

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202
CRIMINAL PROCEDURE ACT 2011.**

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA140/2022
[2023] NZCA 145**

BETWEEN	DANIEL RAYMOND MORGAN Appellant
AND	THE KING Respondent

Hearing:	22 February 2023
Court:	Clifford, Wylie and Whata JJ
Counsel:	C J Tennet for Appellant I S Auld and L C Hay for Respondent
Judgment:	4 May 2023 at 10.00 am
Reissued:	6 December 2023
Effective date of Judgment:	4 May 2023

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
- B The appeal against sentence is dismissed.**
- C Order prohibiting publication of name, address, occupation or identifying
particulars of witnesses, B, MG and K pursuant to s 202 of the Criminal
Procedure Act 2011.**

REASONS OF THE COURT

(Given by Whata J)

Table of contents

	Para no
Facts	[2]
The appeal	[4]
The trial	[6]
<i>The Crown case</i>	[6]
<i>The defence case</i>	[9]
<i>The summing up</i>	[12]
Grounds of Appeal	[13]
Burden and standard	[15]
Inferences	[22]
Sympathy and prejudice	[29]
Demeanour	[31]
Reliability	[33]
Propensity	[34]
Defence case	[40]
Sentence	[51]
<i>Analysis</i>	[55]
Result	[57]

[1] Mr Morgan was found guilty on 16 charges of sexual violation in relation to two complainants, W and P. He was sentenced by Judge Collins in the District Court to 15 years imprisonment with a minimum period of imprisonment (MPI) of seven years and six months.¹ This is his appeal against conviction and sentence.

Facts

[2] W and P are brothers. [REDACTED] they moved in to live with Mr Morgan. Their mother lived there too at this time, having separated from their father. P was 12. W was eight. Over the next 10 years Mr Morgan sexually abused W. By the time W

¹ *R v Morgan* [2022] NZDC 3028.

had turned 18, sex between them had become normalised. Texts revealed that Mr Morgan would demand sex for favours. Mr Morgan also kept photos of his sex with W. Mr Morgan admitted that he had a sexual relationship with W but claimed that it only started after W turned 18, and was consensual. P was also sexually abused by Mr Morgan twice, with P leaving Morgan's house shortly after the second occasion of abuse. Mr Morgan denied any sexual contact with P.

[3] The jury found Mr Morgan guilty of 16 charges of various types of sexual abuse and related offending against W, including instances of masturbating, oral sex, stupefaction, and anal sex. The jury also found him guilty of anal and oral sexual violation of P.

The appeal

[4] The appeal is brought pursuant to s 229 of the Criminal Procedure Act 2011. Section 232(2) of that Act relevantly provides that the Court must allow the appeal if a miscarriage of justice has occurred for any reason. A miscarriage of justice is defined as:²

any error, irregularity, or occurrence in or in relation to or affecting the trial that—

- (a) has created a real risk that the outcome of the trial was affected; or
- (b) has resulted in an unfair trial or a trial that was a nullity.

[5] A miscarriage is something more than an inconsequential or immaterial mistake or irregularity.³ There must be a real risk of an unsafe verdict. A real risk will arise “if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong.”⁴ An appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe; “the presence of a real risk that this is so will suffice”.⁵ The focus is on “realistic rather than theoretical possibilities.”⁶

² Criminal Procedure Act, s 232(4).

³ *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]; *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1; *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85.

⁴ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].

⁵ At [110]; and see *Tuia v R* [1994] 3 NZLR 553 (CA) at 555.

⁶ *Misa v R*, above n 3 at [46] quoting *Wiley v R*, above n 3, at [28].

The trial

The Crown case

[6] The Crown case largely hinged on the testimony of W and P. W gave evidence that from the age of eight right through until the age of 18 he was manipulated by Mr Morgan. He refers to being bribed and drugged. He refers to the sexual activity escalating from masturbation through to anal sex. The Crown placed particular significance on what W and Mr Morgan called “Daddy’s boy rules”, which were said to have governed their relationship. Mr Morgan alleged the rules were an arrangement for an older and younger male with an emphasis on respect and bettering oneself with a sexual component. The rules appeared to envisage an exchange of sex for gifts. The Crown adduced evidence in the form of texts which refer to these rules.

