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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA707/2022
[2024] NZCA 20**

BETWEEN	JOHN ANTHONY BERRY Appellant
AND	THE KING Respondent

Hearing:	24 August 2023
Court:	Goddard, Whata and Downs JJ
Counsel:	C J Tennet for Appellant S C Carter and A C R M Jeffares for Respondent
Judgment:	19 February 2024 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
 - B The appeal against sentence is allowed.**
 - C The sentence of two years and eight months' imprisonment is set aside and
a sentence of 23 months' imprisonment is substituted.**
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REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

[1] Mr Berry was tried before Judge Cathcart and a jury on two charges of sexual violation.¹ He was acquitted on one charge of sexual violation by digital penetration, and convicted on the second charge of sexual violation by unlawful sexual connection between his mouth or tongue and the victim's genitalia. He was sentenced to two years and eight months' imprisonment on that charge.²

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

² *R v Berry* [2022] NZDC 23209 [Sentencing decision].

[2] Mr Berry appeals to this Court against both his conviction and the sentence imposed. He says that his trial was unfair because the Judge:

- (a) Excluded certain evidence that Mr Berry's trial lawyer attempted to introduce during cross-examination.
- (b) Descended into the arena, adopting a highly critical and belittling tone in dealing with defence counsel in a manner which conveyed criticism of both defence counsel and the defence case.
- (c) Failed to fairly put the defence case to the jury when summing up.

[3] Mr Berry appeals against his sentence on the basis that an extraneous matter relating to the first charge, on which he was acquitted, was taken into account. He also says the starting point adopted was manifestly excessive, and greater discounts should have been allowed, with the result that the end sentence was manifestly excessive.

[4] The Judge's criticisms of defence counsel were at times unjustified, and it would have been better if more patience and more courtesy had been deployed at certain times. But we do not consider that the Judge's treatment of counsel resulted in an unfair trial for Mr Berry, or that there is a real risk that it influenced the outcome of the trial. The appeal against conviction is therefore dismissed.

[5] The Judge erred in law in his approach to sentencing Mr Berry on the second charge, on which he was convicted, by making findings of fact in relation to the event that was the subject of the first charge, on which he was acquitted, and taking that finding into account in setting the starting point for Mr Berry's sentence. The sentence imposed must therefore be set aside. Given the time that has passed since trial, rather than direct resentencing in the District Court we impose the sentence that ought to have been imposed of 23 months' imprisonment.

[6] Our reasons are set out below.

Background

[7] Mr Berry was at the relevant time a part-time massage therapist who practised mirimiri, a traditional Māori massage technique, at purpose-built massage premises in Gisborne | Tairāwhiti owned by a friend. The complainant, who had previously received a massage from Mr Berry, made a booking for a massage on 14 July 2021.

[8] At the massage room the complainant undressed and lay down on the massage table wearing her bra, underpants and swimming shorts. She was partly covered with a towel and initially lying on her stomach. After Mr Berry finished massaging her back, the complainant turned over so that he could massage her stomach area.

[9] The complainant said that she felt Mr Berry's hand go in between her pants and his finger or fingers go into her vagina. This was the subject of the first charge of sexual violation.

[10] The complainant said that she then felt Mr Berry's face go between her legs and his felt his mouth and tongue touch her vagina. This was the subject of the second charge of sexual violation.

Trial

[11] The trial took place before Judge Cathcart and a jury in the Gisborne District Court over three days in August 2022. The complainant gave evidence and was cross-examined at some length. Mr Berry elected not to give evidence, but the video of his police interview was played to the jury.

[12] Mr Berry told police that there had been some consensual sexual contact. He said that while he was massaging the complainant's stomach area she became sexually excited and guided his hand down to her pubic area, thrusting against his hand. He believed she wanted to have sex. He confirmed that there had been brief oral sexual contact. He said that at that point the complainant made it clear through her body language that she did not want the sexual contact to continue, and he immediately stopped.

[13] At trial the complainant strongly rejected Mr Berry's account. Her evidence was that she had not sought or consented to any form of sexual contact, and that she was surprised and shocked when she felt Mr Berry touch her genital area. She had immediately pulled on some of her clothing and left the massage premises in disarray, leaving behind her pounamu pendant. She gave evidence and was cross-examined about a subsequent exchange of text messages with Mr Berry in relation to recovery of her pounamu, and what had happened at the massage premises.

[14] The jury acquitted Mr Berry on the first charge, and convicted him on the second.

[15] The events at trial that are the subject of the appeal are described below.

