

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
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

**CA425/2022
[2023] NZCA 313**

BETWEEN N (CA425/2022)
Appellant

AND THE KING
Respondent

Hearing: 9 May 2023

Court: Mallon, Moore and Fitzgerald JJ

Counsel: K E Hogan for Appellant
E J Hoskin for Respondent

Judgment: 24 July 2023 at 11 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

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REASONS OF THE COURT

(Given by Fitzgerald J)

Introduction

[1] Following a trial before Judge Grau and a jury in the District Court at Manukau, N was found guilty of one charge of sexual violation by rape,¹ one charge of strangulation,² one representative charge of male assaults female,³ two charges of male assaults female,⁴ and one charge of threatening to kill.⁵ The complainant was N's former wife. N was sentenced to nine years' imprisonment and a protection order was also imposed.⁶

[2] N now appeals against his conviction and sentence. His conviction appeal reduces to three grounds. First, he says that in asking supplementary questions of the complainant following the playing of her evidential video interview as her evidence-in-chief, the prosecutor adduced unbriefed and repetitive evidence. Second, he says the prosecutor, in both his cross-examination of N and his closing address, improperly emphasised the proposition that the complainant had no motive to lie, and

¹ Crimes Act 1961, ss 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.

² Section 189A(b); maximum penalty seven years' imprisonment.

³ Section 194(b); maximum penalty two years' imprisonment.

⁴ Section 194(b); maximum penalty two years' imprisonment.

⁵ Section 306(1)(a); maximum penalty seven years' imprisonment.

⁶ *R v [N]* [2022] NZDC 14642 [Sentencing notes]; nine years' imprisonment for rape; three years' imprisonment for strangulation; one year's imprisonment for the assaults; and one year's imprisonment for the threat to kill, all to be served concurrently. The protection order was made under s 123B of the Sentencing Act 2002.

that N was not able to suggest any credible reason for her to do so. Third, N says that the prosecutor's closing address was unnecessarily intemperate. Ms Hogan, counsel for N on the appeal, emphasises that it is the cumulative effect of these three matters that is said to have led to a miscarriage of justice.⁷

[3] N appeals against his sentence on the basis that the Judge erred in not giving a discount to reflect his personal and cultural background, as set out in a report put before the Judge pursuant to s 27 of the Sentencing Act 2002.⁸

Background facts

[4] N and the complainant met in April 2019 and married two months later. The relationship quickly became physically abusive.

[5] In August 2019, having become angry about a meal the complainant had prepared, N said the complainant would have to sleep overnight in the lounge. After she had been asleep for about an hour, N came and apologised and told her to come back to bed. But as she was falling asleep in the bed, N strangled her. He told her that he could kill her and choked her until she lost consciousness. He then threw water at her. After she regained consciousness, he verbally abused her.

[6] In early 2020, the complainant went to Fiji for approximately three weeks to care for her sick mother. On her return to New Zealand, N told her the relationship was over and that she should move out. The complainant went to live with a friend.

[7] In March 2020, N contacted the complainant and asked her to return to the house to meet with their landlord. The complainant said that while she was at the house, she and N discussed their relationship. She confirmed that things were over between them and that they should live apart. N did not accept this, saying that he wanted the relationship to rekindle, to which the complainant replied that this would not happen because of how he had treated her during the relationship.

⁷ Criminal Procedure Act 2011, ss 229, 232(2)(c) and 232(4).

⁸ Criminal Procedure Act, ss 244 and 250(2).

[8] Evidently angered by the complainant's response, N admitted that his request to get her to the house to speak with the landlord was a pretext. When the complainant tried to leave, he grabbed her and took her into the bedroom. He pushed the complainant onto the bed and held her hands back while he removed her pants. He then raped her.

[9] It seems that N and the complainant did, however, resume living together at some point after this incident.

[10] The assault charges related to various episodes of violence over the course of the relationship. Throughout the marriage, N repeatedly punched and slapped the complainant to her face and body, and pulled her by the hair. This gave rise to the representative charge of male assaults female. On another occasion, in September 2020, he punched her to the face, causing swelling to her eyes and nose. This gave rise to a charge of male assaults female. In November 2020, N punched the complainant in the head, causing pain and swelling to both her head and ear. This also gave rise to a charge of male assaults female.

[11] On the day that the relationship ended permanently, 19 December 2020, the complainant had a bad toothache. She left for work, which angered N as he had wanted to have sex with her before she left. He sent the complainant the following text messages:

Go you bitch.suck ur boss dick.stay with him.

Get out of my life.

Don't come home in the night.

[12] Upset by the messages, the complainant phoned N to reassure him that she was working. When she spoke with him, he was angry and threatened that he would cut her throat if she came home that night and that he would kill her. He texted her saying, "I have to go to Fiji when my visa expires on 3 January 2021. I will kill you and then I will go". The complainant was upset and concerned enough that when she finished work, she went to a nearby police station to report what N had said to her.

[13] N was arrested the following day and completed an evidential interview. He denied that any of the offending had occurred. He said that there was no violence at all in the relationship, and he gave evidence to that effect at trial. The complainant also completed an evidential interview a few days later on 24 December 2020. As noted, it was played at trial as her evidence-in-chief.

[14] As with most cases of this nature, the Crown's case turned largely on the jury's assessment of the complainant's credibility and reliability. By its verdicts, the jury clearly rejected N's narrative of events and accepted the complainant's evidence.

Conviction appeal

[15] As noted earlier, the conviction appeal is advanced on three grounds. We address each in turn. Having done so, we then stand back to consider whether the appeal grounds, on a cumulative basis, give rise to a miscarriage of justice.