[7] Other texts from Mr Morgan to W said “your hole is mine to deal with” and “only Daddy knows how to please himself with his son.”⁷ There were several texts of this type. Their provenance was not disputed, nor was the fact that W and Mr Morgan were in a sexual relationship at the time. While most of the texts were sent after W was aged 18, the Crown invited the jury to infer that they support a finding of childhood sexual relations. There was also circumstantial evidence which the Crown relied upon to support W’s claims, including the evidence of another resident, MG, who had confronted Mr Morgan about his sleeping in the same bed as W. P also gave evidence about W’s relationship with Mr Morgan, including them sleeping in the same bed together; W doing sexual favours for gifts; seeing W giving Mr Morgan a “blow job” and getting “analed,” about sexualised behaviour between them on multiple occasions. He also gave evidence about seeing and hearing W’s movements at night to be with Mr Morgan and that he told his mother and school counsellor about the abuse. P and W both gave evidence that W had attempted suicide.

⁷ There is another text exchange recording Mr Morgan’s response to a request for a lift home: and “I’m not gonna be pleased driving all the way there to do this and have u fuk around that I cant do anything to u and use u as I see fit”.

[8] The case for the offending against P was more isolated; a single incident of anal violation while he had a soccer related ankle injury and another incident of oral sex in exchange for a motorbike. P was aged 12–14 at the time.

The defence case

[9] The defence case focused on issues of plausibility and reliability. Mr Phelps, defence counsel at trial, highlighted the implausibility of the scale and type of alleged offending occurring in a busy household; W's mental health and defiance issues; and Mr Morgan's support for W and the other children living with him. He also referred to B's evidence, who denied having ever heard about "Daddy's boy rules" and did not witness any type of exchange of sexual favours for gifts, contrary to the evidence of W and P. B, who lived at the address during the period, categorically denied having ever seen any sexual abuse. B also gave evidence that contradicted P's account of W's movements at night. Mr Phelps referred to the mother's evidence who said she was not told about the abuse. Much was also made of the fact that P never went to the police and that there was evidence that P some years later thanked Mr Morgan what he had done for W. All of this is said to have exposed W and P's claims as lies.

[10] Mr Phelps also referred to evidence that W had previously made a complaint to the police of physical violence against Mr Morgan but recanted this allegation while giving evidence at the ensuing trial. Mr Phelps also sought to discredit evidence by W and P of threats by both Mr Morgan and MG, a former partner of Mr Morgan, by pointing to MG's denial that any such threats were made. Reference is also made to inconsistencies on various matters of background detail concerning both sets of alleged offending.

[11] Mr Morgan's denial of the offending and his evidence about W's personal mental health issues and wrap around support, and his encouragement of W to engage with counsellors, is emphasised, as is the implausibility of Mr Morgan sexually abusing W at the same time. Mr Phelps also told the jury that the references to and photographic evidence of sexual activity between them is consistent with Mr Morgan's evidence that sexual relations developed after W turned 18. Mr Phelps noting that it is simply implausible for Mr Morgan to have in his possession such photographic

material unless it was consensual. He also puts to the jury that the text messages are simply reflective of the alpha male role adopted by Mr Morgan. He also puts it to the jury that W's text to Mr Morgan — "want a BJ?" — is about consensual "sexual stuff". He also puts to the jury that Mr Morgan's admission to a nurse that he had sex with W is not an admission of a criminal mastermind. Mr Phelps's also referred to Mr Morgan's erectile dysfunction, and B's awareness of it.

The summing up

[12] The Judge summed up to the jury in three parts about: general matters, the charges, and specific issues. Given the breadth of the appeal grounds, it is more efficient to address the key components of the summing up by reference to those grounds.

Grounds of Appeal

[13] Mr Tennet, for Mr Morgan, claims that the directions in respect of the following matters were wrong, inadequate or not given at all:

- (a) Burden and standard of proof
- (b) Inferences
- (c) Sympathy and prejudice
- (d) Demeanour
- (e) Reliability
- (f) Propensity
- (g) The defence case.

[14] We will address each of these grounds in turn.

Burden and standard

[15] Mr Tennet raises two related matters in relation to the Judge’s directions on burden of proof:

- (a) A proper *R v Wanhalla* direction was not given.⁸
- (b) The tripartite direction was inadequate.

