ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY WITNESSES 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

CA138/2020
[2022] NZCA 506

BETWEEN	M (CA138/2020) Appellant
AND	THE KING Respondent

Hearing:	8 June 2022
Court:	Katz, Thomas and Woolford JJ
Counsel:	S Brickell and OWL Troon for Appellant D G Johnstone and MRL Davie for Respondent
Judgment:	27 October 2022 at 10:30 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

C Order prohibiting publication of names, addresses, occupations or identifying particulars of witnesses pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Following a jury trial in the District Court, Mr M was found guilty of sexual and violent offending against five young family members. Judge PJ Sinclair sentenced Mr M to 17 years' imprisonment, with a minimum period of imprisonment of eight years and six months.[1]

[2] Mr M appeals his convictions on the ground that his trial counsel, Mr Nalesoni Tupou, failed to follow his instructions or, alternatively, failed to represent him competently.[2] Mr M says that these failures have resulted in a miscarriage of justice. Mr M's notice of appeal also included a sentence appeal, but counsel advised at the hearing that the sentence appeal was being abandoned. A formal notice of abandonment was subsequently filed.

[3] Mr M's appeal is over two years out of time. The Crown does not oppose an extension of time. The delay has been adequately explained and we are satisfied that it is in the interests of justice to grant the extension sought.

Counsel competence appeals — legal principles

[4] Under s 232 of the Criminal Procedure Act 2011 (CPA), the Court must allow the conviction appeal if satisfied that a miscarriage of justice has occurred.[3] The CPA defines a miscarriage of justice as an error, irregularity or occurrence in relation to a

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1 *R v [M]* [2017] NZDC 25552 [Sentencing notes].
2 Criminal Procedure Act 2011, s 229.
3 Section 232(2)(c).

trial that has created a real risk that the outcome of the trial was affected,[4] or that has resulted in an unfair trial.[5]

[5] Specific principles apply to trial counsel competence appeals. The Supreme Court provided guidance on the correct approach to such appeals in *Sungsuwan v R*.[6] This Court subsequently provided further guidance in *Scurrah v R*[7] and *Hall v R*.[8] In summary:

(a) The overall issue is whether a miscarriage of justice has occurred.

(b) The Court must first assess whether there was an error on the part of trial counsel and, if so, whether there is a real risk that error affected the outcome of the trial by rendering the verdict unsafe.[9]

(c) There will generally be a miscarriage where there is a failure to follow specific instructions on "fundamental decisions", irrespective of any potential impact on the verdict. This Court, in *Hall v R*, identified three such fundamental decisions: "those relating to plea, electing whether to give evidence and to advance a defence based on the accused person's version of events".[10]

(d) Where trial counsel has made a tactical decision that was reasonable in the context of the trial, the appeal will not ordinarily be allowed on the basis of trial counsel error despite there being a possibility that the decision affected the outcome of the trial.[11] This reflects the reality that trial counsel must use their best judgement to make decisions in the

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4 Section 232(4)(a).
5 Section 232(4)(b).
6 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.
7 *Scurrah v R* CA159/06, 12 September 2006.
8 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.
9 *Scurrah v R*, above n 7, at [17].
10 *Hall v R*, above n 8, at [65], and see also [68]–[69]. See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [40], citing *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300, *Hall v R*, above n 8, and *Kaka v R* [2015] NZCA 532.
11 *Scurrah v R*, above n 7, at [18]; and see *R v Sungsuwan*, above n 6, at [66] per Gault, Keith and Blanchard JJ.

circumstances as they exist at the time.[12] In *Sungsuwan v R*, the Supreme Court said of these cases:[13]

> Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

(e) Nor will there be a miscarriage of justice simply because, in hindsight, some other decision is thought to have offered a better prospect of success than the course of action taken.[14]

The offending

[6] Mr M was charged with 26 offences. His defence at trial was that the events described by the complainants never happened. He gave evidence and called witnesses on his behalf. Following trial, he was convicted of 20 charges and acquitted of five charges.[15] One charge was dismissed during the trial. The offending of which Mr M was found guilty spanned two different time periods and occurred in two different households, as set out below.

Offending against the V children at the first address

[7] The first set of offending occurred between 2012 and 2013, when Mr M and his former wife were living with relatives, Mr V and Mrs V, at an address in Auckland. Mr and Mrs V have two daughters (LV and RV) and two sons (TV and FV) (together, the V children). The V children were all under 12 years old at the time.

[8] On one occasion, LV was lying on her bed asleep. Mr M entered her room, locked the door, and laid down on the bed beside her. He touched her genitalia and

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12 *Scurrah v R*, above n 7, at [18].

13 *R v Sungsuwan*, above n 6, at [66] per Gault, Keith and Blanchard JJ.

14 *Scurrah v R*, above n 7, at [18].

15 We set out the charges on which Mr M was convicted below. Mr M was acquitted of the following charges: charge 6 (a representative charge of sexual conduct with a child under 12 as to LV), charge 7 (a representative charge of assault on a child as to LV), charge 8 (a charge of sexual conduct with a child under 12 as to RV), charge 11 (a charge of assault with a weapon as to RV), and charge 16 (a representative charge of assault on a child as to RV).

bottom (this event was the subject of charge 1). LV tried to run away and yelled for her brothers and sisters. Mr M said to her "If you tell I'll kill you" (charge 2). LV ran from the room.