Supplementary questioning of the complainant

The evidential interview and supplementary questioning

[16] Ms Hogan submits that the prosecutor's supplementary questioning of the complainant amounted to a "wholesale repetition" of her evidential interview. Given that submission, we first summarise the content of the interview.

[17] The evidential interview lasted approximately one and a half hours. The first 40 minutes addressed the rape that occurred in March 2020. The interviewing officer took the complainant through that incident in some detail, including asking her to draw sketches of the house and the bedroom, and where N and the complainant were on the bed when the rape occurred. When asked, the complainant gave evidence about the positioning of her and N's bodies during the rape, how he had restrained her, removed her pants, and then raped her.

[18] The next part of the interview addressed the strangulation. The complainant said as soon as she got into bed and relaxed, N quickly turned around and grabbed her throat, suggesting that he had one hand on her throat and then turned her on her side. During this he said words to the effect of: "You know what I can do to you? You just

do what I say". The complainant said N told her "I can kill you", while he continued putting pressure on her neck until she passed out. The next thing she recalled was N putting some water on her face and asking, "are you alive?". He then said, "women like you should not be alive".

[19] The interviewing officer then had the complainant draw a sketch of the bedroom and then took her through the episode of strangulation in more detail. She reiterated that N's right hand was on her neck and that it seemed like it remained there for what she estimated to be four to five minutes. The complainant said she was pushing back at N and trying to take his hand off but was unable to do so.

[20] The latter part of the interview covered the other assaults. The complainant said that the strangulation was "the start of this time that he started doing all this". She said that N had beat her on a number of occasions "in between that month". When asked what she meant by being beaten, she said that N "punch me, he slap me, he pull my hair. He, he bang me on the thing, on the sofa". She estimated that this would occur monthly, although then said:

And once a week, ah, once a month, yeah, kind of. Sometimes it's twice a month. Sometimes in, in like, it's two, three months and nothing happened. ... [a]nd then suddenly something happens and he beat me again.

[21] The complainant then said:

And once he beat me, not long ago, it was ah, in this year. It was in September, he beat me, and he told me, sit and cry, if you want you can call the cops, it's okay, let them take me.

[22] The interviewer then asked the complainant some more general questions about where on the body N would beat, hit or slap her.

[23] The interviewer then turned to the events of Saturday 19 December 2020. The complainant explained that she had a bad toothache following root canal work, as well as a bad headache. She explained how she and N had woken up earlier that morning and N wanted to have sex with her. Given her toothache and headache, the complainant suggested she have a couple of hours more rest before they could have sex later that day. The complainant said that N tried to pull up her nightie and remove

her pants but she managed to push him away. The evidential interview did not address the events of that day any further.

[24] The last part of the interview covered a few follow-up questions during which the complainant clarified that in November 2020, N had punched her in the head and that she had gone to the doctor as a result. She said that N had accompanied her and told her to tell the doctor that it was simply a headache, fever, and sneezing. The complainant said that this incident had taken place in their kitchen.

[25] Turning to the complainant's evidence at trial, she was called to give evidence at approximately 4.10 pm on day two of the trial. The prosecutor first took the complainant through the sketches and diagrams she had drawn during her interview. Having confirmed that the sketches in the exhibit booklet were drawn by her, the prosecutor noted that he would come back to ask some further questions about the diagrams later in her evidence. The complainant's evidential interview was then played. Immediately before it started, the prosecutor again flagged that he would have some supplementary questions for the complainant following the playing of the interview. This did not elicit any objection from N's trial counsel.

[26] The evidential interview was then played, with the jury retiring at 5 pm part-way through the video.

[27] The trial recommenced the following morning at approximately 10.20 am. Before resuming the playing of the complainant's interview, the prosecutor reoriented her to where they were in the transcript and again flagged that he would have a few more questions for her after playing the interview. This was completed just before 11 am.

[28] The prosecutor's supplementary questioning of the complainant began just before 11 am and finished just before 12.30 pm, with an almost half hour break from 11.30 am until noon.

[29] The first set of supplementary questions asked by the prosecutor sought the complainant's clarification about a number of the diagrams she had sketched during

the interview and what she had written on them. Ms Hogan takes no issue with this aspect of the questioning.

[30] The prosecutor then turned to the strangulation incident. He commenced by stating: “I know you described in your interview and we’ve watched it where his hands were placed on your neck ... but can you just again help us by showing us where he placed his hands around or onto your neck?”. He then sought to clarify with the complainant where and from what direction the pressure was applied on her neck. The complainant responded that it was at the front of her throat and pushing backwards into her throat. The prosecutor also asked whether she recalled if N used one or two hands around her throat; she confirmed that it was one. The prosecutor then asked her further questions about when she regained consciousness. The complainant clarified that N was slapping her cheeks on either side of her face, shaking her, and had thrown water on her. The prosecutor also asked questions about her body positioning at that time. This line of questioning lasted approximately six minutes.

[31] The prosecutor then asked supplementary questions about the alleged assaults. The prosecutor asked at what address or addresses the assaults had occurred. The complainant responded that the assaults had happened continuously over the relationship until she and N permanently separated in December 2020. The prosecutor then noted that the complainant had said in the interview that N had punched her and asked whereabouts he had punched her. The complainant clarified that he would punch her anywhere, and that the slapping was to her face.

[32] The prosecutor then turned to the September 2020 incident (see [21] above) and asked her to “tell us what he did in terms of this beating”. The complainant then gave evidence about that incident in more detail than in the evidential interview.

[33] The prosecutor then turned to the November 2020 assault (see [24] above). He noted that the complainant had said she was punched in the head, and asked, “whereabouts in the head did he punch you on that occasion?”. He then asked how many times N had punched her and at what address it had occurred. The prosecutor then noted that the complainant had talked about “the swelling part” in the interview and asked her to explain that.