[16] When pressed, Mr Tennet said the Judge was wrong to put to the jury that they must be “sure” as this threshold was expressly criticised by the Court of Appeal in *Wanhalla*. In relation to the tripartite direction, Mr Tennet accepted all three elements were present but that the Judge erred when he used the word “believe” instead of the word “accept” when referring to the first step as follows:

The first is that on the material matters in the case, on the evidence which if you like goes to the charges, then if in the context of the case, and in light of all the evidence, you *believe* the defendant then you would find him not guilty of the charge because that would be complete answer to the Crown case.

[17] We consider this ground to be misconceived. The orthodox *Wanhalla* direction concludes by stating that:⁹

In summary, if, after careful and impartial consideration of the evidence, you are *sure* that the [defendant] is guilty you must find him or her guilty. On the other hand, if you are not sure that the [defendant] is guilty, you must find him not guilty.

[18] Relevantly, the Judge referred to:

- (a) The presumption of innocence and that Mr Morgan is presumed innocent.
- (b) The duty of the Crown to prove otherwise beyond reasonable doubt.
- (c) Beyond reasonable doubt is not a “mathematical certainty”, but it is “a very high standard of proof” and that it “is not probably guilty, nor even very likely guilty, probably guilty [or] very likely guilty”.

⁸ *R v Wanhalla* [2007] 2 NZLR 573.

⁹ At [49] (emphasis added).

- (d) The Crown’s duty “to make you sure about the charge” and “if you are not sure and you have a reasonable doubt you must find the defendant not guilty”.

[19] The Judge when summing up about the question trail drew a clear linkage between the need to be sure and the requirement to prove the essential elements beyond reasonable doubt.

[20] Mr Tennet conceded that if we were not with him on this first point, then his related point about the inadequacy of the tripartite direction falls away. We doubt it had purchase in any event. The point is a semantic one at best.

[21] We therefore dismiss this ground of appeal.

Inferences

[22] Mr Tennet submits that the Judge did not give an adequate inferences direction. He says there were no examples of inference directions based on the facts. He claims that the jury was not appropriately cautioned against speculation and guesswork. He also identified the directions at [19] and [39] as particularly flawed and unhelpful:

[19] But also just as another example and the encouragement for you to approach matters in a calm, logical way is this, now it can be said that one aspect of applying logic is to analyse that if you accept a particular fact that that might mean that you must accept another fact. Then if you are not prepared to accept the second fact you may then say well actually then in those circumstances, we are not prepared to accept the first proposition that you were initially of a mind to accept.

....

[39] Now also Mrs [CK] broke down what could be said to be inconsolably when she learnt that Mr Morgan had accepted that he did have a sexual relationship with her son when [W] was 18 and 19. Now her breaking down in itself does not support the Crown case. But does it tell you anything more, well that really is a matter for your assessment. It does, you might well think, tell you that she did not know until she learnt it here in this courtroom. Then you would ask yourself well in the context of the case what else does that then tell you about the case and decisions that you have to make.

[23] The Crown submits that generic inferences direction is not necessary in every case;¹⁰ and that in any event this was a case where the credibility and reliability of the complainants was key.

[24] We accept that a general inferences direction would have been beneficial in this case given that the jury was invited by both the prosecution and the defence to draw inferences from available facts. But we see nothing material in this omission. The jury were given ample guidance on how to reason from facts. In this regard, Mr Tennet focuses on [19] and [39] of the summing up to illustrate his point. We do not think they help him. Dealing first with [19], that paragraph needs to be understood as part of a wider narrative as follows:

[20] An example in this case if you accept that Mr Morgan masturbated [W] when he was around eight or nine you must accept that that is true. If you accept that that is true then you accept that [W] did not complain to authority figures at the time he complained of physical abuse because it is agreed that he did not, he made at the time of [REDACTED] allegations of physical abuse, it is accepted there was no allegation of sexual abuse.

[21] Now you can say in light of that well I am not prepared to accept that Daniel Morgan masturbated him at that time because he did not complain. Or alternatively, and it is a matter for you, you can say well we can say he was already a very vulnerable child from a very troubled background and given that we know many children can delay in disclosing sexual abuse I am comfortable accepting his evidence that he did not disclose his allegations, but he was prepared to make at 19.

