

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA497/2019
[2021] NZCA 135**

BETWEEN **JOHNNY SEMMENS**
 Appellant

AND **THE QUEEN**
 Respondent

Hearing: 15 February 2021

Court: Gilbert, Mallon and Edwards JJ

Counsel: B A Crowley and C O Thorburn for Appellant
 S K Barr for Respondent

Judgment: 27 April 2021 at 9.30 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is allowed.**
- C The concurrent sentences of 13 years' imprisonment for the sexual violation by rape charges are set aside. A sentence of 11 years and nine months' imprisonment is imposed for the rape of A. A concurrent sentence of 11 years and three months' imprisonment is imposed for the rape of B. The concurrent sentence of six years' imprisonment for the sexual violation by unlawful sexual connection charge remains. The minimum period of imprisonment of 50 per cent imposed on all charges also remains.**
-

REASONS OF THE COURT

(Given by Edwards J)

[1] Mr Semmens was convicted of sexual violation by rape and sexual violation by unlawful sexual connection against one complainant (A), and a further charge of rape against a second complainant (B), following a jury trial before Judge Cathcart in the District Court at Gisborne. Mr Semmens was sentenced to a total of 13 years' imprisonment, with a minimum period of imprisonment of 50 per cent imposed on all charges.¹

[2] Mr Semmens appeals against his convictions on the following grounds:

- (a) The Judge was wrong to decline the application for severance of the charges relating to the two complainants. That is because the evidence of A's pregnancy and subsequent termination was irrelevant and highly prejudicial in the defence of the charges relating to B.
- (b) The Judge unfairly criticised defence counsel in his summing up for failures to put certain matters to the complainants and directed the jury to put less weight on Mr Semmens' evidence about these matters as a result.

[3] Mr Semmens submits that these errors gave rise to a miscarriage of justice. Mr Semmens also appeals his sentence on the basis that the starting point of 12 years and two months' imprisonment was too high, resulting in a manifestly excessive sentence.

The offending

[4] The first two charges related to offending against A and arose out of events on 13 June 2018.

¹ *R v Semmens* [2019] NZDC 18528 [Sentencing judgment].

[5] Mr Semmens and A were at a party at his house and both were drinking heavily. A said she went into the hallway to use the toilet and Mr Semmens followed her into the hallway. He grabbed her around the waist, pulled her shorts, tights and underwear down, and began licking her genitalia. She told him to stop and tried to move away from him. At one point, A was pushed against the wall and then slumped to the floor and passed out. When she woke up, she was in the hallway. Her underwear and tights had been pulled up, but her shorts were on the floor beside her.

[6] A said she felt like sexual intercourse had taken place. She became pregnant and subsequently underwent a termination. DNA analysis confirmed that Mr Semmens was the father of the unborn child.

[7] Mr Semmens denied the incident when interviewed by police. At trial, he conceded that he had lied regarding the sexual acts and claimed the sexual activity was consensual.

[8] The rape of B occurred several months later at B's house on 22 September 2018. Mr Semmens and B were heavily intoxicated. B went to bed leaving Mr Semmens in the house with others. B's sister asked Mr Semmens to leave. Instead, he remained and entered B's bedroom where she was asleep. Mr Semmens woke up another person who was lying on a couch in the bedroom and told him to leave the address.

[9] When B woke the following morning, she noticed that her tights and underpants had been removed and Mr Semmens was lying beside her in the bed. She felt as though sexual intercourse had occurred and she had bruising and tenderness to her right leg, arm and buttocks.

[10] Mr Semmens admitted sexual intercourse with B but claimed it was consensual.

Did the admission of the pregnancy and termination evidence give rise to a risk of a miscarriage of justice?

[11] The Judge declined an application by Mr Semmens to sever the charges relating to A and B prior to the trial.² He did so on the basis that each complainant's evidence was cross-admissible as propensity evidence.³

[12] That finding is not challenged on appeal. Rather, counsel for Mr Semmens submits that A's evidence regarding the pregnancy and subsequent termination was highly charged, irrelevant, and likely to have an unfairly prejudicial effect on the trial concerning B.