Sentencing

[16] Mr Berry was sentenced by Judge Cathcart on 23 November 2022. The Crown invited the Judge to make a finding of fact in relation to the touching that was the subject of charge 1. The Crown submitted that the only reasonable available inference from the jury's verdicts was that there had been a connection between Mr Berry's finger or fingers and the complainant's genitalia, but the jury was unsure as to the penetration element. The Crown invited the Judge to make a finding that (non-consensual) touching of the complainant's genitalia occurred before the oral connection that was the subject of charge 2.³

[17] The Judge engaged in a detailed analysis of the trial evidence and concluded that it was appropriate to make a finding of an undisputed touching of the genitalia short of penetration.⁴

[18] Ms Wright, who appeared for Mr Berry at trial, argued that the touching of the complainant's genitalia prior to oral sexual contact could only be used by the Court when considering the circumstances of the offending in relation to the issue of consent. She submitted that the jury could have proceeded on the basis that Mr Berry had an

³ At [3].

⁴ At [4]–[16].

honest belief that the complainant consented to the sexual contact, but that belief was mistaken and there were no reasonable grounds for it.

[19] The Judge rejected the submission that this was a case of honest but mistaken belief in consent.⁵

[20] The Judge then considered the starting point for the sentence on charge 2. He said that the primary aggravating factor was a breach of trust because the complainant went to Mr Berry's massage service and put herself in a vulnerable position by lying down on the bed in the treatment room.⁶ That trust gave Mr Berry the opportunity to offend against her.⁷ The complainant was right to expect that Mr Berry would act professionally and would not breach that trust.⁸

[21] However, the Judge said, this was offending of short duration.⁹ The complainant reacted immediately and left the premises.¹⁰ There were no additional indicia of violence beyond that inherent in the offence.¹¹

[22] The Judge considered that the appropriate starting point fell within band 1 in the guideline decision *R v AM*, namely two to five years' imprisonment.¹² The Judge concluded that the appropriate starting point was three years and four months' imprisonment.¹³

[23] Mr Berry had a previous conviction for rape in 2011. He had been sentenced to five years and six months' imprisonment. The Crown sought an uplift to reflect that conviction, to provide a strong deterrent response and to protect the community.¹⁴

[24] The Judge accepted Ms Wright's submission that, while an uplift may be justified, the principle that a person must not be punished twice for the same offence

⁵ At [13]–[16].

⁶ At [19].

⁷ At [19].

⁸ At [19].

⁹ At [20].

¹⁰ At [20].

¹¹ At [20].

¹² At [17]–[18], referring to *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.

¹³ At [21].

¹⁴ At [22].

was engaged.¹⁵ The Judge considered that there was a need to personally deter Mr Berry further notwithstanding the heavy sentence in 2011, and there was a public risk factor involved in the second offending because of Mr Berry's provision of massage services. He adopted an uplift of three months for the previous conviction.¹⁶

[25] The Judge did not consider that a discount for remorse was justified.¹⁷ The Judge allowed a five month discount for time spent on restrictive bail.¹⁸

[26] The Judge then considered Mr Berry's background circumstances. The Judge accepted that Mr Berry had a dysfunctional background including exposure to racism, exposure to family violence, sexual abuse experienced as a child, and cannabis addiction. Taking all of those factors into account, the Judge found that a further discount of six months was appropriate.¹⁹

[27] The end sentence imposed by the Judge was thus two years and eight months' imprisonment.²⁰

Appeal against conviction

Grounds of appeal

[28] This Court must allow Mr Berry's appeal against conviction if satisfied that a miscarriage of justice has occurred for any reason.²¹ A miscarriage of justice is defined in s 232(4) of the Criminal Procedure Act 2011 as:

... 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.

¹⁵ At [23], referring to *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37.

¹⁶ At [24]–[26].

¹⁷ At [27]–[29].

¹⁸ At [30]–[32].

¹⁹ At [34]–[38].

²⁰ At [39].

²¹ Criminal Procedure Act 2011, s 232(2)(c).

[29] Mr Tennet, who appeared for Mr Berry on appeal, submitted that there had been a number of errors and irregularities at trial which when considered separately and cumulatively created a real risk that the outcome of the trial was affected. We consider each in turn below.

Exclusion of evidence

[30] Mr Tennet grouped together two grounds of appeal relating to exclusion of evidence. First, there had been a difference between the complainant's and Mr Berry's recollections about the weather on the relevant day. The complainant said sunlight was beaming into the room, and she was blinded by the light in her face when she felt Mr Berry's hand go between her pants and touch her vagina. In cross-examination it was put to her that (based on Mr Berry's video interview) it was a frosty day. She denied that, and said it was a "beautiful sunny day".

