

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,  
OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT  
PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR  
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY  
SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR  
IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF  
18 YEARS WHO APPEARED AS A WITNESS OR NAMED WITNESS UNDER  
18 YEARS OF AGE PROHIBITED BY S 204 OF THE CRIMINAL  
PROCEDURE ACT 2011.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA519/2022  
[2024] NZCA 21**

BETWEEN	J (CA519/2022) Appellant
AND	THE KING Respondent

Hearing:	3 October 2023
Court:	Mallon, Churchman and Osborne JJ
Counsel:	J E L Carruthers and J W L Webby for Appellant M J Lillico for Respondent
Judgment:	19 February 2024 at 1 pm

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**JUDGMENT OF THE COURT**

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- A The application to adduce further evidence is declined.**
- B The appeal is dismissed.**
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# REASONS OF THE COURT

(Given by Mallon J)

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## Introduction

[1] The appellant was convicted on a charge of sexual violation by rape following a District Court judge-alone trial before Judge Rowe.<sup>1</sup> He was sentenced by Cooke J in the High Court to 12 years' imprisonment with a minimum period of imprisonment (MPI) of eight years.<sup>2</sup> He appeals against his conviction and sentence.

[2] On the conviction appeal a miscarriage of justice is said to arise on three grounds. The first two grounds relate to evidence the complainant gave, which the appellant submits is not credible, about the door that led to the upstairs area of where she said she was raped. Her evidence was to the effect that prior to the rape the appellant had manipulated the opening mechanism of the door to prevent the door from being opened. First, the appellant submits that his defence was prejudiced

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<sup>1</sup> *R v [J]* [2022] NZDC 3278 [verdict decision].

<sup>2</sup> *R v L* [2022] NZHC 2364 [sentencing notes].

because the door was disposed of prior to trial. He says this prevented him from showing that the door could not be manipulated in the manner alleged. Secondly and alternatively, he submits the Judge's reasoning about this evidence was inadequate.

[3] The third ground relates to statements the complainant's younger sister (the sister), who gave evidence at the trial, is said to have made some months after the appellant's trial. In support of this ground, the appellant seeks leave to adduce affidavit evidence from the wife of the appellant's nephew (the relation), with whom the sister was staying and to whom those statements were made. The proposed evidence, if accepted, is said to show that the complainant's mother (the mother) was trying to push the complainant's sister into making untrue statements about the appellant.

[4] The sentence appeal is on the basis that the starting point adopted by the sentencing Judge was manifestly excessive.

## **The trial**

### *Background*

[5] The appellant elected a judge-alone trial. He stood trial over three days in February 2022. An earlier trial was declared a mistrial due to disclosure issues. The complainant was 17 at the time of the February trial.

### *Crown case*

[6] The Crown alleged the complainant was raped by the appellant, her father, when she was 14 years old. At that time, her father and mother had separated and she and her siblings lived with their mother. The rape was alleged to have occurred when the complainant and her siblings were staying with the appellant over the 2019 Easter weekend. The Crown case relied principally on the evidence of the complainant who gave an evidential interview (EVI) about three weeks after the alleged rape. Evidence was also called from her sister and their mother, the partner of the complainant's brother (the brother's partner) and from two police officers involved in the investigation.

[7] The evidence was that the appellant's home had two levels. The ground floor included four bedrooms and a bathroom. The upstairs had two rooms: a lounge and a kitchen area. The lounge was also used as a bedroom by the appellant. There was a door between the kitchen and the top of the stairs to the ground floor.

[8] The complainant's evidence was that she normally slept in one of the downstairs bedrooms when she stayed over. However, this time the appellant told her she was sleeping in the lounge with him. She wanted to sleep downstairs with her younger siblings but the appellant had said no.

[9] The complainant's evidence was that the usual routine was for the complainant and her siblings to have a bath or a shower before they went to bed. On this occasion, after the complainant had showered, she was unable to find her pyjamas and so she put on a robe. She went upstairs, sat in the living area on her airbed, and heard the appellant doing something to the door at the top of the stairwell.

[10] The complainant's evidence was that the appellant told her that she was not allowed to see what he was doing and she should stay in the lounge. He said it was a "big surprise". She had also heard her father doing something to the door earlier in the day. At that time, her father told that he was trying to stop the dog from pushing through the door. She knew that was a lie because he had a plank of wood that was put across the door for that purpose.

[11] The complainant's evidence was that the appellant told her to get on his bed because they were going to watch a scary movie. The appellant got onto the bed, undid the complainant's robe, took off his jeans and underwear, and raped her. The complainant's description of the rape, as set out in her EVI, was (accurately) summarised by the Judge in his reasons for verdict as follows:<sup>3</sup>

[21] In her evidential interview, [the complainant] described [the appellant] then raping her in the following terms:

- (a) He pushed her downwards, undid her robe and put his penis in her vagina.

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<sup>3</sup> *R v [J]* [2022] NZDC 4706 [reasons decision] (footnotes omitted).