[13] This appeal ground was posited as a challenge to the Judge's decision declining the application to sever the charges. But, as the appeal is against the convictions, the issue is whether the joint trials gave rise to a risk of a miscarriage of justice. The specific question to be asked is whether the admission of the evidence relating to A's pregnancy and termination unfairly prejudiced the defence of the trial involving B.

[14] We are satisfied that it did not. The evidence regarding the pregnancy, termination and subsequent DNA analysis was relatively self-contained. It was recorded in neutral terms in an agreed statement of facts. Although A also gave evidence about it during her evidence-in-chief, she did so in relatively brief terms.

[15] References to the evidence in the Judge's summing up, and in the Crown's closing arguments, were made in similarly confined terms. Overall, the evidence was presented and treated with moderation and it did not receive undue emphasis at trial.

[16] In addition, the Judge expressly directed the jury that the evidence relevant to one charge could not be used as evidence in relation to another (with the exception of propensity reasoning as explained by the Judge). He also directed the jury to consider each charge separately, and to put aside sympathy and prejudice. Any risk that the jury

² *R v Semmens* [2019] NZDC 9434.

³ At [32].

would unfairly assess the charge involving B because of the pregnancy and termination evidence relating to A was adequately mitigated by the Judge's directions.

[17] It follows that we consider there was no error in declining the application for severance and no miscarriage of justice occurred as a result of the evidence of A's pregnancy and termination being admitted at trial. This ground of appeal is dismissed.

Did the Judge err in directing the jury about the weight to be accorded to Mr Semmens' evidence?

[18] The second ground of appeal relates to the directions the Judge gave about the weight to be attributed to Mr Semmens' evidence as a result of trial counsel's failure to put certain propositions to both complainants in cross-examination.

[19] The duty to cross-examine a witness on contradictory evidence arises under s 92 of the Evidence Act 2006. That section provides:

92 Cross-examination duties

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may—
 - (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
 - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
 - (c) exclude the contradictory evidence; or
 - (d) make any other order that the Judge considers just.

[20] In *Hannigan v R*, the Supreme Court described the s 92 duty as embodying the principles of fairness and completeness.⁴ The authors of *Mahoney on Evidence: Act & Analysis* describe those two principles as follows:⁵

⁴ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [104].

⁵ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed,

The fairness justification focuses on fairness to the witness and the party that called him or her, by providing the witness with an opportunity to comment on contradictory factual matters that he or she has not had notice would be in dispute. The completeness justification aims to better equip the fact-finder with the perspective of all relevant witnesses on disputed factual matters.

[21] In this case, the Judge found that there had been a failure to comply with the s 92 duty in the questioning of both complainants. He elected to admit the contradictory evidence and give directions to the jury about it. The first set of directions concerned the failure to put certain matters in the cross-examination of B. The second set of directions concerned the failure to put certain matters in the cross-examination of A. We turn now to consider each set of directions.

Complainant B: the presence of a male in the bedroom

[22] B's evidence-in-chief at trial was that a male relative, SW, was asleep on the couch in her room when she went to bed. She said she "crashed out" and woke the next morning to find Mr Semmens in the bed and her underwear and tights removed. SW was no longer in the room.

[23] SW also gave evidence at trial. He said that he was asleep under a blanket on the couch in B's bedroom when Mr Semmens came into the room, took the blanket off him, and told him to "boot it". SW said that B was asleep at the time he left the room. The Crown case at trial was that Mr Semmens had asked SW to leave the room so as to facilitate the rape of B.

[24] Mr Semmens gave evidence at trial. He said that as he was leaving the house, B grabbed him by the hand, led him to her room, and into her bed. When he entered the room, he said that there was no one else there apart from B's dog. He maintained that sexual intercourse had occurred while B was awake and that it was consensual.