[31] Trial counsel then sought to put to the complainant what she described as a weather report from the relevant day. The document was a printout of an internet page which appeared to be an archived weather forecast for 14 July 2021 from "worldweatheronline.com". Crown counsel objected to admission of the document.

[32] The Judge ruled that the document was inadmissible. The Judge's reasons were set out in a written ruling delivered on 16 August 2022, the second day of the trial. It appears that after some uncertainty about the provision of the Evidence Act 2006 on which Ms Wright relied for admission of the document, her focus was on s 129 which permits a court to receive in evidence published documents dealing with matters of public history, literature, science or art. However the Judge considered that there was no basis on which he could find that the weather forecast document was sufficiently reliable as a source of information to be admitted as evidence of the weather on the relevant day. The document on its face purported to be a weather *forecast*, not a *record* of the actual weather experienced that day. No other evidence had been provided to enable the Judge to assess the reliability of the forecast. The Judge was not satisfied for the purpose of s 129 of the Evidence Act that he had sufficient information to consider the document and its contents to be reliable sources of information.

[33] Mr Tennet submitted that the document was relevant as it had a tendency to prove or disprove something that was of consequence to the determination of the proceeding, given the difference between the complainant's evidence about the weather and statements made by the appellant in his police interview. He said that the evidence would assist the jury in deciding whose evidence to accept and whose to reject.

[34] We consider that the Judge's ruling on this point was plainly correct. Even if the document was reliable evidence of a forecast about the weather at the relevant location on the relevant date, that would not provide a reliable basis for making findings about the weather that was actually experienced on that date. One cannot safely reason from a forecast provided some unknown amount of time in advance to what the weather actually was on any given day. Nor was there any information before the Judge about the source of the forecast, or the reliability of forecasts from that source.

[35] Thus the first ground of appeal did not amount to an error or irregularity affecting the trial.

[36] The second evidence ruling challenged by Mr Tennet relates to a photograph taken by a detective of the complainant's phone, showing text messages exchanged between the complainant and Mr Berry after the events that were the subject of the charges. As already mentioned, Mr Berry's case at trial was that there had been an initially consensual sexual encounter which the complainant then regretted and terminated. Trial counsel sought to establish that a particular text had been sent by the complainant while she was at the police station making her complaint.

[37] The police had extracted relevant text messages from the complainant's mobile phone, and a document setting out these extracted texts was an exhibit included in the Crown's bundle of exhibits. The extracted data showed the time at which each message was sent as "UTC time". It was common ground between the Crown and the defence that New Zealand time could be obtained by adding 12 hours to the UTC time shown in the exhibit before the jury.

[38] Ms Wright sought to put to the complainant, in the course of cross-examination, a photograph that had been taken of the complainant's phone showing some of these texts. Her purpose in doing so was to establish the time at which they were sent. The Crown objected to production of the photograph on the ground that it was needlessly repetitive of information already before the jury. The Judge upheld that objection. He set out his reasons in another written ruling delivered on 16 August 2022 (Ruling 4).

[39] The Judge said that admitting the screenshot of the texts on the complainant's phone, which showed the New Zealand time but not the date of the messages, would be repetitive of unchallenged evidence already exhibited in accurate form before the jury. He considered it would be open to some confusion because no date was visible. Repetitive production of the same evidence is discouraged.

[40] The Judge did not accept Ms Wright's position that she was entitled to do what the defence requires in cross-examining a witness, as he retained a general exclusionary power under s 8 of the Evidence Act. In this case the Judge considered the probative value of the evidence was minimal given it was merely a repetition of what was already before the jury. And it was apt to confuse. To introduce this evidence, the Judge said, would have needlessly prolonged the case, requiring further explanation to the jury as to the comparison between the various documents.

[41] Later the same day Ms Wright cross-examined the officer in charge of the case, Detective Dempsey. She asked her questions about the Crown exhibit showing the text messages and asked her to confirm that conversion to New Zealand time requires adding 12 hours to the UTC time. The Detective responded that it is "about 12 hours to New Zealand time". Ms Wright asked the Detective to produce the photographs and Facebook screenshots included in the Crown's exhibit booklet, then proceeded to ask the Detective about the photograph she had taken of the complainant's phone when she arrived at the police station. The Judge asked Ms Wright if that was the same photograph he had previously ruled inadmissible when she sought to put it to the

complainant. Ms Wright said that she wished to put it to the witness who took the photograph. The Judge said:

Don't try that on me Ms Wright, next question, refused. Don't try that again.

