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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA332/2023
[2024] NZCA 174

BETWEEN	KEITH ALBERT CHURCHER Appellant
AND	THE KING Respondent

Hearing:	15 April 2024
Court:	Wylie, Mander and Jagose JJ
Counsel:	R A Harrison and E J Riddell for Appellant I S Auld for Respondent
Judgment:	23 May 2024 at 10 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

C The application to admit fresh evidence on appeal is declined.

REASONS OF THE COURT

(Given by Mander J)

[1] Keith Churcher was convicted by a jury in the Nelson District Court of a representative charge of sexual violation by rape,[1] two charges of assault with intent

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

to injure,[2] and one of assault with a weapon.[3] Three of these offences were alleged to have been committed by Mr Churcher against his former partner and the mother of his child.[4] He was also found guilty of assaulting his former partner's daughter with intent to injure her.[5] Mr Churcher was acquitted on several other charges of alleged sexual and violence offending against his former partner. He was sentenced by Judge Rielly to seven years and 10 months' imprisonment.[6]

[2] Mr Churcher appeals his convictions on a range of grounds relating to the conduct of the trial and the reasonableness of the verdicts. He also appeals the sentence on the basis the starting point for the rape charge was too high and insufficient credit was provided for personal mitigating circumstances.

Background

[3] Mr Churcher and the complainant lived together in a relationship for at least two years. Mr Churcher claimed their relationship as a couple lasted for a longer period. While they were together they had a child. The complainant also had two children from a previous relationship.

[4] It was the complainant's evidence that several months after the birth of their child the relationship ended. However, following their separation the complainant agreed to Mr Churcher having access to and contact with their child. As noted, there was considerable dispute at trial about the continued nature of the couple's relationship. Mr Churcher maintained it remained a romantic and sexual relationship for much longer than the complainant said it lasted.

Assault with intent to injure (charge 2)

[5] Mr Churcher was convicted of a charge of assaulting the complainant with intent to injure. This was alleged to have occurred after they separated, while she was living in a major metropolitan city. Mr Churcher had come to see their child and,

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2 Section 193 — maximum penalty three years' imprisonment.
3 Section 202C(1)(a) — maximum penalty five years' imprisonment.
4 Charges 2, 3 and 9.
5 Charge 10.
6 *R v Churcher* [2023] NZDC 10509 [Sentencing notes].

during a disagreement that occurred in the course of that visit, he was alleged to have elbowed the complainant in the face causing her a facial injury.

Sexual violation by rape (charge 3)

[6] The complainant and her three children moved to a provincial district. Later that year, she bought a house in that region. There were two sleepouts at this address. The complainant permitted Mr Churcher to stay in one of them for various periods when he was attempting to secure employment in the area.

[7] Mr Churcher was convicted of a representative charge of raping the complainant while staying at the provincial district address. The complainant gave evidence that Mr Churcher raped her on numerous occasions while staying at her address. For the purposes of sentencing, the trial Judge proceeded on the basis there were two occasions of non-consensual sexual intercourse constituting rape.[7]

Assault with a weapon (charge 9)

[8] Mr Churcher was also convicted of assaulting the complainant with a weapon at the provincial district address. This occurred when he became frustrated and angry with the complainant after she dropped some bread on the floor. Mr Churcher picked up a large knife, threatened her with it and held it up against her throat.

Assault with intent to injure (charge 10)

[9] Additionally, Mr Churcher was convicted of assaulting the complainant's daughter with intent to injure her while he was living at the address in the provincial district. This assault involved Mr Churcher grabbing the complainant's daughter by the neck or around the throat area and pushing her up against a door. This occurred when the complainant was away for the weekend. Mr Churcher had become angry after the daughter and a friend made a noise that woke Mr Churcher's child.

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7 At [13].

[10] Mr Churcher faced trial on a number of other charges of assault, injuring and sexual violation of which he was acquitted. One charge of assault with intent to injure was dismissed by the Judge at the conclusion of the Crown's case.[8]

Conviction appeal

[11] Mr Churcher brings his appeal on a number of grounds. He alleges:

(a) The Judge inappropriately intervened in the trial by addressing the complainant about her evidence during cross-examination which had the effect of artificially sanitising the complainant's evidence. This intervention was alleged to have been aggravated by the officer in charge of the police investigation speaking with the complainant overnight during the break in cross-examination.

(b) The jury's verdicts were reached as a result of illegitimate time pressure.

(c) The Judge's direction on counterintuitive evidence was unnecessary. It bolstered the complainant's credibility and resulted in the jury placing too much weight on this evidence.

(d) The conviction for the assault with intent to injure charge (charge 2) is unsafe because of fresh evidence that is now available and is inconsistent with other verdicts.

(e) The assault with a weapon conviction (charge 9) is unsafe because of inconsistencies in the evidence.

(f) The conviction on the assault with intent to injure charge (charge 10) is also unsafe because of inconsistencies in the evidence.

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[8] Criminal Procedure Act 2011, s 147.

Ground 1: Discussions with the complainant during her cross-examination

[12] In order to address the first ground of appeal, it is necessary to set out some further background.

The first trial

[13] Mr Churcher initially stood trial in August 2022. That trial miscarried when the complainant, in the course of her cross-examination, disclosed prejudicial and inadmissible information concerning Mr Churcher's association with a gang and use of methamphetamine.

This trial

[14] The second trial commenced in February 2023. The complainant's evidence-in-chief was provided by way of a recorded evidential interview that was supplemented by some further oral evidence. The complainant was then cross-examined for approximately two days. Shortly before the evening adjournment at the end of the first day, the cross-examination concluded with the following exchange:[9]

> Q. Right, and he would stay in [H] with you?
>
> A. Sometimes he [stays] in a tent there, yeah, I think, but not, not often, yeah. He was there with them.
>
> Q. And then you would travel back together on the Sunday?
>
> A. No, I've only travelled once back with him and that's the time *that I'm not allowed to say*, but I've only travelled once back with him.