[9] The other V children tried to help her. Mr M slapped RV across her face (charge 9). He punched LV in the nose with a closed fist causing it to bleed (charge 3). Mr M then threw a knife at TV, narrowly missing his foot (charge 17) and hit FV across the back with a metal vacuum pipe (charge 18).

[10] On a different occasion, Mr M punched RV to her body (charge 10). LV attempted to intervene by pushing Mr M. When LV and RV were running away, Mr M grabbed LV by the hair and dragged her (charge 5).

[11] On multiple occasions, Mr M laid down or sat on RV and moved his body up and down on top of her (charge 12). On one of those occasions, Mr M held his hands around RV's neck and squeezed, preventing her from breathing for about 10–15 seconds (charge 13).

[12] Mr M also squeezed and touched RV's genitalia on a number of occasions, causing her pain (charge 14).

[13] In February 2013, Mr M left the first address, following an assault on his former wife. He went to live with a relative.

Offending against MP at the second address

[14] In mid-2014, Mr M reunited with his former wife who was now living at another Auckland address with two of his former wife's nieces (Mrs P and Mrs L),[16] their husbands, and Mr and Mrs P's three children, including their eight-year-old daughter MP.

[15] MP was between eight and 10 years old when Mr M lived with her family from 2014 to 2016.

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[16] Mrs L is variously referred to as the sister, niece and cousin of Mr M's former wife in the documents. For consistency, we will refer to her as Mr M's former wife's niece.

[16] On one occasion, not long after Mr M moved in, MP was asleep in a bed with her sister, Mr M's daughter (MM) and Mr M's former wife. Mr M, on hands and knees at the foot of the bed, pulled MP to the bottom of the bed. He removed MP's clothing and licked her genitalia (charge 19).[17] Based on its guilty verdict, the jury also accepted that M then penetrated MP's genitalia (charge 20).[18] (Mr M challenges this finding, as discussed below.)

[17] On a different occasion, when MP was asleep in an armchair in the lounge, Mr M pulled her onto the floor. He removed her underwear and made connection between his mouth or tongue and her genitalia (charge 21).[19] Again, based on its guilty verdict, the jury must have accepted that Mr M again penetrated MP's genitalia (charge 22).[20] The Crown case at trial was that he did this while thrusting his hips up and down as he lay on top of MP, while she was lying facing the floor. (Mr M challenges the finding of penetration, as discussed below.)

[18] Mr M was also found guilty of four representative charges of sexual offending against MP — kissing her mouth and touching her bottom (charge 23);[21] raping her (charge 24);[22] penetrating her anus with his penis (charge 25);[23] and licking her genitalia (charge 26).[24]

Did Mr Tupou fail to follow Mr M's instructions on a fundamental issue?

[19] Mr M's primary ground of appeal is that Mr Tupou failed to follow his instructions on a fundamental issue. In Mr M's written submissions the argument advanced is that Mr Tupou failed to follow Mr M's specific instructions to advance "the agreed defence strategy that the allegations were fabrications and there was a motive for the complainants and their family members to lie". Specifically, it is said that Mr Tupou was instructed to advance a defence along the lines that all of the complainants (the four V children and MP) were persuaded by "the nieces"

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17 Crimes Act, ss 128(1)(b) and 128B (maximum penalty: 20 years' imprisonment).
18 Sections 128(1)(a) and 128B (maximum penalty: 20 years' imprisonment).
19 Sections 128(1)(b) and 128B (maximum penalty: 20 years' imprisonment).
20 Sections 128(1)(a) and 128B (maximum penalty: 20 years' imprisonment).
21 Section 132(3) (maximum penalty: 10 years' imprisonment).
22 Sections 128(1)(a) and 128B (maximum penalty: 20 years' imprisonment).
23 Sections 128(1)(b) and 128B (maximum penalty: 20 years' imprisonment).
24 Sections 128(1)(b) and 128B (maximum penalty: 20 years' imprisonment).

(Mrs P, Mrs L and possibly even Mr M's former wife) to fabricate allegations of sexual and physical abuse by Mr M. The motive for this was said to be that Mrs P and Mrs L wanted Mr M out of the way to prevent him from reclaiming custody of his daughter MM from Mrs L, who had raised MM since infancy. For ease of reference we will refer to this theory, in its various forms, as "the conspiracy theory".

[20] The Crown's written submissions, filed in advance of the appeal, suggested that such a wide-ranging conspiracy was completely untenable, for various reasons. These included the number of people (including neighbours) who would have had to have been involved in the conspiracy, and that the V children appear to have made partial disclosures of the offending (including to third parties) separately to, and likely before, MP disclosed the offending against her. This undermined the proposition that Mrs P was the key conspirator, and that the V children had been persuaded to lie only after Mr M had moved to the second address.

[21] In response, Mr Brickell, who represented Mr M on appeal, appeared to accept that the original version of the conspiracy theory was untenable. He instead advanced a revised (and much narrower) version of the conspiracy theory in oral submissions at the appeal hearing. On the revised version, Mr M's alleged instruction to Mr Tupou was to advance the defence on the basis that Mrs P had a motive to lie (preventing Mr M reclaiming his daughter from Ms L) and consequently persuaded her daughter MP to make false allegations against Mr M, as well as giving false evidence herself at trial. Mrs V and the four V children are not said to be part of this narrower conspiracy. On this scenario, the motive to lie does not extend to the allegations made by the V children but is limited to the allegations made by MP.