[42] The Judge added a postscript to Ruling 4 in relation to this exchange, which read as follows:²²

[7] The matter should have rested on the above ruling. However, later in the case, Mrs Wright whilst cross-examining the officer in charge, Detective Dempsey, attempted to show that witness the same document, *knowing* it had been ruled inadmissible. To make matters worse, Mrs Wright adopted a tactic of trying to avoid the orthodox process of showing the other party what document she was using.

[8] I intervened just before the document was handed to the witness, disallowed the question and expressed disapproval of the covert process employed. In the face of the earlier ruling this second go was not only a plain attempt to usurp the ruling, but also improper conduct by Mrs Wright carried out in a surreptitious manner.

[43] Mr Tennet submitted that the learned Judge was cruel to trial counsel on this issue. There were no grounds to exclude the photograph of the complainant's phone, either when it was put to the complainant or to the Detective. The timing of the text was important to the defence case. The photograph, which was taken by the Detective, was relevant and admissible in terms of s 7 of the Evidence Act. The Judge was wrong to suggest that admitting one photograph taken by the Detective at the police station would needlessly prolong the case, or would confuse the jury. Mr Tennet also emphasised s 8(2) of the Evidence Act which provides that, in determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[44] We agree with Mr Tennet that the photograph was relevant, and therefore presumptively admissible under s 7 of the Evidence Act. In particular, the lack of precision in the Detective's answer to questions about the relationship between UTC time and New Zealand time meant it was reasonable to put that issue beyond doubt when cross-examining the Detective. We also accept Mr Tennet's submission

²² Emphasis in original.

that admitting a single photograph of a phone screenshot did not risk needlessly prolonging the case, or confusing the jury.

[45] The better course would have been to allow the photograph to be admitted in evidence and put to the complainant and the Detective. However we do not consider that declining to admit it had any material consequences for the trial. The material before the jury provided the same information about timing, with some (uncontroversial) explanation. Any confusion there might have been about the timing of the texts following the Detective's somewhat imprecise answers to questions in cross-examination did not flow through into the closings by the Crown and the defence, or the Judge's summing up. The jury cannot have been left in any doubt about the timing of the relevant texts. In those circumstances, we do not consider that the Judge's exclusion of this photograph was capable of causing, or contributing to, a miscarriage of justice.

[46] We add that the jury did not see Ruling 4, so were not aware of the Judge's description of Ms Wright's conduct as "covert" and "surreptitious". These criticisms of Ms Wright were not justified and were unfair. But because the jury was not aware of these comments, they could not affect the ability of the jury to decide the case fairly.

Descent into the arena?

[47] The Judge was critical of Ms Wright on a number of occasions in the course of the trial. His description of her conduct as "covert" and "surreptitious" in Ruling 4 was referred to above. Mr Tennet submitted that there were further unfair criticisms in the Judge's Ruling 3 in relation to a concern expressed by Ms Wright about discovery by the Crown. In that ruling the Judge concluded:

... the whole thing was a storm in a teacup based on the error of counsel.
There is no merit whatsoever in the complaint and we can move on.

[48] As Mr Tennet accepted, these comments were not conveyed to the jury and could not themselves give rise to a miscarriage of justice. However Mr Tennet identified 12 specific incidents where he said the Judge descended into the arena and was critical of Ms Wright before the jury: these are set out in a schedule to this judgment.

[49] Mr Tennet submitted that each of these interventions was forceful and gave the appearance of prejudice. Separately and in the aggregate they showed a pattern that amounted to a miscarriage of justice. The combined effect of all these exchanges, Mr Tennet said, was that the criticism of trial counsel amounted to criticism of the defendant, and stopped the defendant from fully and fairly mounting his defence.

[50] Mr Tennet also referred in this context to the Judge's comments to the jury when he recalled them after completing his summing up to give them a further direction about an element of the defence case, at the request of Ms Wright. The Judge provided the clarification sought by Ms Wright. But he also said to the jury that doing so "is all rather ridiculous", that the redirection was "out of an abundance of caution", and "[n]ow you are all nodding away so you realise, yes, we understand that Judge, because we heard it this morning".