- (b) She “zoned out” because “I didn’t want to feel anything anymore [because] it hurt like really bad”.
- (c) When he pushed her down, he held her hands down. [The complainant] demonstrated her hands being held either side of her head while lying backwards. She specifically recalled [the appellant] grabbing her hands because she has a hand ailment she called “[c]rips” which sometimes hurts.
- (d) [The appellant] had been wearing black “speedo” style underpants which he “kicked [...] off” when he took his penis out.
- (e) [The appellant] got on top of her and she could not move because he was “quite heavy”.
- (f) He used his knees to push her legs apart, which she demonstrated with her hands.
- (g) When describing the pain, she said:

It just hurt, I don’t know how to explain it.

It felt like a giant balloon was inflating inside of me.  
And it [...] got stuck.

- (h) She demonstrated with her hands [the appellant] motion of going up and down on top of her.
- (i) The incident felt like “five or six minutes”, but she “zoned out” while it was happening and tried to think of other things.
- (j) She described the end of the intercourse in the following way:

I don’t know, I guess it just felt slower and ... then like ... then I kind of got my chance, I just got ... like. When he pulled out I got my chance and then I rolled over and just got off.

When asked what she meant by “he pulled out”, she said:

I can’t explain that like. I don’t know. He like. [He] pulled his penis out of my vagina. I guess that’s what I mean, I don’t know. And then I rolled over and got off the bed ...

[12] The complainant’s evidence was that she then searched around the upstairs area for her clothes. She found her pyjamas behind a couch in the lounge and put them on. She went to the stairway door but found the handle of the door had been removed, along with the spindle, which meant that she was unable to open the door. She searched for the spindle and found it, along with her cell phone, under some papers on

top of the fridge in the kitchen. She used the spindle to turn the latch on the door to open it. She went downstairs, locked herself in the toilet and texted her mother.

[13] The complainant's text messages to and from her mother were produced at the trial and were as follows:

Complainant: Come and get me asap tommrow plz

Mother: Why

Complainant: I just dont wanna be here any more

Complainant: Brb

Mother: What's going on

Complainant: Cant say just do

Mother: I need to know why

Mother: Can I call u ?

[14] The complainant's evidence was she texted "brb" (meaning "be right back") text because she heard the appellant yelling and she "absolutely hate[d]" confrontation. The appellant had told her that she was being stupid, and she needed to go upstairs so they could talk. The complainant hid her cell phone and then went upstairs. She did not read the two text messages from her mother after sending the "cant say just do" text.<sup>4</sup> The appellant told her that he would get put in jail and his life would be ruined and that she should tell her mother that they were fighting because the appellant did not know if she could go into town to see her friend, as was prearranged.

[15] The complainant's evidence, confirmed by her mother's evidence, was that her mother called the appellant when she was back upstairs. Her mother asked the appellant what was going on and why the complainant was messaging her. The appellant said that they had an argument about whether she could go to her friend's house the next day. Her mother then asked to speak to the complainant. The complainant was crying and told her mother that the appellant would not let her

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<sup>4</sup> The date and time of these two text messages in the context of the events indicated that they likely were sent that night but not received on the complainant's phone until the next morning when she read them.

go to her friend's house the next day. However, while they were talking the appellant said she could go.

[16] After this call, the complainant's evidence was that she sat in silence for a while because she did not know what to do. Later she had an argument with the appellant about whether she would be going to her friend's house. After this, the appellant tried to put pornography on his computer. The complainant slammed the lid of the computer and pulled out the plug and put it under the air mattress in the lounge.

[17] The next day the complainant helped make breakfast for her siblings and cleaned up around the house. She read the text messages from her mother saying "I need to know why" and "[c]an I call u". She texted "morning" and they exchanged texts about tidying up and about doing something with her nana and at 2.26 pm her mother said she would pick her up soon. The appellant ended up driving the complainant and her siblings back to their mother's house and then driving the complainant to her friend's house after they had unloaded their things at her mother's house. The appellant paid the complainant her pocket money, drove the complainant and her friend to the shops and then left.

[18] That evening, the complainant confided in her brother's partner. The evidence from the brother's partner was that the complainant said the appellant made her and her sisters kiss him on the lips, would only let the girls wear dresses or skirts and made the complainant get changed in a dressing room in front of him when they went shopping.<sup>5</sup> In cross examination the complainant acknowledged that the appellant had not gone into the cubicle with her but had waited outside the cubicle on a couch. She also said that the appellant picked out a bra for her but it was "a stripper's bra" and she instead got a sports bra.

[19] The brother's partner contacted the complainant's mother on the same evening and told her what the complainant had said. The mother confirmed this evidence. The mother discussed this with the complainant the next day and then contacted the police. The complainant and the mother gave police statements that day. These

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<sup>5</sup> Sometime after this conversation the complainant also told her brother's partner that the appellant touched her bum and private areas.

statements reflected the allegations the complainant had made when confiding in her brother's partner. The police contacted the appellant about the allegations made and gave him a "warning".

