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IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203
OF THE CRIMINAL PROCEDURE ACT 2011.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA194/2021
[2021] NZCA 630**

BETWEEN	JOSEPH WILLIAM REWI CRAVEN Appellant
AND	THE QUEEN Respondent

Hearing:	29 September 2021
Court:	Cooper, Venning and Palmer JJ
Counsel:	J P R Scott for Appellant B C L Charmley for Respondent
Judgment:	29 November 2021 at 10.30 am

JUDGMENT OF THE COURT

- A The application to adduce further evidence is declined.**
- B The appeals against both conviction and sentence are dismissed.**
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REASONS OF THE COURT

(Given by Cooper J)

[1] Following a trial before Judge Duncan Harvey and a jury, the appellant Joseph Craven was convicted on one charge of sexual violation by unlawful sexual

connection,¹ three charges of rape,² two charges of male assaults female,³ and one charge each of threatening to kill,⁴ strangulation,⁵ breach of a protection order,⁶ and offering to supply methamphetamine.⁷ Mr Craven had entered a guilty plea to the methamphetamine charge at the commencement of the trial.

[2] The Judge sentenced Mr Craven to an effective term of 14 years' imprisonment and ordered that he serve a minimum period of imprisonment (MPI) of seven years.⁸ Mr Craven appeals against both his conviction and sentence.

[3] The conviction appeal is founded on an alleged miscarriage of justice caused by:

- (a) the admission of unfairly prejudicial propensity evidence, namely his eight previous convictions for offending against the complainant W and evidence about his sexually controlling behaviour towards her years previously when they lived together in Taranaki; and
- (b) materials that had not been produced in evidence being erroneously placed in the jury room.

[4] The sentence appeal is advanced on the basis that the starting point of 11 years' imprisonment adopted by the Judge for the sexual offending was too high, with the result that the sentence imposed was manifestly excessive. It is also argued that the uplift of three years in respect of the violence offending was too great and that an MPI should not have been imposed.

¹ Crimes Act 1961, ss 128(1)(b) and 128B.

² Sections 128(1)(a) and 128B.

³ Section 194(b).

⁴ Section 306(1)(a).

⁵ Section 189A(b).

⁶ Family Violence Act 2018, s 112(1)(a).

⁷ Misuse of Drugs Act 1975, s 6(1)(c).

⁸ *R v Craven* [2021] NZDC 8434 [Sentencing notes].

The offending

[5] The offending for which Mr Craven was convicted was said to have occurred in Whangārei over the course of two days in September 2019. Mr Craven and W had been in an on and off relationship for approximately 18 years. They have three children, then aged 13, 10 and three. W also has a son, then aged 20 months old. As we will explain the relationship had previously been fraught and had led to the making of a protection order against Mr Craven by the District Court at Hāwera on 2 July 2009.

[6] The Crown's case was substantially based on an electronically recorded interview given by W on 17 September 2019 which was played to the jury and amplified by her at the trial.

Offering to supply methamphetamine

[7] On the account she gave, W drove Mr Craven to her home in Whangārei on the evening of Sunday 8 September 2019 on the understanding that he would give her drugs. This was the basis of the charge that he had offered to supply methamphetamine. W said that she wanted the methamphetamine to sell it and buy a better vehicle. When they arrived home, Mr Craven said that he did not have drugs with him and she left the property, thinking it would be best for them to “get a bit of space” between them. When she later returned home, her daughter told her that Mr Craven had been gone for about an hour. In fact, he was waiting for her in a shed on the property. Although she had locked all the doors and windows, Mr Craven was able to enter the house through their daughter's bedroom window.

Sexual offending on Sunday evening

[8] He then asked her where she had been and demanded that she show him text messages on her phone to prove she had not been with someone else. She said that she eventually did so and unlocked her phone which Mr Craven snatched from her, cutting her little finger in doing so.

[9] After reading messages on the phone Mr Craven threw laundry that W had been folding on to the floor. He said that he would just “keep doing it until you fucking give me what I want”. He then read a message in which another man had told W that he would give her “a good fisting”. Mr Craven said that if that was going to happen, he would do that to W too. After an angry exchange, he called her a “fucking slut”.

[10] W said that he told her he wanted to “have it” before the children woke up, and if that did not happen, he would get “real fucked off” and “be in a shitty”. She felt as a result of past experience that she had to let Mr Craven have sex with her otherwise he would make her day “miserable”. At the trial, she explained further that she had felt she had to have sex with Mr Craven because she knew that, he would not stop “hassling” her until she did, and his anger levels would “get higher and higher”.

[11] It was on this basis that W submitted and Mr Craven began to digitally penetrate her in a rough manner. She accepted that she had started to enjoy it but then said it became really sore and she had told him “please stop, it’s hurting”. He nevertheless persisted, although she again asked him to stop and began to pull away. This formed the basis of the charge of sexual violation by unlawful sexual connection.

[12] At this point Mr Craven inserted his penis inside W’s vagina. She explained in her interview that she did not want this to happen but there was nothing she could do to stop it and “it was better than having his hand up there”. This event gave rise to the first charge of rape. She confirmed in her evidence at the trial that she had not wanted to have sex with Mr Craven, and denied a proposition put to her that she had initiated sexual intercourse. After Mr Craven pulled out, she told him that he had hurt her, to which he replied: “that’s why we should’ve had it in the bed”. He told her that he had not finished, to which she replied: “yes, you have, because you hurt me”. She then went to the bathroom. She noticed she was bleeding and wiped off bloody fingerprints which Mr Craven had left on her hip.

[13] W then went to bed and tried to sleep. Mr Craven entered the bedroom, sat on the edge of her bed and tried to put his hand under the blankets. She told him she had had enough and did not want any more. Mr Craven then entered the bed from the

other side. She tried to protect herself using the bed clothes, but Mr Craven touched her sexually over a period of 10 to 15 minutes, notwithstanding her attempts to prevent him doing so. She denied in cross-examination that she had asked Mr Craven to go into the bedroom for more sex.

[14] Eventually, she ceased resisting. At this point, Mr Craven pulled her pants down, and raped her for a second time. After that was over, W was able to sleep for a while and then got up to have a shower. As she did so, Mr Craven walked into the bathroom to ask why she was having a shower. She replied: “to wash the rape off me”. Once again, W rejected the suggestion put to her in cross-examination that she had agreed to have sex with Mr Craven.

