NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT Q PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA836/2024
[2025] NZCA 507

BETWEEN	TIMOTHY PAUL JAGO Appellant
AND	THE KING Respondent

Hearing:	17 June 2025
Court:	Palmer, Dunningham and Grice JJ
Counsel:	I M Brookie for Appellant R M A McCoubrey and R N Thompson for Respondent
Judgment:	29 September 2025 at 4 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] In August 2024, Mr Timothy Jago was found guilty by a jury in the District Court of committing eight historical sexual offences on three occasions against two complainants. He was convicted and sentenced to imprisonment for two years and six months.[1] He appeals his convictions and sentence. We dismiss the appeals. It was appropriate for the March 1995 charges to be considered by the jury and the jury's guilty verdicts on those charges were open to them on the evidence. The Judge's directions to the jury about the delays in the charges being brought and about propensity evidence did not result in a miscarriage of justice. The sentence was not manifestly excessive.

What happened?

[2] Mr Jago was charged with offences against two complainants over three incidents:[2]

(a) three charges of indecency with a boy between 12 and 16, Mr Paul Oliver, in relation to an incident in March 1995 (the March 1995 charges);

(b) three charges of indecent assault on a man or boy over 16, Mr Oliver again, in relation to a second incident occurring between 1995 and 1997; and

(c) three charges of indecent assault on a man or boy over 16, a second complainant Q, in October 1999.

[3] In August 2024, Mr Jago was tried by a jury before Judge D J Sharp in the District Court at Auckland over five days. His defence was that the allegations were not true. On 26 August 2024, Mr Jago was found guilty of all of the charges, except

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1 *R v Jago* [2024] NZDC 28339 [judgment under appeal] at [85].

2 Mr Oliver's name suppression has been waived pursuant to an order under s 203(3)(b) of the Criminal Procedure Act 2011: *R v Jago* [2024] NZDC 29466 at [27]. The identity of the second complainant, Q, is automatically suppressed under s 203 of the Criminal Procedure Act.

one of indecent assault of Q which was dismissed pursuant to s 147 of the Criminal Procedure Act 2011 (the Act) due to a lack of evidence.

[4] On 22 November 2024, in sentencing Mr Jago, the Judge described the offending to him as follows:[3]

> **The Offending Against Paul Oliver**
>
> [2] As regards Paul Oliver, there were two separate occasions on which the offending has been established. The first incident involving Mr Oliver occurred at an [inflatable rescue boat] competition in Raglan. Mr Oliver was approximately 15 years and 10 months of age at that time. You had been spoken to directly by Mr Oliver's father as being a person who would be responsible for taking care of Mr Oliver during the weekend.
>
> [3] It was the first weekend that he was spending away from his family. You were part of the senior leadership of the Surf Lifesaving Club and as such had control over the young persons who were attending at this event. On the night before the competition Mr Oliver drank alcohol supplied by senior members of the club and became heavily intoxicated. He vomited in a vehicle parked at the camping ground and lost consciousness.
>
> [4] Later that evening he [woke] up to find himself naked in your bed. You were lying behind Mr Oliver, fondling Mr Oliver's penis and testicles with your hand. After that you grabbed Mr Oliver's hand and placed it on his penis. You then pressed your penis against Mr Oliver's anus. Mr Oliver awoke the next morning still naked in your bed and you had already left the room.
>
> [5] The second incident occurred a year or so later. Mr Oliver was at that stage 16 or 17 years of age. He attended a social gathering at your home, consumed alcohol during the night and became intoxicated. He passed out. Later that night he woke in your bed. His pants and underwear had been pulled down and you were lying behind him with your body against him. You were naked at that point.
>
> [6] You started touching Mr Oliver's genitals before [placing] Mr Oliver's hand on your penis. After that you started rubbing your penis against Mr Oliver's anus and you touched his anus with your hands. Mr Oliver told you to stop, he only wanted to do this stuff with a female. He got up. He put his clothes on, and he left the bedroom to sleep on the couch.
>
> [7] At the trial, your defence was this did not happen. There is no question of consent at any stage or that consent played any part in relation to these matters, so age has only a peripheral impact in terms of the vulnerability of the complainants.

