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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA539/2022
[2023] NZCA 604

BETWEEN	F (CA539/2022) Appellant
AND	THE KING Respondent

Hearing:	7 November 2023
Court:	Mallon, Fitzgerald and Churchman JJ
Counsel:	M E Goodwin and C M Chester-Cronin for Appellant J M Pridgeon for Respondent
Judgment:	29 November 2023 at 1 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Fitzgerald J)

[1] Following a two-week trial before a jury in the Manukau District Court, the appellant was found guilty of 22 charges arising out of sexual and physical abuse of his wife over their 14-year marriage. Judge Patel sentenced the appellant to 16 years and five months' imprisonment, with a 50 per cent minimum period of imprisonment.[1]

1 *R v [F]* [2022] NZDC 17657 at [103].

[2] Five of the 22 charges of which the appellant was convicted were for sexual violation. Three of those charges were brought as representative charges, for repeated instances of non-consensual anal sex (charge 12), oral sex (charge 13) and rape (charge 14). The representative charges covered the period from 9 October 2005 to 23 December 2019. They were not particularised beyond the type of sexual violation alleged, other than to say that the offending occurred "at Auckland".

[3] The appellant now appeals against his convictions on charges 12 and 14. He says those charges could, and should, have been divided into separate charges reflecting the two different locations at which the complainant said the offending occurred, namely two of the residences in which she and the appellant lived during their marriage. The appellant further says that because the representative charges were not divided into separate charges as they should have been, it was incumbent on the Judge to give a unanimity direction to the jury but he did not do so. This would have directed the jury that not only did they all need to be sure that at least one instance of the alleged offending occurred over the time period covered by the representative charge (on which the Judge did direct the jury), but also that they all needed to agree that the same incident occurred. Absent such a direction, the appellant says there is a real risk that the jury reached its verdicts on charges 12 and 14 without consensus on the underlying factual foundation, and a miscarriage of justice occurred as a result.

[4] If the appeal is allowed, the appellant says that consequent reductions ought to be made to his sentence.

The evidence and how it was addressed at trial

Overview

[5] The appellant and the complainant were married in Fiji in 2005. The complainant immigrated to New Zealand in October 2005 to be with the appellant.

[6] The evidence disclosed that the couple lived in five South Auckland properties over the course of their marriage, including:

(a) a property where the couple lived between 2006 until 2017 (Property 1); and

(b) a property where the couple lived from 2017 until late 2019 (Property 2).

[7] As addressed in more detail below, the complainant alleged that from relatively early on in their marriage, the appellant began to have non-consensual oral, anal, and vaginal sex with her, especially after he had been drinking. This conduct was the subject of the three representative charges of sexual violation. The appellant also faced one charge relating to a specific incident of alleged non-consensual anal sex while the complainant was pregnant with their eldest daughter, and one charge of alleged non-consensual anal sex on 22 December 2019. The appellant also faced a number of charges in relation to alleged physical assaults of the complainant over the course of the marriage, as well as assaults of his oldest daughter, some of which were also brought on a representative basis.

[8] Eleven further charges were laid in relation to events that occurred over the two-day period between 23 and 24 December 2019, and which led to the appellant's arrest. The complainant said that on 23 December 2019, she was subjected to ongoing and serious violence by the appellant (including strangulation), detention in the family home, from which she ultimately escaped (with her children) on 24 December 2019 and fled to the Manukau Police Station.

The complainant's evidential video interviews

[9] The complainant gave two evidential video interviews (EVIs). In the first, made on the day she fled to the Manukau Police Station, she described the appellant's alleged violence towards her, and the couple's oldest daughter, on 23 December 2019 and the events of 24 December 2019. She did not raise any alleged sexual offending in this interview.

[10] A second EVI was recorded in March 2021. In it, the complainant traversed events across the entirety of her marriage to the appellant, including the alleged sexual offending which formed the basis of the five sexual violation charges at trial.

[11] In relation to charge 12, the representative charge of sexual violation by unlawful sexual connection (anal sex), the complainant described the appellant

regularly forcing her to have anal sex with him. She would tell him she was not ready, but he would use "oil or cream" and "push himself" into her anus. She said it was "really hurtful and painful". Sometimes she bled, could not walk properly, and could not defecate for days afterwards.

