

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION 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 COMPLAINANTS UNDER THE AGE OF
18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL
PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA420/2019
[2020] NZCA 321**

BETWEEN	S (CA420/2019) Appellant
AND	THE QUEEN Respondent

Hearing:	19 May 2020
Court:	Cooper, Duffy and Edwards JJ
Counsel:	H B Leabourn for Appellant J E L Carruthers for Respondent
Judgment:	3 August 2020 at 11 am

JUDGMENT OF THE COURT

- A The appeals against conviction and sentence are dismissed.**
- B The appellant's identity is suppressed pursuant to s 200(2)(f) of the Criminal Procedure Act 2011.**
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REASONS OF THE COURT

(Given by Duffy J)

[1] The appellant stood trial before Judge Sinclair and a jury in the District Court on charges of serious sexual offending against his then wife and his daughter. He was found guilty and convicted of two charges of raping his wife and one charge of sexually violating her by unlawful sexual connection.¹ He was also found guilty and convicted of three charges of raping his daughter. A fourth rape charge in relation to her was dismissed at the end of the Crown case.

[2] The appellant also pleaded guilty in the District Court to 10 charges of assault with a weapon.² This offending involved his wife, his daughter and his son.

[3] On 20 August 2019, Judge Sinclair sentenced the appellant to 16 years' imprisonment for the sexual offending and two years' imprisonment for each of the physical violence charges.³ All sentences were to be served concurrently.

[4] The appellant now appeals against his conviction and sentence.

Background

[5] The appellant and his former wife, SL, have two children a girl, RS, and a boy, RJS. The offending against his wife and children happened between 2011 and 2014 at three different addresses.

The sexual offending against SL

[6] The Crown's case on the representative charge of rape was that on multiple occasions, which SL estimated to be twice a week for two months, the appellant raped her. He induced SL's consent to have sexual intercourse with him by threatening her with the withdrawal of his support for her residency visa to remain in New Zealand,

¹ Crimes Act 1961, s 128B.

² Section 202C.

³ *R v [S]* [2019] NZDC 16375.

telling her she was obliged to have sexual relations with him and threatening to have sexual relations with other women if she would not do so. The threats were made constantly. They became fixed in SL's mind and she thought of them even when the appellant was demanding sex without repeating them. The return of a guilty verdict on this charge means the jury accepted that at least one rape occurred during the charge period.

[7] The specific charge of rape related to an occasion where the appellant demanded sex while SL was menstruating. Even though SL did not wish to have sex she relented. SL, noticing her menstrual blood running down her leg, told the appellant to stop. The appellant pushed SL's head into the bath rim and continued having sex with her. The appellant caused SL pain and she asked him to stop several times. He did not, continuing until he ejaculated. The appellant then told SL to clean her blood off him and the floor. The appellant watched her carry out this cleaning and then told her she disgusted him.

[8] The specific charge of sexual violation by unlawful sexual connection related to a time when the appellant accosted SL in the bedroom after she had a shower following her return from work. He demanded she have sex with him and pushed her head down into his lap so that his penis entered her mouth.

Sexual offending against RS

[9] The rapes of RS typically involved the appellant forcibly pulling RS by her wrists into her bedroom and then forcing her pants down, climbing on top of her and inserting his penis into her vagina. RS was raped once when she was five years old and twice when she was six years old.⁴

The physical violence offending

[10] The appellant faced one representative charge of assaulting SL with a weapon. On at least two occasions between November 2012 and December 2013, SL was at

⁴ RS gave evidence the first rape happened when she was five years old. The second rape was when she was six years old. For the third rape, RS said she was seven years old, but it is clear from her description in the evidence of when the incident occurred that she was still six years old.

home with the appellant, RS and RJS. The appellant would attempt to assault either RS or RJS with a plastic coat hanger and SL would shield them and be struck with the coat hanger in the process.

[11] The appellant faced five charges of assault with a weapon on RS. These took place between 2011 and 2014, when RS was between the ages of five and seven. These incidents involved hitting her with a plastic or wire coat hanger, a slipper or a leather belt. On one occasion the appellant hit RS in excess of 20 times, snapping the plastic coat hanger and then continuing to hit her with his leather belt.