[15] After the jury had retired for the evening, the Judge raised her concern with counsel about how the complainant was answering some of the questions:

> **THE COURT:**
> I think I need to get [the complainant] in and have a wee talk to her about some of the answers she's giving to the questions. I have no idea what she means when she says: "It's something I'm not allowed to talk about." Mr Murray, do you know what she's meaning?

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9 Emphasis added.

MR MURRAY:
I'm not. I'm trying to remember, but there were some things that we did talk about last time but I don't, it's not triggering any memory in my mind about a [H] trip.

THE COURT:
No. Okay.

MR HARRISON:
Your Honour, I've – this was a once over lightly just seeing, trying to ascertain rather than having to go through each and every bank statement to confirm when they're there and what time they're there to see whether or not she would agree to certain events. There's nothing in this, in these questions that could possibly even vaguely go anywhere else. I can't, I just can't for the life of me see it, so –

THE COURT:
All right, thanks. ...

[16] The complainant returned to the courtroom and the following exchange occurred between the Judge and the complainant:

THE COURT TO WITNESS:

Q. [The complainant's name], just before when you were asked a question by Mr Harrison, you gave an answer that was essentially along the lines of: "I can't talk about that," and looked over at me, and it was the second time you'd done that, and although I've heard you give evidence before, I have no idea what it was that you felt you couldn't give evidence about so can you tell me?

A. Well, I'm just concerned because, like, last time when I said about the drug use and, like, I told the whole truth and nothing but the truth and it was a mistrial, so I've got to be careful what I say now, I can't talk about like, hey, yeah, when we had that one trip or the trip to thing and the MRI, and then the birthday, he's allowed to go to a birthday and we only had one. But if I say too much, it can be a mistrial again and it's just, and it's not a simple yes/no answer because the way they do it. So what I do –

Q. Okay. So you were asked a question about going to [H] with Mr Churcher?

A. Yeah.

Q. I presume from the evidence you gave at the last trial, there was nothing about visits to [H] that involved drug use by him?

A. No. But he was –

Q. So why did you –

A. But he was violent. He had, when he came, when we had the bikes on the back, my friends were there, and it's in one of my affidavits,

chucked the bikes off, lost his shit and drove really erratically and nearly tried to kill us. You know, so…

Q. Right. So what I'm going to say –

A. I'm not allowed to say that too, though, because that's too much babble. And…

Q. Yes, so I don't want there to be another mistrial.

A. Yeah.

Q. And I'm doing everything I can to avoid it.

A. Yeah.

Q. But for one reason or another, you are overthinking every question asked and you are giving answers, you are giving answers that are coming across as very cryptic at times. You just need to listen to the question and answer the question. The moment you look over at me and say: "Oh, well, I can't answer that," the jury is going to wonder what you're hiding, and you need to give honest answers and if the question is a simple question about how often Mr Churcher went to [H] with you –

A. I don't know how often he went, that's what I mean.

Q. Well, just say that.

A. But they just goad and goad.

Q. No, no. The lawyers have to ask the questions that they are asking, that is their job.

A. Okay. So if I'm not sure how to answer something I say: "Can I have a break?" And then can I talk to you in chambers to make sure I'm doing it the right way before I do it?

Q. Yes. Yes. You just need to listen to the question and answer it as simply as you can. It doesn't need to be a complicated answer.

A. Right, okay. Well, you obviously don't know me. I'm, you know, I talk too much being a hairdresser. That's just who I am and my personality.

Q. Okay.

A. It's just who I am and I can't be who I'm not.

Q. I think that this is really a nerve-wracking process. It is for any person giving evidence, especially about matters of this kind. But all I ask is that you just listen to the question and answer it wherever you can, okay?

A. I thought I was, but obviously not.

Q. So we'll see you back tomorrow. Detective Aimes will come and talk to you about when to meet with her in the morning.

A. Yeah. So if in future, sorry, your Honour, if I'm not sure can I say: "Can the jurors please leave, I need to ask you something"?

Q. If you could just say: "I'm not sure how to answer that question," then that way I'll know and then we can deal with it, okay?

A. Okay. Okay. That will be better.

Q. Just: "I'm not sure how to answer that question."

A. Because I don't want a mistrial and, don't want that.

Q. I know you don't, I know you don't.

A. And I do babble because I'm a hairdresser.

Q. Okay. That's okay. Now, remember as well this courtroom's cold and it's actually colder in the mornings than the afternoons.

A. Okay, I'll bring a jacket.

Q. So, yes, so feel free, and same with you because I think you've probably given up your warm item today, all right. So that will be good. Thanks.

WITNESS STOOD DOWN

THE COURT:
Mr Churcher, do you want to come out and sit behind your lawyers now? Thanks. Can I just say before I hear from counsel, I know I talk too much sometimes and I really didn't want to have to talk to [the complainant] like that, but I was just very concerned about her presentation and we need to stop this now if that is at all possible. And I don't really know how else to do it because I can't allow you to speak to her anymore, Mr Murray, obviously.

MR MURRAY:
No.

THE COURT:
And Mr Harrison has got a job to do and cannot have a quiet, fireside chat about the answers and nor does he probably want to. But it is not ideal, but I think that is the only thing I could do at this stage because I am concerned about these answers.

THE COURT TO MR HARRISON:

[Judge]: So Mr Harrison, you looked like you wanted to say something?

[Counsel]: It's in her evidence-in-chief about him driving them back and nearly killing them, so I can't for the life of me understand how she's not allowed to talk about that. And if this continues, your Honour, I, and if we're going to have stops every 10 or 15 minutes while she clarifies her question with you, then we could

be here for a very long time or it could become to such a stage that it's untenable.

[Judge]: I'm aware of that, but I want to do my very best to just get through her evidence.

[Counsel]: Yes.

[Judge]: And –

[Counsel]: I'm not – sorry, your Honour.

[Judge]: Yes?

[Counsel]: I'm not deliberately trying to provoke her at all, and I'm trying to be just firm. I'm not goading –

[Judge]: I know that. I've seen you question witnesses enough to know that.

[Counsel]: Yes.

[Judge]: She thinks that.

[Counsel]: Yes.