[12] The interviewer asked her to "focus on one of those times", to which the complainant responded "[i]t happens in the bedroom, it happens in the lounge … he will first he will be on top of me and then after that he will turn me around and … force himself from the back". The interviewer then asked the complainant to draw a diagram of the bedroom. With reference to the diagram, the complainant described how the appellant would bend her over the side of the bed and force his penis into her anus, continuing when she was crying and telling him it was painful. She said this happened "[e]very time" the couple had sex after the appellant had been drinking. The complainant labelled the bedroom diagram as depicting the bedroom at Property 2.

[13] The interviewer then noted that the complainant had said it also happened in the lounge, and asked her to draw a diagram of the lounge. The complainant labelled the lounge diagram as depicting the lounge at Property 1. By reference to the diagram, the complainant described how the appellant had anal sex with her in the lounge in the same way he did in the bedroom, saying "[h]e would do the same thing as it happened in the bedroom". He would bend her over the back of the couch and have anal sex with her from behind, continuing even when she was crying and "begging him … not to do it cause it is really painful". A little later in the interview, the complainant said that "this is what has been happening all through my life and it wasn't that one night it happened and then the other night it didn't happen, it was my 14 years of marriage I would say that I have gone through all this".

[14] In relation to charge 14, the representative charge of sexual violation by rape, the complainant said that the appellant also had non-consensual vaginal sex with her. She described often "not [being] ready" for sex but the appellant nevertheless insisting they have sex and pushing his penis into her vagina. She described herself as "lying there like [a] lifeless animal", saying to the appellant that it was painful, that she did not want to have sex, but that he did not appear to listen. She told him "no", that it was "painful", and cried during the sex. She described how her vagina would "burn"

and be "cut" from these incidents. She was asked to think about "a time in the bedroom", in response to which she said, "I would always tell him to stop it's painful", and then described a typical instance of what would occur. In response to a question of where that incident took place, the complainant said it happened in the bedroom at "both" houses, and that it took place more than once.

The complainant's evidence at trial

[15] The complainant's EVIs were played as her evidence-in-chief. The Crown prosecutor then took her through the photograph exhibit booklet to explain various photographs and diagrams, including the two diagrams she had drawn in her second EVI. The prosecutor's remaining follow-up questions focussed on the alleged violence offending over the course of the marriage, and the alleged offending leading up to 24 December 2019. There was no further questioning about the alleged sexual offending.

[16] There was relatively little cross-examination of the complainant about the alleged sexual offending. Most of trial counsel's cross-examination addressed the overall nature of the relationship and the alleged violence offending, as well as why the complainant had not told anybody about the alleged physical and sexual abuse of her over the course of the 14-year marriage. The appellant's case was that no anal or oral sex ever took place, and that all other sexual contact between himself and the complainant was consensual. When this was put to her, the complainant denied it.

[17] None of the complainant's evidence at trial distinguished between the different locations in which the sexual offending was said to have occurred.

The appellant's evidence at trial

[18] The appellant gave evidence at trial. Most of his evidence-in-chief addressed the overall relationship between himself and the complainant, and the specific allegations of violence against her and the couple's eldest daughter. As noted earlier, his case was that no anal or oral sex occurred, and all other sexual contact between himself and the complainant was consensual, and he gave evidence to that effect.

[19] The prosecutor's cross-examination of the appellant about the alleged sexual offending was relatively brief. The appellant denied the factual allegations that were put to him. He also denied the overall proposition that he was lying that the alleged sexual violations either did not occur or were non-consensual.

[20] None of the appellant's evidence about the alleged sexual offending distinguished between the locations at which the couple had lived during their marriage.

The closing addresses

[21] Consistent with the evidence at trial, neither the Crown nor the defence closing address distinguished between the different locations at which the alleged sexual offending was said to have occurred. Indeed, neither closing address mentioned the different locations at all when addressing the sexual offending.

The summing up and question trail

[22] In summing up to the jury, the Judge gave the standard direction about the jury needing to be unanimous on the verdict they reached for each charge.