[22] So it is a question of analysing what you are prepared to accept and acknowledging what that might mean in terms of other facts, but it is for you. So, what I am saying there is that if you accept the allegation that the acts of masturbation happened prior to the social welfare uplift you have to also accept then that you accept that there was reason why he did not complain of the sexual abuse at that time.

[25] Here we can see the Judge guiding the jury to first identify the facts they consider proven and then to reason carefully from these facts, taking into account other facts that might bear on the cogency of any conclusion reached.

¹⁰ See *Xu v R* [2019] NZCA 356 at [55].

[26] The example at [39] also does not assist Mr Tennet, because at [40] the Judge makes clear that:

[40] ... I am just urging is the fact she broke down in itself does not support the Crown case. Look at context, look at the circumstances and see what that tells you.

[27] We also agree with the Crown that this was not a case where fine-grained inferential reasoning was key to the outcome. Rather, the case clearly turned on whether W and P were to be believed based on the jury's assessment of the totality of the evidence.

[28] We therefore dismiss this ground of appeal.

Sympathy and prejudice

[29] Mr Tennet contends that there was an inadequate direction on sympathy. He acknowledges that the Judge touched on this issue but should have said more. We do not consider this point to have merit. The Judge addressed the issue of sympathy appropriately. We have already referred to [39] where the Judge addresses K, the mother of W and P, breaking down and its limited relevance. He also gave a direction on sympathy and prejudice in relation to W's attempted suicide at [16] and [17]:

... I am urging you to decide the case using logic and reasoning and not feelings nor sympathy for anybody, no sympathy, no prejudice.

... it is not difficult for anyone to have some immediate sympathy for [W] when you heard that as a 19-year-old he made an attempt on his life. But what does that tell you about the issues that you have to decide? Well, it would tell you that at that time clearly he was a troubled young man, but members of the jury in this case use great care before you would reason further than that, than the fact of the attempt on his own life, particularly if you are going to use that in support of the Crown case.

[30] The Judge here has carefully and appropriately directed the jury not to use whatever sympathy they may feel for W to influence their decision making and cautioned them against reasoning from the fact of his attempted suicide in support of the Crown case.

Demeanour

[31] The Judge gave the following demeanour warning in his summing up:

[35] Now I talked to you earlier in the trial about demeanour before we had actually seen or heard any of the witnesses and I cautioned you about the use of demeanour. You can use, of course, the way someone presented to you, but you need, as I said to you earlier in the week, to do that with care and if you used the way someone presented to you in helping you to decide whether you accept their evidence or not do not just do it in isolation, look at it in the context of the case and the evidence that the witness has given.

[36] Now there are a couple of obviously dramatic moments in the trial which I need to address, particularly in the context of demeanour. I mean it will not have escaped anybody, that [P] broke down at the end of his evidence. Well, what would be wrong would be to say well he broke down and cried therefore he must be telling the truth. You can have account to the fact that he broke down and cried but do not look at it in isolation.

[37] You can look at the transcript at pages 122 and 123 and what he was talking about at the time that he broke down. Then you will examine in that context was that emotional reaction consistent with what he was saying, was he talking about? Was his breaking down at that point did it fit with what he was talking about? As I say that is at pages 122 and 123.

[38] In that you are really examining well was he somebody who was putting on an act or did his reaction fit with what he was talking about, that is his feelings of his failing his brother for not coming forward with allegations earlier.

[32] Mr Tennet claims that the Judge was wrong to give this demeanour warning in his summing up, referring to the guidance in *Taniwha v R* that demeanour directions are best given in opening and not directed to any particular witness.¹¹ While as a general proposition it is preferable for a demeanour direction to be given in opening, as indeed it was in this case, a trial judge remains free to assess what is needed in light of the trial as it has unfolded before them. We have considered the Judge's direction, and we agree that it was appropriate in this context for him to provide a demeanour direction to assist the jury with evidently emotionally charged evidence.

Reliability

[33] We refer to this ground only to note that it has been abandoned.

¹¹ *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [44]–[45].