[25] The account given by Mr Semmens was put to SW in cross-examination. It was suggested to SW that he may have been mistaken about who had entered the room, and that he was too drunk to remember what happened. It was also put to him on multiple occasions that he was lying about Mr Semmens entering the room in order to

bolster B's case. SW denied that he was lying and maintained that Mr Semmens had asked him to leave B's room that night.

[26] Mr Semmens' version of events was also put to B in cross-examination. Specifically, it was put to her that she had led Mr Semmens by the hand into her bedroom, and that her dog was in the room when she went in. B denied that she had invited Mr Semmens into her room. She admitted having a dog in the house but did not directly answer the question about whether the dog was in her room at the time, although she subsequently confirmed in re-examination that the dog was not in the room. B was also challenged on her evidence that she was asleep during the intercourse and it was put to her that she was lying about that. However, it was not specifically put to B that there was no other person in the room when Mr Semmens entered the room.

[27] The Judge considered the failure to put this proposition to B was a breach of the duty in s 92 and that a direction to the jury on the weight to be attributed to the evidence should be made. The relevant sections of the Judge's summing up are as follows:

Now I need to talk to you regrettably about certain propositions that were not put to [B] and [A]. As you know it is part of the Crown's case that [SW] was asleep on the sofa in [B's] room. The Crown says on the basis of [SW's] evidence in conjunction with other evidence there is support for the proposition Mr Semmens approached [SW] and in effect commanded him to leave that room. And the Crown, in effect, says that then facilitated the rape of the complainant while she was unconscious in the bed. So that is a significant component to the Crown's narrative before you. And you heard [the Crown] place real emphasis on that in her closing address.

Now you will recall [SW] was directly challenged by [counsel for Mr Semmens] on the point along with a suggestion to [SW] that he was giving false evidence to assist [B's] case. I am sure you will remember that passage in the trial. Then [SW] was specifically accused about lying when he said he was sleeping in [B's] room and being awoken by someone. So those propositions were put straight to [SW] by [counsel for Mr Semmens]. But what would have struck you is the defence never challenged [B] on that point. It was never suggested in cross-examination to her that there was no one in [that] room. So, she has had no opportunity to comment on that point. Because of the way this developed in the trial the Crown, therefore, is under a disadvantage. So, I must direct you about what weight you need to attach to this evidence.

I direct you to attach to that evidence what weight you consider is appropriate affected by the non-cross-examination on the point. Non-cross-examination of the complainant means it must carry less force or weight than it would otherwise. So, the weight of the challenge to [SW] is weakened, the weight of Mr Semmens' evidence to the contrary on the point is also accordingly weakened. With those directions in mind it is, therefore, up to you as to how much weight in the end you give Mr Semmens' evidence on that specific point.

[28] Counsel for Mr Semmens says the Judge was wrong to suggest that the failure of trial counsel to cross-examine B on this point affected the challenge made to SW or the weight of Mr Semmens' evidence. He submits that, given B's evidence that she was asleep when Mr Semmens went into the room, there was little point in challenging her on who was in the room at the time she entered.

[29] The key issue in relation to this charge was one of consent. Mr Semmens' defence at trial was that B had invited him into the room, the sexual intercourse was consensual, and it had taken place while B was awake. B, however, denied inviting Mr Semmens into her room, said she was asleep or unconscious at the time the sexual intercourse took place, meaning she did not, and could not, have consented to it.

[30] The assessment of the s 92(1) factors will depend, in part, on how the evidence unfolds at trial. For the purposes of determining this appeal, we are prepared to defer to the Judge's assessment that s 92 was triggered in this case without expressly determining the point. However, we consider the circumstances of counsel's omission, and the relevance of the evidence not put to B, required a moderate and balanced direction to the jury. It is in this respect that we consider the Judge erred. Statements in the summing up such as "regrettably ... certain propositions ... were not put" and "the Crown ... is under a disadvantage" implied a criticism of defence counsel that was unfair given the relative significance of the evidence not put to B. Similarly, phrases such as "what would have struck you" suggested that counsel's deficiency was of key importance. A direction to the jury that the challenge to SW was weakened also went too far in the circumstances.