[22] As Mr Johnstone, counsel for the Crown, submitted, if experienced appellate counsel has struggled to articulate a consistent and comprehensive conspiracy theory defence, despite this being the primary ground of appeal, it is perhaps not surprising that Mr Tupou faced similar difficulties at trial.

What did Mr M tell Mr Tupou about the allegations against him?

[23] It is not in dispute that Mr M told Mr Tupou from the outset that the allegations against him were all lies. Mr Tupou's file note of an early meeting with Mr M

(dated 15 March 2017) records that Mr Tupou went through the police summary of facts with Mr M, who denied all of the allegations against him and said "[it's] lies". The file note further records that Mr M told Mr Tupou that he believed that the allegations were "fabricated by the [nieces] as they have got a crush against him".[25] Mr M did not explain to Mr Tupou at this stage, however, *why* his wife's nieces did not like him. No mention was made of them wanting to get rid of him so that Mrs L could raise Mr M's daughter.

[24] A file note dated 22 March 2017 also records Mr M's instructions as being that all of the allegations are "lies". In relation to two of the charges relating to MP the file note records that MP had made up the rape allegations, supported by her family. Again, however, no motive to lie on the part of MP or her family is disclosed.

[25] On 11 August 2017 Mr Tupou arranged for a private investigator to interview Mr M regarding the allegations against him. A file note of that meeting records Mr M's repeated denials and states further that:

> Although I talked to [Mr M] about why the girls would be making up these allegations if they were untrue and he said maybe someone else did this to them. I did explain that if that was the case for [LV and RV], we still had the more serious allegations that [MP] was making. He did not have anything further to add.

[26] Accordingly, at this stage the only motive to lie offered by Mr M was that "maybe someone else did this to them". This suggestion appears to have related to LV and RV only. There was still no mention of any version of the conspiracy theory.

[27] In Mr M's affidavit of 19 April 2021 (sworn in support of his appeal) he deposed that his instructions to Mr Tupou were simply that he was "not guilty of all the charges and that they were all lies". He further stated:

> I do not remember discussing with Mr Tupou trial tactics and strategy. I do not remember discussing with Mr Tupou how he would question the complainants and the witnesses or what he would say in his speeches to the jury. This was the first time that I had been to trial and I just left it up to Mr Tupou to do the best job for me because he was my lawyer and I trusted him to do a good job for me. Mr Tupou gave me some general advice on how

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[25] Mr Tupou clarified in his evidence that the word "crush" in this context (which was translated from the Tongan word used by Mr M) was a "hatred crush" rather than a "romantic crush".

> I should answer questions by addressing the Judge or the lawyers but other than that he just told me to answer the questions that were asked of me.

[28] It was not until Mr M's reply affidavit of 15 March 2022 that he asserted, for the first time, that Mr Tupou had failed to follow his instructions regarding the defence he wished to advance at trial. Mr M deposed that:

> I told Mr Tupou that the complainants were lying about me sexually abusing them. I told the jury that too when I gave evidence because that was an important part of my defence. I told Mr Tupou that [MP's] mother, [Mrs P], wanted my daughter … to be raised by her sister [Mrs L] and that I was getting in the way of this happening.

[29] Mr M explained that he wanted the jury to know this background:

> … so that they understood the likely reason for why the complainants were lying about the sexual abuse and how [Mrs P] … and other family members ([Mrs L] and possibly [Mr M's former wife] as well) were behind the lies to try and get rid of me. I believe that [Mrs P, Mrs L] and possibly my ex-wife … were behind this.

[30] Mr M further deposed that on the second day of trial he was worried that Mr Tupou had not explained this defence to the jury. He said that he raised his concerns with Mr Tupou during a car trip home from Court, but that Mr Tupou told him "not to worry about it and that he knew everything about the case". Mr M says he told Mr Tupou that "he needed to tell the jury that the complainants were lying and to explain to them why they were lying". We note that this evidence is consistent with the wider version of the conspiracy theory initially advanced in Mr Brickell's written submissions, not the narrower version subsequently advanced at the appeal hearing.

[31] Mr M's evidence before us as to the scope of the alleged conspiracy, and his discussion with Mr Tupou in the car, was broadly consistent with his affidavit of 15 March 2022. Of particular significance, however, is the following exchange which took place during his cross-examination in this Court:

> Q. So is it fair to say that in the course of the trial, you spoke with Mr Tupou about the sorts of things that you might raise in front of the jury and the Judge?
>
> A. Can you please repeat yourself?
>
> Q. You've just described the things that you wanted the jury to know about, haven't you?

A. Yes.

Q. But overall, you actually left it up to Mr Tupou didn't you, about what he would say during his speeches or when he questioned the witnesses?

A. Yes because I didn't know anything about this first. This is the first time ever for me to stand in front of the judge or courtroom since – or there would be a time or there's a time that I can ask or tell [Mr Tupou] can you do this, can you say this on behalf of, you know, what I really want for you to say. That is why I didn't ask any questions to [Mr Tupou] during – when the case – when the court case was on.

Q. So you really left it up to him whether he would raise your concerns about perhaps the adults keeping you out of the house?

A. Yes.

[32] Mr Brickell re-examined Mr M on this key evidence, as follows:

Q. My learned friend's final question to you was that you left it up to him – referring to Mr Tupou, whether he would raise your concerns about the adults kicking you out of the house and your response is – yes I left it up to him.

A. Yes.

Q. I just wanted to be clear. When you told Mr Tupou your concern in the car, did you expect that he would raise that in the trial?