Violence offending on Monday

[15] On the morning of Monday 9 September 2019, Mr Craven left the house to walk to the library with the children. One of the children told him during the walk that W had been seeing another man. W had not told him about that, fearing his reaction. When he learned about this, he ran back to the house and in W’s words:

... pretty much just beating me up and trying to choke me out and trying to kill me and trying to – just doing dumb shit. And that lasted pretty much all day, until about 4 or 5 o’clock ‘cause he was still going through my Facebook and through my Facebook messages.

[16] The charge of threatening to kill and one of the charges of male assaults female were based on events that took place in the bedroom during this period. After W confirmed she had been sleeping with someone else Mr Craven got on top of her on the bed saying “you’re gonna die this time, bitch” and placed his arm around her neck. A struggle ensued during which W managed to get on the ground. She grabbed Mr Craven’s throat and choked him, saying she was not going to die but he was. In cross-examination, she said that she had been fighting for her life and had threatened to kill him because it was either him or her. After an ongoing struggle, W eventually gave up and began to cry because she was scared and in pain. Mr Craven attempted to force her to apologise for sleeping with another man, and said he would stay at her house, or get her children taken from her, using photographs he claimed to have of her 20-month-old son with a methamphetamine pipe.

[17] W said that over the course of the day she felt that she was being held hostage and that every time she went near a door Mr Craven would ask where she was going. She said that she feared that if she left the house, he would drag her back inside and she did not think that she could risk leaving the children behind, especially her youngest son who was not Mr Craven's.

[18] There was another incident in which Mr Craven threw W to the ground and choked her by placing his arm on her neck and pushing down. She began to feel herself blacking out. That incident gave rise to the charge of strangulation.

[19] Another charge of male assaults female was based upon Mr Craven grabbing W's head and smacking it into a bedroom door, causing her to fall to the ground. It was put to her in cross-examination that she had head-butted the door frame herself, which she denied. W's account was that at this point she had sat on the ground with her knees to her chest, gripping them with her arms and crying. She said she had suicidal thoughts because she could not see any way out of the situation. After a while, she got up and began preparing the children's lunch. At this point, she said Mr Craven told her she was a "disgusting slut", that she was going to "die tonight bitch" and that if he could not have her, no one could.

Further offending on Monday

[20] Mr Craven told W to go into the bedroom saying that he would have further intercourse with her. W said she asked him why he thought he could demand sex from her and that it was not okay to force her to have sex when she did not want it. He responded by saying he only wanted what she was prepared to give to others and further insults followed. Further sexual intercourse took place, forming the basis of the third charge of rape. W described herself as feeling "emotionally broken", and "degraded". She "cried it out" in the bedroom for a while, as Mr Craven left her alone.

[21] W said that after Mr Craven went to sleep that night, she had her chance to call the police. She dialled 111. The call was recorded and a transcript made.

The recording was not played at the trial, and the transcript was not admitted in evidence.⁹

[22] In addition to the charges based upon the sexual and violence offending, Mr Craven was charged with contravening the protection order which had been granted in her favour by the District Court at Hāwera in July 2009.

The defence

[23] At the trial, Mr Craven gave evidence.¹⁰ On his account, W had become abusive towards him after realising that he did not have methamphetamine when they returned to her address. He said that when she returned after leaving the property for a while she was high on methamphetamine. Mr Craven's evidence was that she had then initiated sex with him, and they had consensual intercourse in the lounge and again in the bedroom. At no point had he digitally penetrated her vagina. He said that the following day, she became angry with him because he had taken photographs of her son with a methamphetamine pipe. He said she was worried he would show the photographs to Oranga Tamariki and hid his phone. He also claimed she was jealous of him because he had been with another woman.

[24] According to Mr Craven there had been an argument during which W had strangled him and stomped on his head. He had pulled her hair in self-defence. In explanation of red marks which were on W's neck Mr Craven said they were a hickey and in explanation of the fact that she had a swollen eye he said she had head-butted the door. He also said her eyes were swollen as she always "gets like that when she cries".

[25] The jury rejected Mr Craven's evidence. They returned a verdict of not guilty in respect of one charge of male assaults female,¹¹ but found him guilty on the other charges. As we have mentioned, Mr Craven pleaded guilty to the charge of offering to supply methamphetamine.

⁹ It was however among materials wrongly left in the jury room as we address below.

¹⁰ The evidence largely conformed to what Mr Craven said to police in the interview conducted after his arrest.

¹¹ It was alleged in relation to that charge that Mr Craven had punched W.

The conviction appeal

Propensity evidence — prior convictions

[26] The Crown was permitted to lead propensity evidence as a consequence of a ruling made prior to the trial by Judge Orchard.¹² The propensity evidence concerned Mr Craven’s previous convictions for offending against W over a period from 5 June 2008 to 30 January 2018. The offences were listed in the pre-trial ruling as follows:¹³

- 30 January 2018 – breach of protection order.
- 8 November 2016 – breach of protection order and wilful damage.
- 18 October 2016 – breach of protection order.
- 4 June 2015 – breach of protection order.
- 17 October 2011 – breach of protection order.
- 14 May 2010 – breach protection order.
- 5 June 2008 – male assaults female.

[27] Judge Orchard summarised the circumstances of each of these offences on the basis of the summary of facts to which Mr Craven had pleaded guilty, noting that in each case the Crown had filed a certificate of conviction.¹⁴ She also noted that it was common ground that the evidence was propensity evidence.¹⁵ She recorded a submission made by the Crown that although the evidence was not “classic” propensity evidence, it was within the concept of “relationship” evidence of the type held admissible in this Court’s judgments of *P (CA354/2017) v R*, *Campbell-Joyce v R* and *Perkins v R*.¹⁶ She held:

[26] I am satisfied that not only do the circumstances of the previous offending give a picture of the relationship, which will assist the jury in understanding why events unfolded in the way that they are alleged to have done on this occasion, but also they disclose a pattern of behaviour by the defendant towards the complainant over a period of more than a decade.

¹² *R v Craven* [2020] NZDC 25378 [Pre-trial ruling].

¹³ At [20].

¹⁴ At [21].

¹⁵ At [22].