[12] The appellant faced a further four charges of assault with a weapon of RJS, which happened when RJS was aged between three and five years old. These involved striking RJS across the arms, back and buttocks using a coat hanger or leather belt. On one occasion RJS was struck with the metal end of the belt causing significant pain. Between 2011 and 2014 these assaults were described as happening daily.

The conviction appeal

[13] The appellant appeals against his convictions for the sexual offending on the following grounds:

- (a) The prosecutor made errors in her closing address that adversely impacted on the defence.
- (b) The Judge erred in allowing amendments to the dates in the charging list.
- (c) When summing up the Judge erred by:
 - (i) focusing unduly on the Crown case; and
 - (ii) failing to give a motive direction.
- (d) The verdicts were unavailable on the evidence.

Errors in the prosecutor's closing address

The appellant's position

[14] Mr Leabourn, on behalf of the appellant, submits that the prosecutor erred by offering a personal anecdote in her closing address to the jury. RS in her evidential video interview (EVI) had alleged that at one stage of the offending the appellant had thrown her onto the bed and locked the bedroom door. However, both the appellant and SL confirmed that at that time the house they were living in did not have locks on the bedroom door. This contrary evidence was not challenged by the prosecutor, however in closing she addressed the matter by giving the following personal anecdote:

I was thinking going back over the houses that I've lived in, in recent years and you might want to do the same, can you actually remember whether there [were] locks on the bedroom door. My last house I remember there was because my son who was one at the time locked me out of the bedroom, and that was quite a traumatic memory for me. ... So it's a difficult thing but if that hadn't have happened I don't think I'd know whether there was actually a lock on that door or not ...

The prosecutor followed this by saying that "[RS] talked about there being a lock, she certainly felt locked in that bedroom".

[15] Mr Leabourn submits that this anecdote was inappropriate as it was contrary to the evidence given and it invited the jury to speculate and to ignore the evidence given by both the appellant and SL that there had been no lock. Mr Leabourn portrays the anecdote as an attempt to engage the jurors' sympathies so they would ignore the evidence that there was no lock. He contends that in such circumstances the Judge should have directed the jury to ignore the anecdote and warned them against the influence of prejudice and sympathy, but instead she endorsed the prosecutor's remarks.

[16] Mr Leabourn refers to another passage of the prosecutor's closing address he takes issue with, which related to one of the alleged rapes of RS, where it was said that RJS was hiding in a closet in the room throughout the incident. When RJS gave evidence, he could not recall the incident. In closing the prosecutor said "we know [RJS] doesn't recall that but is that really surprising given he was just four years old

at the time? Perhaps even as young as three ...”. Mr Leabourn submits that these statements invited the jury to speculate as to the reasons why RJS did not remember the incident. He contends the Judge should have directed the jury to ignore what he portrays as an invitation to speculate, but instead the Judge endorsed the prosecutor’s remarks.

The respondent’s position

[17] The Crown submits there is nothing objectionable in the way in which the prosecutor used the personal anecdote, the point of the anecdote being to illustrate that the presence of locks on the doors could be considered a rather mundane detail that people may not remember unless it had played a part in a memorable event. The Crown also submits there was nothing wrong with the Judge’s response to the anecdote in the summing up; she addressed both points of view and informed the jury at the outset of the summing up that the closing addresses were not evidence.

Analysis

[18] The personal anecdote used by the prosecutor in her closing address drew on her life experience and asked the jury to do the same. This was not an invitation to speculate as to the presence of locks on the door or lack thereof. Rather, it was a tool that was utilised in an attempt to illustrate that the presence of locks was a detail that people may struggle to remember in the absence of an important event. This was the prosecutor’s way of explaining the inconsistencies between the position of RS and that of the appellant and SL, the available inference being that SL and the appellant may not remember the presence of the locks in the absence of an important event drawing their attention to them. There was nothing wrong with the use of the anecdote to illustrate this point. Equally, there was nothing wrong with the way in which Judge Sinclair addressed the matter, briefly summarising each party’s position when summarising their respective cases.