A. Yes, he told me – don't care and don't worry about anything. I'm ready to do everything on my behalf.

[33] Mr Tupou's response to Mr M's allegation that he had instructed Mr Tupou to advance the conspiracy theory at trial was set out in his affidavit of 10 May 2022. Under cross-examination, Mr Tupou acknowledged that Mr M had told him at some stage that part of the reason the family was not receptive to him was around the care of his daughter MM. Mr Tupou said that this was not the only factor, however. Mr Tupou understood that another significant reason Mr M was not liked by the family was due to his excessive alcohol consumption.

[34] Mr Tupou denied that Mr M had *instructed* him to advance the conspiracy theory at trial. In Mr Tupou's view, the conspiracy theory lacked any evidential foundation and was totally implausible. Further, he was concerned that questioning Mrs P about her reasons for preferring that Mr M's daughter live with Mrs L rather

than Mr M would have been a dangerous path to go down, as it could well have elicited highly damaging evidence.

Discussion

[35] An "instruction" is a "clear direction as to how the trial or an aspect of it is to be run".[26] As this Court recognised in *R v S*, instructions are "intended to be directions to be observed and implemented by counsel".[27] Instructions are to be distinguished from "an expression of the client's views on a particular matter",[28] which counsel is not necessarily obliged to follow.

[36] In support of his submission that there must have been a firm instruction from Mr M to Mr Tupou to advance the conspiracy theory, Mr Brickell noted that Mr Tupou had asked questions of some of the Crown witnesses regarding Mr M's daughter MM, including where she was living, who cared for her and whether Mr M had any role in her upbringing. Mr Brickell submitted that there was "absolutely no way competent counsel would introduce [MM] into the equation" unless that was on instructions. The risk, he submitted, was that in the context of three other young girls making allegations of sexual abuse, the jury might think that MM was a potential fourth victim.

[37] In our view, the fact that Mr Tupou asked the Crown witnesses some questions about MM does not mean that there must have been a firm instruction by Mr M to advance the conspiracy theory as part of his defence. Rather, given that Mr M had raised issues around the care of his daughter as giving rise to a possible motive to fabricate the allegations against Mr M, it was not unreasonable for Mr Tupou to (somewhat tentatively) explore the issue with some of the Crown witnesses to see if it elicited any helpful evidence. It did not.

[38] Mr Tupou squarely put it to Mrs P (the alleged key conspirator) that she wanted Mr M out of the house. He did not, however, put it to her that the reason for that was to prevent Mr M from regaining custody of his daughter. Mr Tupou explained in his affidavit of 10 May 2022 that the reason for this was that Mrs P was a hostile witness

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26 *Hall v R*, above n 8, at [69].
27 *R v S* [1998] 3 NZLR 392 (CA) at 394, cited with approval in *Hall v R*, above n 8, at [69].
28 At 394.

and that he did not trust her to answer fairly and truthfully questions about the care of MM. He considered that if this line of questioning were followed, evidence harmful to the defence could be adduced. In our view this was a reasonable judgement call to make in the circumstances. There was a clear risk that any questioning of Mrs P on this topic could elicit evidence that would be highly damaging to the defence.

[39] Mr M clearly articulated the broader version of the conspiracy theory to Mr Tupou at some stage, although quite possibly only after the trial had commenced. As we have noted above, however, Mr Brickell appeared to acknowledge that this version of the theory was untenable. There is no evidence that Mr M ever articulated the narrower version of the conspiracy theory to Mr Tupou, let alone instructed Mr Tupou to advance it as part of his defence at trial.

[40] Overall, the evidence falls far short of establishing that Mr M *instructed* Mr Tupou to advance any form of the conspiracy defence at trial. We accept the Crown's submission that, as in *Hall v R*, the only "true instruction" issued by Mr M was that the complainants' allegations were untrue.[29] Mr M ultimately left it to Mr Tupou's judgement as to how to best run his defence, constrained only by the general instruction that the complainants' allegations were lies. This is apparent from the evidence we have set out at [27] and [31]–[34] above. In particular, Mr M's statement in his first affidavit that he had "just left it up to Mr Tupou to do the best job for me because he was my lawyer and I trusted him to do a good job for me" is consistent with his evidence at the appeal hearing and, in our view, reflects the truth.

[41] At best, Mr M's statements to Mr Tupou as to the possible motive family members may have had to lie were "an expression of the client's views on a particular matter".[30] As such, these statements were not binding on Mr Tupou. We accept the Crown's submission that, as in *Hall v R*, Mr M left it up to Mr Tupou "to decide on tactical issues at trial such as the line of cross-examination to be pursued and the evidence to be called".[31] Mr Tupou was not obliged to advance the conspiracy theory

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29 *Hall v R*, above n 8, at [190].
30 *R v S*, above n 27, at 394.
31 *Hall v R*, above n 8, at [190] (footnote omitted).

(in either of its forms) and no real risk of a miscarriage of justice arose from his decision not to do so.

Other errors allegedly made by trial counsel

[42] Mr Brickell submitted, in the alternative, that trial counsel made a number of errors in the conduct of the defence that created a real risk that a miscarriage of justice has occurred, either because the outcome of the trial was affected[32] or alternatively because these errors deprived Mr M of a fair trial.[33] The written submissions for Mr M identified four errors: errors in the cross-examination of MP which elicited evidence strengthening the Crown case; errors in the cross-examination of other witnesses; failure to prepare a brief of evidence and to prepare Mr M to give evidence; and an inadequate closing address. We address each alleged error in turn.