[51] Ms Carter, who appeared for the Crown, submitted that the Judge's interventions would not have given an impression of prejudice by the Judge towards the defence. Rather, the Judge was controlling the conduct of the trial overall. Ms Carter referred to s 85 of the Evidence Act, which provides that if a judge considers a question, or the way in which it is asked, is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge must disallow the question or direct that the witness is not obliged to answer it. Most of the interventions, Ms Carter submitted, reflected an understandable desire on the part of the Judge to avoid needless repetition and ensure the trial was conducted efficiently.

[52] Ms Carter noted a number of points at which the Judge had spoken firmly to the complainant about answering the question, and not making speeches. For example, when Ms Wright put it to the complainant that the light had not been in her eyes on the day of the mirimiri and produced the photograph booklet, the witness commented on the movement of the sun, and the Judge intervened to say:

Ms [X], no question was pending then, you're not at liberty to give a speech.
I said several times madam, you obey what I say.

[53] As this Court said in *Tahere v R*:²³

The judicial power of control over a trial extends ... to clarifying evidence so the judge or jury understands it, to insisting that evidence should focus on relevant matters and avoid repetition, to calling witnesses to order, to stopping counsel once an issue has been sufficiently explored, to assisting witnesses by ensuring, for example, that they understand counsel's questions ...

[54] In *B (CA182/2018) v R* this Court explained that where a complaint is made about a judge's conduct of a trial causing a miscarriage of justice, the ultimate question is whether the judge's conduct reasonably gives rise to an impression of lack of neutrality.²⁴ The Court said:²⁵

Intervention by a Judge in performing the legitimate and important role of assisting a jury in a criminal trial can have the incidental effect of advancing the case of the Crown or defence to some extent. That consequence of clarification of evidence is often inevitable and is not in itself objectionable. What the Judge is, however, bound to do is to refrain from stepping outside the limits of the judicial role, especially by assuming that of the Crown or defence in the trial. As well, while acting within the legitimate scope of the judicial role, the Judge must not act in a manner which reasonably gives rise to an impression there is a lack of neutrality in the Judge's conduct of the trial. This reflects the underlying principle that a presiding Judge should not show bias ...

[55] Applying that test, we do not consider that the Judge's treatment of Ms Wright would have been likely to give the jury the impression that the Judge was not neutral as between prosecution and defence. The criticisms of Ms Wright's questioning were on some occasions justified as a matter of substance, but could have been expressed in more courteous and less forceful ways. Some of the other criticisms were not justified as a matter of substance. But the overall impression conveyed was, we think, one of impatience with Ms Wright rather than with the defence case as such.

[56] We also think it would have been apparent to the jury from the Judge's treatment of the complainant that he tended to express himself forcefully, in particular when his patience was tried.

²³ *Tahere v R* [2013] NZCA 86 at [29] (footnotes omitted).

²⁴ *B (CA182/2018) v R* [2019] NZCA 18 at [33].

²⁵ At [33], quoting *R v H (CA421/01)* (2022) 19 CRNZ 518 (CA) at [33].

[57] The Judge's desire to ensure the trial was conducted efficiently was understandable. But it is essential that judges treat all court participants with patience and courtesy, and take particular care to refrain from making comments in the presence of a jury that might be understood as criticisms of defence counsel or of the conduct of the defence case. At certain points in the present case it would have been better if more patience and more courtesy had been deployed. But overall we do not consider that the Judge's treatment of defence counsel in the presence of the jury amounted to a departure from the neutrality required of a judge. Nor do we consider that there is a risk that the jury would have understood the Judge's criticism of defence counsel to be a criticism of the defence case.

Judge's summing up of defence case

[58] Mr Tennet raised a number of concerns about the Judge's summing up to the jury.

[59] The Judge began his summary of the Crown and defence cases by saying "[n]ow a brief summary of the competing cases by the Crown and the defence". The Crown case was then summarised at [74]–[92]. The defence case was summarised at [93]–[105].

[60] Mr Tennet's first concern was the relative brevity of the Judge's treatment of the defence case. He submitted that this was not a fair coverage of the defence case, especially by contrast with the Crown case.

[61] The second concern raised was the Judge's approach to the further direction sought by Ms Wright. After the jury retired, Ms Wright raised two points. First, she submitted that the Judge should have clarified the need for the jury to be satisfied that Mr Berry actually inserted a finger in the complainant's genitals. She submitted that the language used by Crown counsel led to a possibility the jury might think that merely trying to insert a finger would be sufficient. The Judge considered he had adequately addressed that proposition, and the essential elements of the charge, and it was not necessary to repeat them. The second point related to the relative time spent

summarising the Crown and defence cases, and how the complainant's complaint unfolded. In his ruling (Ruling 5) the Judge said this:

[4] The second point has two features to it.