¹⁶ At [24], citing *P (CA354/2017) v R* [2018] NZCA 361; *Campbell-Joyce v R* [2016] NZCA 192; and *Perkins v R* [2011] NZCA 665.

[27] A consistent theme through the Summaries of Fact is the defendant's verbal abuse of the complainant; his jealousy which leads to verbal abuse, and on one occasion, violence, including strangulation; overbearing and controlling behaviour, including a refusal to desist from mistreatment when asked and refusal to leave when asked even when he is subject to a protection order.

[28] In this case the defendant has sought to paint the complainant as the aggressor. He has also alleged that she is in the habit of "setting him up". His pleas of guilty to these earlier charges will assist the jury in determining those issues. The jury will be given guidance as to the use that this evidence can be put and cautioned not to use it for improper purposes.

[29] I order that the proposed propensity evidence is admissible and can be adduced by production of the Summaries of Fact and Certificates of Conviction or by a s 9 admission, if that is the parties preference.

[28] No doubt as a consequence of the pre-trial ruling the defence decided to admit the fact of the offending and the circumstances of it in a statement of admitted facts for the purposes of s 9 of the Evidence Act 2006. The admissions were recorded in the statement of facts as follows:

1. The defendant has the following convictions for offending against the complainant [W]:

a) Male assaults female : offence date 5 June 2008

At 8:00am on 5 June 2008 the defendant was at his home address ... [in] Harewa. [W] was also at the address. Both the defendant and [W] were in bed.

An argument began and the defendant elbowed [W] a number of times. When she elbowed him back he punched her in the face twice near her right eye. He then straddled her while she was lying down on the bed. He put his hands on her throat and applied pressure until she could not breathe. He then stopped and stood at the end of the bed.

[W] tried to get out of the bed to phone Police but the defendant repeatedly pushed her back onto the bed.

He would not let her leave the room for 5 to 10 minutes.

[W] eventually escaped by climbing out a window and ran to a neighbouring property where she phoned Police. The defendant followed her to the neighbouring property but left the address before the Police arrived.

When spoken to by Police the defendant denied the facts as outlined and said that [W] was in fact the one who hit him and that he had not touched her.

The defendant entered a guilty plea to the charge of male assaults female on 1 September 2008.

b) Contravening a Protection Order : offence date 14 May 2010

At 11:30am on 14 May 2010 the defendant was at [W]' address in Hawera. He was at the address looking after their two children while [W] was working. When she arrived home from work she and the defendant argued over the fact that she was 15 minutes late and the defendant accused her of seeing someone else.

[W] told the defendant that she was not going to argue with him in front of the children and told him to leave the address. The defendant did not leave the address. [W] picked up the phone and rang Police. As she was talking to the operator the defendant pulled the telephone plug from the wall ending the call.

The defendant and [W] continued to argue until Police arrived at the house.

The defendant ran down the back of the section and left the address across adjoining farm land.

The defendant pleaded guilty to contravening a Protection Order on 8 June 2010.

c) Contravening a Protection Order : offence date 17 October 2011

At approximately 2:30pm on 17 October 2011 the defendant was at [W]'s address in Harewa. He was at the address looking after one of their children while she was out with her mother. When she arrived home the defendant became abusive and stated that she was seeing someone else.

[W] told [the] defendant that she was not going to argue with him in front of the child and told him to leave the address. She put headphones on and began listening to music to avoid a confrontation with the defendant. The defendant approached her and pulled the headphones out of her ears. She repeatedly asked the defendant to leave but the defendant replied by calling her a slut each time he was asked to leave.

When he did not leave the address [W] picked up the phone and rang Police. He eventually left the address when he became aware that the Police had been called.

The defendant pleaded guilty to contravening a Protection Order on 29 November 2011.

d) Contravening a Protection Order : offence date 4 June 2015

At 11:00am on 4 June 2015 the defendant and [W] were at Trafalgar Square Mall in Taupo Quay, Wanganui. They were in the Bed, Bath and Beyond store in the mall.

[W] asked the defendant to look after the children on Saturday so she could play netball and mix with her friends. The defendant started verbally abusing her, telling her she was a slut and that she wanted him to look after the kids so she could go out drinking. [W] walked away however the defendant followed her around the store. She told the defendant to get away from her or she would call the Police. The defendant kept following her around the store. The Police were called.

The defendant pleaded guilty to contravening a Protection Order on 23 June 2015.

e) Contravening a Protection Order : offence date 18 October 2016

On 18 October 2016 at 9:30am [W] was in her bedroom at her home address. She heard a noise coming from within the kitchen.

A short time later she opened her eyes and saw the defendant standing over her next to her bed. He reached over and attempted to kiss [W]. She refused his advances and covered her face, pushing the defendant away.

She told the defendant to get out of her house straight away. The defendant failed to leave when told to and walked into the kitchen muttering something about bacon that was on the side. [W] realised the defendant had not left her house and began to call Police. The defendant heard [W] ask for Police and left the address via the rear of the house.

The defendant entered a guilty plea to the charge on 19 December 2016.

f) Wilful damage and contravening a Protection Order : offence date 8 November 2016

At approximately 7:30pm on Tuesday 8 November 2016 [W] and the defendant were at the defendant's father's address in Kaeo. They had arrived separately to visit their youngest child and to skype their eldest child who was staying with a paternal grandmother in Maketu, Bay of Plenty district.

The defendant became abusive towards [W] so she removed herself from the dwelling, socialising with family outside the address. When she entered the dwelling again to speak to her daughter on skype the defendant again abused her, threatening to stop her having access to her children.

[W] immediately left the dwelling to avoid further conflict. She went and sat in her [vehicle] and locked the doors. The vehicle belonged to her mother. The defendant approached the vehicle and demanded to speak with [W]. When she told him she had nothing to say he became angry and proceeded to strike out at the vehicle with his hand. He struck the driver's side wing mirror with such force that the glass mirror smashed and fell out of its mounting. The defendant then

picked up the broken wing mirror and waved it defiantly at [W] as she sat in her vehicle.

When the defendant walked off [W] got out of the car and went to the dwelling in order to obtain cellphone reception to phone Police. When asked by the defendant's family not to bring Police to the address she went to collect her shoes in order to leave to phone Police.

As she bent to pick up her shoes the defendant attempted to grab them from her causing her to lose balance and fall into a doorway. As she fell she put her elbow through a glass door pane causing it to shatter. This caused the defendant's family to phone Police and a short time later the defendant left the address following persistent requests from his family. He was located some hours later at a family address in Matua Block in Kerikeri.