[Judge]: But the fact she thinks that is irrelevant. We've just got to try our best to get through it but there's nothing about the questions you've asked that I consider is inappropriate. So we've just got to hope for the best and hope that she gets good sleep overnight and has a listen to what I've said, but I'm just not sure. If I wasn't going grey before now, I feel like I will be by the end of this trial. Right. Now, what are we doing about bail overnight?

[Counsel]: Yes.

[17] The following morning, prior to the trial recommencing, a court official reported to the Judge they had heard the officer-in-charge and the complainant's support person having a discussion with her. The Judge raised the issue with counsel in the following way:

THE COURT:
... but there's another issue that has arisen just now before I've come into court and this is a matter for you Mr Murray, I am going to retire briefly and I would like you to speak to the officer in charge of the case about what discussions took place this morning between herself, the support person and the complainant about the giving of evidence because a senior court official has overheard a conversation and reported it to me that gives me rise for concern about what that conversation might have been. So if you can just find out what was said please and report back and then I will decide what we're going to do about that.

MR MURRAY:
Okay, I'll go down to the Crown room and have that conversation.

THE COURT:
That would be good thank you.

[18] The Crown prosecutor reported as follows to the Court:

MR MURRAY:
Thank you Ma'am, I've had a detailed discussion with Detective Inglis, she's recounted to me the conversation she's had with the complainant. The primary focus was to – was on the process of giving evidence and trying to reiterate some of the techniques that have been passed onto her, so she's told her to focus on the question, if it's not clear what the answer is to ask it to be repeated. The support person reiterated if you're feeling angry have a drink of water, take a breath. I understand the complainant brought up the [H] cross-examination examination and also the suggestion that the defendant's family was her family, and there's been a discussion where the officer in charge said she had a relationship with the defendant and has a child with him and the support person well it's a biological relationship. There was some discussion about that the Court process was a process which the jury decide guilt, he's pleaded not guilty, one of you is lying and obviously you're not lying.

THE COURT:
So who said that?

MR MURRAY:
The officer in charge said that. And if challenged to answer truthfully, be short and not talk, talk, talk. So that's the essence of what was discussed. So it was an attempt to try and keep the process on the rails which is obviously didn't happen last time.

The argument

[19] It was submitted on behalf of Mr Churcher that the Judge effectively directed the complainant on how to answer questions and that the exchange influenced the way she gave her evidence. It was suggested the complainant's presentation in the witness box was more measured at the second trial in comparison to the first when she struggled to remain calm and answer questions in a sensible manner. It was submitted the complainant was lapsing into that type of behaviour before the Judge's intervention which, it was argued, had sanitised the complainant's reactions and prevented her true personality from being exposed.

[20] In relation to the involvement of the officer-in-charge and support person, reference was made to the prohibition contained in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Lawyers Conduct Rules) that a

lawyer must not communicate with a witness during the course of cross-examination.[10] It was submitted that rule applied by analogy to this situation.

[21] It was further argued that a key aspect of the defence's challenge to the complainant's credibility was that, contrary to her position, the couple remained in an affectionate de facto relationship and remained a family unit for a much longer period than she claimed. The complainant maintained the periods Mr Churcher had stayed at the provincial district address involved nothing more than co-parenting of their child. It was emphasised that a term used during the complainant's discussion with the police officer and the support person, of there being a "biological relationship" between Mr Churcher and their child, was used subsequently by the complainant in her evidence. This, it was submitted, was indicative of the way this discussion had illegitimately influenced the complainant's evidence.

Analysis

[22] We do not consider the trial Judge's interaction with the complainant in the absence of the jury was inappropriate. It was motivated by a twofold concern. The first was the need to ensure the complainant did not give inadmissible evidence as she had done at the previous mistrial. The second was to avoid any repetition of her statement that she was "not allowed" to raise certain matters in response to questions lest the jury infer there was evidence they were not being permitted to hear. This risked an illegitimate prejudicial inference being drawn against Mr Churcher. We consider the Judge's direction to the complainant that she listen to and answer the questions put to her and focus on what she was being asked in cross-examination accorded with the trial Judge's obligation to ensure a fair trial and prevent a reoccurrence of what had previously occurred at the first trial.

[23] It is apparent the Judge was aware of the potential drawbacks of speaking to the witness about the way she was answering questions. However, the discussion was undertaken in the presence of counsel and was directed at providing the complainant with "guardrails" to ensure she provided answers that addressed the questions being asked in a way that did not result in inadmissible material being disclosed, or in a way

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10 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.10.7.

that was illegitimately prejudicial to Mr Churcher. Moreover, the Judge's intervention did not engage with the substance of the complainant's testimony. The Judge's statements were neither partisan nor intended to favour either party. To the contrary, we consider the Judge's intervention was made to keep the trial on track and for the purpose of ensuring the complainant did not give impermissible answers. We do not consider the Judge's intervention disadvantaged Mr Churcher.

[24] We accept the involvement of the officer-in-charge and the support person is more problematic. The Crown acknowledged it was inappropriate for this discussion to have taken place while the complainant was being cross-examined. However, we do not consider there is any real risk this occurrence had any material effect on the trial.

[25] The Lawyers Conduct Rules only apply to legal practitioners, although we appreciate how the rationale behind the prohibition on a lawyer communicating with a witness during cross-examination is sought to be applied in support of Mr Churcher's argument. On occasions it will be necessary for police officers and sanctioned support persons to speak to witnesses who are being cross-examined for the purposes of managing their welfare and their ongoing appearance at trial, particularly where questioning extends into a second day. However, that contact must not include discussion about the witness's evidence. Such involvement with a witness at that stage of their evidence is improper. It happened here. It should not have.

[26] In the present case, the trial Judge requested the Crown prosecutor to enquire about what had occurred. No issue arises regarding the accuracy of his report or the information provided upon which the Judge relied. For ourselves, we believe a better course would have been for the Judge to have required the officer-in-charge and, if necessary, the support person to have given evidence about their interaction with the complainant. We appreciate the Judge had a jury waiting but we consider the acquisition of first-hand information from the persons involved is preferable.