[34] The prosecutor then noted that he was going to move to the final matter discussed in the interview — namely the events on 19 December 2020 to clarify some of the timing of what had happened that day. He took the complainant through the text messages N had sent to her; he also asked her why she had sent some of the messages she had. The prosecutor then took the complainant through the phone call between herself and N on 19 December 2020 and what N had said to her. Next, the prosecutor had the complainant explain what she had done after receiving N’s texts — namely going to the police station and making a statement.

[35] There is nothing in the notes of evidence that suggests that trial counsel for N objected to any of the supplementary questions. The Judge did not intervene.

The appeal

[36] Ms Hogan first highlights that the prosecutor’s supplementary questioning took almost as long as the complainant’s evidential interview itself, and that he worked methodically through the evidential interview transcript. She says this highlights that the questioning went well beyond the simple clarification of a few points that were unclear in the interview. Ms Hogan further submits that the Crown is not entitled to restate its case or “plug holes” in the complainant’s evidence-in-chief by way of supplementary questions — which she says was really what the prosecutor’s questions were aimed at. She argues that doing so offends against the restriction upon introducing prior consistent statements into evidence, which leads to repetition and unfair bolstering of the Crown case.

[37] In support of this submission, Ms Hogan referred us to *Hart v R* (which concerned the admissibility of the evidence of a friend of the complainant, who said that the complainant had told him about the offending),⁹ and to *Taylor v R* (being a challenge to the admissibility of text messages between the complainant and a friend of her mother’s, on the basis that they amounted to prior consistent statements).¹⁰ Ms Hogan also referred to Elias CJ’s observations in *Guy v R* (writing for both herself and Glazebrook J), namely that the policy behind the prior consistent statement rules

⁹ *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

¹⁰ *Taylor v R* [2022] NZCA 240.

is to avoid prolonging trials with evidence that is repetitive, and to “avoid the impression that repetition bolsters the credibility of evidence”.¹¹

[38] Ms Hogan also referred us to this Court’s decision in *R v E (CA308/06)*, in which the Court held that where a videotape of a child’s interview is played, it is acceptable to ask the child if he or she confirms what was said in the interview and to ask supplementary questions on topics not covered in the interview, but that it was “not the occasion for a wholesale repetition of what was said in the interview and certainly not ... elicited by leading questions”.¹²

Discussion

[39] We can deal with this aspect of the appeal briefly.

[40] First, we do not accept Ms Hogan’s characterisation of the supplementary questioning of the complainant as a “wholesale repetition” of her evidential interview. On the contrary, a significant portion of the supplementary questions comprised the prosecutor taking the complainant through the diagrams she had drawn during the interview and having her explain what was shown in them. In addition, the latter part of the supplementary questioning sought further detail from the complainant about the assaults on her by N, which were addressed relatively briefly in the evidential interview. In the event, Ms Hogan quite properly did not press her submissions in relation to these aspects of the supplementary questions.

[41] The large majority of the remaining questions were by way of clarification of matters the complainant had addressed in her evidential interview. There is nothing improper in that. We accept that there was some repetition in the supplementary questioning about the strangulation incident. Again, however, most of the prosecutor’s questions on that topic were also by way of clarification. For example, he asked how many hands N had used when strangling the complainant and from which direction he had applied pressure. We see nothing in this aspect of the supplementary questions that gives rise to concern, let alone a miscarriage of justice. In addition, Ms Hogan

¹¹ *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [54].

¹² *R v E (CA308/06)* [2007] NZCA 404, [2008] 3 NZLR 145 at [66].

rightly did not suggest that anything surprising or new arose out of the supplementary questions. This is reinforced by the fact that trial counsel did not object to any of the questions at the time, nor did he seek an adjournment to take further instructions from N. And as noted, the Judge did not see any need to intervene. While that is not determinative, it is nevertheless instructive.

[42] This case is accordingly far removed from those relied on by Ms Hogan and referred to above.¹³ While there was some (although not substantial) repetition of the complainant's evidence about the strangulation, this is not the type of repetition that s 35 of the Evidence Act 2006 is primarily aimed at, being out-of-court prior statements made by a complainant that are consistent with his or her evidence given in court. Rather, any (brief) repetition here was simply between different aspects of the complainant's evidence-in-chief.

[43] This ground of appeal is dismissed.

Absence of motive to lie

What happened at trial

[44] The complaint under this ground of appeal is the prosecutor's focus during his cross-examination of N and his closing address on the proposition that the complainant had no motive to lie, and that N was unable to advance any credible reason why she would do so.

[45] Fairly early on in his cross-examination, the prosecutor asked N "can you think of any reason, any logical reason why your wife would be going into the police station that night". Trial counsel for N objected at that point. In the presence of the jury, the Judge accepted the prosecutor's submission that it was an appropriate question, going

¹³ In *Smith v R* [2022] NZCA 448 at [28], this Court emphasised the particular context in which the decision in *R v E* (CA308/06), above n 12, is to be viewed.

on to state “bearing in mind that [N] does not have to prove his case”. The prosecutor was accordingly permitted to continue, with the following exchange taking place:

Q. Now I acknowledge and I will acknowledge again to the jury when I close the case that you don’t have to prove anything, and you know that don’t you?

A. Yeah.

Q. Okay. And I’m not asking you to put yourself into [the complainant’s] mind on the night of the 8th of March 2020, I’m not asking that. What I am asking you is can you, given that you were married to her at the time, can you think of any reason why she would’ve gone into the police station on the night of the 8th of March 2020 as she appears to have done, and the evidence has not been challenged, and told the police that she was fearful for her safety because of you? Can you think of any reason why she would’ve done that?