Propensity

[34] The Judge gave the following propensity direction:

[108] Now we have talked about separate charges and that you have got to give individual consideration to each charge. But you may well be thinking to yourselves well what do we do with the fact that there is 16, 17 charges, 16 charges and we have got two different complainants? Well, you apply to your deliberations on a charge the evidence that is relevant to that charge. But you have here, as I say, the fact that two brothers make allegations and it may be in your mind to say well can I use the fact that one brother makes allegations and the other brother makes allegations, make the fact of the other brother's allegations boost the Crown case in relation to the first brother?

[109] The defendant says that both have made false allegations. Now firstly the fact that person B makes an allegation does not of itself boost person A's allegation. So, the fact that [P] makes an allegation of being sexually violated by Mr Morgan in itself does not boost the allegation that [W] makes. It is quite separate where [P] says I saw and heard things in relation to what was happening to [W]. That is where he is giving direct – he is giving evidence of what he says he knew of those matters. But it is the fact that the two make their own allegations.

[110] Now if you consider that there are features of say [W's] allegations which make [P's] allegation more likely, then you can use those features that you find to support the allegation against P or vice versa. And so, what you have here is that what is features which are similar to both, or the same to both, is that obviously they are brothers and had come into Mr Morgan's care when they were both vulnerable and he has alleged to have shown a tendency to sexually abuse these boys who were in his care. So those features apply to both of them. And if you think that logically for you, it is a matter for you, but if you think that supports the allegation in relation to the other brother because of what the first brother says then you can use that to support a charge in relation to the other.

[111] And you will recall though that the Crown case is to here is that [P] resisted the sexual approaches by Mr Morgan and that he being older that Mr Morgan's course of conduct then was to focus his attention on the younger more vulnerable brother.

[112] So just to recap before you use evidence in relation to one allegation, by one complainant to support another, you would have to accept the evidence of one because you cannot use evidence that you do not accept. And secondly, you have to be satisfied that there was that logical connection in the evidence which allowed you to say that this genuinely did make the other brother's allegations more likely. But what you must not do is reason by saying well there is more than one complainant and there are 16 charges so on any particular charge we think that allegation is more likely because there are so many other charges. It is just not a weight of numbers game members of the jury.

[113] But in relation to that more importantly is that here the Crown says that each in their own right can be believed for the reasons that Mr Manning advanced to you yesterday and for the defence Mr Phelps says each is to be

individually disbelieved for the reasons that he advanced yesterday. So, it very much is a focus on the credibility of each of the [two boys] as to whether each came to court to do their best to tell you the truth.

[114] What I am going to suggest is that you start, and I will come to this in a moment, start your discussions or deliberations around your assessment of the credibility of each of them. Assessing their honesty of purpose. Maybe start that in terms of [W] with the “daddy boy rules” because this is something that at least when he was 18 or 19 is not in dispute. So, you are reasoning from something which is not in dispute and you have got the text messages, what interpretation you give them is over to you. The evidence yesterday was well set out for you and you have those texts, and you are very familiar with them.

[115] But so reasoning forward from undisputed facts you know that there was a sexual relationship through [REDACTED]. The position for the defence of Mr Morgan he says that [W] initiated that because he was exploring his sexuality and it only started after he was 18.

[35] Mr Tennet submits that the direction was inadequate because:

- (a) the reference to “what you have here” at [110] takes as given the matters relied upon by the Crown;
- (b) it needed more qualifiers;
- (c) the Crown’s evidence is treated as if it is fact; and
- (d) the Judge failed to direct the jury that the propensity had to be proven beyond reasonable doubt.

[36] This matter was not pressed in oral argument and we need deal with it only briefly. First, the reference to “what we have here” links to incontrovertible matters — they are brothers, in Mr Morgan’s care, vulnerable (at that time as young children), and both *allege* sexual abuse.

[37] Second, key elements of a propensity direction can be found in the Judge's comments:¹²

- (a) the relevant evidence is identified;
- (b) the defendant's position is noted (they both made false allegations);
- (c) the commonalities are noted;
- (d) the jury must first accept the evidence of the brothers;
- (e) there must be a logical basis for finding that the evidence of one brother supported the other brother's allegations;
- (f) the relevant tendency (to sexually abuse boys in his care) is identified;
- (g) the jury is told not to simply assume from the presence of more than one complainant and multiple charges that they are therefore more likely to be true.