[27] However, having made that observation, we do not consider the Judge erred in her conclusion that the complainant's discussion with the police officer and the support person was not likely to have materially tainted her evidence. These types of mistakes

will occur during trials. The fact such an event happens does not by itself render a trial unfair. There needs to be some connection between the conduct and a finding of unfairness giving rise to a miscarriage of justice.[11]

[28] Reliance was placed on the complainant's use of the term "biological" to describe the relationship between Mr Churcher and their child as an example of how the witness was influenced by the illegitimate discussion with the officer-in-charge. However, this single indication of influence was consistent with the position the complainant had always maintained, that her later relationship with Mr Churcher was limited to co-parenting their child. It does not provide a sufficient basis upon which to conclude the complainant's evidence was irrevocably tainted by the involvement of the police officer or the support person. We do not consider this unfortunate occurrence materially influenced the substance of the complainant's evidence or allowed her to present herself in a way that created a real risk the outcome of the trial was affected.

[29] It is trite to observe that a trial is not rendered unfair, or verdicts unsafe, merely because there has been an irregularity in one or even more than one facet of the trial. Not every departure from good practice will render a trial unfair.[12] We do not consider, either standing alone or in combination, that either the Judge's intervention or the discussion that took place between the officer-in-charge and the complainant has had such an effect. It follows that this ground must fail.

Ground 2: Timing of verdicts during deliberations

[30] Mr Churcher claims the timing of the delivery of the jury's verdicts demonstrates they were placed under undue pressure and renders the verdicts unsafe. It is necessary to set out some further background regarding the way the trial unfolded to address this ground. The jury retired on the penultimate day of the trial (the sixth day) at 2.19 pm. At 4.47 pm, they made the following enquiry:

> What happens if we cannot reach a unanimous decision on all 14 charges?

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11 *Wells v Police* [2015] NZHC 1825 at [34]; and *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78]–[79]

12 *Condon v R*, above n 11, at [78].

> Will we be able to leave at 5 pm Tuesday regardless RE: pre-planned plans?

[31] In answer to the first question, the jury were informed that they were required to strive for unanimous verdicts but there may come a point where it would be possible for a majority verdict to be brought in respect of one or more of the charges. The jury were told that to do so they would need to have been deliberating for four hours. The Judge stated she could provide them with such directions at that point if there was an indication from them this would be appropriate. In the meantime, they would need to continue to strive to reach unanimous verdicts. In relation to the second question, the Judge stated:

> So, this is where the options come in. If you would like to, you can sit longer tonight. We will all remain here. That said, you've got 14 charges to consider. This has been a relatively lengthy trial, and I don't want to put any one of you under pressure to come to verdicts because that's not fair on you, and it's also not fair on either of the parties, that you make decisions under time pressure. So we can stay, and also we can have meals brought in if you choose to stay. But the other option is, and I've discussed this with counsel, that you would come back tomorrow and continue your deliberations from 9 am. ...

[32] Before the jury retired to consider those options, the Judge reiterated "that you need to be really careful at this stage of the process not to put undue pressure on each other". The jury retired for the day and went home shortly after 5 pm.

[33] The following day, the jury enquired at 11.20 am:

> What are the options due to the jury being unable to produce a verdict?

[34] An orthodox majority direction was provided in response and the jury provided with a form to complete when they had reached verdicts recording, in respect of each charge, whether it was a unanimous verdict, a majority verdict, or that they had been unable to reach a verdict.

[35] At 2.25 pm, the jury asked a further question:

> What is the next stage after handing in the majority verdict?
>
> If we have charges that we still don't agree on, do we continue deliberation, or does it end as a hung jury. Or do you give further direction?

[36] After discussing the jury's questions with counsel, the jury were requested to complete the form previously provided in order to inform further steps. This form indicated they had reached unanimous and majority verdicts on all charges except charges 3, 6 and 7. There was no indication as to the verdicts they had reached on the other charges. Charge 3 is the representative sexual violation by rape charge of which Mr Churcher was convicted. Following further consultation with counsel, the Judge addressed the jury in the following way:

> We now know that there are three of the 14 charges that you as a group have been unable to reach a unanimous or majority verdict on. The question I have for you now to discuss as a group is if you deliberate for a further period of time, do you consider that in respect of those three charges on which you haven't been able to reach a unanimous or majority verdict, that any further time will assist you or will it be unlikely to change?
>
> And then if you could please communicate to us in writing whether, yes, further time may assist us, or no, further time will not allow it to change, that just makes sure that from my perspective, that we are trying our very best to get all charges to a verdict if you as the jury think that's possible. Okay? So if you could go away and discuss that and then come back.

[37] The jury retired again at 2.42 pm. The Judge indicated to counsel that if the jury did not reply within 15 minutes, she would have them brought back because she did not want them to be under "extraordinary pressure". Four minutes later, at 2.46 pm, the jury responded by advising they would take more time to deliberate.

[38] At 3.23 pm, the jury communicated they had reached verdicts on all charges.

The argument

[39] Mr Churcher placed reliance on the jury's communication late on the first afternoon of their deliberations when they enquired, "[w]ill we be able to leave at 5 pm Tuesday regardless RE: pre-planned plans?", to support a submission the jury was under increasing pressure to come to verdicts by the end of the following day. It was submitted the Judge's remarks that "from [her] perspective, that we are trying our very best to get all charges to a verdict if … the jury think that's possible" put them under further pressure beyond what was appropriate in the circumstances.

[40] It was also noted that two of the charges upon which the jury initially could not return verdicts were rape charges and it was suggested the fact they ultimately returned

different verdicts on each indicated they were the product of an improper compromise motivated by a desire to conclude their deliberations in order to leave, rather than the result of a proper consideration of the evidence. It was submitted at least one juror must have changed their mind under pressure to conform with the others, rather than for legitimate reasons.

[41] In support of this argument, it was emphasised there was only 45 minutes between the jury's completion of the first form, when they indicated they could not reach verdicts on three charges, and when they communicated they had verdicts on all charges. And only 30 minutes from when they advised they wanted more time. It was argued that while the jury were alive to the fact there could be a hung jury, they were not told that verdicts could be taken on the charges they had agreed on and that the jury may have thought the whole trial in respect of all 14 charges would have to be tried again if they could not reach verdicts. It was submitted this was an illegitimate added pressure influencing the jury during the last stages of their deliberations.