[20] Not long after this, the complainant told her mother that she did not want to see the appellant ever again. This led to the complainant telling her mother that the appellant had raped her and the complainant giving her EVI. The mother in the company of the complainant telephoned the appellant about the allegation. The mother put the call on speaker and the complainant told the appellant that she needed to say what had happened because, even though he said it would destroy him, it was destroying her.

[21] At trial, the complainant was asked about the variance between her allegations when confiding in her brother's partner (reflected in her statement to the police at that time) and her subsequent allegation that she was raped. She explained that she thought that what she said to her brother's partner would stop the appellant from seeing her and her siblings and that they would then be safe. The complainant also explained that she chose to confide in her brother's partner because she had told the complainant about things she had been through and would therefore have some empathy with the situation.

[22] There was also evidence about the appellant helping with showering the complainant's sister during the Easter weekend. The sister was 13 years old at the time. The sister's evidence was that she had suffered a burn on her thigh from spilling hot coffee on it on Easter Friday. The hospital had put on a bandage and she was told that she had to keep it dry with glad wrap when she was having a shower. During that weekend, when they were at the appellant's place, the appellant told the sister to get undressed and to jump in the shower.

[23] The sister's evidence was that the appellant decided to wrap her leg even though she "could fully well wrap [her] own leg". A chair was put in the shower which she sat on. The appellant asked the complainant to help the sister have her shower. The complainant was standing in front of the chair inside the shower (the sister was facing the complainant) and the appellant was standing behind her washing her hair.



The sister told him she could wash her own hair. Her evidence was “I just found it like awkward that he was like practically in the shower with me”.

[24] The complainant also referred to this incident in her evidence. She described being “really uncomfortable” with it. The complainant’s recollection is that the chair was the other way around in the shower. Her sister wanted the complainant to help her shower but the appellant insisted on helping even though her sister said she was uncomfortable with this. The complainant said the appellant yelled at her to go away. She did not recall being inside the shower box, nor helping with the showering in any way.

[25] The Crown also adduced propensity evidence in the form of two sets of previous convictions:<sup>6</sup>

(a) In 1991 the appellant pleaded guilty to three charges: sexual intercourse with a girl under 12 years; sexual intercourse with a girl aged between 12 and 16 years; and indecent assault on a girl aged between 12 and 16 years.<sup>7</sup> The offending took place between 1988 and 1991. The victim was the daughter of the appellant’s then-partner. On one occasion the appellant was looking after the victim while her mother was in hospital giving birth to her second child. The appellant called the victim into his bedroom, had forceable intercourse with her and told her not to tell anyone or he would slit her throat. The appellant had intercourse with and indecently assaulted the victim on many occasions until she was 12 years old.

(b) In 2005 the appellant pleaded guilty to indecently assaulting a girl under 12 years.<sup>8</sup> The offending took place in 2000 or 2001. The victim was the nine year old daughter of the appellant’s partner at that time (a different partner from the 1991 offending). The victim was staying the night with the appellant. The appellant told the victim that she needed

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<sup>6</sup> This propensity evidence was ruled admissible by Judge Northwood pre-trial: *R v [L]* [2021] NZDC 3417.

<sup>7</sup> Crimes Act 1961, ss 132(1), 134(1) and 134(2)(a).

<sup>8</sup> Section 133(1)(a).

a shower. The appellant began undressing her until the victim said she could undress herself. Once she was in the bathroom, the appellant lifted her into the bath and washed her, including over her bottom, between her legs and her chest. He also lifted her out of the bath and dried her with a towel.

[26] There was evidence about the police investigations regarding the door at the top of the stairs. Detective Timothy Marshall, the officer in charge of the investigation (the Detective), visited the property in the November following the rape allegation. By this time the appellant had not lived there for about five months. He found that the door handle could not be dismantled easily and because of this it did not appear to him to be the door that the complainant had described. He therefore wondered if the doors had been moved around. He looked through the rest of the house and identified the door to one of the downstairs bedrooms (bedroom 1) as fitting the description the appellant had given.

[27] The mother gave evidence that, when she had lived at the house with the appellant they would remove the door handles and spindle of the door at the top of the stairs so the children could not get into the upstairs area. The Detective visited the address with the complainant's mother in July 2020, the year following the alleged rape. She said that this meant the door could be shut but could not be opened. At this time, the property was being renovated and there was no door at the top of the stairs. The mother identified the door to another downstairs bedroom (bedroom 3) as having been the door that had previously been hung upstairs.

[28] Subsequent to the July visit, the Detective realised that the door to bedroom 3 could not have been the door because it was hung the other way. He explained this to the mother and they went back to the property in October. From his measurements of the doors, there were only two doors that could have been the door upstairs (bedrooms 1 and 2) but only one of them (bedroom 2) had a handle similar to the description given by the complainant. The mother identified bedroom 2 as the door that used to be upstairs. She said that there had been a hole in the door downstairs and that door was removed and replaced with the upstairs door. She said that she had removed all the doors and refitted them during the renovations.