[31] It follows that we consider there were errors in the Judge's directions on this point. Whether those errors gave rise to a miscarriage of justice is considered below.

Complainant A: the nod to follow

[32] A's evidence at trial was that at one point in the evening she and Mr Semmens were alone in the laundry where they and others had been drinking. She then left the laundry to go to the toilet, but only made it to the hallway. A said that it was there that Mr Semmens grabbed A around the waist and sexually assaulted her.

[33] The cross-examination of A proceeded on the basis that the sexual activity was consensual. It was put to her that, contrary to her evidence, it was Mr Semmens who walked out of the laundry and that A followed him. She denied that this happened. It was also put to her that she was the one who walked up to Mr Semmens in the hallway and kissed him, and that she helped him remove her jeans and underwear so that he could perform oral sex on her. She denied that any of this happened.

[34] When Mr Semmens gave evidence, he said that A, her partner and himself were drinking in the laundry. He said he began "feeling up" A, and when A's partner left the laundry, Mr Semmens "hinted" to A to follow him into the hallway by nodding at her and that A had followed him there. The relevant part of his evidence in chief is as follows:

A I hinted to [A] – when [A's partner] had left I hinted for [A] to follow.

Q You whated?

A I hinted to [A] to follow.

Q Hinted? How did you hint?

A Oh, I nodded at her. I went like that.

Q Where did you go to?

A The hallway.

Q Did she follow you?

A Yes.

THE COURT ADDRESSES MR FORSTER (16:49:02) – LEGAL DISCUSSION

[35] The Court's interruption was to point out that the proposition regarding the nod had not been put to A in cross-examination. Mr Semmens completed his evidence,

and the Judge saw counsel in chambers. Counsel for Mr Semmens sought to recall A, but that application was opposed by the Crown. The Judge declined to recall A, deciding that the appropriate course was to direct the jury regarding the weight to be attributed to Mr Semmens' contradictory evidence.⁶

[36] Those directions in the Judge's summing up were as follows:

Also, you will recall yesterday I raised with [counsel for Mr Semmens] my concern over the failure to put to [A] certain not insignificant aspects of the narrative claimed by Mr Semmens during his evidence. As you recall Mr Semmens said he hinted at [A] and that she gave him a gesture—a no—to go to the hallway area. The obvious inference being suggested by Mr Semmens is that by giving the gesture, it is a signal that she wants to follow him into that hallway area.

That specific and important proposition was never put to the complainant, [A]. Again, in the same way you are entitled to use that fact and assess its weight because of failure to put it to [A] and also to assess Mr Semmens' credibility on that point. Again, like the other matter I raised a moment ago it is for you in the end to give what weight you attach to that evidence.

[37] We consider the reference to “a no” above is most likely a typographical error, with the correct word being “nod”. That is the only way of making sense of the sentence that follows, namely, the inference is that by giving the gesture it is a signal that she wants to follow him into the hallway area.

[38] The first point to note is that the Judge mischaracterised Mr Semmens' evidence regarding the nod. Mr Semmens had said that *he* gave A a nod, whereas the Judge summarised Mr Semmens' evidence as saying that it was *A* who had given him a nod.

[39] It is likely that this mischaracterisation affected the Judge's decision about whether s 92 was triggered in the circumstances. But it does not necessarily follow that s 92 was not triggered at all. As we explain below, the point is not determinative of the appeal, and so we proceed on the basis that s 92 was triggered in this case irrespective of the mischaracterisation of the evidence.

⁶ *R v Semmens* [2019] NZDC 10345 (Ruling 1 of Judge Cathcart) at [9].

[40] However, and like the position with the directions regarding B, the direction the Judge gave attributed more significance to the failure to cross-examine on the point than was otherwise warranted. For example, the Judge referred to the evidence as “not insignificant aspects of the narrative claimed by Mr Semmens”, and later referred to it as the “specific and important proposition”. These statements contained an implicit criticism of defence counsel, which added to the earlier criticism in relation to B. They also placed more weight on the omission than was justified. That was an error in our view. Whether it gave rise to a risk of miscarriage is considered next.⁷

Was there a risk of a miscarriage of justice?