Mr Tupou's cross-examination of MP

[43] Mr M was found guilty of all eight charges relating to MP. These included two specific charges of rape and one representative charge of rape. Mr M also faced one representative charge of sexual violation by anal penetration.

[44] In relation to the rape charges, the Crown opened to the jury as follows:

> I'm reluctant to use the words "have sex" because it's not complete penetration that the Crown must prove, but the Crown says that there was penetration of the genitalia area.

[45] This reflects that, as a matter of law, the slightest degree of introduction of the penis into the genitalia is sufficient for penetration to have occurred.[34] Female genitalia means a person's vagina and includes the labia (the inner and outer lips at the entrance of the vagina).[35]

[46] Mr Brickell submitted that, based on MP's evidential video interview (EVI), a strong argument can be advanced that she is describing anal penetration *only,* but not

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32 Criminal Procedure Act, s 232(4)(a).
33 Section 232(4)(b).
34 Crimes Act, ss 128(2), 2(1) definition of "sexual connection" and 2(1A).
35 See *R v N (T90/92)* (1992) 9 CRNZ 471 (HC); *R v Kahui* HC Auckland CRI-2006-057-1135, 29 June 2007 at [9]–[15]; and *Goodwin v R* [2012] NZCA 87 at [49]–[51].

penetration of her genitalia. Accordingly, he submitted, prior to trial counsel's cross-examination there was a strong basis to make an application to dismiss the rape charges pursuant to s 147 of the CPA. Mr Brickell did not dispute, however, that there was sufficient evidence for the jury to find Mr M guilty of the representative charge of sexual violation by anal penetration, even without Mr Tupou's cross-examination.

[47] Even if a s 147 application had been made and dismissed, Mr Brickell submitted, there would still have been a strong basis to submit to the jury in closing that the jury could not be satisfied that MP was describing penetration of her genitalia as opposed to solely penetration of her anus. Mr Tupou is said to have given away this opportunity, however, by expressly putting it to MP that Mr M denied having "put his penis in your vagina". MP responded that "[h]e did" and "[i]t happened".

[48] As this Court said in *Hall v R*, trial counsel must exercise some judgement as to their approach to cross-examination.[36] In *S (CA361/2010) v R*, this Court observed that it will ordinarily be "slow to second guess" defence counsel's cross-examination of complainants in sexual abuse cases, particularly young complainants.[37] Similarly, in *Z (CA589/2011) v R*, this Court observed that cross-examination "is an area for the professional judgment of counsel, subject to any particular instructions of the client".[38] Mr M acknowledges he did not issue any cross-examination instructions to Mr Tupou.

[49] Nevertheless, there will be some (relatively rare) cases where trial counsel's cross-examination falls so far short of the expected norms that it gives rise to a risk of a miscarriage of justice.[39] One example of this could be asking unnecessary questions of a Crown witness that elicit answers which cure a fatal defect in the Crown case (particularly if competent counsel would have reasonably foreseen the risk of such an outcome).

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36 *Hall v R*, above n 8, at [75], citing *Z (CA589/2011) v R* [2013] NZCA 118 at [55]; *S (CA361/2010) v R* [2013] NZCA 179 at [60]–[61]; and *Loffley v R* [2013] NZCA 579 at [53].

37 *S (CA361/2010) v R*, above n 36, at [60].

38 *Z (CA589/2011) v R,* above n 36, at [55].

39 See for example *Langley v R* [2016] NZCA 71 at [32] and [35]–[41].

[50] Here, the Crown case on the rape charges relied on MP's EVI and two diagrams (one of a man and one of a woman/girl) that MP labelled during the course of her interview. MP was 10 years old when the EVI was undertaken.

[51] The alleged penetration occurred during what MP described as the "bunny hop". She said the bunny hop had happened 10 to 15 times, including on two specific occasions, which she described. The bunny hop involved Mr M "going up and down". Asked what part was going up and down, she said "his erm thing … front private bit".

[52] MP further described the bunny hop as being "like when he put his front private part behind my erm bum … [f]ront private part in my erm bum." She described the conduct occurring when she was face down to the floor and Mr M was lying on top of her, on her back. She said Mr M was heavy and she felt like she couldn't breathe.

[53] MP went on to refer to Mr M putting "his thing on my hips". She later explained that another word for hips is "bum". She said "when he put it on my hip it was yuck … [i]t was like watery or something … I heard him putting his erm hands on his mouth and putting them on his thing … it's all slimy". When asked where on her body she could feel the slimy thing, she said "[i]n my hip".

[54] When asked where exactly on her hip and bum MP felt "the thing", MP said that she felt it "[i]nside"; that "he put his thing inside" her hip; and that it felt "fat" and it made her feel "[s]limy and yuck".