The defendant entered guilty pleas to these charges on 19 December 2016.

g) Contravening a Protection Order : offence date 30 January 2018

On 30 January 2018 [W] and her children were at the defendant's family home. They had been there since Christmas Eve. At about 5:00pm [W] asked the defendant for her car keys and eftpos card so she could drive to Kerikeri to get her children some dinner.

The defendant told her to wait and went off on the farm for about an hour. When he returned he gave her the keys and they all got into the car to go and get dinner. [W] questioned the defendant as to why she had to wait for an hour to get the keys. An argument began. [W] asked again why she had to wait to get her own car keys. This angered the defendant. [W] left and went to town to get dinner.

She called into the Kerikeri Police Station to report the matter but took the children back as they were upset. On arrival back at the house [W] collected some clothes before walking back to the car.

The defendant approached [W] as she was leaving, trying the door handles of the car, asking her where she was going. He said to her "please don't do this". [W] told him it was too late and started reversing the car. [W] left and went straight to the Police Station to report the incident.

In explanation to Police the defendant stated that the facts were wrong and that he did not breach any Protection Order like [W] had stated. He stated that it was [W] doing all the shouting and causing all the issues at the scene.

The defendant entered guilty pleas to the charge on 17 October 2018.

[29] Mr Scott, counsel for Mr Craven, argued on appeal that the evidence should not have been admitted as relationship evidence. He submitted that to be in that category, it was necessary to establish the evidence was necessary to enable a

complainant to describe their acquiescence to what was occurring because of a fear of violence. In this case, there was only the one instance of violence which had given rise to the conviction for male assaults female in 2008 and proving breaches of the protection order were not necessary to enable W to explain her conduct.

[30] Mr Scott submitted the evidence was also inadmissible as orthodox propensity evidence. He conceded that the conviction based on events that occurred on 5 June 2008 involved violence but submitted it was at a “particularly low level” compared to the violence alleged to have occurred in the present case. But the other charges concerned breaches of a protection order. Mr Scott accepted the relevant facts showed what could be described as a propensity to disregard a protection order, a propensity not to leave when requested and perhaps to overbearing or controlling behaviour. But he argued this was not sufficient to give rise to a propensity relevant to the present charges. Admitting the evidence carried with it the risk that the jury could have improperly reasoned that because Mr Craven committed breaches of the protection order he was more likely to have committed the offending with which he had been charged in the present case.

Propensity evidence — events in Hāwera

[31] There was another category of propensity evidence which Mr Scott submitted had been wrongly ruled admissible in the pre-trial judgment. That involved allegations of offending made by W in her evidential video interview which had not been the subject of charges laid by the Crown. Passages ruled admissible, and which were included in the interview played to the jury, included the following:¹⁷

And he’s done it to me before when, um, we lived in Hāwera, he did it for about six months to a year. He would, ah, make me have a shower every night, and he would stand at the door and watch me have a shower, and then he would force me to have sex with him because that was my – that had to be my way of proving to him that I wasn’t sleeping with any of his mates and then he made me move towns to prove to him that I wasn’t sleeping with any of his mates. So, yeah. And that’s, that’s all that happened.

¹⁷ Pre-trial ruling, above n 12, at [30].

[32] Mr Scott also criticised the ruling that the following statements in W's video interview were admissible:¹⁸

Q Now, you also spoke about Hāwera, um, and you said that the sexual stuff, um, had been happening for six months to a year, and that you had to have a shower, and then you had to have sex with him to prove that you weren't sleeping with someone else.

A Yeah.

Q Just focus in on one of those incidents and describe to me everything that happened that you remember.

A Um, so he would come home, home from work and he would just be shitty, and he would say to me, "Oh, I know you've slept with this guy and this guy and that guy", and he would tell me that, um, that I would have to have sex with him to prove to him that I wasn't sleeping with that person or that I hadn't slept with that person today. Um, but he would also force me to have a shower too, so I have to have a shower and I had to wash my hole out, and then I had to go into the bedroom and he would have his way with me, and if I didn't do that then he would just be a complete asshole to me and the kids, and he would tell the kids that - like, my son walked up to him one day and said, "Oh, Dad, can you help me with this?" and he turned around and goes, "Ask your other daddy, Phil, to help you with it", and this was one of his mates that he thought I was sleeping with. And, um, one night he — like, he didn't even care that my son was asleep in bed next to us, he would still have sex with me even though my son was asleep right next to us. Sorry.

[33] Mr Scott submitted that these passages were again not admissible as relationship evidence as they were not necessary for W to explain how the offending with which Mr Craven had been charged occurred: W had been able to give a coherent account of the allegations without any reference to what had occurred historically in Hāwera. Mr Scott also argued that there was no link between this evidence and the alleged offending. He emphasised that the allegations about what happened in Hāwera were not relevant as propensity based upon improbable coincidence reasoning and submitted there was no other justification for the evidence to be admitted.

Intervention in cross-examination

[34] Another aspect of Mr Scott's argument was based on the fact that the Judge had prevented him from challenging W about the Hāwera allegations in

¹⁸ At [39].

cross-examination. He claimed this meant the allegations about what happened in Hāwera went to the jury effectively unchallenged.

Discussion

[35] Mr Scott's submission on the cross-examination of W has to be seen in the context that in the pre-trial judgment, Judge Orchard had ruled inadmissible other statements made by W as to events that she claimed had occurred whilst the family was living in Hāwera.¹⁹ When Mr Scott was endeavouring to question W about the Hāwera evidence that had been ruled admissible the Judge interrupted him and there was a discussion in the absence of the jury. During that discussion, the Judge said he did not consider line of questioning would assist the jury in dealing with credibility issues relevant to the charges before the Court. He also indicated that if Mr Scott persisted with his line of questions, then he would look favourably on any application the Crown might make to call further evidence about events in Hāwera.

[36] The Judge also expressed his concern about the effect on the jury if there was cross-examination on the Hāwera issues when they were not central to the allegations which were the subject of the trial. In the course of the discussion, the Judge indicated that if the Hāwera issues had not been pursued, he would have been telling the jury that they had nothing to do with the issues in the case. That observation is consistent with the view the Judge evidently formed that the propensity evidence on which the Crown relied was only properly probative in relation to the charges of violence offending, as is reflected in the Judge's summing up to which we will refer shortly.