[42] In response, the Crown submitted the Judge's answers to the jury's questions did not place undue pressure on the jury. To the contrary, the Judge was careful to ensure they were not placed under pressure to reach verdicts. It was argued the Judge's approach ensured the jury were given an appropriate opportunity to reach verdicts and that she properly consulted with counsel regarding each step and the content of her communications with the jury.

Analysis

[43] We do not consider there is any proper basis upon which to be concerned about the validity of the jury's verdicts, or to conclude they had not been reached by way of an appropriate process. Nor do we consider the Judge's directions and the steps she took at each stage of the jury's deliberation were anything other than orthodox in the circumstances.

[44] Mr Churcher's arguments in respect of this ground are largely premised on the jury's communication late on the afternoon of the first day of their deliberations when an enquiry was made regarding whether they would be able to leave at 5 pm on Tuesday "regardless RE: pre-planned plans". We consider this question related to a

concern about being able to leave the Court at 5 pm the following day in order to meet commitments that evening. The Judge's subsequent directions regarding the choice of being able to continue their deliberations that day or return the next day would have eased any concerns a juror may have had about being occupied in Court on the Tuesday evening. It would have been apparent to the jury from the approach taken on the first day of their deliberations that, had they not concluded their deliberations, they could come back to Court the following day. We therefore do not consider this message from the jury on the first day about needing to leave at 5 pm on Tuesday indicates any self-imposed deadline by which verdicts had to be reached or that the jurors were unavailable beyond the Tuesday.

[45] The Judge's responses to the jury's communications on the second day of their deliberations were orthodox. The jury was explicitly asked whether further time would assist them or whether their present position would be unlikely to change. They were required to respond to that enquiry before resuming their deliberations. We consider the jury's response that further time to consider the charges would assist must be taken at face value. We do not consider there is any basis upon which it can reasonably be concluded that individual jurors, in breach of their oaths or affirmations, entered into unprincipled "bargains" to reach compromised verdicts. That would involve illegitimate speculation. The jury deliberated for some nine hours to reach their verdicts and there was nothing to indicate they approached their task in an improper way. To the contrary, the Judge observed they had been "committed to the process throughout" and diligent in their task. The Judge had also cautioned them that they needed to be "really careful at this stage of the process not to put undue pressure on each other".

[46] We do not consider there is any realistic basis upon which to suggest the jury were labouring under a misapprehension they had to return verdicts on all the charges or none at all, particularly given they had been issued with a form that specifically required them to indicate the nature of their verdicts on each charge being either unanimous or majority, or that they were unable to agree. The instructions that accompanied the form contemplated the jury possibly returning a mixture of verdicts, including charges on which they could not agree. In respect of such an outcome, the form instructs the foreperson to tick the "no agreement" column for that charge.

Furthermore, the Judge specifically addressed the jury about the completion of the form when answering their question regarding what was to occur if they had charges upon which they still did not agree and whether they should continue their deliberations. The information provided by the Judge in respect of the completion of the form left no room to misapprehend that the verdicts they had decided upon would not be received.

[47] Finally, we do not consider the Judge's statement to the jury when she enquired as to whether further time would assist the jury to make sure "that we are trying our very best to get all charges to a verdict if you as the jury think that's possible" was either illegitimate or gave rise to any risk of individual jurors becoming subject to undue pressure. The enquiry at that stage was solely for the purpose of gauging whether further time would benefit the jury in reaching a decision.

[48] Being satisfied there is no reasonable basis to conclude the jury was placed under undue pressure to reach its verdicts, this ground of the appeal must be dismissed.

Ground 3: Directions on counterintuitive evidence

[49] Counterintuitive evidence about complainants delaying the disclosure of sexual abuse, and the concealment of violence within a relationship, was admitted at trial pursuant to an agreed admission of facts.[13] The Judge gave directions regarding the use of this evidence both at the time the agreed facts were read and as part of her summing up. Relevantly, the Judge directed:

> [33] In this case you have agreed facts about what is called counter-intuitive evidence. As I told you when you had the agreed facts read to you, and I repeat myself now, the purpose of receiving this evidence is for educative purposes. The content comes from academic research. It is important for you to remember that the admitted facts are not concerned with the facts of this particular case and they do not relate to [the complainant's] credibility in this case. You cannot use the agreed fact material to strengthen [the complainant's] evidence. These admitted facts, or agreed facts, have been put before you to correct any misconceptions you may have had that victims of sexual assault in the context of intimate partner relationships can be expected to promptly complain that sexual abuse has occurred.
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> [34] [The complainant] delayed making a complaint about Mr Churcher's conduct, saying nothing at the time and not saying anything for several years.

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13 Evidence Act 2006, s 9.

> You might think that a person would complain to people close to her about sexual abuse and that she would complain about sexual abuse at the first opportunity after it happened, however, I can tell you, as a matter of agreed and established fact, that it is not uncommon for victims of sexual abuse to delay reporting the abuse for some time, even though they have had the opportunity to tell members of their family, or other people they trust, about the sexual abuse.
>
> [35] Although you might expect that a complaint would be made promptly the research has shown it is not uncommon for victims of sexual abuse to delay reporting abuse for some time, or to initially disclose part of it, or indeed not report it at all. This may be so, even though there have been many opportunities to disclose the abuse to other trusted members of their family or professionals. Similarly, people remain in violent relationships and conceal their victimisation from others who may be potentially protective in their lives. Research has shown it is not uncommon for victims of family violence to act in exactly this way.
>
> [36] This does not mean that people who have been subjected to violence follow this pattern of conduct, it just means that such conduct can arise where there has been real abuse. Again, this academic research material about concealment of victimisation is not evidence about the facts of this case. In particular, it does not say anything about the credibility of [the complainant], or what she has said in evidence. The purpose of this evidence is to inform you of the range of behaviour found among victims of family violence so as to counter any thought that you might have had along the lines that it is to be expected that a victim would leave the relationship and make a complaint straightaway.