[38] Third, we do not consider the Judge was wrong to leave the jury with the impression that the Crown's evidence mentioned in this part of the summing up can be treated as fact. The only evidence expressly referred to in the above passages are references to the "daddy's boy rules" and that there was a sexual relationship through [REDACTED]. Neither of these matters were disputed. What then followed in the summing up was a detailed direction dealing with the handling of this evidence and what use could be made of it, referring to both the Crown and defence argument.

[39] Finally, the complaint about failure to direct the jury to find each allegation proved beyond reasonable doubt is not reconcilable with multiple directions through the summing up and in the question trail that the allegations must be proved beyond

¹² As William Young J noted in *Mahomed* [2011] NZSC 52, [2011] 3 NZLR 145 at [95], the key elements are — identifying the evidence and why it has been led and the legitimate respects in which it might be taken into account, putting the competing contentions of the parties and cautioning the jury against reasoning processes which carry the risk of unfair prejudice.

reasonable doubt and that the jury had to be sure about proof of each key element of the alleged offending.

Defence case

[40] In written submissions Mr Tennet submitted that the Judge failed to put the defence case in 13 different ways. Ultimately, they may be reduced to the following key complaints (in addition to the matters already addressed):

- (a) the summing up was unbalanced and favoured the Crown case;
- (b) the summary of the defence case was inadequate or adverse to the defence;
- (c) there was no clear summary statement of the Crown case and the defence case, in that order.

[41] Mr Tennet highlighted the following (among other things):

- (a) the treatment of the “daddy’s boy rules” in which he says a lengthy account of the Crown position is noted, while the defence receives a one line summary;
- (b) the inconsistencies in the evidence of W and P identified by the defence are effectively side-lined;
- (c) what was said about the defence is diffuse and/or relevant defences were not mentioned at key junctures in the summing up for example, relating to issues of sympathy;
- (d) the Judge failed to remind the jury that Mr Morgan did not have to prove why W and P made the allegations up;

- (e) the treatment of the defence proposition that it would have been irrational for Mr Morgan to have sexually violated W was effectively rejected by the Judge.

[42] Save in one respect, we agree with Mr Auld that there is no merit in these complaints. The summing up clearly referred to the key respective positions of the Crown and the defence:

[4] What is this case all about and from each side's view? The Crown says that the defendant sexually abused two boys. That they had been taken off their father, they had been placed with their mother when she was incapable of looking after them. The Crown says at that point they were already vulnerable young children, and they were at that point effectively placed into the care of the defendant Mr Daniel Morgan.

[5] In thereafter the Crown says, and what you have heard in terms of what you have to decide there are two possibilities, [P] and [W] have both lied or the defendant has lied. All of them cannot be telling the truth and the Crown says applying reasoning or Mr Manning may have used the word applying your common sense and applying that reasoning or that common sense with the proven undisputed facts in the case the only scenario, or the only outcome that makes sense is that each of [P] and [W] is telling the truth.

[6] Well the defence case disagrees with that and through Mr Phelps it is submitted to you that the allegations are false, and Mr Phelps in essence has come of that by saying that there are so many inconsistencies that neither complainant can be credible and that what they say is so inconsistent with what others have had to say that you are not going to be in a position where you can determine that any charge has been proved beyond reasonable doubt. Mr Phelps submits that you cannot get to the point on any charge where you could be sure.

[7] Well members of the jury that is the broad proposition in the case. The Crown saying honest witnesses, may be differences in terms of some detail that memory has affected over the years possibly, but essentially they are here to tell you the truth. The defence case saying you cannot accept what they have to say, you cannot accept them as credible because of the inconsistencies.

[43] Key defences are also mentioned in the summing up, including that:

- (a) Mr Morgan's position is that the sexual connection never occurred;
- (b) W and P "made false allegations";

- (c) W initiated the sexual relationship “because he was exploring his sexuality and it only started after he was 18”;¹³
- (d) It is “extraordinary that [W] had so much opportunity” [over many years] to make these allegations, but did not”;
- (e) Because there are so many inconsistencies between the witnesses, this can be used to go to the credibility of W and P;
- (f) “those inconsistencies seriously undermine the credibility of both the Crown complainants as well as their reliability.”;
- (g) There was “no obligation on Mr Morgan to say why either [W] or [P] would make a false allegation.”