[37] When the Judge intervened to see counsel in chambers about this line of questioning, Mr Scott was evidently nearing the end of a long cross-examination of W in which he had comprehensively put Mr Craven's denial of her allegations about the charges before the jury. He had also challenged her on her allegations of jealousy about her sleeping with others at the time of the Hāwera allegations and also put it to her that she had not complained to the police at the time despite her saying that Mr Craven had extensively had sex with her against her wishes.

¹⁹ Pre-trial ruling, above n 12, at [40].

[38] During the discussion in chambers, although the Judge warned Mr Scott about the possibility that the Crown might be given leave to call further evidence, he did not expressly stop Mr Scott from pursuing that line of cross-examination. Counsel may have been faced with a difficult choice as a result of the Judge's intervention, but we are not persuaded that a miscarriage of justice arose as a result. During his discussions with counsel the Judge expressed concern about the potential for Mr Scott's line of questioning to put the defence in jeopardy by upsetting W in front of the jury on a matter that was only peripheral to the issues at trial. In our view those concerns were well-founded. In all the circumstances, we are not persuaded that any miscarriage of justice arose from this aspect of the trial.

[39] We are strengthened in that view by the way in which the Judge dealt with the propensity evidence in summing up. He did so by concentrating on the previous convictions and the factual context addressed in the statement of admitted facts. And his remarks were put in the context of the charges of male assaults female, strangulation and breaching a protection order. It was in this context that the Judge said:

Now, as part of its case, the Crown has led evidence of other incidents committed by the defendant in similar circumstances during the period of his relationship with [W]. Now, if you accept that that is what Mr Craven did on those previous occasions, and likely you will be, because he entered pleas of guilty, then the Crown says it is therefore more likely that Mr Craven has done what he is charged with on this occasion.

The Crown has highlighted for you what they say are the similarities between the complaints, and the Crown say that the similarities disclose a pattern of behaviour which make[s] it more likely that the defendant has committed the offences of assault, strangulation, and breaching the protection order.

Now, it is very important — in fact, it is vital — for you to understand that those previous convictions that you have been told about will not assist you in determining whether or not the defendant has sexually violated the complainant or threatened to kill her. It is very important that when you are considering your verdicts on those charges, you put the previous convictions to one side. They may only assist you, if at all, when you are considering the charges of assault — or, rather, male assaults female — strangulation, and a breach of the protection order.

The Crown submit to you that these similarities disclose a pattern of behaviour which makes it more likely that the defendant has committed these offences. And I can tell you that that is a legitimate argument, but only if you first accept that the similarities or pattern actually exists.

Now, the issue is whether the defendant, Mr Craven, did assault [W], did strangle her, and did breach the protection order.

[40] The Judge then proceeded to emphasise what the Crown had highlighted in respect of the similarities in the following passage:

The Crown highlight what they say are the similarities. In 2008, he put his hands around her throat and applied pressure until she could not breathe. In 2019, he put his arm around her throat and applied pressure, affecting her breathing. In 2010 and 2011, Mr Craven accused her of cheating on him, and this is a continuing theme in September 2019. He continues to exhibit control and jealousy. In 2015, [W] asked Mr Craven to look after the children so she could go out and play netball. His response was to call her a slut and continue to follow her around while she told him to leave.

[41] The Judge then summarised the defence response. He said:

Now, the defence contests these similarities. They say that there is no pattern. The defence say that in five of the previous instances of breach of a protection order, there was no violence. On the 8th of November 2016, the violence was directed towards her car, not her person. On the 5th of June there was violence, but there the strangulation was with his hands, not his forearm. There were elbow strikes which are not present in this case before you. He did not take the phone. There was no discussion about why violence was being used, and there were no threats to kill or otherwise. The defence say that the current charges involve considerable escalations in seriousness from any of the previous convictions.

[42] The Judge concluded by telling the jury they needed to ask themselves a very simple question when looking at the charges of male assaults female, strangulation and breach of a protection order. The question was whether they were satisfied that the previous incidents disclosed a pattern of behaviour. If so, then the evidence of the previous incidents could be used with respect to those charges.

[43] Consistently with this, the Judge also instructed the jury that the previous convictions and the facts on which they were based would not assist in determining whether or not Mr Craven had sexually violated W or threatened to kill her. He told the jury to put the previous convictions to one side when considering those charges.

[44] We consider that the challenged evidence was properly ruled admissible in the pre-trial ruling and nothing that occurred at the trial would have justified a different conclusion. In our view the evidence was properly to be regarded as evidence establishing and explaining the dynamic of the relationship between Mr Craven and

W. This was the basis upon which Judge Orchard decided, in the pre-trial ruling, that the evidence should be admitted.²⁰ In so deciding, the Judge was properly influenced by this Court's observations in *Campbell-Joyce v R*, in which it was said:²¹

[26] It will not be necessary to demonstrate close match or unusual act fact patterns in the context of same victim offending. Such a requirement would miss the point of this kind of propensity evidence. The relevant propensity arises from what the evidence says about the nature of the relationship between the protagonists and in particular about the triggers within it to abusive, violent or threatening behaviour on the part of the appellant.

[45] To a similar effect was what this Court said in *Perkins v R*:²²

[20] Although it will fall within the definition of propensity evidence the relevance of evidence of other misconduct by the defendant to the victim will not normally depend on ideas of coincidence. Its relevance as bearing on the background or the nature of the relationships between those involved will usually be sufficiently obvious as to not require particular explanation. The rationale for its admission rests on it establishing hostility on the part of the defendant to the victim and the violence of its expression. It is not always necessary to direct the jury in relation to such evidence. The risk of unfair prejudice associated with such evidence is likely to be less than with orthodox similar fact evidence and is usually addressed simply by the judge warning the jury in general terms against being influenced by prejudice or emotion. As was stated in the minority decision in *Mahomed*:

This is because the misconduct is usually not extraneous to the alleged offending and thus the associated evidence will not portray the defendant as being generally of bad character.

