts and A was consistently clear that there had been relatively serious offending in December 2015. Moreover, on the assumption that the jury accepted, for whatever reasons, that A was hedging or confabulating when she referred to “Uncle S”, her evidence that it was T who was the perpetrator was, again, sufficient.

[48] We are unable to conclude that the guilty verdicts here could not be reasonably supported by the evidence at trial, for the reasons we have given. The conviction appeals are dismissed accordingly.

## **Sentencing**

### *The “s 27” reports and the pre-sentence report*

[49] At sentencing, the Judge had before her letters, submitted under s 27 of the Sentencing Act 2002, from six members of T’s family (his mother, siblings and more distant whānau). These letters all described his many positive attributes and expressing their support and love for him and their commitment to support his rehabilitation. There was also a letter of support from his employer at the time of sentencing.<sup>23</sup> From reading those letters it seems possible that T might have difficulties with communication. His biological mother raises the possibility of Fetal Alcohol Syndrome (FAS); she says she drank heavily while pregnant. Other points of note are that T is fluent in Te Reo, has been brought up in the Mormon church,

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<sup>23</sup> T had been bailed pending sentence.



has a positive work ethic and apparently wishes to pursue higher education. It seems clear that he has positively contributed to his wider whānau, his community and his church.

[50] The pre-sentence report is brief and explores none of the issues raised by the letters. Although assessing T as presenting a low risk of reoffending, the report writer expressly proceeds on the basis that imprisonment is the only option, given the penalties for offending of this kind.

[51] Unsurprisingly (in light of T's conviction appeal) there has been no acceptance of responsibility by T nor any expression of remorse.

#### *The construction of the sentence*

[52] The Judge began her sentencing by referring to the oral submission she had heard from T's mother and the strong family support for him in Court. She observed:<sup>24</sup>

... their support and the information that they have supplied are all likely to be relevant to parole and release considerations.

[53] Next, the Judge expressed her view that T's sexual offending fell either at the top end of the *R v AM* unlawful sexual connection (USC) band one or the bottom of the *R v AM* USC band two, and that a four-year starting point was appropriate.<sup>25</sup> She identified five culpability factors: violence above that inherent in the act of sexual violation, victim vulnerability, the harm to the victim, breach of trust given the familial relationship, and the scale of the offending given there were two separate incidents proved. Then, the Judge said:

[14] Given the aggravating factors here and the scale of offending, and the aggravating factors I find present to a moderate degree, particularly on the breach of trust, the victim vulnerability and harm to the victim, I consider that the starting point, based on those decisions, is four years. There were two incidents, not counting the additional threat to kill reflected in charge 7. A threat to kill issued against a young victim is a serious matter. I cannot say that it should be higher than four years. I cannot conclude that anything above four years would be justified. There are no personal aggravating factors, both counsel agree. ...

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<sup>24</sup> Sentencing notes, above n 1, at [1].

<sup>25</sup> At [7]–[14], referring to *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750 at [113].

[54] The Judge acknowledged that there were no aggravating personal factors requiring an additional uplift but declined a discount on the guilty plea. From the combined four-year starting point, she gave a credit of six months (13 per cent) to reflect the absence of any significant previous convictions, his personal circumstances and prior character, and the information in the s 27 letters about the level of family and cultural support available to him.<sup>26</sup>

[55] The end sentence of three and a half years' imprisonment was imposed concurrently on charges six (sexual violation) and seven (threatening to kill), with concurrent terms of 18 months' imprisonment imposed on charges two, four and five.

#### *The sentence appeal*

[56] Notwithstanding our rejection of T's conviction appeal, we have reached the conclusion that his sentence is manifestly excessive. Our reasons are as follows.

[57] First, we consider that the Judge erred in her characterisation of the threatening to kill charge. As we noted above at [8] of this judgment, the conduct on which the threatening to kill charge was founded involved T calling 111 and effectively turning himself in to police as a method of anger management. At best, this conduct falls at the very least serious end of the spectrum of such offending. That is especially so because, as we noted above, it is unclear on the evidence whether A heard, or was aware of, the threat. Accordingly, we proceed on the basis that the psychological trauma usually associated with this kind of offending, the harm, is absent. In our view, this very low-level offending does not justify uplifting the starting point.

[58] We also consider that the Judge was wrong to identify a breach of trust as an aggravating factor. In our view, the fact that T was living in the same house as A, and a part of her family, does not of itself mean that T was living in a relationship of trust with A — the age difference between the two of them was small, just five years, and we do not see any evidence that T was fulfilling a parental role or something akin to

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<sup>26</sup> At [15].

that.<sup>27</sup> To the contrary, as we go on to discuss, T was seen by his whānau as immature for his age and very much the baby brother of the family.