[23] In relation to the representative charges of sexual violation, the Judge first addressed charge 12, directing the jury in the following terms:

> [57] The Crown alleges that [the appellant] sexually violated [the complainant] by putting his penis in her anus several times, but is unable to prove precisely when or how often. The Crown has laid one representative charge as an example as it is entitled to do. It alleges that [the appellant] sexually violated [the complainant] by putting his penis in her anus at least once between the above dates. Before you can find [the appellant] guilty on this charge, you must be sure that he sexually violated [the complainant] by putting his penis in her anus at least once during that period. So that is the issue about the representative charge.

[24] The Judge then took the jury through the specific questions they would need to answer in order to reach a verdict on charge 12, and gave various directions as to the elements of the offence and consent. As noted, he did not give a specific direction to the effect that the jury needed to be unanimous on the *same* incident before finding the appellant guilty of the representative charge.

[25] The Judge did not specifically address the elements of charge 14, but briefly summarised the competing Crown and defence cases on each of the sexual violation charges.

[26] The question trail was set out in conventional terms, and, consistent with the Judge's summing up, included the following note in relation to charge 12 (and a similar note in relation to charge 14, albeit with reference to rape):

> The Crown alleges that [the appellant] sexually violated [the complainant] by putting his penis in her anus several times but is unable to prove precisely when or how often. The Crown has laid one representative charge as an example, as it is entitled to do. It alleges that [the appellant] sexually violated [the complainant] by putting his penis in her anus at least once between the above dates. Before you can find the defendant guilty on this charge, you must be sure that he sexually violated [the complainant] by putting his penis in her anus at least one time during that period.

[27] Finally, and although there was no affidavit evidence put before us, we were provided with a copy of a file note taken by the Crown prosecutor said to record a discussion between Crown and defence counsel some six months before trial. The note records that there had been a discussion about whether the representative charges could be particularised further, recording that defence counsel had said she did not think they could be, other than the alleged incident "two days prior" (which we take to be a reference to the alleged non-consensual anal sex on 22 December 2019, which was the basis of charge 16), and "the specific incident when she was pregnant" (which was the basis of charge 15). The note further records "All – Lounge, bedroom, same" and that defence counsel considered "it would be unfair to split into separate rep charges per violation per address".

Legal principles

[28] Ordinarily, a charge must relate to a single offence and contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence alleged.[2] As this Court stated in *Gamble v R*, separate charges facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and

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[2] Criminal Procedure Act 2011, s 17.

need to be distinguished for the purposes of the different charges and enable each specific allegation to be tested separately.[3]

[29] However, s 20 of the Criminal Procedure Act 2011 permits representative charges to be brought in specified circumstances. Relevantly, s 20(1) provides that:

> (1) A charge may be representative if—
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> (a) multiple offences of the same type are alleged; and
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> (b) the offences are alleged to have been committed in similar circumstances over a period of time; and
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> (c) the nature and circumstances of the offences are such that the complainant cannot reasonably be expected to particularise dates or other details of the offences.

[30] A "representative charge should not be filed under s 20(1) if the evidence supporting that charge discloses identifiable, discrete instances of offending".[4] Further, where repetitive acts can be distinguished "in a meaningful way",[5] separate charges should be brought because without doing so:[6]

> [T]here is a risk that all jurors will be satisfied of the proof of one [incident], but not necessarily the same one. While a jury may arrive at the same point by different reasoning, they must be agreed on the factual basis on which they find a defendant guilty. Without such agreement there is no common foundation for the verdict.

[31] There will be no unfairness, however, if the charge is not divided and the jury is instead expressly directed on the need to all agree that the same incident occurred before reaching a guilty verdict on a representative charge.[7]

The appeal

[32] Mr Goodwin, counsel for the appellant on the appeal, submits that given there were identifiable different locations at which the alleged sexual offending took place,

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3 *Gamble v R* [2012] NZCA 91 at [33].
4 *Renes v R* [2021] NZCA 188, (2021) 30 CRNZ 114 at [53].
5 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].
6 *K (CA106/2016) v R* [2016] NZCA 543 at [8]. See also *R v Mead* [2002] 1 NZLR 594 (CA) at [14]–[15] and [20].
7 *Stewart v R* [2019] NZCA 288 at [27]; *Walker v R* [2012] NZCA 520 at [52]; *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [12]; and *Gamble v R*, above n 3, at [51].

and identifiable time periods in relation to each location, the alleged offending no longer met the statutory criteria in s 20(1) for a representative charge. The representative charges encompassed all locations across the period October 2005 to December 2019. Mr Goodwin says that each of charges 12 and 14 should have been divided into two discrete charges relating to Property 1 and Property 2 respectively. He also emphasises the complaint's description in her EVI of alleged sexual offending in the lounge at Property 1 and in the bedroom at Property 2, being further distinguishing features of the alleged offending.