[41] Although it would have been preferable for the Judge to temper the directions he gave in relation to the failure to cross-examine both A and B, we do not consider the errors gave rise to a risk of miscarriage, in the sense that there is a real risk the outcome of the trial was affected. We say that for three reasons.

[42] First, although the omission was overemphasised, the directions were nevertheless tailored to the specific evidence not put to the witness. Importantly, the directions did not invite the jury to accord less weight to Mr Semmens’ evidence generally or invite broad adverse credibility findings to be made against him. Any errors were therefore relatively limited in their reach.

[43] Second, the directions must be seen in the context of the summing up as a whole. This was a comprehensive summing up (running to some 137 paragraphs in written form) of which the directions regarding the failure to cross-examine formed a very small part. The key issues at trial were the questions of consent and reasonable belief in consent. The Judge directed the jury extensively on the law regarding those two issues, including the time at which those questions were to be assessed. The question trail also asked the jury to consider those questions at the time the sexual activity took place. We consider it unlikely that the errors in the Judge’s directions would have had a material impact on the jury’s deliberations regarding these issues.

⁷ Criminal Procedure Act 2011, s 232(4)(a).

[44] Third, the Crown evidence against Mr Semmens was strong. The evidence of both complainants, who did not know each other, provided mutual support for the credibility of their respective accounts. The Judge directed the jury on the assessment of credibility and reliability, and the assessment of Mr Semmens' evidence generally. In those circumstances, any error in the directions regarding the failure to cross-examine on certain points is unlikely to have made any difference to the end result.

[45] This ground of appeal is also unsuccessful. The appeal against convictions is accordingly dismissed.

Sentence appeal: was the starting point too high?

[46] Mr Semmens was sentenced to concurrent sentences of 13 years' imprisonment for each of the rape charges, and a concurrent sentence of six years' imprisonment for the unlawful sexual connection charge. A minimum period of imprisonment of 50 per cent was imposed on all charges.⁸

[47] Those sentences were reached by taking a starting point of 12 years and two months' imprisonment for the totality of the offending.⁹ An uplift of 10 months for prior convictions was then applied.¹⁰ There is no challenge to the uplift or the imposition of a minimum period of imprisonment. The sole ground of appeal relates to the starting point adopted by the Judge.

[48] The Judge considered there to be an underlying pattern to the offending and categorised it as that of a sexual predator. He said that there was an element of premeditation in that Mr Semmens preyed on vulnerable women who were incapacitated due to alcohol.¹¹ The Judge concluded that the offending fell within the upper end of band two of *R v AM (CA27/2009)*,¹² and, after considering cases cited to him by defence counsel, fixed the starting point of 12 years and two months' imprisonment.

⁸ Sentencing judgment, above n 1, at [18]–[20].

⁹ At [12].

¹⁰ At [15].

¹¹ At [5].

¹² At [8], referring to *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[49] Ms Thorburn, who made submissions on this aspect of the appeal on behalf of Mr Semmens, submits that a starting point of seven to eight years' imprisonment would have been appropriate for the offending against A with an uplift of no more than three years for the offending against B. That would lead to a total starting point of 10 or 11 years' imprisonment, and an end-sentence considerably less than the 13 years' imprisonment imposed.

[50] We start with the aggravating features of the totality of the offending, of which there are several:

- (a) Both complainants were extremely vulnerable due to their intoxication with the rapes taking place when they were effectively unconscious.
- (b) The offending had a devastating impact on both women, with the extent of the harm to A, due to her pregnancy and subsequent termination, being particularly severe.
- (c) There was an element of premeditation in that both complainants were targeted due to their advanced state of intoxication.
- (d) There were two rapes, approximately three months apart, in very similar circumstances.

[51] In addition, the unlawful sexual connection offending, and Mr Semmens' persistence in the face of A's protests, aggravates the offending against her. The bruising to B, and the fact that the offending took place in her home, and in her bed, are additional aggravating features of the offending against B.