[50] It was submitted on behalf of Mr Churcher that the Judge should have exercised her discretion not to direct the jury further on the s 9 material. It was argued that, because of the detail in the s 9 admission and the explanations the complainant had given during her evidence as to why she had not complained earlier or distanced herself from Mr Churcher, the jury already had sufficient information before them in respect of "counterintuitive" behaviour. It was argued the Judge's direction had the effect of further emphasising this evidence and bolstered the complainant's credibility.

[51] We do not consider the direction gives rise to any error. The Judge was obliged to address the content of the s 9 admission. In *DH (SC 9/2014) v R*, the Supreme Court held:[14]

> Where counter-intuitive evidence is admitted in a jury trial, the judge *must* instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the

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[14] *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30](e) (footnote omitted, emphasis added).

> complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

[52] The Judge's direction complied with this obligation. We do not consider her reference to the content of the s 9 admission led to this evidence being unduly emphasised or created any imbalance. A judge may give their own direction that there can be good reasons for a victim in a sexual case to delay or fail to make a complaint.[15] In this case, the Judge appropriately referred to the content of the s 9 admission and cautioned the jury from using it in an illegitimate way. We do not consider the Judge's approach led to its overemphasis. This ground of the appeal is dismissed.

Ground 4: The safety of the assault with intent to injure verdict (charge 2)

[53] Mr Churcher argued the guilty verdict on this charge was inconsistent with not guilty verdicts on other charges that also alleged he had assaulted the complainant. Before discussing this ground of appeal, we address the application to adduce further evidence in respect of this issue.

Application to adduce further evidence

[54] The evidence that Mr Churcher seeks to have admitted is a Christmas card sent by the complainant to Mr Churcher's mother. Its handwritten words wish the recipients "[a]ll the best in health & happiness 4 2010" and purports to be from the complainant, Mr Churcher, their child and whānau. It was submitted the card undermines the complainant's evidence that her relationship with Mr Churcher was over at this time and that she was so scared of him that she felt compelled to lie to her doctor about the injury caused by the assault that occurred that month. The evidence is sought to be admitted on the basis it supports this ground of the appeal that alleges the verdict on this charge was inconsistent with other verdicts and was therefore unreasonable.

[55] The admission of evidence on appeal turns primarily on its credibility, cogency and freshness, in the sense that it could not have been obtained for the trial with reasonable diligence. If that criteria is established it will generally be admitted unless

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15 Evidence Act, ss 126A(3)(a) and 127.

it would have no effect on the safety of the conviction. Even if the proposed evidence is not fresh, if there is the risk of a miscarriage if the evidence is excluded it should be admitted.[16]

[56] We consider the cogency of this proposed evidence is linked with its relevance to the merits of the ground of appeal in respect of which it has been put forward. While we take it into account for the purpose of making that assessment, its cogency and therefore ultimate admission will turn on that determination.

The required approach to inconsistent verdicts

[57] The principles to be applied when assessing the question of inconsistent verdicts were identified by the Supreme Court in *B (SC12/2013) v R.*[17] Relevantly, the Court held that the test for inconsistent verdicts turns on whether no reasonable jury could have arrived at different verdicts on two different charges. Where there is some evidence to support the verdict said to be inconsistent, an appellate court will not usurp the jury's function by substituting its own view. An appeal will only be allowed where the different verdicts are "an affront to logic and common sense" or where "the evidence on one count is so wound up with the evidence on the other that it is not logically separable."[18]

[58] Where the case involves a complainant's credibility, the observations of this Court in *R v Shipton* are instructive:[19]

> [77] Time after time in appeals to this Court it is argued, as counsel argued here, that because the jury must have "disbelieved" a witness to acquit on one count, it was inconsistent to rely on her to convict on another count. The argument is utterly fallacious; there may be all sorts of valid reasons why the jury may be convinced by a witness on one count but not on another. To put this another way, there is no reason why credibility must be static. As was said in *R v G* [1998] Crim LR 483, "A person's credibility is not a seamless robe, any more than is their reliability". It is not necessarily illogical for a jury to be convinced as to the credibility of some aspects of one person's story,

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16 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; and *Ellis v R* [2021] NZSC 77, (2021) 29 CRNZ 749 at [29]–[30].

17 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [67]–[74]. At [68], the Supreme Court adopted six propositions regarding inconsistent verdicts identified by the High Court of Australia in its majority judgment in *MacKenzie v R* (1996) 190 CLR 348 at 366-368.

18 *B (SC12/2013) v R*, above n 17, at [68](e) citing *MacKenzie v R*, above n 17, at 368; and *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [14].

19 *R v Shipton* [2007] 2 NZLR 218 (CA).

> but not as to others, a fortiori where it is convinced, but not beyond a reasonable doubt.

The argument

[59] In advancing this ground of Mr Churcher's appeal, counsel placed considerable reliance on a series of ACC claims the complainant made for various injuries. In her evidence, the complainant maintained she had provided false narratives when making these claims about how she had sustained the injuries which had actually been inflicted by Mr Churcher. In respect of the assault with intent to injure charge (charge 2), the complainant's evidence was that she told ACC she had been "headbutted by infant son on nose" when in fact Mr Churcher had elbowed her in the face. At trial she said that Mr Churcher had also elbowed her in the throat on this occasion.

[60] There were several other charges relating to alleged assaults that were said by the complainant to have been the subject of similar false ACC claims. Mr Churcher was acquitted of these charges. On his appeal, it was suggested by counsel for Mr Churcher that, in acquitting him of these charges, the jury may well have accepted the ACC forms submitted by the complainant had provided the correct narrative, rather than what she was now alleging. It was argued there could not therefore be any justification for the jury reaching a different conclusion in respect of the assault the subject of charge 2, which was described as also being an "ACC form-based charge".

Analysis

[61] We do not consider the alleged inconsistency in the verdicts gives rise to any concern regarding the safety of the conviction on this charge. As the Crown submitted, the violence charges were not based on the ACC forms. While the ACC claims were used to identify dates for the alleged assaults and were relevant as previous inconsistent statements about which the complainant could be challenged, the Crown relied on the evidence the complainant gave in her recorded evidential statement and at trial. The complainant's position was that the accounts she provided to medical professionals were false because she feared retribution from Mr Churcher and felt shame and embarrassment from being in an abusive relationship.