[46] To a similar effect was this Court's more recent decision in *Pahi v R* in which it was held that the history of the appellant's controlling behaviour towards the complainant, including the use of violence on occasions, was properly admissible in the appellant's trial for sexual violation.²³ The evidence was considered "highly probative" in the context of a claim that the complainant had consented to the sexual intercourse and the credibility of her claim that she had considered a further "hiding" likely if she took any more active steps than she did to resist the appellant's sexual advances.²⁴ Such evidence can be useful in viewing an alleged offence within the

²⁰ Pre-trial ruling, above n 12, at [26].

²¹ *Campbell-Joyce v R*, above n 16.

²² *Perkins v R*, above n 16 (footnotes omitted).

²³ *Pahi v R* [2021] NZCA 348.

²⁴ At [50].

context of the relationship holistically, rather than through only the prism of the particular alleged conduct.

[47] We consider the evidence ruled admissible pre-trial and called at the trial was relationship evidence of the kind discussed in these cases. It established the nature of the relationship between Mr Craven and W. It was relevant not only to the violence offending, but also as demonstrating his sense of entitlement to sexual gratification regardless of W's wishes. Given the defence being run that the sexual violation by digital penetration did not happen, and that the events on which the charges of rape were based were occasions of consensual sexual intercourse initiated by W, the evidence was clearly relevant. Seen in that light, the way in which the Judge summed up on the evidence, was in fact clearly favourable to the defence. As we have shown, the summing up endeavoured to limit any propensity reasoning to those aspects of Mr Craven's conduct historically which the jury might consider relevant to whether or not it was likely that he had committed the offences of male assaults female, strangulation and breach of a protection order.

[48] We are satisfied that the admission of the evidence and the way it was treated in the summing up did not give rise to a miscarriage of justice. For these reasons this aspect of the conviction appeal cannot succeed.

Material wrongly left in the jury room

[49] The other ground of the conviction appeal concerns material wrongly left in the jury room as they commenced their deliberations. During the trial, the Crown produced as exhibits W's evidential video interview and its transcript, a diagram by W of the house where the offending occurred, the protection order made against Mr Craven and certain photographs. Some other documents were filed as exhibits but not formally produced in evidence. These included the recording and transcript of W's 111 call; a police officer's notebook statement from when Mr Craven was arrested and a typed version of it; a DVD of the police interview given by Mr Craven and a transcript of it; the transcript of W's complete, unedited evidential video interview and some additional photographs.

[50] The jury retired to deliberate shortly before 3 pm on Thursday 28 January 2021. At 5.15 pm they were permitted to leave, to resume deliberations at 10 am the following morning. At approximately 9.45 am, the Judge was advised by the Registrar that a communication from the jury was anticipated, which would ask for the Court's permission for the jury to listen to the 111 call. That alerted the Registrar to the fact that on the previous day a parcel had been delivered to the jury room together with the exhibits not produced in evidence. Contained within the parcel was material that had not been formally produced including the police officer's notebook statement and the typed copy, a transcript of the DVD interview given by Mr Craven to the police, the recording and transcript of W's 111 call, the transcript of her unedited evidential video interview and the further photographs.

[51] The information about the presence of the parcel was conveyed by the foreperson of the jury, D, and the Judge immediately arranged for him to be separated from the rest of the jury to carry out further inquiries. In the presence of counsel, the Judge inquired of the Registrar what information had been given to the jury that they should not have had. On ascertaining what the position was the Judge asked D to come into Court and he asked him a number of questions relating to what information he had seen and might have discussed with other jurors. In the ruling that he made, the Judge recorded that he found D to be a "very straightforward person" and said that the way he spoke and answered questions gave the Judge "real confidence in him".²⁵

[52] D told the Judge that when he saw the parcel it was open, and he was interested to see some of the photographs in it. The Judge was satisfied there was nothing prejudicial in any of the photographs.²⁶ He then recorded that D said that he had not read any of the transcripts in the package but that another juror, B, had begun to read the transcript of Mr Craven's police interview.²⁷ The Judge then asked D to return to the room where he had been placed on his own, and asked B to come into Court.

[53] The Judge recorded that B told him that she had been through the package. She had seen the transcript of W's interview but had not looked at it because she

²⁵ *R v Craven* [2021] NZDC 1505 [Jury materials ruling] at [3].

²⁶ At [4].

²⁷ At [5].

assumed it was the same as the transcript the jury already had. She was however “very interested in the defendant’s interview and she was reading that in some detail”.²⁸ She told the Judge that she had read about three quarters of the interview but had not discussed anything she had read with other jurors.²⁹ She had not seen the transcript of the 111 call, nor had she looked at any of the other material.³⁰ The Judge asked B to return to the jury room.

[54] At some stage, it is not clear when, the Judge spoke to another juror, LW, who had been sitting next to B in the jury room. The Judge recorded her answers to his inquiries gave rise to “no concern to either counsel”.³¹ We did not understand Mr Scott to dispute that on appeal.

[55] At this point, the Judge sent a message through the Registrar asking the jury not to continue with their deliberation and allowed time for counsel to consider their respective positions. He was still waiting to hear from counsel and saw counsel again at about 11.30 am. Shortly afterwards Mr Scott asked the Judge to declare a mistrial.

[56] The Judge then heard from counsel on the question of whether the trial should be aborted. While he declined to grant Mr Scott’s application for a mistrial, the Judge decided it would be prudent to discharge B. He explained to her he was doing so not because she had done anything wrong or because he did not believe her, but so as to avoid any appearance to “an uninvolved person sitting in the back of the court” that she may have seen or read something that was not part of the evidence in the trial.³²

[57] Mr Scott submitted on appeal that there was information in the materials wrongly left with the jurors that might have affected their ability to consider the evidence impartially and influenced the jury against Mr Craven. This comprised the following:

²⁸ At [6].

²⁹ At [17].

³⁰ At [6]. The Judge also recorded that D had not seen the transcript of the 111 call.

³¹ At [16].

³² At [18].

- (a) An allegation by W in the 111 call that Mr Craven had stolen and consumed Ritalin from her son's medicine bottle.
- (b) An admission made by Mr Craven in his police interview that he was an alcoholic.
- (c) A statement made in Mr Craven's video interview when the interviewing officer had left the room leaving the recording equipment operating criticising W as a "fucken lying little bitch ... trying to get me in jail aye cunt". It was said that in this unguarded moment Mr Craven had expressed himself with more anger and less restraint than he had displayed in the balance of the interview.
- (d) A discrepancy between the video interview and Mr Craven's evidence in Court about where the youngest child had been sleeping during the head-butting incident. Mr Scott emphasised that the video interview had not been played to the jury, and the Crown had not raised any inconsistency with between the interview and the evidence Mr Craven gave at the trial.
- (e) The unedited version of W's video interview including damaging material (described by Mr Scott as involving details of physical assaults, strangulations, repeated sexual abuse including sexual violations and verbal and emotional abuse) that had never been charged and was ruled inadmissible in the pre-trial judgment.