[33] Mr Goodwin submits that the failure to frame the alleged offending by way of separate charges was compounded by the Judge's failure to direct the jury that on charges 12 and 14 they must all agree that the same incident (or incidents) occurred before finding the appellant guilty. Mr Goodwin submits that, absent that direction, there was a real risk that some jurors may have accepted the complainant's evidence in relation to one address, but not the other, and vice versa.

[34] In his oral submissions, Mr Goodwin was also critical of the way the case against the appellant had been advanced more generally. He described the Crown's case as "blurry", which he said was reflected in the broad and sparsely particularised representative charges. In Mr Goodwin's view, that ambiguity obscured the need for the charges to be separated out into their separate identifiable components. Mr Goodwin emphasised the importance of counsel and trial judges carefully scrutinising representative charges to ensure there is no unfairness to a defendant from the way in which they have been framed. He said such scrutiny was lacking in this case.

[35] In summary, given charges 12 and 14 could, and should, have been divided into separate charges, and the Judge's failure to give an unanimity direction, Mr Goodwin submits that there can be no confidence that the jury reached its verdicts on those charges based on the same factual foundation. A miscarriage of justice therefore arose.

Discussion

[36] An appeal court must allow an appeal against conviction if a miscarriage of justice has occurred for any reason.[8] A miscarriage of justice occurs if there is any error, irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected; or has resulted in an unfair trial or a trial that was a nullity.[9]

[37] While we accept Mr Goodwin's submission that charges 12 and 14 *could* have been divided into separate charges, we are not persuaded that they should have been. Further, we are far from persuaded that the fact the Judge did not give a unanimity direction in the terms referred to at [3] above means a miscarriage of justice occurred in relation to charges 12 and 14.

[38] In some cases, the circumstances of alleged repetitive offending differ in a meaningful way so as to require separate charges to be laid. For example, in *Stewart v R*, this Court concluded that the circumstances of the alleged offending in that case differed sufficiently to preclude the use of representative charges by offence type only.[10] The evidence suggested that the conduct had occurred in three different locations, namely in a Mitsubishi car, at Ladies Bay, and inside a factory. As this Court explained:

> [33] For Charge 5, separate representative charges should have been laid on the basis of the allegations that indecent assaults by Mr Stewart touching MT' penis occurred in the Mitsubishi car, at Ladies Bay and at the factory. Charge 6, which alleged that Mr Stewart induced MT to touch his penis, should similarly have been laid as separate representative charges alleging offending at those three locations. The allegations that Mr Stewart put MT's penis in his mouth at Ladies Bay and at the factory should have been addressed by separate representative charges identifying those locations. Some jurors may have been satisfied that the offending alleged to have occurred in the car took place because MT's description of the vehicle as a white Mitsubishi was sufficiently similar to the off-white Mitsubishi Mr Stewart said he had owned, whereas they were not satisfied about the alleged offending at Ladies Bay because there was no evidence tending to support MT's allegation regarding that location.

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8 Criminal Procedure Act, s 232(2)(c).
9 Section 232(4). See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [23]–[41].
10 *Stewart v R*, above n 7, at [32].

[39] Further, the Court concluded that the Crown should have laid two representative charges in relation to the alleged offending at the factory. This was because "two separate occasions could be identified, for only one of which eye witnesses were alleged to have been present".[11] The Court summarised the alleged offending overall as having "clearly distinguishing factors".[12]

[40] Similarly, in *K (CA106/2016) v R*, this Court allowed an appeal; in part because a representative charge had improperly encompassed touching in three different locations, where the evidence regarding the alleged offending said to have happened at each address was different, and for one address, the complainant said she had been touched but did not say what type of touching had happened.[13] In *Takiwa v R*, this Court allowed the appeal on the basis separate charges ought to have been brought, when the evidence disclosed three specific rapes, two of which could be tied to a specific locality, specific circumstances and an approximate timeframe.[14]