[62] The jury were at liberty to assess her explanation as they saw fit, but we agree with the Crown's submission that the proposition the jury may have accepted the ACC forms as the correct version of events is entirely speculative. There may have been a myriad of reasons as to why the jury considered themselves satisfied beyond reasonable doubt in respect of some of the charges and not others. A jury may be sure of guilt in respect of some charges about which a complainant has provided a narrative, but unsure in respect of others. It must be shown that the acquittals logically impugn the guilty verdict. That is not demonstrated simply because the jury has convicted in reliance on one part of the complainant's evidence but not others.[20] This is not a situation where the jury has accepted certain evidence in relation to one charge but rejected that same evidence in relation to another.[21] It follows that this ground of appeal cannot succeed.

Disposition of the application to admit further evidence

[63] We return to the issue of Mr Churcher's application to adduce further evidence. Having reviewed the merits of this ground of the appeal, we are unable to discern the relevance of the proposed further evidence. It obviously was not evidence before the jury and cannot assist the argument that their verdicts were inconsistent. To the extent it is sought to be admitted in furtherance of an argument the complainant lacked credibility in respect of her explanation as to why she provided a false explanation for her injury, that could only be in support of a submission that the verdict in relation to the assault the subject of charge 2 was unreasonable.

[64] As we have previously observed, the issue of whether the complainant continued to be in a family relationship with Mr Churcher after the time she maintained their intimate relationship had ended or had transitioned to a "co-parenting" arrangement was a central point of dispute at the trial and fully canvassed in the evidence. We do not consider the Christmas card would have materially added to the evidence already before the jury relating to this issue. Moreover, while arguably relevant to the complainant's credibility, we do not see how it renders the charge 2 assault conviction unsafe. Whether the complainant continued

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20 *BC (CA44/2013) v R* [2013] NZCA 140 at [10] citing *R v Shipton,* above n 19, at [77].

21 *Dempsey v R* [2013] NZCA 297 at [18]; and *B (CA862/2011) v R* [2012] NZCA 602 at [10(a)] citing *R v Irving* CA234/87, 4 March 1988.

to have a close domestic or family relationship with Mr Churcher does not directly bear on whether she was or could have been assaulted by him at this time. The jury may well have rejected the complainant's evidence regarding that issue but that would not have prevented them from accepting other parts of her evidence about Mr Churcher's conduct, including her account of this particular assault.

[65] Leaving to one side the issue of whether the proposed evidence qualifies as being fresh, while we accept the document on its face is credible, we are not satisfied, if admitted, it could have any potential effect on the safety of Mr Churcher's conviction for the assault with intent to injure charge (charge 2). It simply lacks the necessary cogency to potentially bear on the safety of that conviction. The application for its admission is therefore declined.

Ground 5: Alleged unreasonableness of the guilty verdict on the assault with a weapon charge (charge 9)

[66] The assault with a weapon charge involved an allegation that Mr Churcher held a knife against the complainant's throat which caused welts on her neck. Evidence was given about this incident by the complainant and her children. It was argued on behalf of Mr Churcher that this evidence was so inconsistent and unreliable the jury could not reasonably have reached a guilty verdict. It was submitted the complainant's change in narrative to the blunt side of the knife being held to her throat made the welt injury she referred to in her recorded evidential interview implausible. It was further argued that the age of one of the children at this time raised doubts about whether that child could remember such an incident or whether the child was simply repeating what he or she had been told.

[67] We do not consider this challenge to the verdict is sustainable. An unreasonable verdict is one where, having regard to all the evidence, a jury could not reasonably have been satisfied beyond reasonable doubt as to a defendant's guilt.[22] The appellate court has a review function but it is not permitted to substitute its own view of the evidence for that of the jury. The weight to be afforded to particular pieces of evidence is essentially a jury function in respect of which reasonable minds may

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[22] *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 337 at [17].

differ, and appellate courts should not lightly interfere with the jury's assessment of the facts.[23]

[68] We accept there were inconsistencies between the accounts provided by the three witnesses, two of whom were children at the time. However, whatever differences there may have been in their accounts, we are satisfied it was well open to the jury to conclude that Mr Churcher assaulted the complainant with a knife in the manner alleged. The inconsistencies and alleged deficiencies in the evidence were issues that were able to be identified and canvassed with the jury at trial. In that regard, we note the corroboration provided by the complainant's daughter, whose evidence appears to have also been accepted by the jury in respect of a separate assault on her, and would by itself have been sufficient for the jury to have found this charge proved.

[69] We do not consider Mr Churcher has demonstrated the jury's verdict on this charge was unsafe.

Ground 6: Alleged unreasonableness of the guilty verdict on the assault with intent to injure charge (charge 10)

[70] The incident the subject of this charge involved Mr Churcher strangling the complainant's daughter. In support of a submission that the jury's guilty verdict was unreasonable, reliance was placed on the differing version of events provided by the complainant's young son of witnessing his sister being strangled. It was submitted the siblings' versions of events were vastly different from one another and that there were inconsistencies "littered" throughout the evidence. There was evidence of the complainant having taken her daughter and her friend, who also witnessed the assault, to a lawyer to make affidavits about the incident, and it was submitted that collusion and contamination could not be ruled out. It was argued that, in the circumstances, the jury's verdict was unsafe.

[71] Three witnesses gave evidence of either experiencing or observing this assault. The Crown points to the witnesses' young age and the length of time that had passed since the incident as possibly explaining their differing memories of some details of

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23 At [13].

the incident. It was acknowledged the young boy's evidence concerning this incident varied significantly from that of his sister and her friend. However, the Crown at trial expressly disavowed reliance on the child's recollection of this incident, which it was acknowledged on appeal could have been formed from what he had been told by other people, or that he could have conflated different events.

[72] Whatever criticisms can be made about the evidence, it is apparent these difficulties and inconsistencies were matters that were addressed before the jury for their consideration. Importantly, the jury had the benefit of the evidence of both the victim of this assault and her friend who witnessed the attack. They were aged approximately 12 years at the time of this incident. The jury was well placed to assess the reliability and credibility of these witnesses and we are satisfied they were entitled to rely upon their evidence to find this charge proved beyond reasonable doubt. We do not accept the jury's verdict was unreasonable and consider there is no proper basis upon which it would be appropriate for us to come to a different view. It follows that this ground of appeal must be dismissed.