[5] The first is criticism about the length of time I spent summarising the Crown case and the defence case. I can give that point short shrift. I have the habit of almost repeating verbatim points made by Crown and defence in jury trials, well beyond what is required in a summing up, which is to present an adequate summary of the competing theories.

[6] Here, the time spent on the Crown case was reflective of the fact that Mr Stuart's closing address was far more comprehensive in detail and in length than Mrs Wright's address to the jury. So timing is reflective of the different length and content of each address. To suggest any other reason is scurrilous.

[7] The second point raised is that I did not refer to what Mrs Wright now calls the "important feature" in the case as to how the complainant's complaint unfolded and the arguments that she presented there.

[8] On that particular issue, I am satisfied I should redirect the jury so that their attention is brought back to those arguments to ensure that there is no suggestion of inadequacy on that point.

[9] For that limited purpose, I am going to re-call the jury and direct them on that point only.

[62] When the jury was brought back into the courtroom, the Judge gave the following further direction:

[108] Sorry to bring you in, members of the jury. As with all jury trials there is a checks and balances system. Traditionally, as I have done here, I called for comments from both counsel as to whether they wanted me to add anything in the summing up that I did not mention.

[109] I have decided, more out of an abundance of caution than anything else, to mention one area at the invitation of Mrs Wright. But you will bear in mind that, as I said, I am not required to repeat verbatim everything counsel says and it is all rather ridiculous in the sense you heard these closing addresses this morning. We are dealing with a very short jury trial.

[110] But, out of an abundance of caution, I remind you of the argument raised by Mrs Wright about how this particular complaint unfolded. You will recall that she spoke about the texts, particularly the one at 3.47 am, and the unusual timing of that text. And the argument was that [the complainant] was in the process, if not having reached a position, of coming up with a plan to make a false complaint out of revenge. And then Mrs Wright went through a series of arguments to support that general proposition. In short, the defence was saying to you that the manner in which the complaint arose and the timing of it is relevant to your assessment of her credibility.

[111] Now you are all nodding away so you already realise, yes, we understand that Judge, because we heard it this morning. But I have given you the redirection.

[112] Thank you, just retire.

[63] We do not consider that there was any unfairness in the relative length of summary of the Crown and defence cases. In part that reflected the relative simplicity and conciseness of the defence case. The Judge has a wide discretion as to the level of detail in which the Judge sums up the Crown and defence cases. As this Court said in *R v Keremete*:²⁶

A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not the judge. ... [T]here is a wide discretion as to the level of detail to which the judge descends in carrying out that task.

[64] It is well settled that there is no requirement for a trial judge to traverse every point made by counsel or to deal with every item of evidence.²⁷

[65] The only specific concern about the content of the summing up that was raised by Ms Wright at the trial was the point on which the Judge brought the jury back and gave a further direction. Having decided that it was appropriate to do so, it is unfortunate that the Judge used dismissive language such as “rather ridiculous”, and made the additional comment at [111] set out above at [62]. But the point was covered.

[66] We also accept the Crown's submission that the nuanced result reached by the jury, with an acquittal on the first charge and a conviction on the second, tends to confirm that the jury understood the questions they were required to determine and the evidence on those questions, and conscientiously applied themselves to doing so.

[67] We do not consider that there were any material deficiencies in the Judge's summing up that resulted in a miscarriage of justice or an unfair trial.

²⁶ *R v Keremete* CA247/03, 23 October 2003 at [18].

²⁷ See *The King v Anderson* [1951] NZLR 615 (CA) at 627–228; and *R v Keremete*, above n 26, at [18].

Overall assessment

[68] Finally, we stand back and consider the four matters raised by Mr Tennet: the excluded evidence, the Judge's treatment of trial counsel, and the summing up. Although some of Mr Tennet's criticisms have been made out, we do not consider that any of them taken separately amounted to a miscarriage of justice. Nor, considering those points cumulatively, was the trial unfair or was there a real risk that the outcome of the trial was affected.

[69] The appeal against conviction is therefore dismissed.

Appeal against sentence

Finding of non-consensual digital contact

[70] The primary concern that Mr Tennet raised about the sentencing of Mr Berry related to the finding made by the Judge at the request of the Crown in relation to connection between Mr Berry's finger or fingers and the victim's genitalia. As already mentioned, the Crown asked the Judge to make a factual finding that Mr Berry had touched the complainant's genitalia before the oral connection that was the subject of charge 2. The Judge carried out a detailed analysis of the evidence at trial and the implications of the jury's verdicts, and made the finding sought by the Crown.