[52] There is no issue with the Judge's categorisation of this offending as falling within band two of *R v AM*. That has a starting point range of seven to 13 years' imprisonment and was described by this Court as follows:¹³

[98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative

¹³ *R v AM (CA27/2009)*, above n 12.

terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[53] The issue is whether fixing the starting point towards the top end of that band resulted in a manifestly excessive sentence.

[54] Counsel for both parties referred us to cases involving rapes against a single complainant, and those where the defendant had committed rapes against different complainants on different occasions. We have found three cases of this Court, falling into the first category, to be of assistance in determining a starting point.¹⁴ All involved a complainant who was intoxicated or sedated to the point of unconsciousness.

[55] In *Tahiri v R*, the rape took place in the complainant's bed and she was unaware that it was occurring.¹⁵ The complainant was the mother of a friend of Mr Tahiri's and had known him since he was a little boy. She had invited him to stay on the couch on the evening of the rape. A starting point of eight years' imprisonment was held to be at the top end of the available range but nevertheless available to the sentencing Judge.¹⁶

[56] In *B (CA231/2017) v R*, the complainant and defendant knew each other.¹⁷ The defendant was in the complainant's house when the offending occurred. The defendant forced his penis down the complainant's throat, after which the rape, which she could not remember, took place. A starting point of eight years' imprisonment was not challenged on appeal.

[57] In *Simpson v R*, the complainant and her friends went to Mr Simpson's workplace for an event prior to a sporting match.¹⁸ The complainant was heavily intoxicated and became sick. Mr Simpson drove her and her friends to the apartment

¹⁴ The Crown also referred us to *R v Morris* [1991] 3 NZLR 641 (CA). That case was cited in *R v AM (CA27/2009)*, above n 12, at [102] as an example of a case falling towards the upper end of band two. The circumstances of that offending were sufficiently different to the present case so as to be of limited assistance in determining a starting point.

¹⁵ *Tahiri v R* [2013] NZCA 73.

¹⁶ At [15].

¹⁷ *B (CA231/2017) v R* [2018] NZCA 137.

¹⁸ *Simpson v R* [2016] NZCA 95.

she was staying at and carried her inside to bed. Mr Simpson then dropped her friends off to the sports event. He returned to the apartment, entering through an unsecured door, and raped the complainant while she was asleep. The complainant awoke to find herself being penetrated. A starting point of nine years and six months' imprisonment was held by this Court to be within the available range.¹⁹

[58] We consider that the offending in *Tahiri v R* is less serious than the offending against A. That is due to the additional offending against A, namely the unlawful sexual connection offence, and the impact of the pregnancy and termination. However, the offending in *Tahiri v R* is broadly on a par with the offending against B.

[59] The offending in *B (CA231/2017) v R* is on par with that against A, and more serious than that against B. Finally, the offending in *Simpson v R* could be considered less serious than that against A, and similar to that against B. Arguably, however, there was a greater level of premeditation in that case when compared to the offending against A and B.

[60] Based on these cases, we consider a starting point of eight years' imprisonment for the offending against A, and seven years and six months' imprisonment for the offending against B could be justified if each set of offending was sentenced on a stand-alone basis. That would lead to a total starting point of 15 years and six months' imprisonment which would need to be adjusted for totality purposes. Guidance on the extent of that adjustment may be received from cases involving rapes against two separate complainants. There were two cases of this Court cited to us by the appellant.

[61] In *R v Dawson*, the first complainant had been in a relationship with Mr Dawson which was characterised by violence.²⁰ Mr Dawson went to the first complainant's house, strangled her, pressed his hand hard on her face, and took her phone. He returned the following morning, forced her on the bed, pushed his wrist against her throat so she passed out, held a knife to her arm, threatened to slice her throat and cut some of her hair. Mr Dawson then pulled her tights and underwear down, threatened to slice her genitalia and raped her. The second complainant was

¹⁹ At [58].