[58] Mr Scott submitted that the Judge's inquiries were insufficient to establish that jurors other than B and D had not considered any of the material left with the jury. He also claimed that the Judge had wrongly recorded an answer given by D: Mr Scott alleged D said he had read the transcript of the 111 call, whereas the Judge said D had not read the transcript. Mr Scott also referred to notes he had made that all three jurors spoken to said the other jurors had seen the material or been told it was there and the Judge should have made more extensive inquiry than he did to ascertain what had been seen by others.

[59] Mr Scott submitted further that the explanation given by the Judge to the remaining jurors after he discharged B caused further prejudice to Mr Craven. Essentially the Judge told the jury he had discharged B because she had seen information that it was not intended they see (in particular, Mr Craven's police interview) and an uninvolved person sitting in the back of the Court might think that if one juror read something the others had not the trial could have been prejudiced. Mr Scott argued the jury might not have accepted that explanation; they could have inferred that if the Judge's explanation was correct and what B had read was innocuous then any observer would not have had any issue with B continuing as a juror. The problem would have been compounded because the remaining jurors would have been left to speculate about the "obviously not innocuous material" that B must have read before she was discharged.

[60] We are not persuaded that any of the matters raised by Mr Scott gave rise to a miscarriage of justice. Similar issues arose for consideration by the Supreme Court in *Guy v R*.³³ In that case, after Mr Guy was found guilty of sexual violation it was discovered that the jury have been provided with two documents that had not been introduced in evidence. They were the transcript of Mr Guy's police interview and the transcript of the statement made to the police by the complainant. The former document had not been produced because of the way in which the interviewing officer had conducted the interview. The latter document was not produced because it was considered inadmissible as a prior consistent statement under s 35 of the Evidence Act.

[61] A majority of the Supreme Court held that where material not in evidence was provided to the jury, the question for determination was whether it could have affected the result of the trial and thereby caused a miscarriage of justice.³⁴ It was determined that the material wrongly provided to the jury was capable of affecting the verdict, and its provision had therefore caused a miscarriage.³⁵ But O'Regan J explained:

[83] I think it is common ground among all of us that the mere fact that the jury had access to material that had not been part of the evidence at the trial does not automatically mean that the trial was unfair or that there was a miscarriage of justice. In other words, there is no absolute rule that the

³³ *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315.

³⁴ At [68] per McGrath and William Young JJ and [85] per O'Regan J.

³⁵ At [58]–[59] per Elias CJ and Glazebrook J and [83] per O'Regan J.

presence of such material in the jury room requires that an appeal against conviction be allowed.

[62] In *Guy* the discovery that the materials had been wrongly left with the jury occurred after the jury had delivered its verdict. The appeal proceeded on the basis that the material had been viewed but the extent to which the transcripts had been considered by the jury was unknown. Here the fact that material had been wrongly provided was discovered during the jury deliberations. The Judge was able to make appropriate inquiries to establish the extent to which the materials had been considered. While B had read Mr Craven's police interview, she confirmed she had not discussed it with the other jurors and neither she nor D had read the transcript of the 111 call. The third juror to whom the Judge spoke, LW, gave answers which as we have noted raised no concern with either counsel. By discharging B, the Judge dealt with the only issue that potentially arose as a consequence of her having read W's police interview. There was no suggestion that any other juror could have been reading Mr Craven's police interview other than LW.

[63] As we have noted, in his ruling the Judge recorded that D had said that he had not read any of the transcripts in the package. On appeal, Mr Scott told us from the bar that he had a note indicating that D had told the Judge he had read the 111 transcripts. With all respect to Mr Scott, we are not inclined to proceed on the basis of an unsworn assertion that the Judge has made a mistake of fact. If that was to be asserted, it should have been made the subject of evidence, but it was not.

[64] Nor are we persuaded by Mr Scott's submission that the Judge's inquiries were insufficient to establish that jurors other than B and D had not considered prejudicial material wrongly delivered to the jury room. We infer from the Judge's ruling that the only person who had done so was B. There is no basis to contemplate that other jurors had done so.

[65] Mr Scott's claim of further prejudice arising from the discharge of B is essentially speculation about how the jury would have reacted to the discharge of B.

However, the Judge's ruling recorded that after giving his explanation for the discharge he:³⁶

... told them in very clear terms that they were only to take into account the evidence that they heard during the course of the trial. I then invited them to return to the jury room to continue with their deliberations.

[66] There is no reason to depart from the normal assumption that the remaining jurors would have complied with this instruction.

[67] For these reasons, the second aspect of the conviction appeal cannot succeed and that appeal must be dismissed.

The sentence appeal

[68] The Judge took the three charges of rape as the most serious offending. He placed it at the top of band 2 of *R v AM (CA27/2009)*, the band that attracts starting points of seven to 13 years.³⁷ In doing so, he considered that there was premeditation to a "low or possibly moderate degree", a "moderate degree" of violence and a "low to moderate degree" of vulnerability.³⁸ He observed also that the charge of sexual violation by digital penetration involved more violence than was inherent in the charge.³⁹ In the end, it seems that the Judge adopted a starting point of 11 years for the sexual offending as a whole, including the charge of sexual violation by digital penetration. In the result, he adopted a starting point for the sexual offending of 11 years' imprisonment.⁴⁰

[69] He then applied an uplift of three years to recognise the charges of male assaults female, strangulation, threatening to kill and breach of a protection order.⁴¹ He rejected a Crown submission that there should in addition be an uplift for previous convictions. He considered further uplifts for the previous convictions and to mark

³⁶ Jury materials ruling, above n 25, at [19].

³⁷ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [90(b)].

³⁸ Sentencing notes, above n 8, at [33]–[35].

³⁹ At [21].

⁴⁰ At [43].