[19] We also see nothing objectionable in the prosecutor drawing RJS’s age to the jury’s attention as a possible explanation for why he could not recall being a hidden presence during one of the rapes of RS.

[20] It follows that this ground of appeal fails.

Did the Judge err in allowing amendments to the charge notice?

The appellant's position

[21] Both during the trial and after counsel had delivered their closing addresses, amendments were made to the dates on the charging notice in regard to the offending involving RS. These amendments were made following applications by the Crown. However, no reasons were provided, and no minutes appear on the file.

[22] Mr Leabourn submits that these changes hindered counsel's ability to cross-examine the complainants in a focused way. And, as the defence ran its case based on one theory, it could not recast it to meet the amended charges. Mr Leabourn says that is particularly problematic in this case as the allegations lacked detail and accuracy, and for effective cross-examination it was necessary for the dates to be accurate. Given this, Mr Leabourn submits there is a real and appreciable risk that a miscarriage of justice has occurred. Further, he contends that any amendments should have been explained and justified in the form of a minute and Judge Sinclair should have addressed the matter in her summing up.

The respondent's position

[23] The Crown submits that while it was unfortunate the amendments to the dates had to be made, they had no impact on the course of the trial. This is because RS's allegations were not tethered to dates but to the three residential addresses where the family lived over the course of the charge period. RS could not say exactly when any of the alleged sexual offending occurred, as evident in her EVI, and this meant that the appellant was always going to have to approach his defence on what life was like generally at the relevant address, as opposed to what others were doing at any one moment in time.

[24] Moreover, the Crown says there is no indication either in the notes of evidence or from the defence closing address that trial counsel had any difficulty cross-examining the complainant or advancing the defence.

Analysis

[25] At trial, the defence case on the charges involving RS was that the incidents never occurred and that RS was lying. In closing, defence counsel emphasised the vagueness of the allegations and the various inconsistencies in RS's evidence. The defence referred to RS's claims that: (a) there was a lock on the bedroom door whereas other witnesses said there was not; and (b) her brother RJS was hiding in the closet during one of the incidents, whereas his evidence was that he had no knowledge of the allegations of sexual abuse of RS until a month before she made this complaint. Defence counsel also referred to other inconsistencies and the practical difficulties of RS's allegations, including the number of people that stayed in the rooms where the alleged incidents occurred, and the fact she had said her mother (SL) had arrived home after one of the alleged incidents, when usually the appellant and the children would pick SL up from work. Defence counsel contended that RS was lying because she was upset about her father's affair with another woman, and with him subsequently starting a family with her.

[26] However, at no point did the defence case hinge on the dates on which the incidents allegedly occurred. Rather, the defence used the various addresses at which the incidents were alleged to have taken place as a marker. This strategy was unaffected by the amendments to the dates in the charge notice. The defence case also relied on the roles undertaken by others, including that of close family, and how those affected the ability of the appellant to carry out the offending. Thus, the dates of when the alleged offences occurred were not a part of the defence. Nor did Mr Leabourn provide us with any specific examples of how the alteration of the dates adversely affected the defence.

[27] It would have been better had the Judge issued a minute which explained the amendments. However, it is apparent that the changes were made to align dates in the charge notice with dates given in the evidence so as to avoid confusion. This was done in circumstances where proof of the issues in the trial did not hinge on specific dates. Thus, the changes caused no prejudice to the defence. Accordingly, we find the Judge did not err in allowing them.

[28] It follows that this ground of appeal fails.

Did the Judge err by failing to give a motive direction when summing up?

[29] Mr Leabourn submits the Judge erred by failing to direct the jury on motive. Mr Leabourn says the Crown, as evidenced in its cross-examination of the appellant and in its closing, emphasised there was no motive for RS to lie. Relevantly, in closing the prosecutor said to the jury:

But if you accept that there is a lack of plausible motive then it can in fact support the proposition that [RS] is telling the truth, and the Crown says that there isn't a motive, there's been some suggestions that it's about jealousy and the new family and the like, but does that fit with the evidence?