[44] We also do not consider that the summing up was unbalanced overall. While there are instances where the Crown case is put without mention of the defence position, that occurs largely in the context of the Judge explaining what the Crown had to prove on a particular charge. The following is illustrative:

[56] So the first thing that the Crown has to prove is that there was an act, some action, some act that the defendant did to the complainant and here the Crown says that the act that occurred was the masturbation. If you are sure that this happened on the first occasion, and the Crown alleges that it happened in the defendant’s bedroom, you would answer that yes and then you would go to question 1.2.

[45] We have also considered the Judge’s approach to the “daddy’s boy rules”. It is helpful to repeat the direction given about them here:

[124] So all of that is not in dispute but what is in dispute is how the “daddy boy rules” relationship started and when it started. But the fact of it is not. So those text messages are for you.

[125] Can I just raise this for you to consider. There are the two concepts that we have heard about. There is the concept of father/son relationship which we might understand to be the traditional father/son relationship and then we are told there is this concept of the “daddy boy rules”. So, the relationship between the daddy and the boy and we know that in the “daddy boy rules” relationship there is clearly a sexual aspect to it. That the boy does

¹³ Although the Judge noted at [107] that this was not put to W.

sexual favours or participates in sexual acts with the dad. But in distinguishing the “daddy boy” relationship from the father/son relationship it has been suggested to you that the “daddy boy” relationship has extra components like mentoring and things like that.

[126] Well members of the jury it is a matter for you, but you might think that things like mentoring, setting rules in the house, seeing the children do their chores quintessentially or inherently are part of the relationship between father and son. And that they would be in almost all father/son relationships.

[127] So again it is a matter for you, but you might think that the only thing that really distinguishes then the father/son relationship concept with the “daddy boy” concept relationship is the sexual acts in the “daddy boy” relationship. It is entirely a factual matter for you to contemplate and you might wish to have regard to that then as to what you make of the text messages and what possible meaning there could be in the messages that Mr Morgan was sending to [W].

[46] As Mr Auld concedes this direction is favourable to the Crown, but we do not think materially so. Mr Phelps told the jury that the relationship between W and Mr Morgan had developed into a sexual one when W turned 18, and that Mr Morgan was effectively the alpha male. There was then no real dispute about the significance of the daddy’s boy rules in that respect. The only real issue is if these rules pre-date W’s 18th birthday. Nothing in the summing up favours the Crown in this regard.

[47] However, there was one aspect of the summing up that caused us some pause for thought. The Judge had this to say about the defence case based on irrationality:

[24] So Mr Phelps is saying well look if he had committed these sexual acts on [W] why would he have encouraged him to go to counselling, speak to his counsellors, why would he have kept these photos on his phone and so on. He is saying because to have done those things would be irrational.

[27] So members of the jury I may not have put that as clearly as I have intended but the proposition to you is that if he had been a child sexual abuser he would not have done the other things because that would not make sense. But what I am suggesting to you is it is entirely a matter for you but to analyse the first proposition because sexual abuse in itself is not rational so why then would you necessarily logically expect somebody who has done those irrational things then to have acted rationally? That is just in the context of the submission that Mr Phelps made to you.

[29] Reason from the undisputed facts and reason from the facts that you find proved. So, reason forward and there is much in this case which is not in dispute, and I will come to that later. But importantly do not reason backwards from an outcome that might have an emotional appeal to you.

[48] In our view this direction would have confused the jury and may have left them with the impression that the irrationality point was meritless. It was the Judge’s task to leave the defence with the jury to assess its merits. It was not an unimportant point for the defence, given that the presence of the images were clearly prejudicial to Mr Morgan.

[49] But we are satisfied that there is no real risk that these comments would have had any material effect on the outcome of the trial. In reality, Mr Morgan accepted that he had a sexual relationship with his “son” from the age of 18. The rationality of keeping images of the sexual relations fades into insignificance next to the fact of their sexualised relationship and the uncontroverted evidence of power imbalance, or as Mr Phelps put, Mr Morgan’s role as the “alpha male”. The fact that the jury preferred W and P’s version of events was plainly available to them, and the notion that their sexual relationship only post-dated W’s 18th birthday was, as the trial Judge said in sentencing, implausible. We therefore see no real risk of an unsafe verdict whatsoever arising from the irrationality direction.