A. Yes.

Q. Well, please tell us what you say to that?

A. Because daytime on eight when we had an argument I said: “You get out of my life. I don’t need you any more and we are getting separate.”

Q. Right.

A. So because she might be saving, she don’t want to lose me or anything, so she’s fear about that.

Q. So you told her: “Get out of my life”?

A. Yes.

Q. “I don’t want anything further to do with you”?

A. Yes.

Q. And you’re suggesting to us that that may have led her later that night to have gone into the police station and reported to them that she was fearful for her safety, is that what you’re suggesting?

A. Yes.

Q. All right. ...

[46] Later in the cross-examination, the prosecutor put a similar question to N:

Q. Right. My question for you is this and if you don’t have an answer, please just tell me. Can you think of any reason why your wife appears to have driven directly to the police station once she’s finished work that night and she’s gone in to see the police and she has reported to them that she’s fearful for her life, that her husband has just threatened

to kill her and she has provided a statement to the police in relation to that? Can you think of any reason why she may have done that –

A. Yes.

Q. - and taken those steps if nothing in fact had been said to her by you?

A. No, I can sir, that because I told her not to come home and she was working till 11 pm night. I wouldn't text her around 3.30, so she might have come back to my place, but I told her not to come home, so she might have gone to the police asking for help so that because after work, where is she gonna go and stay. So might be she wanted to get back to the house because once somebody's chased from house or then they'll be finding a bit hard to come back there and there'll be fearing about everything that why that person has chased me out from the house or has told me not to come home, and then I'll be knocking off at 11 and then where I'll be going. So the best idea is to go to the police station and her seek some help, so that's my thinking.

[47] Following that answer, the prosecutor questioned N further about a suggestion he made to the effect that the complainant went to the police station because she didn't have anywhere to stay, asking:

And you're suggesting, are you, that that's a reasonable explanation for [the complainant's] actions on the night when she drives directly to the police station and makes her report?

[48] N answered "yes".

[49] Almost immediately thereafter, the following exchange took place:

Q. Do you accept that there must have been some reason for [the complainant] to go into the station that night and talk to the police or are you saying to us: "Look, she might've just done that for the hell of it, she might've done it for kicks"?

A. Well, I don't have any idea why she did that.

[50] A little later, in the context of addressing the assault charges, the prosecutor asked:

Q. And again and I acknowledge, of course, that you do not have to prove anything, but I ask you can you think of any reason why [the complainant] might be saying these things on oath and giving the detail she has provided to us about these assaults if none of this happened? Can you think of any reason why she may have said those things?

A. No reasons.

- Q. No reason?
- A. I don't know.
- Q. You're not aware of any reason why she would just say these things for no good reason, are you?
- A. No.
- Q. No. All right.

[51] The afternoon adjournment was then taken and shortly after court resumed the following exchange took place:

- Q. ... And are you saying to us [N] that again, what [the complainant] has described occurring on that occasion is simply all made up, is that what you are saying?
- A. Yes.
- Q. Okay. All right. So for some reason [the complainant] has seen fit, has thought it appropriate to make that allegation against you as well and to give that detail as to when it occurred and what occurred when you say: "Nothing happened," do I have that right?
- A. Yes.
- Q. All right. I'm suggesting to you, it won't come as any surprise to you [N] that the reason why [the complainant] has said that that occurred to her in September 2020 is because she's telling the truth, that is what happened, that's why she's saying it. What do you say to that?
- A. It never happened.

[52] Finally, in cross-examining N about the rape allegation, the following exchange took place between the prosecutor and N:

- Q. And just so I've got it right and the members of the jury have got it right, are you once again suggesting that [the complainant] has, for some reason, simply made all of this incident up? She has given us this level of detail when none of it happened, is that your evidence?
- A. Yes. None of thing happen, because from 8 March, I got separated with her, and then we reconcile on 16, and that's the first time I met her again. From 8th to 16th, I never met [the complainant] anywhere. I was not with her.
- A. [N], I am obliged to put to you, and I do, that you're lying. You are lying on oath that you have committed these offences, that [the complainant] has told us the truth and that you are lying on oath as to what you did to her. Do you have any comment to make to that proposition?

A. Yes. I'm not lying.

[53] Turning to the prosecutor's closing address, it is fair to characterise it as a firm address, that had some focus on the submission that the complainant had no motive to lie and that N had not suggested any reasonable basis why she would have done so.

[54] In addressing the individual charges, the prosecutor reminded the jury "to pay attention carefully to my learned friend and whatever he may say as well. It cuts both ways". He highlighted the stark contrast between the complainant's account of the short-lived marriage and that of N. He then said:

But in reality, [N] suggests to us, and suggests to you, and you have to engage with this, because that's what he's suggesting, and take it front on, you need to look at it, I suggest to you it's absolute rubbish. That's for you 12, but you need to consider it. He says to you [the complainant's] evidence in respect of all of this offending is just a ruse, a calculated attempt by her to mislead everyone in this courtroom. That's really what he's saying. It's an enormous proposition, but that is *what he is suggesting to you: that she has embarked, for some reason – and there can be no logical reason, I suggest to you, and he hasn't suggested one* – that she has embarked upon a journey back in late 2020 to go to the police and tell them what he has been doing to her, then undertake the evidential interview that we saw, and we've watched and listened to carefully, and go into the detail that she has done. And this is all some part of an elaborate ploy, seems to be the suggestion being made to you by [N].