Mr Leabourn submits that the prosecutor used the lack of a plausible motive to lie as grounds for the jury to find RS was telling the truth, and then invited them to rely on this to find RS a credible witness. In doing so the prosecution wrongly gave the impression the defence was required to prove RS had a motive to lie.

[30] In such circumstances, Mr Leabourn submits, the Judge was required to give a specific direction to the jury that the defence did not have to prove or disprove motive. The absence of any such direction left the jury with the impression that without such proof it could assume guilt.

The respondent's position

[31] The Crown acknowledges that no direction regarding the proof of motive was provided, but submits that one was not necessary in this case. The Crown relies on *Tuhaka v R* where this Court said there is no hard and fast rule that a Judge must always give a direction on this topic.⁵ When the prosecutor addressed the jury on lack of motive she explicitly reminded them that the defendant bore no burden of proof, and the Judge gave directions on the burden of proof in her opening remarks and summing up. Thus there was no risk the jury were not clear on this matter.

⁵ *Tuhaka v R* [2015] NZCA 540 at [18].

Analysis

[32] Where the Crown relies on the absence of an apparent motive to lie, the Judge must ensure the jury is not distracted from the central issue, being whether the Crown has proved the elements of each charge beyond reasonable doubt.⁶

[33] Whether a specific direction on the use of lack of motive is required will depend on the context. The critical question will be whether there is a risk the jury may view the burden of proof as having shifted from the prosecution to the defendant.⁷ Where it is made clear from the addresses and the summing up as a whole that the burden of proof rests with the Crown, no specific direction as to motive will be required.⁸

[34] It is important to examine the context in which the prosecutor referred to the absence of a motive. In her closing she stated:

Finally, in respect of [RS] the Crown says there is no motive to lie. The defence case is this is all made up. She might be telling the truth about the physical violence, but she's got it wrong when it comes to the sexual stuff. Now there is no onus on [the appellant] at all to prove a motive to lie as to why this might have happened, there's no onus on him to do that. And he said in evidence when I questioned him about this, you know, "is there any reason that you know of?" He said, "I just don't know".

But if you accept that there is a lack of plausible motive then it can in fact support the proposition that [RS] is telling the truth, and the Crown says that there isn't a motive, there's been some suggestions that it's about jealousy and the new family and the like, but does that fit with the evidence?

[35] The matter was addressed generally by the Judge in summing up. She gave the standard direction regarding the burden of proof in criminal trials. The direction was essentially repeated in the question trails provided to the jury. She also reminded the jury that the defence case was that the alleged events had not occurred and insofar as the offending against RS was concerned, the appellant had "no idea" why she would allege he had sexual contact with her.

⁶ At [14] citing *R v T* [1998] 2 NZLR 257 (CA) at 265.

⁷ At [18].

⁸ At [18] citing *P(CA672/2013) v R* [2015] NZCA 96 at [35].

[36] We consider that here lack of motive played a minor role in the prosecution's case. Whilst the Judge did not give a specific direction on the burden of proof in relation to lack of motive we do not think the Judge erred. Throughout the trial the jury received many reminders regarding where the burden of proof lay. The prosecutor only referred to lack of motive in the cross-examination of the appellant and her closing address. When she made this reference in closing she coupled it with a reminder to the jury that the burden of proof remained with the Crown. This was reiterated in the defence closing. Then the Judge gave the standard direction from *R v Wanhalla* later in the summing up.⁹ She gave a further direction that the appellant did not need to prove anything. In such circumstances we find it was unnecessary for the Judge to provide a specifically tailored direction on lack of motive. This ground of appeal fails.

Did the Judge place too much focus on the Crown case in her summing up?

The appellant's case

[37] Mr Leabourn submits the Judge spent a disproportionate amount of time setting out the Crown case as against the defence case, in respect of each charge. As a consequence, there is a real and appreciable risk the jury were left with the impression the trial Judge preferred and endorsed the prosecution case over that of the defence. Essentially, Mr Leabourn submits that the summing up was unbalanced.