Conclusion on conviction appeal

[73] Having reviewed each of the grounds of appeal, we are satisfied that neither individually or in combination were there errors or irregularities that created a real risk the outcome of the trial was affected or resulted in an unfair trial. Nor do we consider the jury's verdicts were unreasonable. In the absence of Mr Churcher being able to demonstrate a miscarriage of justice, his conviction appeal must be dismissed.

Sentence appeal

[74] Mr Churcher appeals his sentence on two grounds. He alleges:

(a) the starting point in relation to the representative rape charge was excessive; and

(b) he was afforded insufficient credit for his background and personal circumstances.

Sentencing decision

[75] The Judge took the representative rape charge as the lead offending. She concluded there had been two occasions when this offending had occurred. The Judge identified breach of trust, the repetition of the offending, and the impact on the victim as aggravating factors before determining the offending fell within the lower end of band 2 of the guideline judgment of *R v AM*.[24] A starting point of eight years' imprisonment was adopted.[25] Taking into account the principle of totality, the Judge applied an uplift of nine months for the other three charges.[26] This resulted in a combined starting point of eight years and nine months' imprisonment.

[76] The Judge concluded from the information contained in a s 27 cultural report that Mr Churcher had been raised amidst a dysfunctional whānau and had been victimised in a significant way as a child. She accepted that Mr Churcher's upbringing had influenced the way he conducted himself with the complainant and her children. However, she rejected there was any causal relationship between his upbringing and the sexual offending. A 10 per cent discount was applied to reflect Mr Churcher's personal background.[27] This resulted in the end sentence of seven years and 10 months' imprisonment.[28] He was sentenced to concurrent sentences of 12 months' imprisonment on each of the violence charges.[29]

Starting point

[77] In support of this ground of the sentence appeal it was submitted the Judge was wrong to categorise the offending as falling within band 2 of *R v AM*. The details of the rape offending were described as being limited to Mr Churcher coming into the complainant's room, slipping into the sheets, telling her to shut up, and forcing himself onto her. It was argued this offending should have been categorised as falling within band 1 and the starting point closer to six years' imprisonment.

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24 Sentencing notes, above n 6, at [30]–[37] citing *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.
25 At [37].
26 At [39].
27 At [50].
28 At [51].
29 At [52].

[78] It was submitted the Judge erred in categorising the breach of trust as "moderate" because Mr Churcher had no authority over the complainant, as would be the case in a parent/child or teacher/student relationship, and the extent of the familial relationship was limited, as the complainant had described, to one of being "co-parents". It was therefore submitted any breach of trust was minimal. The level of harm the offending had caused to the victim was also submitted as being overstated. Having regard to the fact Mr Churcher had been acquitted of the majority of the allegations, it was argued his offending could not have been the cause of all the issues described by the complainant in her victim impact statement and that no physical harm had been caused by the sexual offending.

[79] Rape band 1 in *R v AM* provides for a range of between six to eight years imprisonment. It will be appropriate for offending at the lower end of the spectrum where aggravating features are either not present or only to a limited extent. Where one or more such factors are present to a low or moderate degree, a higher starting point within the band will be required.[30] Rape band 2, which provides for a range of imprisonment between seven and 13 years, is described as being appropriate for a "scale of offending" which in relative terms is moderate. It is appropriate for cases which involve two or three factors that increase culpability to a moderate degree.[31]

[80] We do not consider the Judge erred in setting the starting point for the rape offending at eight years' imprisonment. We do not accept there was only a minimal breach of trust. The complainant had permitted Mr Churcher to stay with the family in the sleepout to assist him to seek employment and to maintain contact with their child. There was a breach of trust, at least to a moderate degree, in Mr Churcher ignoring the boundaries of those arrangements by entering the complainant's bedroom and raping her. Nor do we consider the Judge was wrong to have regard to the impact of this offending on the complainant.

[81] Whatever arguments may be available regarding the degree to which certain factors were present, or whether the offending ought to be categorised as falling within

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30 *R v AM*, above n 24, at [93].
31 At [98].

band 1 or band 2, the repetition of the rape by Mr Churcher sufficiently aggravated this offending to warrant the eight-year starting point which straddles both bands.

Discount for personal circumstances

[82] It was argued on behalf of Mr Churcher that the Judge erred in not accepting a connection between his sexual offending and his traumatic upbringing, and that greater credit should have been afforded to him for this factor. However, we do not consider the Judge's assessment resulted in any error.

[83] The Judge carefully considered the cultural and pre-sentence reports and the representations made by Mr Churcher's former counsellor on his behalf.[32] It was accepted that Mr Churcher's dysfunctional family environment as a child which resulted in him being placed in care, his experiences of abuse and deprivation, and his alienation from his culture and its values, had a deleterious impact on him. A connection between this upbringing and his treatment at the hands of others was made with the way he conducted himself as an adult in a familial environment and in his relationship with the complainant. A linkage was able to be made between his background and Mr Churcher's violent behaviour in the family home.

[84] However, the Judge did not consider his past experiences had causatively contributed to him committing the acts of rape.[33] We, too, are not satisfied there is a tenable nexus to warrant any greater discount in respect of the sexual offending. The relatively modest reduction appropriately reflected the lesser role the discrete instances of violence (which attracted a relatively modest uplift) played in the assessment of Mr Churcher's overall culpability. We do not discern any error in the Judge's approach.

Conclusion on sentence appeal

[85] We are satisfied the final sentence imposed of seven years and 10 months' imprisonment was within the range of sentences available to the Judge in the exercise

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32 Sentencing notes, above n 6, at [40]–[50].
33 At [50].

of her discretion and was not manifestly excessive. It follows that the appeal against sentence must be dismissed.

Result

[86] The appeal against conviction is dismissed.

[87] The appeal against sentence is dismissed.

[88] The application to admit fresh evidence on appeal is declined.

Solicitors:
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