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3 Judgment under appeal, above n 1.

The Offending Against [Q]

> [8] This offending took place at night after drinking at your house. [Q] was about 17 years of age at the time. During the course of the evening [Q] became intoxicated, eventually put[ting] himself to bed in your bedroom. Some time later he awoke to find you lying next to him in bed naked. You reached over and grabbed [Q's] groin area squeezing it with your hand. You also grabbed [Q] by the wrist and placed it on your pubic area. This only ceased when [Q] moved himself to the edge of the bed.

[5] Mr Jago appeals his convictions, on three grounds which, taken separately or together, he says resulted in a miscarriage of justice, under s 232(2)(c) of the Act. He also says that the question of unreasonable verdicts is raised under s 232(2)(a). This Court must allow the appeal if satisfied that, having regard to the evidence, a jury's verdict was unreasonable; or a miscarriage of justice has occurred for any reason.[4] Under s 232(4), a miscarriage of justice "means 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". Mr Jago also appeals his sentence.

Issue 1: Should the March 1995 charges have been dismissed?

What happened?

[6] In cross-examination, the following exchanges occurred between Mr Oliver and Mr Jago's counsel:

> Q. So, when you said: "I'm remembering Raglan that's my truth", is it fair to say you're not at all sure where you say this thing happened?
>
> A. That is correct, yes.
>
> Q. And not sure when either?
>
> A. At that age that I gave in my evidence.
>
> Q. And you said that you stopped [off] at the Red Fox Tavern, on the way?
>
> A. I'm unsure of the Tavern's name for certain.
>
> Q. You said Red Fox though, didn't you?
>
> A. I thought that that may have been, but I cannot be sure.

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4 Criminal Procedure Act, s 232(2).

Q. So, the Red Fox Tavern in Maramarua, right?

A. I'm not sure of the location of the Red Fox Tavern.

Q. But you have heard of the Red Fox Tavern in Maramarua?

A. I have heard of it

[…]

Q. You've never been to the Coromandel?

A. I have, yes.

Q. So, don't you go through Maramarua past the Red Fox Tavern?

A. Maybe that's where I recall it from.

Q. Well, so you weren't on the way to Raglan, were you, if you went to the Red Fox Tavern.

A. No, if it's on the way to the Coromandel then no it can't be on the way to Raglan.

[7] Under re-examination by the prosecution, Mr Oliver stated he was unable to say for certain whether the assault took place on the same weekend as a photograph of him at the Raglan event in March 1995. Mr Oliver also accepted under cross-examination that a sketch relating to where he remembered being offended against was inconsistent with photographs of the motel.

[8] Part way through the Crown case at trial, the defence applied to dismiss the charges relating to the March 1995 offending because no properly directed jury could reasonably convict Mr Jago, on the basis of Mr Oliver's evidence that he was unsure where or when that offending occurred.

[9] The Judge noted that the Crown had other witnesses pointing to surrounding circumstances that might potentially form a basis for the jury to come to the conclusion that the offending occurred at the Raglan event. Mr Oliver said he had only been to one such event and there was evidence "that could point to the date range being the one which is relied on". In declining the application, the Judge concluded:

> So, I understand that there are questions that could properly be asked about the date range, but I do not see it as a situation in which a jury properly

> instructed could not come to the conclusion that it was within the date range alleged.

[10] Mr Jago seeks to adduce further evidence, being an affidavit which includes as exhibits a newspaper article about a surf lifesaving competition at Mount Maunganui in late January 1996, attended by the surf lifesaving club to which Mr Oliver belonged (the Club). By then, Mr Oliver would have been 16. No parts of the newspaper article mention Mr Oliver.