[55] MP was later asked if there had been any time "where his thing went anywhere else but on your hip and bum". She answered "yeah inside". When asked to explain she said that it had gone inside "the holes", which she elaborated on as follows:

> Q. Tell me what you mean by the holes
>
> …
>
> A. Mm like the woman's
>
> Q. Mhmm
>
> A. Yeah

Q. What about the woman's

A. Mm it has holes

[56] MP was later asked to mark an X on a drawing of a girl to show where the hip or bum was. The drawing was of a basic outline of a girl with the first page viewed from the front and the second page viewed from the back. MP drew an X on the back view of the girl, at the top of where her legs joined. The following exchange then occurred:

Q. … [S]o I'm gonna write both of those words, hip bum. Alright now erm you also talked about holes. So I want you to put an X on the paper for where the holes are

A. Same one

Q. Same one okay. So you said holes, is that one hole or more than one hole

A. One

[57] As is common with child witnesses, the language used by MP was not anatomically correct. In our view, however, there was clear evidence to support a finding that there had been penetration of MP's genitalia, prior to Mr Tupou embarking on his cross-examination. Although MP may have used the same X on the drawing of a girl to represent hip, bum and holes, that is not surprising. The drawing did not include any anatomical detail. Given that MP had already placed an X at the juncture of the girl's legs to represent "hip/bum" there was no obvious other place to put an X to represent a woman's "holes" (or hole). In her interview, however, MP clearly described a woman's holes (or hole) as being distinct from her hip or bum. Specifically, the reference to "the woman's holes" was in response to being questioned as to whether there was any time "where his thing went anywhere else but on your hip and bum".

[58] Nor, in our view, is it significant that the X for a woman's holes (or hole) was placed on the drawing of the back of the girl, rather than the front. MP's evidence was that the "bunny hop" took place from behind, with her facing the ground and Mr M lying on top of her, on her back. The X she drew on the back of the drawing of the girl is consistent with this scenario.

[59] As the Crown acknowledged, Mr Tupou's cross-examination of MP could have been more skilful. We are satisfied, however, that no real risk of a miscarriage of justice has arisen, given that there was a sufficient evidential basis for the jury to find Mr M guilty of rape prior to Mr Tupou's cross-examination.

Mr Tupou's cross-examination of other witnesses

[60] Although Mr Brickell's primary complaint related to Mr Tupou's cross-examination of MP on penetration of her genitalia, he also gave a number of other examples (described as "not as serious") of Mr Tupou asking questions of MP and other witnesses that allegedly strengthened the Crown case. More generally, Mr Brickell submitted that there had been excessive repetition of the complainants' evidence-in-chief during cross-examination which had served to reinforce the complainants' evidence and strengthen the Crown case, and "irritated and confused" the jury.

[61] It is clear from the notes of evidence that another counsel might have cross-examined the Crown witnesses with a greater degree of skill and in a more focussed manner. We are not persuaded, however, that this is one of those rare cases where the interests of justice require appellate intervention. As we have noted at [48] above, appellate courts will be slow to second guess the way trial counsel cross-examine witnesses.

[62] Mr Tupou was faced with an extremely strong Crown case, involving multiple complainants. The only possible motive to lie provided by Mr M was the conspiracy theory. Mr Brickell appeared to accept that the original (broader) version of that theory, as set out in the written submissions filed in support of the appeal, was untenable. That was an appropriate concession on the evidence. However, the broader version of the conspiracy theory is the only version that Mr M had suggested to Mr Tupou at the time of trial. As explained above, the narrower version of the conspiracy theory was only developed in oral submissions at the appeal hearing, after the Crown had pointed out the various reasons why the original version of the conspiracy theory was untenable. The narrower version, however, was not supported by Mr M's evidence or the contemporaneous documents and there is no evidence that

Mr M ever suggested to Mr Tupou that the narrow version of the conspiracy theory be advanced at trial.

[63] This left Mr Tupou in the unenviable position of simply putting the Crown to proof and advancing the only defence available to Mr M (and the defence that we have found Mr M instructed him to advance) which was that the offending did not occur. Consistent with this defence, Mr Tupou challenged and tested the evidence of each Crown witness. Admittedly this was done at greater length and in greater detail than was strictly necessary. We are not persuaded, however, that Mr Tupou's cross-examination style generally, or any of the specific matters identified by Mr Brickell (some of which are fairly minor) have given rise to a real risk that one or more of the verdicts is unsafe.

Alleged failure to prepare a brief of evidence and prepare Mr M to give evidence

[64] Mr M gave evidence at trial. He says that Mr Tupou did not prepare a brief of evidence for him and that, if Mr Tupou had done so, it is likely that some errors that Mr M made in his evidence at trial (which the prosecutor sought to use to his advantage) would not have been made.

[65] No comprehensive brief of evidence was prepared. Instead, Mr Tupou relied on several documents as together comprising a brief of evidence, including:

(a) A file note dated 15 March 2017, relating to a meeting between Mr Tupou and Mr M, over a period of approximately two and a quarter hours. During the meeting Mr Tupou went through the summary of facts with Mr M and sought his response to each allegation. These were recorded in the file note.

(b) A file note dated 22 March 2017, recording a further discussion between Mr M and Mr Tupou about the various charges and Mr M's response to them.

(c) A file note dated 11 August 2017 of a meeting between Mr M and a private investigator engaged by Mr Tupou, recording Mr M's responses

to detailed questioning by the private investigator regarding the charges.

[66] Although each document includes some additional background detail, the general tenor of Mr M's responses was simply that he denied all the offending.

[67] Mr Brickell submitted that although these documents contain information that could have been included in a brief of evidence, they are no substitute for a formal brief. He submitted that, due to the lack of a comprehensive brief, Mr M had made some errors while giving evidence that were used to good effect by the prosecution.

[68] The first error was that Mr M said that he had left the first Auckland address in 2012 rather than 2013. The 2013 date was subsequently confirmed by reference to a domestic violence incident between Mr M and his former wife which resulted in the police being called and Mr M being removed by the police from the first Auckland address. The prosecutor subsequently submitted in closing that Mr M lied about when he lived at the first Auckland address.