[50] There being no other basis for finding error, the appeal against conviction must be dismissed.

Sentence

[51] Mr Morgan was sentenced to 15 years imprisonment and an MPI of seven and half years.¹⁴ The Judge adopted a starting point of 18 years, for the offending as a whole having placed it within band four of *R v AM*.¹⁵ He noted that there was planning and premeditation, threats of violence, the boys vulnerability, great harm, and a significant breach of trust.¹⁶ He referred to Mr Morgan psychological and physical domination of the boys from a young age,¹⁷ and that from [REDACTED], W slept in his bed, and adhered to the “Daddy/Boys Rulz”.¹⁸

¹⁴ *R v Morgan*, above n 1, at [22] and [25].

¹⁵ *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750 at [108]–[109].

¹⁶ *R v Morgan*, above n 1, at [11].

¹⁷ At [14].

¹⁸ At [15].

[52] In fixing the starting point the Judge referred to the guidance given by the Court of Appeal in *L v R*,¹⁹ a matter on which he was the sentencing Judge, to the effect the principles in *R v AM* should have been applied in that case, with the result that the starting point should have been 18 years (not 19 and half years).²⁰ The Judge then identified 18 years as an appropriate reference point for the present offending.

[53] The Judge acknowledged the trauma suffered by Mr Morgan as a youth and applied a two-year discount for this, adopting Mr Phelps recommendation.²¹ He also applied a further discount of one year for health issues. This brought him to a cumulative end sentence of 15 years. An MPI of 50 per cent was also imposed. Mr Morgan was also registered on the Child Sex Offender Register.

[54] Mr Tennet contends that the Judge was wrong to rote adopt the approach taken in *L v R* and instead should have looked to *R v AM*, and in particular the reference in that case to *R v Martin*,²² with the result that the present offending could be located in lower band four. He says a starting point of 16 years 10 months was more appropriate. Mr Tennet also challenges the MPI, noting the careful approach taken by this Court in *O'Connor v R* to the MPI evaluation.²³ Mr Tennet contends that a 40 per cent MPI should have been imposed.

Analysis

[55] Mr Morgan was found guilty on four charges of anal rape, five charges of oral sex, four charges (including one representative charge) of masturbating a child, and three charges of disabling. The offending occurred while W and P were children (as young as eight) or teenagers in Mr Morgan's home. He was like a father to W. They were vulnerable. Abuse of power and manipulation over a lengthy period are evident features of the offending. The maximum sentence for anal rape is 20 years. Band 4 of *R v AM*, the guideline judgment for sexual offending, is 16–20 years. The paradigm case of offending within Band 4 is that of repeated rapes of one or more family members over a period of years. Offending of this nature especially involving

¹⁹ *L v R* [2021] NZCA 297.

²⁰ *R v Morgan*, above n 1, at [18].

²¹ At [21].

²² *R v AM*, above n 15, at [109] and [110] citing *R v Martin* CA251/99, 12 October 1999.

²³ *O'Connor v R* [2014] NZCA 328, (2014) 27 CRNZ 302 at [61].

children and teenagers will attract starting points at the higher end of this band.²⁴ We therefore see no error in the starting point adopted of 18 years.

[56] We also see no basis for departing from the Judge's MPI assessment. All four purposes of an MPI are engaged by the present offending: accountability, denunciation, deterrence, and protection of the community.²⁵ Given Mr Morgan continues to deny the offending and lacks any evident remorse, an imposition of a 50 per cent MPI is not wrong in the circumstances of the present offending.

Result

[57] The appeal against conviction is dismissed.

[58] The appeal against sentence is dismissed.

[59] The identities of the complainants are suppressed pursuant to s 203 of the Criminal Procedure Act. We make an order prohibiting publication of the name, address, occupation or identifying particulars of the witnesses, B, MG and K under s 202 of the Criminal Procedure Act, in order to protect the identities of the complainants.

Solicitors:

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

²⁴ *R v AM*, above n 15, at [108]–[109].

²⁵ Sentencing Act 2002, s 86(2).