And it went further than that, because you will recall yesterday when I asked [N]: "Well, look, are you really suggesting to us that the emotion we saw from [the complainant] when she gave her evidence in this trial was just a put-on? That that was part of the game, the ploy, the deception?", and he said to us: "Yeah. Yeah, I am suggesting that."

Well, that's his position. He's entitled to that. He's entitled to that view, because he's put it out there. He's pushed the boat out there, and he's asking you to actually consider that. Well, do consider it. It's nonsense. And I'm raising it because that's what he's asking you to accept.

Just don't forget, please, not just what [the complainant] said to us, but the way she said it, the raw emotion that we saw when she gave her evidence to us in this trial. Crocodile tears, fake tears, is what he's suggesting. It's absolute nonsense.

(Emphasis added)

[55] The prosecutor then reminded the jury of the onus of proof:

Let me please remind you, respectfully, just to be absolutely clear about it, [N] doesn't need to prove anything, and I know that you know that. It's important you do, and it's important and fair that I again remind you of that. There's no onus on him to prove anything or disprove anything, and we've talked about

that already. Her Honour has had a mention about that with you, I know, and will again remind you of that in summing up, and that's right. That's fair and proper. I just want to remind you of that.

[56] The prosecutor then highlighted that N had chosen to give evidence and proceeded to make submissions on why the jury should reject his evidence. This included the submission that it was “completely lacking in any value at all”, was “unbelievable” and “incredible”. He went on to say:

Complete and utter nonsense is what we heard from him yesterday, in my submission to you. *He had no explanation as to why [the complainant] would have made these serious allegations against him if they were not true. And again, okay, he doesn't need to have an answer, and I accept that, and I made that, I hope, clear when I questioned him.*

But that tells its own story, I suggest to you 12. He couldn't think of a logical reason why she would somehow come up with these allegations if they were not true. There is simply, in my submission, no reasonable, no logical reason at all why [the complainant] would have made these allegations against her husband, as he then was, unless they were true, unless she was telling the police and telling us what he did to her. And that's a very valuable indicator, and it won't have been lost on you 12, I know. But just bear that in mind, please, when you consider the evidence we have in this trial.

So, look, those are some introductory remarks which I hope are useful to you.

(Emphasis added)

[57] The prosecutor then turned to charge 1, including the submission that:

... there's absolutely no logical reason for any of this to be made up by [the complainant], and nothing has been suggested to you on that score. And that's a problem for [N]. That's a real problem.

[58] The prosecutor then turned to charge 2, again noting that N's position was that the complainant had made up the allegations. He said:

And he's also saying in the same breath, as he did for charge 1: “Look, I can't think of any reason why [the complainant] would make that allegation up if it wasn't true. I don't know.” And again, he doesn't have to prove anything, and you know that. But he's inviting you to, you 12, to conclude that [the complainant] has for some reason concocted, made up, a further false and detailed and serious allegation against him. That is what he is asking you to accept.

[59] Finally, the prosecutor made a similar submission in relation to charge 6. After submitting why the jury could accept the complainant's evidence on this charge, he said:

And [N] doesn't have to prove anything, and I don't want to overdo the point, but it's important. He's chosen to give evidence, and he's got no plausible explanation at all as to why his wife would have finished work that night and driven straight to the police station, in a state, and reported that her husband had threatened to kill her that afternoon. There isn't any plausible explanation as to why she would have done that and said that if it were not true, in my submission to you. There just isn't.

[60] The defence closing was relatively brief. N's trial counsel did not expressly address the proposition that the complainant had no motive to lie, instead focussing on the suggested implausibility of the complainant's account, the fact she did not make any complaint about the alleged offending until December 2020, and suggested errors and inconsistencies in her evidence. The only aspect of the defence closing that touched on the complainant's motive to lie was trial counsel's final comment to the jury, namely "[w]e don't know why she made this up. We don't, we're not in her brain".

[61] In her summing up, the Judge gave the usual directions about the burden and standard of proof, that counsel's submissions were not evidence, as well as a tripartite direction because N had given evidence. Importantly, she also directed the jury specifically on the proposition that N had no credible response to why the complainant might lie about the events in issue, stating:

I remind you here again that the Crown must prove the charge. [N] does not have to prove anything. He does not have to suggest a reason why his wife went to the police or why she might lie.

The appeal

[62] Ms Hogan first refers to this Court's observations in *R v T* in which the Court stated:¹⁴

We accept that the proposition "Why would the complainant lie?" should not be presented in a way which would deflect or distract the jury from the central issue, whether the Crown had proved the charge and each element of the charge beyond reasonable doubt. Nor should any suggestion be allowed that

¹⁴ *R v T* [1998] 2 NZLR 257 (CA) at 265–266.

there was an onus on the accused to advance a credible answer. Generally, the trial Judge would be required to intervene firmly if these principles were infringed. And without wishing to burden Judges with yet another topic which must be covered in summing up, in any case where the prosecution had sought to bolster the complainant's credibility by reference to the absence of a motive to lie, the charge to the jury needs to be clear that regardless of the absence of evidence of motive, the onus of proof remains on the Crown throughout.

We also accept the distinction between questions relating to facts on the one hand and opinion on the other, and that absence of evidence of motive should not be equated to absence of motive. ... The question: "Why should she lie?" must be interpreted as and confined to the eliciting of facts known to the accused, not speculation as to possible motives.

[63] Ms Hogan also refers to this Court's subsequent comments in *R v Hayman*, where it said:¹⁵

R v T should not be read as suggesting an invariable requirement. A direction is not required every time there is mention of any absence of motive on the part of the complainant to make a false allegation (see for example *R v Adams* CA70/05 5 September 2005 at [74]). The critical issue is whether there is a risk that the jury may view the burden of proof as being shifted from the Crown. Where it is clear from the summing up, viewed as a whole, that the onus of proof rests with the Crown, as was the case here, no such direction is required.