[71] Mr Tennet submitted that Mr Berry should not have been sentenced on the basis of conduct that was the subject of a charge on which he was acquitted. And even if that conduct was relevant to sentencing on the charge of oral violation, there was a dispute about those facts which should have been the subject of a disputed facts hearing under s 24 of the Sentencing Act 2002.

[72] The Crown submitted that the Judge's conclusion that Mr Berry touched the complainant's genitalia without penetration was consistent with the jury's verdict of not guilty on the charge of sexual violation by unlawful sexual connection. A not guilty verdict did not mean the jury rejected that the appellant touched the complainant's genitalia externally without her consent and without belief on reasonable grounds in consent. That is true. But that is an insufficient basis for making

a finding of fact relevant to sentencing. Mr Berry did not admit that he had touched the complainant's genitalia; rather his evidence was equally consistent with a touching of her pelvic area over her clothing. The Judge did not engage with any evidence that would have enabled him to make a finding beyond reasonable doubt to the effect that Mr Berry had touched the complainant's genitalia. We accept Mr Tennet's submission that if the facts surrounding the touching were relevant to Mr Berry's sentencing, a s 24 hearing was required.

[73] The Crown also submitted that there was nothing to suggest that the Judge's conclusion that Mr Berry touched the complainant's genitalia resulted in any increase to the starting point. After making that finding the Judge did not go on to address the way in which it was relevant to his sentencing analysis. However the only reasonable inference from the Judge's extended discussion of this topic is that it was taken into account as a relevant circumstance when imposing the sentence on charge 2, presumably when determining where in band 1 of the guidelines in *R v AM* Mr Berry's overall conduct should be located, and the starting point that should be adopted.

[74] At the risk of stating the obvious, Mr Berry was acquitted on the charge of sexual violation with his finger(s). In those circumstances it was wrong in principle for the Judge to make what was in effect a finding of non-consensual touching of the complainant's genitalia, despite that acquittal, and to impose a sentence for the oral connection that also took into account the alleged digital connection. That clear error by the Judge means that Mr Berry's sentence must be set aside.

[75] We considered whether the case should be remitted to the District Court for resentencing. However we heard full argument on the sentence that ought to have been imposed. Bearing in mind the length of time that has elapsed since the trial and sentencing, and the likely impact on the complainant and on Mr Berry of a further sentencing hearing, we consider that it is preferable that we impose the appropriate sentence.

Starting point

[76] We agree with the Judge that this case falls within band 1 of *R v AM*. The primary aggravating factor was the breach of trust element. There is an element

of trust involved in a person removing their outer clothing and lying on a massage table. But this offending did not involve a high degree of breach of trust, as where a caregiver offends against a dependent person. And the offending was of a comparatively short duration. We consider that this aggravating feature was present to a relatively minor level. And as the Judge noted, there was no violence over and above that inherent in the offending.²⁸ In those circumstances, we consider that the appropriate starting point for the relevant offending is two years and seven months' imprisonment.²⁹

Uplift for previous rape conviction

[77] Mr Tennet submitted that the three month uplift to reflect the fact that Mr Berry had been convicted of rape in 2011 was excessive or wrong in law.

[78] Section 9(1)(j) of the Sentencing Act requires a court to take into account the number, seriousness, date, relevance and nature of any previous convictions of the offender. Previous convictions are relevant as an indicator of character and culpability, or because they show the need for a greater deterrent response, or as an indicator of risk of reoffending.³⁰ That uplift must not constitute further punishment for the 2011 offending.³¹

[79] In the present case, we agree with the Judge that an uplift is justified by reference to the goals of deterrence and protection of the public from the risk of reoffending. An uplift of three months (approximately 10 per cent) is appropriate.

Discount for remorse?

[80] We agree with the Judge that no discount for remorse was justified. Mr Berry did not acknowledge the nature of his actions, or express any remorse for non-consensual sexual conduct. There was no evidence of true insight on Mr Berry's part.

²⁸ Sentencing decision, above n 2, at [20].

²⁹ For a broadly comparable but somewhat more serious case where this Court approved a starting point of two years and eight months' imprisonment, see *Tanuvasa v R* [2019] NZCA 217.

³⁰ *Orchard v R*, above n 15, at [39].

³¹ At [41], quoting *Taylor v R* [2014] NZCA 561 at [13].