The respondent's position

[38] The Crown submits there is little support for this ground of appeal as the Judge's summing up was balanced throughout. She provided nutshell summaries of each side's case as a whole, and then moved to a detailed consideration of their submissions on the evidence and of their cases more generally.

Analysis

[39] Following a trial, the Judge has a duty to sum up the case to the jury, including the provision of a summary of the Crown and defence cases, at least in their broad

⁹ *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49].

form, and in a balanced and clear way.¹⁰ A balanced summing up is to be assessed with regard to whether rival contentions have been fairly put to the jury, rather than the imposition of artificial equality between rival cases or by requiring the Judge to devote equal time to the parties' respective cases.¹¹ The ultimate question is whether the summing up when read as a whole against the factual background, the evidence given at trial, the charges, the prosecution and defence cases was unbalanced and unfair.¹² We do not find this threshold is met.

[40] The summing up gave the jury a general overview of the prosecution and defence cases. The Judge informed the jury that she would be covering the prosecution's case for a comparatively longer time than the defence because the latter rested on a denial of the offending and providing them with direction on that would take less time. In specifically giving that direction the Judge left no room for the kind of reaction by the jury Mr Leabourn suggests.

[41] The Judge then proceeded to give a clear and objective summary of the prosecution and defence cases. Although a greater part of the summing up was dedicated to the prosecution case, much of what was said related to directions on the use of the evidence, including among others, directions as to the use of the evidence of the assault convictions. It is not the time dedicated to each case that is important, rather, the question is whether the summing up has put the rival contentions fairly before the jury. We are satisfied the Judge did so. She made sure both cases were clearly summarised to the jury and she explained the evidence relied on by each party. It cannot be said the Judge endorsed the prosecution case in any way. This ground of appeal fails.

Were the verdicts available on the evidence?

[42] This ground is listed in the notice of appeal, but it was not addressed in Mr Leabourn's written submissions and it was given little attention at the hearing. We deal with it for completeness.

¹⁰ *Waters v R* [2018] NZSC 49 at [8] citing *Waters v R* [2018] NZCA 84 at [9].

¹¹ *Keremete v R* CA247/03, 23 October 2003 at [19].

¹² *Waara v R* [2010] NZCA 517 at [32].

[43] The Crown does address this ground in its written submissions. It submits the ground is unsustainable as there was no question the evidence, if accepted, could meet the elements of the six sexual offending charges. The charges were drawn from clear statements in the complainants' evidence, from which they did not retreat at trial. Accordingly, the Crown submits that the argument must be that the evidence was so lacking in credibility that no reasonable jury properly directed could have found it convincing. The Crown contends that argument cannot be sustained. We agree.

[44] There is nothing in this ground and counsel sensibly did not pursue it.

Conviction appeal conclusion

[45] Mr Leabourn has failed to make out any of the grounds of appeal he has raised. Accordingly, the appeal against the convictions is dismissed.

Sentence Appeal

[46] Mr Leabourn contends the sentence of 16 years' imprisonment for his sexual offending is manifestly excessive.

[47] Judge Sinclair applied the guideline judgment of *R v AM* to establish an appropriate starting point for the sexual offending.¹³ The Judge identified six aggravating features of the offending, these being premeditation, the vulnerability of the victims, the scale of the offending, a breach of trust, the degree of violation and the harm to the victims. The Judge placed the offending at the lowest level of band four of the guideline judgment, adopting a starting point of 16 years' imprisonment. In doing so she considered comparable case law as a cross-check, including *N v R*,¹⁴ *Gordon v R*,¹⁵ and *Martin v R*.¹⁶

[48] Regarding the physical violence offending the Judge found that had she been sentencing the appellant on the violence charges alone she would have placed them in band three of *Nuku v R* where a starting point of four years' imprisonment would be

¹³ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

¹⁴ *N v R* CA88/05, 23 November 2005.

¹⁵ *Gordon v R* [2009] NZCA 145.

¹⁶ *Martin v R* CA251/99, 12 October 1999.

appropriate.¹⁷ However, after having regard to the totality principle she uplifted the 16-year starting point for the sexual offending by one year to reach a global starting point of 17 years for both the sexual offending and the physical violence offending.