Law of dismissing charges and unreasonable verdicts

[11] Section 147(4)(c) of the Act provides that the court may dismiss a charge if the judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant in relation to the charge. The Crown case must be taken at its highest.[5] In *R v Flyger*, this Court stated:[6]

> [13] The power to discharge an accused … must be taken to be a power exercisable in the interests of justice. The nature and circumstances of a case will inform the interests of justice. In a trial before a Judge and jury a Judge must respect the jury's responsibility to decide the facts. Accordingly a Judge should not normally make an order for discharge pursuant to s 347(3) [(the predecessor to s 147 of the Act)] where there is before the Court evidence which, if accepted, would as a matter of law be sufficient to prove the case. The Judge's function in these circumstances is not to attempt to predict the outcome but to examine the evidence in terms of adequacy of proof, if accepted.
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> …
>
> [15] … It is not a question of what a jury would be likely or unlikely to do but what a jury may properly do. The evidence in support of a charge may be barely adequate and so tenuous as to lead a Judge to the view that the jury could not properly convict and accordingly the interests of justice require an order for discharge. The evidence in a case may be adequate, if accepted, but witnesses may appear so manifestly discredited or unreliable that it would be unjust for a trial to continue. It may be that in such circumstances a jury would be unlikely to convict, but the rationale for an order for discharge is not the likelihood of acquittal but the unsafeness of a conviction having regard to the evidence. …

[12] Further, in *Parris v Attorney-General*, this Court stated:[7]

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5 *R v Flyger* [2001] 2 NZLR 721 (CA) at [17].

6 As endorsed in *R v Hong* [2018] NZCA 97 at [28]; and *R v Wee* [2025] NZCA 87 at [11].

7 *Parris v Attorney-General* [2004] 1 NZLR 519 (CA), as cited in *R v Hong*, above n 6, at [29]; and *R v Wee*, above n 6, at [12].

> [13] … There should be a s 347 discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to much the same thing.
>
> [14] It is vital, however, to appreciate the proper compass of the word "reasonably" in this context. The test must be administered pretrial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal has the reserve power to intervene on evidentiary grounds. The constitutional divide between trial Judge (law) and jury (fact) mandates that trial Judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence. …

[13] Verdicts will be unreasonable under s 232(2)(a) of the Act if the appellate court, having regard to all the evidence, is satisfied the jury could not reasonably have been satisfied to the required standard that a defendant was guilty.[8] Appellate courts do not interfere lightly with a jury's decision.[9] Ultimately, the key issue is "whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant" having regard to all the evidence at trial.[10] As the Supreme Court stated in *R v Owen*:[11]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

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8 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17]. See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [10(c)].

9 *R v Owen*, above n 8, at [13(e)], endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

10 *R v Munro*, above n 9, at [86], affirmed in *R v Owen*, above n 8, at [14]–[15] and [17].

11 *R v Owen*, above n 8, at [13], citing *R v Munro*, above n 9.

(f) An appellant who invokes s 385(1)(a) [of the Crimes Act 1961, the precursor to s 232(2)(a)] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

Submissions

[14] Mr Brookie, for Mr Jago, submits the three charges of offending in Raglan in March 1995 should have been dismissed under s 147 of the Act. Because they were not, the jury's verdict was unreasonable under s 232(2)(a) of the Act. Mr Oliver was unsure where or when the offending occurred. His sketch was inconsistent with the photo exhibits of the motel. The event could not have been at Raglan if they stopped at the Red Fox Tavern in Maramarua, as Mr Oliver accepted. There was evidence he stayed away from home regularly. The date of alleged offending was material here because Mr Oliver turned 16 less than two months after the Raglan event. Because there were many other events the surf club attended, there was a reasonable possibility the offending occurred at a different surf event, including in Mount Manganui when he was over 16.[12] The evidence was so unreliable that the charges should have been dismissed. The proposed evidence, while not fresh, is credible and cogent, and should be admitted.

[15] Mr McCoubrey, for the Crown, submits there was ample evidence for the three charges to be left to the jury to decide. Mr Oliver's reliability was addressed at length in the Crown and defence closing addresses and the Judge's summing up. The verdicts were entirely unsurprising. The Crown does not oppose the proposed evidence being admitted but submits it has little to no probative value and its relevance is, at best, very limited.