### *Defence case*

[29] The defence was that the complainant had made up the allegation. The defence contended that the complainant had given evidence that was inconsistent and not credible in several respects. The appellant elected not to give evidence. He called evidence from his daughter from an earlier relationship (the daughter), and the daughter's partner (the daughter's partner) in support of his defence that the complainant's account was not credible.

[30] The daughter gave evidence that she had a close relationship with the complainant. The daughter had received counselling because she had suffered abuse (not from the appellant) and that she regularly discussed this with the complainant's mother when the complainant and her younger siblings were present. She referred to a particular occasion sometime in the period when she was 22 to 24 years old (and when the complainant was 12 to 14 years old) where she had told the complainant's mother that her abuser removed the door handles from his bedroom door to isolate her. She recalled looking up and seeing that the complainant was there and that she needed to stop talking about this.

[31] The daughter also gave evidence about the door to the upstairs area. She used to visit the appellant and the complainant's mother at the address on a regular basis from when she was 15 years old. She had also lived there for a period of about three months. When the complainant's mother moved out, she continued to visit regularly. She said the door at the top of the stairs did not shut properly and would slam open in the wind and smash against the banister. She identified the door as being the same one that the Detective had photographed in November.

[32] Lastly the daughter gave evidence that the appellant had visited her with the complainant and her siblings during the Easter weekend. The complainant seemed happy and bragged about being able to sleep upstairs where she got to use the TV and the remote.

[33] The daughter's partner gave similar evidence about the door at the top of the stairs and about the complainant bragging about being able to sleep upstairs.

*District Court verdict*

[34] The Judge gave his guilty verdict two days after the trial along with an oral summary of his reasons.<sup>9</sup> In this summary the Judge identified the key issue as being whether the inconsistencies in the complainant's evidence gave rise to a reasonable doubt.<sup>10</sup> As to these:

- (a) The Judge considered that some inconsistencies were probably occasions where the complainant had embellished or exaggerated what had happened.<sup>11</sup> The Judge regarded this probable embellishing or exaggeration as not inconsistent with the thought processes of a 14-year-old girl feeling conflicting allegiances to her father, her mother, herself and her siblings and seeing things affected by hindsight.
- (b) The Judge regarded other examples of inconsistencies as being on matters of detail.<sup>12</sup> The Judge regarded inconsistencies of this kind as being discrepancies of recall affected by the lapse of time, emotion, age and by the detail perhaps not seeming important at the time or subsequently.
- (c) As to the complainant's evidence about the door handle, the Judge was satisfied, having carefully reviewed the evidence about this, that her evidence was not inconsistent with the evidence of the sister, and the two defence witnesses and that they were all referring to the same door.<sup>13</sup>

[35] The Judge considered that overall the complainant had given a "compelling account as a 14-year-old of an event she actually experienced".<sup>14</sup> He considered that

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<sup>9</sup> Verdict decision, above n 1.

<sup>10</sup> At [3].

<sup>11</sup> At [4]. Examples the Judge referred to were what the complainant had disclosed to her brother's partner, her mother and the police when she first made allegations to the police.

<sup>12</sup> At [5]. The Judge said examples included whether the complainant had slept in the lounge before, whether she was upset about sleeping in the lounge on this occasion, whether all or some of the children played PlayStation, how often she had stayed previously, the timing of when the appellant was playing pornography and the timing of the argument about going to see her friend.

<sup>13</sup> At [9].

<sup>14</sup> At [11]. He referred to aspects of her account in support of this view which he referred to again in his subsequent decision.

the inconsistencies relied on by the defence were either neutral or were not real inconsistencies and did not raise a reasonable doubt.<sup>15</sup> He was left “sure” the appellant had raped the complainant and the charge was therefore proven.<sup>16</sup>

*Reasons for verdict*

[36] The Judge later issued a decision setting out his reasons in more detail.<sup>17</sup> The Judge discussed each of the inconsistencies relied on by the defence under the following headings: exaggerations or embellishments; inconsistencies of detail; inconsistencies in behaviour; and the door.

[37] The complainant’s initial disclosures, the sleeping arrangements and showering the complainant’s sister were discussed under the exaggerations or embellishments heading. In the Judge’s view:

- (a) The embellishment or exaggeration in the initial disclosures was regarded as a reason to be cautious about her evidence but it was not a basis to reject her evidence.<sup>18</sup> It was consistent with the complainant’s conflicting loyalties as a 14-year-old who had been raped by her father.<sup>19</sup>
- (b) The complainant may have been affected by hindsight and read more into the sleeping arrangements than was justified but the more material point was that she did sleep in the lounge area over that Easter weekend.<sup>20</sup>
- (c) The differences between the complainant’s evidence and her sister’s about the shower incident were likely partly because the complainant and her sister remembered different aspects and partly because the complainant was likely influenced by hindsight and the subsequent

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<sup>15</sup> At [11].