Discount for time on restrictive bail

[81] Mr Tennet submitted that the five month discount allowed by the Judge for time spent on restrictive bail was insufficient.

[82] Prior to trial Mr Berry spent 370 days (just over a year) on bail. During this period he was bailed to the home of his elderly father, for whom he was caring. He was subject to a 24-hour curfew. There was only one breach of bail when he left the address during curfew hours. He had few if any variations from these restrictive conditions.

[83] In these circumstances a substantial discount for time spent on restrictive bail was justified, but we are not persuaded that the five month discount adopted by the Judge was wrong.

Background circumstances

[84] Finally, we turn to the discount allowed by the Judge for Mr Berry's background circumstances. We agree with the Judge that a discount of six months is appropriate to reflect those circumstances, for the reasons given by the Judge.³²

End sentence

[85] The end sentence to be imposed on Mr Berry is therefore 23 months' imprisonment.

[86] We understand that Mr Berry has already served approximately 15 months in prison. In those circumstances, no question of home detention arises.

Result

[87] The appeal against conviction is dismissed.

[88] The appeal against sentence is allowed.

³² Sentencing decision, above n 2, at [33]–[37].

[89] The sentence of two years and eight months' imprisonment is set aside and a sentence of 23 months' imprisonment is substituted.

Solicitors:
Luke Cunningham Clere, Wellington for Respondent

Schedule — Transcript passages relied on by counsel for the appellant

[1] Mr Tennet submitted that the following exchanges during the trial in front of the jury, whether on their own or collectively, illustrate the Judge descending into the arena and criticising Ms Wright.

- (a) During cross-examination of the complainant, the Judge said this, which Mr Tennet submitted emphasised the Crown's case and this element of the offending:

Q. Did you feel the tongue as well?

A. I felt like, yeah, I must have.

Q. Yes.

A. Yes.

- (b) Mr Tennet submitted the following exchange, which took place during cross-examination of the complainant, was a legal discussion in front of the jury and prevented defence counsel from putting material to the complainant and cross-examining her on it:

Q. I just want to talk to you about some Facebook images and activity during that time so just wonder if you could be shown this image now we've confirmed it's the right account.

WITNESS REFERRED TO SECOND IMAGE

THE COURT ADDRESSES MS WRIGHT — RELEVANCE

LEGAL DISCUSSION — NOT RELEVANT

CROSS-EXAMINATION CONTINUES: MS WRIGHT

Q. I wonder if the witness could be shown these images?

OBJECTION: MR STUART — RELEVANCE

THE COURT ADDRESSES MS WRIGHT — NOT RELEVANT

- (c) Mr Tennet said the following intervention by the Judge was prejudicial and closed down cross-examination:

THE COURT:

We've done that, next proposition.

- (d) Mr Tennet submitted that these other statements illustrated the Judge descending into the arena:

THE COURT ADDRESSES MS WRIGHT — PAUSE, ARE THESE QUESTIONS OR ARGUMENTS

...

THE COURT ADDRESSES MS WRIGHT — JURY DO NOT NEED TO HEAR A THIRD TIME SO MOVE ON

...

THE COURT ADDRESSES MS WRIGHT — ALREADY COVERED DATE

...

THE COURT ADDRESSES MS WRIGHT — STYLE OF QUESTIONING

...

THE COURT TO MS WRIGHT:

Q. Pause there, where on earth is there a foundation of evidence, are you giving evidence from the bar on this?

...

THE COURT:

We won't have your description of it Ms Wright, the witness' description.

...

THE COURT TO MS WRIGHT:

Q. Right we've covered that rather easily now haven't we, Ms Wright.

...

THE COURT TO MS WRIGHT:

Q. For what purpose?

A. The jury may want to see it Sir.

Q. The jury may want to see it?

A. Yes.

Q. For what purpose, you are trying to lead it for a technical reason that this witness cannot comment on.

A. I will talk to I think Detective Constable Weeks, he is [to] join us on the AVL.

Q. Right well then we will resume that discussion then.

A. Thank you Sir.

...

THE COURT TO MS WRIGHT:

Q. Which one is this Ms Wright?

A. It's the photograph that the witness took of [the complainant's] phone at the police station Sir.

Q. Have we dealt with this before?

A. We've dealt with this in relation to another issue of cross-examination Sir. This is the witness who took the photograph Sir. It's simply I'm not going to ask her –

Q. It repeats what we've got in the other ones?

A. It does Sir but that's a photograph taken by this witness.

Q. Don't try that on me Ms Wright, next question, refused. Don't try that again.