Adequacy of the evidence supporting the March 1995 charges

[16] Whether further evidence should be admitted on appeal requires consideration of whether it is fresh, credible and cogent.[13] The proposed evidence that the Club attended a surf lifesaving competition in Mount Maunganui is not fresh, as Mr Brookie

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12 Citing *K (CA665/2014) v R* [2015] NZCA 566 at [48]–[49].
13 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

acknowledges. Nor is it cogent. There is no evidence that Mr Oliver attended that event. So the proposed evidence of the event occurring cannot support the submission that there was a reasonable possibility that the offending by Mr Jago against Mr Oliver occurred at another event, rather than at the Raglan event, other than by showing that the Club attended other events. As Mr Brookie submits, that fact was made clear in cross-examination of a witness. We decline to admit the proposed evidence.

[17] The jury had to find that it had been proven beyond reasonable doubt that the relevant offending had occurred at Raglan within the date ranges in the charges, and while Mr Oliver was aged between 12 and 16. We are satisfied that the evidence was sufficient for the jury to reasonably make such findings.

[18] As Mr McCoubrey submits, Mr Oliver's evidence about the Red Fox Tavern is a red herring. Mr Oliver did not say he was certain it was the Red Fox Tavern that they stopped at. He said he was not sure of its name, he was not sure it was the Red Fox Tavern, and he was not sure of its location. He accepted the Red Fox Tavern was not on the way to Raglan but he did not accept that they could not have been on the way to Raglan. The deficiencies Mr Brookie points to were before the jury. It was open to them to conclude that they were outweighed by other evidence.

[19] Mr Brookie relies on an example given by this Court of a reason for discharge in *R v Flyger* that "[t]he evidence in a case may be adequate, if accepted, but witnesses may appear so manifestly discredited or unreliable that it would be unjust for a trial to continue".[14] But all the evidence before the jury must be considered. Considering all the evidence, we do not consider the jury's verdicts were unreasonable here. The Judge was correct not to dismiss the charges pursuant to s 147 of the Act.

[20] There was other independent evidence that tended to support the offending having occurred at the Raglan event. Photographic evidence put Mr Oliver and Mr Jago at that event. Three witnesses — Mr Oliver, his father and another member of the Club — gave evidence that the Raglan event was the only surf lifesaving weekend away that they recall Mr Oliver attending. Mr Oliver's father stated that he would have been likely to remember if there were other events Mr Oliver went away

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[14] *R v Flyger*, above n 5, at [15].

to because of his age and that he and Mr Oliver's mother would have "certainly known" about any other weekends away he attended. Furthermore, the reliability of Mr Oliver's evidence, particularly on the time and date of the Raglan offending, was put squarely before the jury in counsel's closing addresses. The Crown accepted "he was a little bit wobbly on that point" which defence counsel then highlighted in challenging the evidence. The Judge gave comprehensive directions about the importance of assessing Mr Oliver's credibility and reliability, the evidence given by the witnesses, and the Crown and defence arguments including in relation to this issue as it arose in the question trail. He also made clear that the jury had to be sure that Mr Oliver was aged between 12 and 16 during the relevant date range of the charges, at Raglan.

[21] On the basis of the evidence before them, we are satisfied the jury could reasonably have been satisfied that Mr Jago was guilty of the March 1995 charges. The Judge did not err in declining to dismiss those charges. It was appropriate for them to be considered by the jury, as they were. The jury's verdicts were open to the jury. They were not unreasonable. This ground of appeal fails.

Issue 2: Directions about delay

Appeal of directions

[22] In relation to issues 2 and 3, Mr Brookie submits that deficiencies in the Judge's summing up constituted a miscarriage of justice. Mr McCoubrey submits that the criticism of the Judge's directions is unwarranted; there was no error or irregularity, and certainly no miscarriage of justice.

[23] In *R v Shipton*, this Court stated:[15]

> [33] The underlying principle is that it is the absolute duty of a trial Judge to identify and adequately remind the jury of the defence case in relation to each defendant. It follows that a failure to refer in the summing up to a central line of defence that has been placed before the jury will generally result in the conviction being set aside, and a new trial ordered.
>
> …

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

> [35] There never has been, and is not now, any dispute as to the character of this fundamental requirement of a summing up. The difficulty in the vast majority of cases which advance on appeal under this head has lain rather in what is required in the fact-dependent circumstances of each case.