<sup>16</sup> At [11].

<sup>17</sup> Reasons decision, above n 3.

<sup>18</sup> At [58].

<sup>19</sup> At [56].

<sup>20</sup> At [63]–[64].

events between the appellant and the complainant.<sup>21</sup> This was a reason to be cautious about the complainant's evidence but did not mean the complainant was necessarily unreliable or unbelievable on other matters.<sup>22</sup> On either the complainant's or the sister's account, the appellant's conduct was objectively concerning but an indecent intention could not be inferred.<sup>23</sup> The shower incident was therefore "neutral" in relation to whether the appellant had raped the complainant.<sup>24</sup>

[38] The Judge discussed the evidence about whether there was an argument between the appellant and the complainant about visiting her friend, when the appellant watched pornography (before or after the rape and the complainant's response to this), how the complainant came to be on the appellant's bed and evidence about what her mother had said after she had disclosed the rape as matters of detail that were not material.<sup>25</sup> As to the latter, more material in the Judge's view was that the complainant and her mother gave broadly consistent accounts of the mother's call to the appellant when the complainant confronted the appellant.<sup>26</sup>

[39] The Judge discussed that questions were put to the complainant and submissions were made in closing that the appellant's behaviour was not consistent with what she had said had happened. The Judge considered that this did not reflect on her credibility or reliability noting that there was no "normal" or "expected" way that a 14-year-old would react to being raped by her father.<sup>27</sup>

[40] The defence submission was that the complainant's evidence that after the rape she needed a spindle to open the upstairs door was irreconcilably inconsistent with the evidence of the complainant's sister, the appellant's daughter and the daughter's

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<sup>21</sup> At [73].

<sup>22</sup> At [74].

<sup>23</sup> At [75].

<sup>24</sup> At [76].

<sup>25</sup> At [77]–[93].

<sup>26</sup> At [93].

<sup>27</sup> At [99].

partner. The Judge reviewed the evidence in detail and concluded it was not inconsistent:

- (a) The complainant's evidence that she knew the appellant was telling a lie when he said that he was trying to stop the dog from pushing through was consistent with her evidence and that of her sister's that the dog could push through the door when it was closed and the handle was on.<sup>28</sup> It was also consistent with the evidence of the appellant's daughter and her partner that the door did not shut properly and could be easily opened by pushing it without turning the handle.<sup>29</sup>
- (b) The complainant's evidence that after the rape she needed to find the spindle to open the door was consistent with her mother's evidence.<sup>30</sup> Her mother's evidence was that she and the appellant used to remove the door handles and spindle so the children could not get into the upstairs area and to open it the spindle needed to be put back in.<sup>31</sup>
- (c) The complainant's evidence was not undermined by the Detective's evidence as to the door mechanism as he found it six months later.<sup>32</sup> Further, he was incorrect in his understanding that the complainant had said that the door was easily removed as the complainant's evidence was that the appellant had worked on the door twice on the day of the rape.<sup>33</sup>

[41] The Judge rejected the mother's identification of the downstairs door. Her evidence on the point was conflicting and she could not identify the door in the photographs taken by the Detective.<sup>34</sup> The Judge also rejected the submission that the complainant was mimicking a feature of the abuse suffered by the appellant's daughter because this was not detail that was discussed directly with the complainant.<sup>35</sup>

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<sup>28</sup> At [122]–[126].

<sup>29</sup> At [126].

<sup>30</sup> At [131].

<sup>31</sup> At [131].

<sup>32</sup> At [128].

<sup>33</sup> At [129].

<sup>34</sup> At [109].

<sup>35</sup> At [130].

The complainant's description of the appellant working on the door earlier in the day was a departure from what the appellant's daughter had described and would be a "surprising detail" if it was not true.<sup>36</sup>

[42] The Judge rejected the defence submission that the complainant and her mother had motives to lie.<sup>37</sup> In the complainant's case the submission was that she resented going to the appellant's address and had made up the allegations to avoid having to do so. The complainant accepted she did not like going to the appellant's address but, in the Judge's view, this enhanced her credibility.<sup>38</sup> Further, she had given consistent evidence at two separate trials as a "now young woman" who could no longer be compelled to go to the appellant's address.<sup>39</sup> In the mother's case there was no basis for the suggestion that she had an ulterior motive in relation to the appellant's parental rights in relation to the children.<sup>40</sup>

[43] The Judge described the complainant's account as "compelling" and consistent with having actually experienced the event.<sup>41</sup> He referred to the complainant's evidence as to:<sup>42</sup>

- (a) The type and colour of [the appellant's] underpants and that he "kicked them off".
- (b) The way [the appellant] held her hands on either side of her head after pushing her backwards.
- (c) The way [the appellant] used his knees to push her legs apart.
- (d) What it felt like to have the weight of an adult male on top of her.
- (e) The pain she felt from intercourse and her uniquely 14-year-old description of what it felt like to have an adult male penis in her vagina: "It felt like a giant balloon was inflating inside of me. And it got stuck".
- (f) [The appellant] "pulling out" of her vagina at the end of intercourse.