[64] Ms Hogan submits that despite the Judge directing the jury on the absence of a motive to lie and that N bore no onus of proof in that regard, the frequency and force with which the prosecutor questioned N about that issue, and the emphasis on it in his closing address, overwhelmed the Judge's direction, and gave rise to a real risk of the jury proceeding on the basis that N bore an onus to provide a credible answer to the prosecutor's questions.

Discussion

[65] Historically, whether a prosecutor could question a defendant on whether he or she knew of any reason why the complainant might have a motive to lie had given rise to some controversy, as addressed by this Court in *R v T*.¹⁶ However, as the Court explained:¹⁷

... New Zealand trial practice has allowed the accused to be asked whether he knows of any reason for the complainant to fabricate her account, and for the

¹⁵ *R v Hayman* CA478/05, 23 June 2006 at [32].

¹⁶ *R v T*, above n 14, at 264–266.

¹⁷ At 265.

prosecutor to use the absence of any credible reason as a closing argument in favour of the complainant's credibility.

[66] However, while such questions and associated submissions are permitted, they become improper when their effect is to deflect the jury from the task of determining whether the Crown had proved the charges beyond a reasonable doubt.¹⁸ In *R v E*, this Court said:¹⁹

The greater the repetition of any questions on motive to lie, the more likely it is that the trial process will be improperly perverted. Prosecutors should not persist with their questions on motive after an accused has clearly stated that he or she can give no explanation.

[67] The Court further stated that:

[125] In a case where the prosecution has sought to bolster the complainant's credibility by reference to the absence of a motive to lie, the summing up needs to be clear that, regardless of the absence of evidence of motive, the onus of proof remains on the Crown throughout. In particular, the jury should be directed that it is not for an accused to prove motive ... The absence of such a direction will not always lead to an appeal being allowed. The critical issue is whether there is a risk that the jury may view the burden of proof as being shifted from the Crown ...

[68] Turning to the present case, as can be seen from the extracts from the prosecutor's cross-examination of N, there were more than just a few instances in which the prosecutor asked N if he could suggest any reason why the complainant might lie. The prosecutor also returned to this topic a number of times in his closing address. Most of these questions and submissions were, however, directed to different charges. Further, the prosecutor's questions did not press N to speculate on why the complainant might have a motive to lie. Instead, the questions sought to elicit facts known to N, the complainant's husband, as to why she might lie — reflecting the distinction highlighted in *R v T*.²⁰ And in response to most of the questions, N said that he *did* know of facts which he said gave the complainant a motive to lie. The jury was entitled to consider the reasonableness or otherwise of N's responses in assessing his and the complainant's respective credibility.

¹⁸ *R v E* (CA308/06), above n 12, at [52].

¹⁹ At [52].

²⁰ *R v T*, above n 14.

[69] The prosecutor also reminded the jury several times, during both his cross-examination of N and in his closing address, that N did not have any onus to prove anything, including a motive for the complainant to lie. Such “reminders” by the prosecution will not always cure a scenario in which the court considers counsel has overstepped the mark. As this Court said in *R v E*, despite the prosecutor in that case giving the jury such a reminder, the prosecutor “immediately undid any effect that may have had”,²¹ by submitting to the jury that “if there had been any reason why [Mr E] or his family might have thought that [the complainant] was lying ... *you can bet your bottom dollar you would have heard about it*, but there’s been nothing.”²² The Court considered this last aspect of the prosecutor’s submission to be “tantamount to placing an obligation on the defence to prove motive”.²³ In the present case, however, the prosecutor made multiple references to the fact that N bore no onus to provide an explanation of why the complainant might have a motive to lie, to the point he apologised for “labouring” the point, but reminding the jury that it was “important”.

[70] Further, and unlike in *R v E*, the Judge expressly directed the jury on the complainant’s motive to lie and that N carried no burden in this regard. That the Crown carried the burden of proof throughout was also the subject of the usual directions given by a trial judge on that topic, as well as the tripartite direction, and a further reminder of the burden of proof when addressing the question trail. The combined effect of these matters means there is no risk the jury would have been deflected from the central task of determining whether the Crown had proved the charges against N beyond a reasonable doubt.

[71] This ground of appeal also fails.

Tone of the closing address

The appeal

[72] The remaining ground was effectively advanced in a supporting role to the ground just addressed. Ms Hogan characterises the prosecutor’s closing address as

²¹ *R v E* (CA308/06), above n 12, at [57].

²² At [56] (emphasis in original).

²³ At [57].

“intemperate”. She highlights the prosecutor’s submission that N’s version of events was “absolute rubbish”, “nonsense”, “completely lacking in any value at all”, “unbelievable” and “incredible”. Ms Hogan also refers to the prosecutor’s references to N as being a “nasty, domineering husband who treated his wife appallingly”, and that N’s suggestion that the texts sent on 19 December 2020 were not abnormal to send to a wife were “nonsense”.

[73] Some of the flavour of the closing address can also be seen from those extracts set out at [54] to [59] above.

Discussion

[74] We start by making the obvious point that the particular remarks or aspects of a prosecutor’s closing address on which an appellant focuses “should not be viewed in isolation”.²⁴

[75] While we agree that the prosecutor’s closing address overall was forceful, we are not persuaded that it was improper. As well as considering the closing address as a whole, it is also to be viewed in the context of a case such as this — a head-to-head credibility contest between the complainant and N. The closing address is also to be viewed against the backdrop of the defence case being that the complainant had lied in *all* aspects of her evidence and was making up the entirety of her detailed allegations of sexual and physical abuse. The prosecutor also emphasised several times during his closing address that the jury must also have regard to what counsel for N had to say and reminded the jury that the lawyers’ submissions were not themselves evidence (a point reiterated by the Judge in her summing up).