[24] In *Scott v R*, this Court stated:[16]

> [33] In summing up a Judge is not required to traverse every detail of both parties' cases or to deal with every item of evidence. Rather, "there is a wide discretion as to the level of detail" required of the Judge in summarising the parties' factual contentions. The Judge need not "strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other".

Law of directions about delay

[25] Section 122 of the Evidence Act 2006 states, relevantly:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> …
>
> (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
>
> (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
>
> (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
>
> (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
>
> (4) It is not necessary for a Judge to use a particular form of words in giving the warning.

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16 *Scott v R* [2020] NZCA 448.

…

(6) This section does not affect any other power of the Judge to warn or inform the jury.

[26] In *R v R*, the Supreme Court stated:[17]

> [77] As we have said, s 122 warnings will be, indeed must be, case-specific. … No particular form is required, but the language used must convey the need for the jury to bring to its task something more than the usual level of care. In the very different context of this case, we prefer "real care", although we acknowledge that there are other formulations capable of conveying the point[.]

[27] Section 127 of the Evidence Act states:

> **127 Delayed complaints or failure to complain in sexual cases**
>
> (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
>
> (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

[28] In *Bian v R*, this Court stated of s 127:[18]

> [51] … Section 127 of the Evidence Act 2006 permits the Judge to tell the jury there can be good reasons why the victim in a sexual case may delay making a complaint. The point of such a direction is to neutralise the erroneous perception that a victim of a sexual offence would complain immediately. Section 127 does not, however, mean that the jury cannot take anything adverse from a delayed complaint. It remains a matter for them, taking into account that there may be good reasons for a delay, and the complainant gave reasons for that here.

The directions about delay

[29] Mr Jago's offending against Mr Oliver occurred between 1995 and 1997. A police witness gave evidence that, on 8 February 2000, after the second complainant made his complaint, he contacted Mr Oliver who did not raise any allegations of

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17 *R v R* [2023] NZSC 132, [2023] 1 NZLR 507.

18 *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 (footnote omitted).

offending by Mr Jago. In 2022, Mr Oliver subsequently made a formal complaint to the police about Mr Jago's offending against him.

[30] At trial, under cross-examination, Mr Oliver said he did not remember being contacted by the police in 2000 and was not given an opportunity to make a complaint against Mr Jago then.

[31] In his closing address to the jury, defence counsel stated that Mr Oliver had a "golden opportunity" to complain in 2000. But Mr Oliver made a "strange and troubling" denial of the conversation. While there may be good reasons why people might delay complaining, here Mr Oliver did not make a complaint because there was nothing to complain about.

[32] In summing up the case for the jury, the Judge stated:

> [18] It is important when considering complaints and indeed all cases involving sexual allegations, that there is no way of telling whether a complaint is true or not by how soon afterwards the complaint is made. Sometimes people who are making true complaints will report them immediately, sometimes they will report them years later, sometimes they will report them in an incremental way which means parts come out at various times. It is a mistake to think that if a complaint is not made immediately afterwards, that means the complaint [may be] false. It is important that you recognise there can be personal reasons that make it hard for people to complain.
>
> [19] Complaints of this kind are embarrassing. They involve people having to say things that they would not normally say, and it can be difficult. These were young men, and they are speaking about an occasion in which their sexuality might be brought into question. You may consider that is a factor that makes it harder for them to make their complaints. It is also a mistake to make a decision about what a person does in this type of situation on what you might do yourself. You have to remember these were relatively young men and their experiences may differ from your own. So, it is important that you do not base it on something along the lines of "well I would have x, y, z" because it is not, we know a good guide to apply in cases of this kind.
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> …
>
> [78] I just want to speak to you briefly about some misconceptions about the behaviour of people who are alleging sexual abuse or have suffered sexual abuse. None of what I tell you has direct impact on this case. It is simply that research has shown that sometimes jurors have misconceptions, one of those relates to delayed complaints. That is not to be seen as a signpost that the complaint is not true because we know that there can be many reasons why complaints may not be made soon after events that are said to have happened.