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<sup>36</sup> At [133].

<sup>37</sup> At [134]–[142].

<sup>38</sup> At [139].

<sup>39</sup> At [140].

<sup>40</sup> At [142].

<sup>41</sup> At [143].

<sup>42</sup> At [144].



[44] The Judge also considered the complainant's description of trying to find clothes and contacting her mother were consistent with the aftermath of such an experience.<sup>43</sup> He noted that not immediately reporting the rape was not inconsistent with having been raped.<sup>44</sup> It was "unsurprising that she would take some time to rationalise what had happened and what she should do about it".<sup>45</sup> Further, when the complainant confronted the appellant on the telephone about what he had done, she used the very rationale that he had told her should prevent her from disclosing what had happened.<sup>46</sup>

[45] The Judge concluded that he was sure on the basis of the complainant's evidence that the appellant had raped the complainant and that none of the inconsistencies relied on by the defence individually or collectively undermined this conclusion.<sup>47</sup> The Judge regarded the charge to be proven regardless of the appellant's previous convictions but considered that they did support his conclusion, but not strongly so.<sup>48</sup>

## **Conviction appeal**

### *First appeal ground*

[46] The first ground of appeal relates to the evidence that the door at the top of the stairs had been removed when the Detective returned to the property with the complainant's mother in July in the year following the alleged rape. The appellant submits this prevented the door from being further tested and caused prejudice to the defence in testing the credibility of the complainant's evidence narrative.

[47] This Court in *R v Harmer* set out the test for establishing whether a miscarriage of justice arises from the absence of potential evidence as follows:<sup>49</sup>

[91] In our view, there are two relevant considerations, namely whether the evidence has been lost because of acts or omissions by the police involving bad faith, and whether it is probable that the lost evidence would have been of

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<sup>43</sup> At [145].

<sup>44</sup> At [145].

<sup>45</sup> At [145].

<sup>46</sup> At [146].

<sup>47</sup> At [148].

<sup>48</sup> At [163].

<sup>49</sup> *R v Harmer* CA324/02, 26 June 2003.

real assistance to the defence in the circumstances of the particular case. The emphasis, we consider, should be upon the need for a showing by the accused or convicted person that it is more probable than not that the lost evidence would have been of real benefit to the defence because it would have created or contributed to creating a reasonable doubt. ... [I]n the absence of such deliberate conduct or other bad faith by the police – which is the position in this case – the concern should be with the effect on the defence of the absence of the evidentiary material rather than with whether the police have been negligent. The particular significance of the missing evidence to the defence will necessarily have to be considered in light of all the available evidence. When, as here, the issue arises on an appeal from a conviction, the ultimate question will be whether the unavailability of the evidence to the defence appears to have given rise to a miscarriage of justice.

[48] The appellant submits this is one of the rare cases where the absent evidence would have been of real assistance to the defence because the manipulation of the doorway was, as the Judge acknowledged, a “key” feature of the complainant’s narrative.<sup>50</sup> However, this submission assumes that testing of the door had it been available would have favoured the appellant. There is no sufficient basis for that assumption. To the contrary, there was evidence that the door had been manipulated in the way described by the complainant in the past. As the Judge carefully discussed, the complainant’s evidence about the door was consistent in some respects with the other witnesses and not undermined by the Detective’s observations when he inspected the door six months later.

[49] The appellant has therefore failed to show that it is more probable than not that the lost evidence would have been of real benefit to the defence by creating or contributing to creating a reasonable doubt. We are satisfied that the unavailability of the door for testing does not give rise to a miscarriage of justice.

### *Second appeal ground*

[50] The appellant submits that the Judge’s reasoning in relation to the door was inadequate such that a miscarriage of justice occurred. He submits that the Judge effectively side-stepped the evidence that the handles on the upstairs door were redundant because the door could be pushed open as well as the evidence of the Detective about the door handle he inspected. The appellant says that, in accepting the complainant’s account, the Judge did not explain how the appellant could have

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<sup>50</sup> Reasons decision, above n 3, at [103].

manipulated the handles as alleged when the latch did not catch or was missing altogether. He says the evidence that the handles could be manipulated in this way was years before the offending and therefore said nothing about whether the door could still be manipulated in this way at the time of the offending.