⁴¹ At [43].

the methamphetamine offending would be inappropriate having regard to the principle of totality.⁴²

[70] Turning to the question of whether there should be an MPI, the Judge endorsed comments made in the pre-sentence report that Mr Craven posed a high risk of reoffending in a similar way and causing harm to others.⁴³ He also took into account the previous convictions for breaches of the protection order and the male assaults female convictions. He considered a minimum term was appropriate having regard to the provisions of s 86(2) of the Sentencing Act 2002, for each of the purposes of accountability, denunciation, deterrence and community protection.⁴⁴

[71] In the result, Mr Craven was sentenced to an effective term of 14 years' imprisonment in respect of each of the rape convictions.⁴⁵ The Judge imposed concurrent terms imprisonment of six years on the charge of sexual violation by unlawful sexual connection, one year in respect of each of the charges of male assaults female and threatening to kill and two years in respect of the charges of strangulation and breach of the protection order. A term of one year's imprisonment was imposed in respect of the offer to supply methamphetamine. The Judge ordered that Mr Craven serve an MPI of seven years.⁴⁶

[72] Mr Scott submitted that the Judge erred when he adopted a starting point of 11 years' imprisonment for the sexual offending. He argued W had not been vulnerable and noted that she had left the children with Mr Craven after she said she had been raped twice and sexually violated to such a degree as to cause her to bleed. He contended the fact that she was prepared to leave the children in Mr Craven's care indicated that she was not vulnerable. Mr Scott accepted that there was a moderate level of violence but argued that the Judge was wrong to consider there was any premeditation. He contended that the only basis upon which the offending should have been regarded as falling within band 2 of *R v AM* was that the degree of violence was moderate, and that on a totality basis a starting point in the middle of band 2 was

⁴² At [44].

⁴³ At [45].

⁴⁴ At [46].

⁴⁵ At [47].

⁴⁶ At [48].

the highest available. Mr Scott therefore submitted an appropriate starting point would be eight to nine years' imprisonment for the sexual offending alone, or 10 to 11 years' imprisonment if the violence offending were also taken into account.

[73] Mr Scott argued that no uplift should have been imposed having regard to the fact the starting point of 11 years' imprisonment for the sexual offending was sufficient to also account for the accompanying violence. Alternatively, he submitted the three-year uplift imposed by the Judge was too high, and that an uplift of no more than two years was appropriate. Mr Scott submitted these errors meant that the final sentence of 14 years' imprisonment was manifestly excessive.

[74] He also contended that the Judge should not have imposed an MPI. He submitted that there was nothing in the circumstances of the offending which warranted a minimum term. Further, he said that the Judge had been wrong to rely on Mr Craven's previous breaches of the protection order and the pre-sentence report writer's opinion that Mr Craven posed a high risk of reoffending and a high risk of harm to others. Mr Scott claimed that the report writer's assessment of Mr Craven's risk was based on a subjective judgement due to the escalation and the severity of the offending represented by the current charges.

[75] We do not consider the Judge erred in adopting the starting point of 11 years' imprisonment. The Judge was entitled to locate the offending at the top of band 2 of *R v AM*. There were four sexual violations which took place in the context of an ordeal of approximately 23 hours of sexual and physical violence accompanied by verbal abuse. We consider the Judge was correct to find that violence was present to a moderate degree in respect of the sexual offending. In respect of the sexual violations W described the first and third rapes as having caused her pain and the sexual violation by digital penetration made her bleed.

[76] We also consider the Judge was entitled to find premeditation to a low or moderate degree. It seems to us the finding was well justified having regard to the number of incidents and the period of time that they took place. We also consider W was vulnerable. We do not accept Mr Scott's submission that this was not the case based on the fact she left Mr Craven alone with the children. That argument first has

to be viewed in the context of the 18-year-long relationship between Mr Craven and W and the fact he was the father of their three children. Secondly, W expressed feeling that she could not in fact leave the children alone with Mr Craven, nor could she escape from the situation which he had imposed on her.

[77] In all the circumstances, we do not consider the starting point of 11 years' imprisonment for the sexual offending was excessive.

[78] Nor do we consider that the uplift of three years for the violence offending was inappropriate. This included Mr Craven banging W's head into a door frame, strangling her and placing his arm around her neck. This conduct was accompanied by threats to kill, which W feared he would carry out. The uplift was justified on the basis of these offences considered in themselves, and does not reflect double counting of the violence that accompanied the sexual offending.

[79] We are satisfied that the overall sentence of 14 years' imprisonment was not excessive.

[80] We are also satisfied that the MPI imposed was appropriate. This was offending over a sustained period of time involving multiple offences against a vulnerable complainant and accompanied by actual violence and threats of violence. We do not consider the Judge erred in deciding that a minimum term was appropriate for the purposes set out in s 86(2) of the Sentencing Act. He was entitled also to take into account the previous convictions and the fact that the charges for which Mr Craven was being sentenced represented an escalation of what had gone before.

[81] Fixing the minimum term at seven years, or 50 per cent, of the sentence imposed was properly within the Judge's discretion.

Application to admit fresh evidence

[82] There is one further issue that we need to address, namely an application to adduce further evidence that was filed on 5 November 2021, 26 working days after the hearing of the appeal. It is said that the evidence shows a propensity on the part of W to use violence, shows her willingness to lie to authorities undermining her

veracity and contains information which is inconsistent with her evidence at the trial about her personal drug use. It is said that the issues are all relevant to the determinations made by the jury in Mr Craven's case. The evidence in question consists of an affidavit of a social worker employed by Oranga Tamariki. The deponent, whom we need not name, swore the affidavit in the context of proceedings in the Family Court concerning an application for care or protection orders in respect of the children of Mr Craven and W.

[83] The deponent could not have given evidence in this case about the matters covered in the affidavit because the events described are not relevant to the offending with which Mr Craven was charged. Further, much of the material in the affidavit appears to relate to events occurring in 2021, well after the events the subject of the present proceeding.

[84] Even if some of the material may be about events earlier in time, we do not regard the evidence as cogent. Nor do we see what justification there could be for admitting the evidence on appeal for the purpose of advancing arguments based upon the wrongful admission of evidence and alleged errors by the Judge at the trial. In the circumstances, the application to adduce further evidence must be declined.

Result

[85] The application to adduce further evidence is declined.

[86] The appeals against both conviction and sentence are dismissed.

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