[76] Finally, we are bound to observe that aspects of N’s evidence do appear somewhat unbelievable and nonsensical. For example: his suggestion that there was nothing unusual or untoward about the tone of his text messages sent to the complainant on 19 December 2020; that the complainant went to the police station that night because she did not have anywhere to stay; and his denial that he was angry when he sent the text messages (particularly given in his evidential interview he had

²⁴ *Satini v R* [2014] NZCA 413 at [10].

said he was “very angry”). In those circumstances, it was not improper for the prosecutor to make submissions to the jury about the implausibility of N’s evidence, including in a relatively forceful way, and certainly nothing that gives rise to a miscarriage of justice.

[77] This ground of appeal is also dismissed.

The cumulative effect of the grounds of appeal

[78] Standing back, we do not consider the matters raised under each of the three grounds of appeal, considered on a cumulative basis, give rise to a real risk of a miscarriage of justice.

[79] As noted, this case involved a sharp conflict of evidence between the complainant and N. The prosecutor was entitled to challenge N on his evidence, which in a number of respects lacked credibility. While at times the questioning and the closing address were forceful, we do not consider the prosecutor overstepped the mark such as to give rise to a miscarriage of justice. Further, the jury was reminded on multiple occasions, by both counsel and the Judge, that the Crown bore the onus of proof throughout and that N did not have to prove anything. Finally, the Judge specifically directed the jury that N did not have to establish a motive for the complainant to lie.

[80] The conviction appeal is dismissed on this basis also.

[81] We turn now to the sentence appeal.

Sentence appeal

The material before the Judge at sentencing

[82] To assist with sentencing, the Judge had before her a Provision of Advice to Court (PAC) report, as well as a s 27 cultural report addressing N’s background.

[83] The PAC report recorded that N maintained his innocence and, while he and the complainant had arguments, everything else was “made up”. He was assessed as

being at a moderate risk of reoffending and a high risk of harm, particularly in an intimate relationship. Given his denial of the offending, the report writer recorded that there was no demonstration of remorse by N.

[84] The report touched briefly on N's background. It recorded N's view that growing up in Fiji was at times difficult as the family had little money, but "despite this he said that he enjoyed a good childhood and has always been grateful for the opportunities given by his parents, particularly around education". The report recorded N telling the report writer that much of his upbringing and education was assisted by the Hindu community, as both his parents worked long hours on a farm to support the family. N told the report writer that part of the reason for coming to New Zealand was to enable him to provide financial support for his parents.

[85] The s 27 cultural report was relatively brief. Its factual content was self-reported by N, but with some reference to academic literature about Hindu culture.

[86] The report recorded that:

[N] grew up in a very poor environment. His father was a farmer and his mother a home maker. Women were treated as slaves and were there to support the men in order to attain their goals.

[87] This comment was supported by academic writing saying that an aspect of Hindu culture includes the "reproduction of male dominance and stark gender differences". The report writer also referred to another article on the basis of which the report writer described a suggested tendency in Hindu culture to operate on a patriarchy that devalues women, viewing men as the "ruler of the household" while pushing women into subordination.

[88] The report then addressed N's upbringing. Unlike N's account to the PAC report writer of a good childhood, the report recorded that N suffered severe beatings from his father and had witnessed his mother and sister also being beaten by his father. N said that these beatings occurred on a regular basis. The report recorded:

He suffered the same as what they did. Women were considered slaves in their households. They had no say over the running of the family or home and did what they were told to do. [N] said there were times he considered killing

himself as he was powerless to protect his mother and sister. He said his childhood was not a happy time for him or his sister. His mother never answered back because of the fear of being beaten. [N] did say his mother and sister instilled good morals in him with regards to the treatment of women. He was taught to respect them and not treat them as slaves or less than himself.

[89] N told the report writer that he was introduced to the complainant approximately 18 months after arriving in New Zealand, through a mutual friend during a religious ceremony. He also told the report writer that he had never been in a relationship with a woman before.

The sentence adopted in the District Court

[90] In sentencing N, the Judge adopted a starting point of seven years' imprisonment for the lead charge of rape — the bottom of band 2 in *R v AM (CA27/09)*²⁵ — and then uplifted that by three years for all other offending.²⁶ No issue is taken with these aspects of the sentence. From the overall starting point of 10 years' imprisonment, the Judge reduced the sentence by six months, or approximately five per cent, for the fact N had no previous convictions.²⁷ The Judge also adopted a further discount of six months for the 12 to 15 months N had spent on EM bail.²⁸ Again, no issue is taken with these discounts.

[91] The Judge then turned to the report, stating:²⁹

[26] That brings me to the cultural report. It makes for difficult reading. I am not sure whether I am supposed to accept that because women are said to be treated as slaves in your culture, that this somehow makes you less culpable for the way you treated your wife in New Zealand. I cannot accept that.

[27] I am also unable to accept that there is a link between your background and culture of devaluing women and the treatment of your wife from the very start of your marriage.

[28] The first point is that there is a complete denial of the offending. You do not even admit that you have been violent towards your wife. The second point is all of the inconsistencies between various accounts that come from you. On the one hand you say you have had a good childhood and then on the other hand that it was a violent household. But leaving that aside, you have

²⁵ Sentencing notes, above n 6, at [16] referring to *R v AM (CA27/09)* [2010] NZCA 114, [2010] 2 NZLR 750.