[51] We do not accept this submission. The Judge gave thorough and detailed consideration to the evidence and explained why he accepted the complainant's evidence. As the Judge discussed, the complainant's evidence that the dog could push through the door was consistent with the evidence of other witnesses. The complainant's evidence that she could not open the door without the spindle in it was consistent with the evidence that in the past the appellant and the complainant's mother used to do this and to open the door the spindle needed to be put back in. The Judge's reasoning showed engagement with the issue, explained how he had resolved it, and his reasons were rational and considered and so met the requirements set out in *Sena v Police*.<sup>51</sup>

[52] Importantly, the Judge's assessment of the complainant's evidence about the door was part of the broader assessment the Judge made about the complainant's credibility about the allegation of rape. For the reasons he explained, he found the complainant's account to be compelling. The cross examination of the complainant was thorough. Having seen the witnesses and heard all the evidence, the Judge was sure the complainant was telling the truth. On appeal, this Court does not have the advantages of the trial judge to assess credibility on contested oral evidence and so is required to exercise "customary caution".<sup>52</sup> Here, we see no proper basis to interfere with the Judge's assessment. Indeed, having reviewed the evidence at trial, we agree with the Judge that the complainant's account was consistent with her having experienced the event she described and that the inconsistencies in her evidence did not detract from that compelling account.

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<sup>51</sup> *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [36].

<sup>52</sup> At [38], quoting *Austin, Nicols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]. See also *Sena v Police*, above n 51, at [39]–[40], in which the Supreme Court explained that the approach described in *Austin, Nichols* broadly applies to appeals from judge-alone trials.

*Third appeal ground*

[53] The appellant seeks leave to adduce affidavit evidence from the relation.<sup>53</sup> In that affidavit the relation explains that not long after the trial the complainant's sister came to live with her and her husband (the appellant's nephew) for about three and a half months. She says the complainant's sister was having problems at home. She says that initially it went well having the complainant's sister live with them but after the first month she fell into some bad habits and was quite unwell mentally. She says:

While staying with us [the complainant's sister] occasionally spoke about [the appellant's] trial. She said [the complainant's mother] told her what to say about [the appellant] and told her she had to say it. She said she didn't want to say things about [the appellant] that weren't true but didn't elaborate on what wasn't true. She said she wanted to withdraw her statement but felt forced by [the complainant's mother] to go through with giving evidence.

[54] The affidavit goes on to say:

I was quite friendly with [the complainant's mother] in the past. She told me on occasions though that if [the appellant] ever pissed her off she knew how to get back at him, which was by using his past against him.

[The complainant's mother] made similar comments in the lead up to [the appellant's] trial. She said she heard he was trying to claim impotence, which he'd been to the doctor about, and was thinking of ways around that. She also said she would point out all his breaches of the extended supervision order he was on, and that once he was in jail she knew people who could deal with him.

[55] The respondent opposes the evidence on the basis that it is hearsay. Certainly, the evidence is less cogent for being a second-hand report of what the complainant's sister and the complainant's mother is said to have said. The affidavit was also sworn 15 months after the trial.

[56] Even if the second-hand report accurately conveys what the mother is said to have said, it is not cogent evidence that the mother was motivated to persuade the complainant's sister to give untruthful evidence. It is evidence of being aware of the appellant's past history of offending and concern in the context of the upcoming trial that the appellant was trying to find a way to defend the allegation. It is not evidence that would have assisted the Judge's assessment of the complainant's credibility.

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<sup>53</sup> As noted above, the relation is the wife of the appellant's nephew.

[57] In relation the complainant's sister, even if the second-hand report accurately conveys what she said shortly after the trial, it does not mean that the complainant's sister was telling the truth to the relation. The sister having been through the trial involving an allegation of rape of the complainant and which included evidence of other inappropriate behaviour by her father, it is unsurprising that she was having a difficult time and was experiencing conflicting emotions about her evidence. It would also be understandable if she had been reluctant to give evidence, or if she wished to say to the relation that she had been reluctant to give evidence, given that she now found herself living with the relation.

[58] The sister gave evidence that supported the complainant about the dog being able to push through the door. The defence relied on that evidence as being consistent with the defence evidence that the door did not shut properly and so could not have operated, it was submitted, in the way described by the complainant. For the reasons explained, this claim was rejected. The affidavit evidence is therefore not cogent in relation to the door evidence. The Judge did not rely on the sister's evidence about the appellant kissing or hugging them (discussing the complainant's evidence about this only in the context of evidence that the complainant may have exaggerated or embellished). Nor did the Judge rely on the sister's evidence about the shower incident except to find that it was inconsistent with the complainant's evidence and that he placed no reliance on the incident because he was not satisfied it involved an indecent intention.

[59] The key issue at trial was the complainant's credibility, not that of the sister. As we have discussed, the complainant's account was compelling and credible irrespective of some exaggeration and embellishment and some inconsistencies on matters of detail. The sister's evidence was peripheral and not relied upon by the Judge in assessing the complainant's credibility other than in relation to the door (which, as we have said, was evidence the defence relied on as undermining the complainant's credibility). We are not satisfied that the affidavit evidence raises any issue about the safety of the appellant's conviction.

[60] We are therefore not satisfied that it is in the interests of justice to grant leave to adduce the affidavit evidence in support of the conviction appeal.