[41] In contrast, in *L (CA450/2017) v R,* the appellant was convicted of a number of charges of sexual offending, including two indecent assault charges brought on a representative basis.[15] The appellant appealed against his conviction on the basis that the trial Judge had failed to give a unanimity direction. The complainant's evidence was that the appellant had "fiddl[ed]" with her in the appellant's house, outside his house, and at a church.[16] She also gave evidence that similar things happened "a lot … every time he got the chance".[17] Counsel for the appellant submitted that a miscarriage arose because in the absence of a unanimity direction, it was possible that the jury were unanimous about the fact that the touching happened but that they were not necessarily agreed on the same incidents.

[42] This Court dismissed the appeal, stating that the case fell squarely within s 20(1), alleging a continuing course of conduct, being an orthodox basis for charging by way of a representative charge. The Court observed that "[t]he conduct complained

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11 At [34].
12 At [37].
13 *K (CA106/2016) v R*, above n 6.
14 *Takiwa v R* [2018] NZCA 152.
15 *L (CA450/2017) v R* [2018] NZCA 104.
16 At [19].
17 At [20].

of was always the same".[18] The Court rejected the suggestion that the charges should have been more precise as to location, stating:[19]

> [W]e do not consider that this evidence required or, indeed, enabled discrete charges to be laid. All the Crown needed to prove was that the girls were being truthful when they said that the "fiddling" occurred many times or at "every chance he got". That is what is meant by a continuing course of conduct. On the evidence, there was no risk that the jury would reach its verdicts on the representative charges on different factual foundations.

[43] *T (CA561/2014) v R* concerned sexual offending by a husband against his wife over a period of 10 to 12 years.[20] Again, the appellant argued on appeal that representative charges ought to have been divided into separate charges reflecting the different locations at which the offending was said to have occurred. This Court rejected that argument, stating:[21]

> [55] It is also clear that T's wife could not distinguish between the various sexual acts by providing dates, places or other details. *If charges had been laid to reflect for instance each family home, this would have been artificial. The prosecution had no evidence distinguishing events relating to each particular home*.

[44] The Court concluded that the concept of a representative charge was designed "to accommodate precisely this scenario, despite the particular spread of the time and geographical locations in the current charges".[22]

[45] The present case is similar to *L (CA450/2017)* and *T (CA561/2014)*. The allegations were appropriately divided into representative charges relating to each of the different types of sexual violation alleged, namely unlawful sexual connection involving anal and oral sex, and rape. But there were no other features that meant the offending could be further distinguished in any meaningful way. Rather, the complainant described a continuing course of conduct in relation to each type of alleged sexual violation, in similar terms and circumstances, and all occurring within the family home, wherever that happened to be at any given time. The references to the lounge at Property 1 and the bedroom at Property 2 only arose in response to the

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18 At [24].
19 At [25].
20 *T (CA561/2014) v R* [2016] NZCA 235, (2016) 28 CRNZ 17.
21 Emphasis added.
22 At [57].

interviewer's request that the complainant focus on a single incident, and also did not give rise to any meaningful distinction. And rather than the case against the appellant being "blurry" as Mr Goodwin suggests, it appropriately reflected the nature of the complainant's evidence and that the offending took place over a lengthy period.

[46] Accordingly, there is no discernible basis in the evidence to conclude that the jury could have been sure about the alleged offending at one location but not another. As a result, the risk of the jury not reaching its verdicts on charges 12 and 14 on the basis of a common factual foundation did not arise.

[47] That is sufficient to dispose of the appeal. For completeness, however, we observe that dividing charges 12 and 14 into separate charges concerning Property 1 and Property 2 would have carried the very real risk of the appellant being convicted on more discrete charges than he actually was. We expect this was the reason why the appellant's trial counsel did not insist on charges 12 and 14 being divided, and the apparent concern recorded in the file note referred to at [27] above that to do so would be "unfair".

[48] Finally, the appellant's name has been anonymised in this judgment, though he does not have name suppression. This is because referring to the appellant's name in conjunction with the matters discussed in this judgment would likely identify the complainant and thus undermine her statutory suppression under s 203 of the Criminal Procedure Act.[23]

Result

[49] The appeal is dismissed.

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[23] See *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58].