> [79] Further, that continued association may happen for multiple reasons. Sometimes a situation [may be] such that a person simply chooses to get on with life and does not cease to have any contact with the person who has committed abuse against them. It is not necessarily the case that someone will immediately disassociate from someone that they say has abused them and that is subject to people's own individual makeups and, again, it is wrong to apply your own standards and how you may see it because we know that human reactions to this type of behaviour can vary across the board and it is not evidence that could be said to mean that a complaint necessarily was untrue. You will still have to examine the facts to come to the conclusions you make, but it is important that I point out that these misconceptions are sometimes held and to avoid them in your deliberations and consideration.
>
> [80] I do need to talk about the time delay in this case because we are looking at events alleged in 1995 and in 1999 which is 25 or 29 years ago. You do need to be conscious that a delay of that length will affect the reliability of people's recollection. You may have experienced the situation yourself where you are convinced someone was at a family event or was not at the event and then someone produces a photograph that is totally at odds with your recollection. We can convince ourselves of things that are not true and people's recollections that they hold are dangerous because the person [may] honestly believe them, and the risk is that they can be a convincing witness because they honestly but mistakenly present as being true about events. Human recollection 25 to 29 years after is a fact that you need to consider.
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> [81] That of course must be balanced about the events that are spoken about, particularly significant events are often remembered by people. Particular events that have a powerful effect on them will often be able to be recalled even if the surrounding details can be blurry or sometimes lost but it is important when you consider this in your deliberations, that care needs to be taken with evidence that is from that long ago.
>
> [82] In addition, there is another factor in relation to evidence from a long time ago and that is potentially a defendant [may be] disadvantaged. Material that could be remembered and might be presented in a defence is forgotten or lost, and so a defendant who faces allegations from that long ago is in a position where often it is difficult to find material to support the position which they take. Mr Brookie referred to this on a number of matters that he talked to you about, but it is a very important factor to take into account. These are matters that you must take into account when you are considering the strength or otherwise of the evidence.

[33] After the Judge's summing up, Mr Brookie, for Mr Jago, objected that the directions about delay effectively said there is always going to be an excuse for a complaint and did not cover the defence point that there had been a "golden opportunity" to complain before. The Judge accepted he did not cover the "golden opportunity" point. He called the jury back and directed them:

> [2] The second reason as I told you about the reason sometimes people will delay complaints and there is nothing wrong with that that is correct, and you should have been told that.

> [3] In this case the defence point is that there was an opportunity to complain and that was when [the police witness] called Mr Oliver and so there was a specific opportunity in which complaints were raised, and the defence point is that was a time and which this was focused and there was no complaint forthcoming. So, you take that into account as well as the reasons why people do not complain, but it is important that that is there for balance.

Submissions

[34] Mr Brookie submits the Judge's summing up was unbalanced and incomplete in relation to Mr Oliver's delay in complaining. The delay was a major issue because of: Mr Oliver's reliability issues in relation to the March 1995 charges; Mr Oliver's golden opportunity to complain in 2000; and the severe forensic disadvantage to Mr Jago, particularly in relation to the March 1995 charges. The directions only considered reasons why the complaints might have been true. They did not say that "real care" should be taken. There was no reference to Mr Oliver having had a "golden opportunity" to complain earlier was a central defence argument. The Judge did not set out the defence position clearly enough about whether the touching occurred at another event in a different timeframe such that the charges could not apply, and neglected to note specific issues that defence counsel had highlighted. The jury was not told it remained open to them to regard the delay as adverse to Mr Oliver's credibility. The directions tended to close down that possibility.

[35] Mr McCoubrey submits the criticism of the Judge's directions is unwarranted. The Judge was permitted to give a direction under s 122(1) of the Act. No particular formulation of words was required. The defence case was summarised. The direction was a perfectly adequate summary of the defence position on Mr Oliver's reliability. The s 127 direction was unremarkable.

Adequacy of directions about delay

[36] The Judge summed up comprehensively, including in relation to the issue of delay. He covered the reliability issues, as explained in issue 1 above.[19] The Judge was entitled to give a s 122 warning about the need for caution in deciding whether to accept evidence and he did so. He was not required to use the words "real care" with

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[19] See above at [20].

respect to the s 122 warning, as both s 122(4) and the Supreme Court state explicitly.[20] The words the Judge used conveyed the point well in the specific circumstances of the case.