[49] The Judge then gave a discount of six months for previous good character and a further deduction of six months for the guilty pleas on the physical violence offences. This resulted in an end sentence of 16 years' imprisonment for the sexual offending and two years' imprisonment for each of the physical violence charges, to be served concurrently. The appellant was also given his first three strikes' warning.

Discussion

[50] Mr Leabourn contends the Judge adopted a starting point that was too high, the uplift provided for the physical violence offending was too high and insufficient recognition was given to the totality principle.

[51] Regarding the starting point, Mr Leabourn argues that the Judge erred in her assessment of the severity of the offending against SL. He contends that despite mistaken belief in consent not being raised as a defence at trial this was something that diminished the appellant's culpability for the purposes of sentencing. He also contends that because the appellant and SL were in a long-term relationship and consensual sexual relations were intermingled with the offending the degree of cruelty and callousness required to place the offending in either band three or four of *R v AM* were absent. Thus the offending more appropriately falls within band two, which would warrant a starting point of 11 years' imprisonment. Moreover, the cases the Judge relied upon to cross-check her choice of starting point involved offending of a more serious nature. We disagree.

[52] We see no error in the way the Judge arrived at the starting point of 16 years' imprisonment. The aggravating factors the Judge identified were available on the facts of the offending and appropriately place the offending within band four of *R v AM*. Here, there were two rapes and one incident of unlawful sexual connection with his wife as well as three rapes of his daughter; once when she was five years old and twice

¹⁷ *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39 at [38].

when she was six years old. Such offending is largely similar to the paradigm offending described by this Court in *R v AM* as appropriately falling within band four, that being offending involving repeated rapes of one or more family members over a period of years.¹⁸ Whilst the sexual offending may not have been accompanied by the more violent features typically associated with band four offending, there was multiple offending over a prolonged period of time. It involved vulnerable family members, in particular RS who was a young child. It occurred in the family home, which should have been a safe place for the complainants. It involved a significant breach of trust given the relationship between the appellant and the complainants, in particular his young daughter. The complainants were entitled to look to him for protection from harm. We consider the absence of attendant physical violence with the sexual offending was accounted for by the Judge placing this offending at the lowest level of band four.

[53] Regarding the cases the Judge used as a cross-check we acknowledge that *Martin v R* is not comparable to the present offending, however this has no effect on the outcome here. The other two cases have enough similarities to enable them to be used as a cross-check. No two cases are ever the same.

[54] The level of the appellant's culpability is not reduced by his ongoing relationship with SL or any mistaken belief in consent. The fact he was in an ongoing relationship with SL does not detract from the severity of the violation he inflicted upon her; rather it has a tendency to increase the severity of the offending as he took advantage of the relationship he had with SL for his own desires. There was no evidence at trial of a mistaken belief in consent. Accordingly, the level of culpability cannot be reduced on this basis.

[55] It follows that the starting point was not too high.

[56] The appellant contends the uplift of 12 months to take into account the violence offending was too high. Further, that his guilty pleas to this offending meant RJS was not required to give evidence, and that in regard to RS the violence offending can be

¹⁸ *R v AM*, above n 13, at [109].

said to form part of the violence included in the sexual offending. He argues that these factors weigh against the uplift. We disagree.

[57] The violence offending involved separate discrete incidences to that of the sexual offending. This offending was serious of itself. Particularly in regard to RS and RJS who were young vulnerable children. We see no error with the uplift of one year; rather it is entirely consistent with the need for the end sentence to reflect the appellant's culpability, balanced against the need to recognise the totality principle. On its own such offending would have attracted a higher sentence.

[58] We accept the Crown's submissions that there is nothing objectionable about the end sentence or the process by which it was reached.

[59] It follows that the appeal against sentence is dismissed.

Result

[60] The appeals against conviction and sentence are dismissed.

[61] The names and identifying particulars of the complainants are automatically suppressed.¹⁹ We order that the appellant's identity be suppressed also pursuant to s 200(2)(f) of the Criminal Procedure Act 2011 in order to protect the identities of the complainants.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁹ Criminal Procedure Act 2011, ss 203 and 204.