[59] It follows that we would adopt a reduced starting point to that adopted by the Judge. The starting point must nevertheless reflect that A suffered significant harm as a result of this offending, was vulnerable and that two charges of unlawful sexual connection were proved. In light of these factors, a starting point around the middle of the *R v AM USC* band one, three years' imprisonment, is appropriate.

[60] The next issue is the extent of reduction in sentence justified by T's personal circumstances. As the Judge acknowledged, the level of whānau and community support for T, expressed in the s 27 letters before her, was significant.<sup>28</sup> As s 27(1)(d) recognises, a real prospect of support of this kind can be relevant to an offender's rehabilitative prospects and to the type of sentence that may be appropriate.<sup>29</sup> In T's case, the level of support evidenced by the letters, together with the personal qualities to which they attest, indicate that T's rehabilitative prospects are indeed strong. That view was supported by the pre-sentence report writer's assessment of his (low) risk of future offending. That said, however, we acknowledge that T's failure, as yet, to take responsibility for his actions and (necessarily) the absence of remorse must also be taken into account when considering T's rehabilitative prospects.

[61] As noted earlier, the Judge gave T a six month (13 per cent) discount to account for the "s 27" personal factors. That was the discount proposed by the Crown and agreed as appropriate by Ms Beaton. It may be that the relatively low-level discount was a consequence of the Judge's view (expressed more than once in her sentencing notes) that whānau support would be particularly relevant on T's release and could be taken into account then by the Parole Board.

[62] In the circumstances of this case, we have formed the view that this 13 per cent discount was inadequate in terms of assisting T's rehabilitation and reintegration as mandated by s 7(1)(h) of the Sentencing Act. That is particularly so when

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<sup>27</sup> Compare *R v Takamore* [2013] NZHC 719 at [23]; *R v H* [2016] NZHC 2705 at [28]; and *MacKenzie v R* [2007] NZCA 72 at [5].

<sup>28</sup> Sentencing notes, above n 1, at [15].

<sup>29</sup> *R v Taulapapa* [2018] NZCA 414 at [16].

consideration is had not only to the s 27 matters strictly so-called, but also to the question of youth, which does not appear to have been separately taken into account at all. There is no express recognition that he was only 19 or 20 at the time of the offending itself,<sup>30</sup> or of the greater capacity for rehabilitation possessed by young people.<sup>31</sup> We think that when T's youth is considered in combination with T's personal attributes, the very significant support and commitment expressed by his supporters and his low risk of reoffending, his prospect of rehabilitation is high and warrants being at the forefront of the sentencing process.<sup>32</sup>

[63] So, from a three-year starting point, and weighing T's rehabilitative potential, we think appropriate credit for youth and s 27 matters would be in the vicinity of one third, or 12 months. That would take the end sentence into home detention range. Our strong sense is that that may well be the least restrictive outcome appropriate in the present circumstances, notwithstanding the presumption contained in s 128B of the Crimes Act 1961.

[64] The appeal against sentence is allowed accordingly. All sentences are quashed and the following are substituted:

- (a) a sentence of two years' imprisonment on the sexual violation charge (charge six);
- (b) a sentence of three months' imprisonment on the threatening to kill charge (charge seven); and
- (c) sentences of 12 months' imprisonment on charges two, four and five.

[65] All of these sentences are imposed concurrently. Leave is granted under s 80I of the Sentencing Act for T to apply to the District Court for home detention.

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<sup>30</sup> His youth is also relevant to any fair assessment of the breach of trust involved in the offending; at 19 and 20 he was far from being A's much older "uncle" he was only five years older than she.

<sup>31</sup> *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]; and *Overton v R* [2011] NZCA 648 at [27]–[33].

<sup>32</sup> We observe that T will necessarily remain subject to the three strikes law and will remain on the Child Sex Offender Register.

## **Result**

[66] The appeal against conviction is dismissed.

[67] The appeal against sentence is allowed. The sentences are quashed.

[68] We substitute sentences for the offending as set out at [64]–[65] of this judgment. Leave is granted for T to apply to the District Court for home detention.

[69] Given the close familial relationship between T and A, a suppression order for T is necessary to protect A's identity. Accordingly, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act.

### **Solicitors:**

Crown Law Office, Wellington for Respondent