[69] In our view this is the type of recall mistake that witnesses commonly make about events which took place many years earlier (in this case four years), even when a signed brief has been prepared. As Mr Johnstone observed, the prosecutor's submission that Mr M lied about the relevant date was strained and without force. The more likely explanation, which we agree would have been obvious to the jury, is that Mr M was mistaken over a matter of detail. This is particularly so given that a number of other witnesses (including witnesses called by Mr M) were obviously in a position to give the correct date, and Mr M would have known that.

[70] The second mistake Mr M is said to have made when giving evidence is saying that he had never been to Court before. He had to explain later in his evidence that he had made a mistake and that he had previously appeared in court for driving with excess breath alcohol. Mr Brickell submitted this was highly prejudicial as MP alleged that the offending against her took place when Mr M was drunk. Further, the prosecutor again used this mistake to suggest that Mr M was lying.

[71] We find it somewhat difficult to see how having a written brief of evidence would have avoided this slip-up, given that a written brief would presumably not have included reference to Mr M's drink driving conviction. In any event, any additional prejudice arising from the disclosure of Mr M's conviction would have been minimal, given that there had already been extensive evidence at trial of Mr M's drunken behaviour. Such evidence included that the church caretaker was sick of Mr M coming drunk to social activities; complaints about Mr M "coming every weekend drunk and swearing"; that Mr M had promised not to drink when he moved into the second Auckland address; that Mr M would "shop in the shopping centre and around houses drunk"; that Mr M had come to the local hall drunk and been sent home; and that Mr M had embarrassed his family by going to church drunk. Indeed, Mr M himself acknowledged coming home drunk, although he denied offending while drunk. Instead, he claimed that:

> What I know is when I come home drunk I go straight into the kitchen, look for something to eat and then I go to the room and sleep.

[72] Mr Brickell further submitted that Mr Tupou had on some occasions failed to lead evidence from Mr M consistent with the propositions that he had earlier put to Crown witnesses, and that this was due to the lack of a written brief. For example, Mr Tupou suggested to Mrs P that Mr M was responsible for looking after Mrs P's children and did the washing for all the family, which Mrs P denied. No evidence was led from Mr M on this, however.

[73] In *Hall v R* the Court noted that legal aid providers are required by the relevant practice standards to record the client's factual instructions in a signed brief of evidence unless there is a good reason not to do so.[40] Clearly, in this case, it would have been best practice for Mr Tupou to have prepared a signed written brief of evidence for Mr M. Mr Tupou has not advanced any good reason why this was not done. Nevertheless, while it would have been preferable for Mr Tupou to prepare a brief of evidence, as this Court stated in *Weston v R*, "failure to prepare a brief is not, of itself, an error that is necessarily fatal to a defendant receiving a fair trial".[41]

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40 *Hall v R*, above n 8, at [95], citing Ministry of Justice *Practice Standards for Legal Aid Providers* (October 2011) at [5.1]. This remains a requirement under the current practice standards: see Ministry of Justice *Practice Standards for Legal Aid Providers* (February 2017) at [5.4].

41 *Weston v R* [2019] NZCA 541 at [35].

[74] Mr M's defence was straightforward — a blanket denial of all of the offending. It is not clear that any of the "mistakes" referred to by Mr Brickell would have been avoided if there had been a written brief. Further, given the context of a trial involving very serious allegations of sexual offending by multiple child complainants, these "mistakes" are unlikely to have had any effect on the outcome of the trial. Similarly, none of the other criticisms advanced by Mr Brickell under this head raise matters that could realistically have impacted the outcome of the trial.

[75] In conclusion, Mr Tupou should have prepared a written brief of evidence for Mr M and had him sign it. There is nothing to suggest, however, that the failure to do so has given rise to a real risk of a miscarriage of justice in this case.

Criticisms of Mr Tupou's closing address

[76] The final trial counsel competence issue raised by Mr M is the adequacy of Mr Tupou's closing address.

[77] Mr Brickell noted that Mr Tupou had commenced his closing address by apologising to the jury. Specifically, he asked for forgiveness if he had asked questions in the course of trial that were not the ones the jury wanted him to ask, or if he had failed to ask the right questions. He also asked for forgiveness if, in his closing address, he omitted to mention certain matters. He asked that any mistakes he may have made not be held against Mr M.

[78] Mr Brickell submitted that this apology would have undermined the jury's confidence in the defence and is strong evidence that Mr Tupou was aware that his conduct of the trial had elicited an adverse reaction from the jury and that it had prejudiced Mr M.

[79] We do not accept that submission, but rather accept Mr M's explanation that he had been told by a senior barrister many years ago that it is best to be honest and frank with a jury and explain that we are all human. If counsel makes an error or mistake, that should not be visited on the defendant. Mr M said that he usually commences his closing addresses in this way. In our view, this is simply a matter of individual style and did not unfairly prejudice Mr M.

[80] In a closing address trial counsel has a duty to identify and emphasise the weaknesses in the Crown case and the key aspects of the defence case which should have precluded the jury from being satisfied that the charges were proven to the requisite standard.[42] The Court will not usually question the advocacy style of trial counsel provided the defence case has been adequately explained to the jury.[43] However, in certain situations, a closing address may be so deficient as to warrant judicial intervention. These include situations where, for example, trial counsel has failed to put the defence case, contravened the defendant's instructions, or undermined the credibility of the defendant.[44]

[81] Mr Brickell submitted that Mr Tupou's closing address inappropriately focussed on the complainants' "don't remember" answers, relating that to the fragility of memory and emphasising the complainants' demeanour as inconsistent with the allegations being true. Mr Brickell also gave a number of examples of evidence (or lack of evidence) Mr Tupou did not mention which, he submitted, could have been referred to in support of the defence to specific charges.