## Conclusion

[61] The appeal grounds on the conviction appeal are not made out. It follows that the conviction appeal is dismissed.

## Sentence appeal

[62] The Crown applied for a sentence of preventative detention and sentencing was transferred to the High Court.<sup>54</sup> In the High Court, Cooke J declined to impose a preventive detention sentence.<sup>55</sup> He instead sentenced the appellant to 12 years' imprisonment with an MPI of eight years. The Judge reached that end sentence by adopting a starting point of 11 years' imprisonment and increasing it by one year because of the appellant's previous convictions.<sup>56</sup> There were no mitigating factors warranting any discount.<sup>57</sup>

[63] The appellant submits the sentence was manifestly excessive because the starting point was excessive. He submits that the starting point should have been in the region of nine years' imprisonment. The appellant submits the Judge was in error in relying on two High Court decisions that predated this Court's guideline judgment in *R v AM*.<sup>58</sup> He submits there are numerous decisions of this Court applying *R v AM* that suggest the starting point should have been lower than 11 years.

[64] The appellant refers to *Ikinepule v R*, *Nicholson v R* and *Laipoto v R* as examples.<sup>59</sup> In those cases young girls respectively aged 10, 11 or 12 and eight or nine years were raped by their mother's partner, their step-father or an extended family member. The respective starting points in those cases of nine years and six months, nine years and 10 years were upheld on appeal. In upholding the 10-year starting point in *Laipoto* this Court observed that the complainant was younger than the complainant

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<sup>54</sup> Sentencing notes, above n 2.

<sup>55</sup> At [40].

<sup>56</sup> At [16] and [18].

<sup>57</sup> At [17]. As the Judge noted, the appellant's trial counsel did not propose there were any.

<sup>58</sup> *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750. The two cases, which the Judge referred to at [15], are *R v A HC Rotorua CRI-2009-063-2158*, 16 September 2009; and *R v R HC Auckland CRI-2005-04405017*, 13 June 2008.

<sup>59</sup> *Ikinepule v R* [2017] NZCA 125; *Nicholson v R* [2018] NZCA 352; and *Laipoto v R* [2021] NZCA 562.

in *Nicholson*.<sup>60</sup> On the basis of these cases, the appellant submits the starting point should have been in the region of nine years' imprisonment and the end sentence in the region of 10 years' imprisonment.

[65] We first observe that the suggested starting point is lower than the 10-year starting point trial counsel submitted was appropriate at the sentencing hearing in the High Court.<sup>61</sup> However, the real question is whether the starting point adopted led to an end sentence that was outside the available range.<sup>62</sup> We are satisfied that it was not. As the Judge identified, there were three aggravating factors clearly present (planning, vulnerability and breach of trust) and there was also an element of detention.<sup>63</sup> Detention was not an element present in the three cases the appellant relies on. Nor did those cases involve offending by a biological father on his daughter, a particularly egregious breach of trust.

[66] Reflecting that not all the aggravating factors were present to a high degree and that the offending involved a single instance, the Judge's starting point of 11 years put the offending towards the upper end of band two of *R v AM*. While arguably stern relative to the examples relied upon, it cannot be said to be out of range given that band two is appropriate where there are two or three aggravating factors and here there were three aggravating factors clearly present and a further factor present to some extent.

[67] We consider that a stern sentence was appropriate in the appellant's case. Unlike the cases relied on by the appellant, the offenders did not have the appellant's history of offending. The Judge decided against imposing a sentence of preventive detention on the appellant "on balance" and "by a fine margin".<sup>64</sup> A stern sentence was required, recognising the particular need for denunciation, deterrence and public protection in the appellant's case.<sup>65</sup> If the Judge had adopted a starting point less than the 11 years he did, he could not have been criticised if he had uplifted that starting

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<sup>60</sup> *Laipoto v R*, above n 59, at [7].

<sup>61</sup> Sentencing notes, above n 2, at [12].

<sup>62</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

<sup>63</sup> Sentencing notes, above n 2, at [12]–[13].

<sup>64</sup> At [40].

<sup>65</sup> Sentencing Act 2002, s 7(1)(e),(f) and (g). See also *R v Leitch* [1998] 1 NZLR 420 (CA) at 430; *D (CA197/2014) v R* [2014] NZCA 373 at [19]–[21]; and *Bell v R* [2017] NZCA 90 at [19].

point by more than one year to reach an end sentence of 12 years to meet these needs. We are satisfied that the end sentence of 12 years' imprisonment was not manifestly excessive.

[68] The appeal against sentence is dismissed.

### **Suppression**

[69] Counsel informs us that the appellant's name was suppressed by an order in the lower courts to preserve the complainant's automatic statutory suppression. We have also anonymised the names of the other witnesses (who do not have automatic statutory suppression) for that same purpose.

### **Result**

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

[71] The appeal is dismissed.

Solicitors:

Tucker & Co, Auckland for Appellant

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