²⁶ At [22].

²⁷ At [25].

²⁸ At [25].

²⁹ Sentencing notes, above n 6.

said that your mother and sister taught you how to respect and treat women. I cannot be sure anything that you have said is true or whether you are just trying to paint yourself in a good light. But the fact that you have said that you have tried to protect your mother and sister, or you could not, and that they have taught you how to respect and treat women means that you knew you could not treat your wife like this. This is an acceptance that you knew what you were doing to her was wrong.

[29] As I have said, all of this seems a rather clumsy attempt by you to paint yourself in a better light. All of the material is self-reported. I am not prepared to give any discount for the cultural report. I can see no basis on which to do so.

[92] The Judge accordingly sentenced N to an overall sentence of nine years' imprisonment.³⁰ No minimum period of imprisonment was imposed.

The appeal

[93] Ms Hogan submits that the s 27 cultural report detailed cultural factors which may have assisted in providing an explanation for N's behaviour that mitigates his culpability. She refers in particular to those aspects of the report that record:

- (a) N grew up in another country, in an environment where women were poorly treated;
- (b) N was beaten severely by his father in his childhood, and witnessed his father beat his mother and sister;
- (c) his family was very poor and his childhood was unhappy;
- (d) he had not previously been in a relationship with a woman; and
- (e) he was suffering ill health.³¹

[94] Ms Hogan submits that the Judge rejected these factors without providing an opportunity for the credibility of the report to be properly tested and determined. She submits that if a disputed fact is a matter of mitigation (here, the link between N's

³⁰ At [30].

³¹ The cultural report recorded N's advice that he had suffered a heart attack three weeks prior and was suffering a serious kidney complaint. N reported that his health was being monitored by the Department of Corrections' Health Department in conjunction with Auckland Hospital.

background and his offending), an opportunity for oral evidence on the point should have been afforded to N, as well as the prosecution.³² Ms Hogan submits that this is consistent with the enactment of s 24 of the Sentencing Act which provides for a disputed fact hearing. She accordingly submits that the Judge should not have made any findings against the link between N's background and his offending without first providing the opportunity for oral evidence on that issue.

Discussion

[95] A disputed fact hearing in this case was unnecessary. In all cases in which a s 27 report is put before a sentencing judge, the judge must evaluate and assess the content of the report, often in conjunction with a PAC report, and any suggested connection between the offender's background and their offending. The Supreme Court in *Berkland v R* addressed a similar point in the context of a s 27 report regarding the appellant, Mr Harding.³³ It accepted the Crown's submission that the report had a number of shortcomings, including inconsistencies between it and a psychiatric report. There was no suggestion that those shortcomings ought to be dealt with by way of calling of oral evidence. Rather, the Court stated that "such shortcomings as there may be can be adequately addressed in the weight to be attributed to the various conclusions in the report".³⁴ Similarly, the Court doubted the suggestion in the s 27 report that Mr Harding had been physically abused as a child, and again there was no suggestion that oral evidence ought to be called on that topic.³⁵

[96] It is instructive to consider what would have been the subject of a disputed fact hearing in this case. If it was to determine the truthfulness of N's statements to the cultural report writer about his unhappy childhood, including that his father regularly beat his mother and sister, family members inevitably would have needed to be called to give evidence on those matters. We see a disputed fact hearing in this context as having the potential to become a mini-trial and therefore quite unworkable. Instead, the inconsistency between the s 27 cultural report and the PAC report was readily apparent on the face of the reports, and counsel for N had an opportunity to take

³² Referring to *R v Moananui* [1983] NZLR 537 (CA) at 543.

³³ *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [175]–[186].

³⁴ At [175]. See also [129].

³⁵ At [183].

instructions from N on those inconsistencies and address the Judge on them at the sentencing hearing. Alternatively, in light of the inconsistencies and given the information in the cultural report was self-reported by N, there was nothing to prevent the report writer, or N's counsel, taking steps to speak with N's family members (presumably his mother and/or sister) to seek further information.

[97] We reiterate that a sentencing judge's assessment of a s 27 report is an evaluative exercise, against all of the information available to the judge at sentencing. And while the Supreme Court in *Berkland* said that self-reported facts in a cultural report are not to be put to one side merely because they are self-reported,³⁶ that is not to say that sentencing judges cannot bring a critical eye to such matters, particularly when they conflict with what the offender has told another report writer.

[98] Even accepting the content of the s 27 cultural report, however, we do not consider that the Judge erred in not giving a discount for it. As the Supreme Court said in *Berkland*, an offender's background must have acted as a causative contributor to their offending before it will be relevant to the sentencing outcome.³⁷ Accepting for present purposes that N's cultural background might involve the subservience of women, this does not explain ongoing physical and sexual violence in his marital relationship. N told the report writer of his father's physical abuse of his mother and sister. But N also said that his mother and sister had taught him how to respect women and not to treat them as slaves or less than himself. On that basis, it is difficult to see any ongoing causal connection between N's background and his offending.

[99] Finally, even if a modest discount might have been warranted for the cultural report, we do not consider the Judge's end sentence was manifestly excessive. The seven year starting point on the rape charge was unremarkable, and the uplift of three years for the remaining offending, which was serious in and of itself (particularly the strangulation charge), was arguably somewhat generous. It is also arguable that the five per cent discount for N's lack of previous convictions was also generous, given the extended period over which N's offending occurred. For these reasons, the

³⁶ At [129].

³⁷ At [109].

sentence imposed was within the range available to the Judge and the sentence appeal must therefore fail.

Result

[100] The appeal against conviction is dismissed.

[101] The appeal against sentence is dismissed.

Solicitors:

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