²⁰ *R v Dawson* [2012] NZCA 225.

raped in a car which was parked in a remote spot near a beach. Mr Dawson placed a knife on the dashboard which he made the complainant aware of when she told him to stop. Both complainants were 16 years old.

[62] A starting point of 12 years' imprisonment for each of the sexual violation charges, on a stand-alone basis, was not challenged on appeal. What was challenged was the 12-month uplift the sentencing Judge applied to reflect that Mr Dawson was being sentenced on two charges involving two different complainants, resulting in an effective sentence of 13 years' imprisonment imposed for each rape charge.²¹ On appeal, this Court considered that the end sentence of 14 years' imprisonment, which included a 12-month uplift for other offending, was at the lower or end of the available range.²²

[63] The second case of *Solicitor-General v Iti* involved two defendants who picked up the first complainant from the street at night in a van and drove her to a secluded location where one defendant raped her.²³ The second complainant was also raped in the van driven by both defendants after being offered a lift late at night and being driven around town. A global starting point of 10 years' imprisonment was increased to 13 years' imprisonment on appeal with this Court noting that a starting point 12 to 18 months higher than this could not have been successfully challenged on appeal.²⁴

[64] Both cases involved offending more serious than the present case due to the additional acts of violence, use of weapons, level of premeditation and the fact that there were multiple offenders. Something less than the starting points adopted in those cases is warranted.

[65] We have also had regard to High Court cases involving two complainants in setting the starting point.²⁵ Starting points ranging from 12 to 15 years' imprisonment were adopted in those cases. We consider the offending in those cases to be generally

²¹ At [56] and [58].

²² At [60].

²³ *Solicitor-General v Iti* [2012] NZCA 27.

²⁴ At [39].

²⁵ *R v N* [2019] NZHC 1321; *R v John* [2018] NZHC 89; *R v Dixon* HC Auckland CRI-2009-044-486298, 14 August 2009; and *R v Onaariki* HC Auckland CRI-2008-404-313, 23 February 2009.

more serious than in the present case due to the additional acts or threats of violence, use of weapons, and the age of some of the complainants.

[66] Taking all of these cases into account, we consider the starting point of 12 years and two months' imprisonment adopted by the Judge was outside the available range. We do not diminish the seriousness of the offending or its impact on the complainants. However, the principle of consistency requires comparable sentences to be imposed for comparable offending.²⁶ The comparison of Mr Semmens' offending to that involved in other cases suggests that a starting point less than 12 years was appropriate. We consider an overall starting point of 11 years and six months' imprisonment would reflect the gravity of Mr Semmens' offending and his overall culpability in this case.

[67] The 10 month uplift for prior convictions was not challenged on appeal, but requires adjustment for proportionality and in setting the appropriate end sentence. The only relevant conviction in the last 10 years of any relevance to the index offending is a conviction for male assaults female in 2014, for which Mr Semmens was sentenced to five months' imprisonment. The only other convictions for sexual offending were entered more than 10 years ago, when Mr Semmens was 15 and 19 years of age respectively. Taking into account the age of these convictions and the sentences imposed, we consider an uplift of three months is appropriate for Mr Semmens' prior convictions.

[68] This brings the end sentence to 11 years and nine months' imprisonment. It follows that the sentence imposed by the Judge was manifestly excessive and the appeal against sentence is allowed.

Result

[69] The appeal against conviction is dismissed

[70] The appeal against sentence is allowed.

²⁶ Sentencing Act 2002, s 8(e).

[71] The concurrent sentences of 13 years' imprisonment for the sexual violation by rape charges are set aside. A sentence of 11 years and nine months' imprisonment is imposed for the rape of A. A concurrent sentence of 11 years and three months' imprisonment is imposed for the rape of B. The concurrent sentence of six years' imprisonment for the sexual violation by unlawful sexual connection charge remains. The minimum period of imprisonment of 50 per cent imposed on all charges also remains.

Solicitors:
Public Defence Service, Wellington for Appellant
Crown Law Office, Wellington for Respondent