[82] The Crown submitted that, despite any shortcomings in trial counsel's closing, no miscarriage of justice had occurred. The Crown submitted this is not a case where the closing address "fail[ed] … to emphasise an accused's denial of allegations",[45] "undermined the defence case",[46] prevented the jury from "fairly judg[ing] the case",[47] "undermine[d] the defendant's right to have his or her defence properly put",[48] "failed to put the defendant's case",[49] "acted contrary to the defendant's instructions",[50] or "undermined the credibility of the defendant".[51]

[83] Mr Tupou's closing address was fairly lengthy. As is common when the defence is one of bare denial, he stressed the standard and burden of proof, the need

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42 *E (CA113/2009) (No 2) v R* [2010] NZCA 280 at [27].
43 At [28], citing *Blake v R* [2010] NZCA 61 at [61].
44 *Kaka v R*, above n 10, at [31].
45 *E (CA13/2009) (No 2) v R*, above n 42, at [28].
46 At [28].
47 At [29].
48 *Kaka v R*, above n 10, at [31].
49 At [31].
50 At [31].
51 At [31].

for the jury to consider each charge individually, and the need for the jury to be unanimous. He gave an example of evidence given by one of the complainants that was contradicted by another witness. He suggested that the complainants' accounts of sexual offending were implausible because the houses in which the alleged offending occurred were filled with people, yet no one had heard or knew about what was going on. He noted that the complainants were unable to answer questions on matters of detail and submitted that this demonstrated their unreliability. Specifically, with reference to his cross-examination of one of the complainants, Mr Tupou addressed the jury as follows:

> "Where was your brother, [TV]?" "Can't remember." "Where was your brother [FV]?" "Can't remember." "Where was [MM]?" "Can't remember." Then I asked her on the same page, 82, 10 lines from the bottom, I've said, "And this event, was it daytime or night-time?" She says, "Afternoon." "Tell me about what he did to your shorts." "I can't remember." "Tell me about what he did to you." "I can't remember." "Did he touch you?" "Can't remember." "Was your sister there?" "Can't remember or I don't know."

[84] Mr Tupou submitted that there were "just … too many" such examples, and that this gave rise to doubt.

[85] We have noted above that the framing of a closing address is a matter of judgement for counsel.[52] As the Crown accepted, aspects of Mr Tupou's closing left something to be desired. The closing address was rambling in places and the relevance of some of the submissions Mr Tupou made (for example, comments about Mr M being in love, and love being an honest emotion) is unclear, even after Mr Tupou's explanations at the appeal hearing. Many of these issues may simply be a matter of style. In *E (CA113/2009) (No 2) v R*, this Court confirmed that:[53]

> This Court will rarely question the advocacy style of trial counsel when trial counsel error in closing is alleged … this Court will not delve into issues of style and preference when the defence case has been adequately explained to the jury.

[86] Mr Brickell identified a number of evidential discrepancies that he submitted could have been used to bolster the defence closing address. It is not surprising, however, that with the benefit of hindsight, no time pressure, and an opportunity to

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52 *Ikinepule v R* [2017] NZCA 125 at [25] and [27], citing *Scurrah v R*, above n 7, at [18].
53 *E (CA113/2009) (No 2) v R*, above n 42, at [28] (footnotes omitted).

undertake a thorough review of the evidence, it is possible to identify further submissions that may have bolstered the defence. We are not persuaded, however, that Mr Tupou's failure to refer to those matters has given rise to a real risk of a miscarriage of justice.

[87] Mr Tupou's closing address was in accordance with Mr M's instructions (a complete denial of the offending). Mr Tupou reminded the jury of the high standard of proof the Crown carried and repeatedly emphasised Mr M's denial of all of the allegations. The key issue is whether the defence case was adequately explained. In our view it was. Mr Brickell submitted that in this case a defence "could simply never be built around the possibility of mistake and false memories". However, the only alternative was to build a defence case around the proposition that virtually all of the Crown witnesses (including the four child complainants) were lying, in the absence of any plausible motive to lie. Neither alternative was an attractive one, in the face of a very strong Crown case. Suggesting that most or all of the witnesses (including the child witnesses) were lying, however, likely carried a greater risk of alienating the jury.

[88] Although Mr Tupou's closing address may have lacked skill and finesse, his general approach of inviting the jury to reflect on the need to be sure of the overall reliability of the complainants' accounts was one that was reasonably available to competent counsel. The fact that the jury acquitted Mr M of five charges (a mix of sexual and violence charges relating to RV and LV) suggests that they understood Mr M's defence and carefully assessed the relevant evidence in reaching their verdicts. Accordingly, this ground of appeal also fails.

Result

[89] The application for an extension of time to appeal is granted.

[90] The appeal is dismissed.

[91] Mr M's name is suppressed pursuant to a District Court order which remains in force. The complainants' names are suppressed pursuant to ss 203 and 204 of the CPA, and the names of child witnesses are also suppressed pursuant to s 204 of the

CPA. To protect the identity of the complainants, we make an order suppressing the identities of persons who were called as witnesses pursuant to s 202(2)(d) of the CPA.

Solicitors:
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