[37] The Judge was also entitled to give a s 127 direction and did so. The purpose of a s 127 direction is to neutralise misconceptions a jury may have about the implications of a complainant delaying making their complaint and the direction did just that. Mr Brookie relies on *Bian* to submit that the jury should have been, but was not, told that it remained open to them to regard the delay as adverse to Mr Oliver's credibility. But *Bian* does not require the jury to be so directed. It notes that it remains a matter for the jury what to take from a delayed complaint.[21] That was the effect of the Judge's direction in saying the jury still had to examine the facts to come to its conclusions, that delay will affect the reliability of recollection, and it is important to take care with evidence from that long ago. There was nothing deficient in the Judge's summing up in this regard.

[38] Finally, defence counsel emphasised the "golden opportunity" point in closing. The Judge did not do so in his summing up. But the Judge remedied that by calling the jury back and reminding them of Mr Oliver's specific opportunity to raise a complaint when the police officer called him. That may have given it even more emphasis than if it had been mentioned explicitly in the summing up.

[39] The Judge did not err in giving these directions and they did not lead to a miscarriage of justice. This ground of appeal fails.

Issue 3: Directions about propensity

Law about propensity directions

[40] Section 43(1) of the Evidence Act allows the prosecution to offer propensity evidence "only if the evidence has a probative value … which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant".

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20 *R v R*, above n 17, at [77].
21 *Bian v R*, above n 18, at [51].

Section 43(2)–(4) outlines considerations a judge must (or may) take into account in assessing the probative value of the propensity evidence and its prejudicial effect.

[41] In *Mahomed v R,* McGrath and William Young JJ stated that, when giving a propensity direction, a judge should:[22]

> (a) *Identify the evidence in question and explain why it has been led and the legitimate respects in which it might be taken into account by the jury.* We see no need for the judge to define "propensity" … In cases in which a demonstrated propensity could legitimately be a stepping stone in the reasoning process of the jury, that should be identified using concrete language addressed not to "propensity" as an abstract concept, but rather specifically to the particular pattern of behaviour or thinking which is in issue. In most cases, the legitimate reasoning available to the jury will be based around coincidence or probability. That should be explained to the jury in simple and direct language addressed to the particular facts and what is said to be the implausible coincidence or how the evidence otherwise bears on the probability of the defendant being guilty. This is likely to require a discussion of the similarities involved in the conduct alleged. Where there are factors which may explain the postulated coincidence (for example, suggested collusion between the witnesses) that too should be addressed. We see no need for the judge to otherwise go through the s 43(3) criteria[.] …. These criteria are addressed to the admissibility decision the judge must make and not the factual assessment which is for the jury.
>
> (b) *Put the competing contentions of the parties.*
>
> (c) *Caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence.* This should usually be along the lines that the fact that the defendant has or may have offended on other occasions does not establish guilt and that the only legitimate reasoning process available to the jury is the one which has been outlined.

The propensity directions

[42] In directing the jury about the propensity evidence here, the Judge stated:

> [86] Propensity, that is a legal word. It means when you are considering this case, what issue might [you] make of the other charges. We have two sets of charges from two different complaints. In fact, there are three sets of events which are alleged.
>
> [87] If you got to the point where you found one of those events to have been proven to the point that you are sure, then you are able to consider

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[22] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [95] (emphasis in original); and see: *Ross v R* [2017] NZCA 587 at [66].

whether that demonstrated what you saw as a particular characteristic way of behaving being held by the defendant. If the defendant was shown by the evidence to have sexual interest in young males and to have acted on that interest in circumstances where they were vulnerable, that would be a factor that you could consider. And the way that it would be considered when you are considering it was whether or not the coincident of other allegations contain similar approaches and similar types of allegations showed a coincidence that was unlikely, unless that coincidence was a response to the characteristic … way of thinking or behaving that was held by Mr Jago.

[88] You must, if you are going to use that form of reasoning, first be sure of one of the occasions and sure also beyond reasonable doubt that this way of behaving or way of thinking was held by him. If you are unsure, you just set that to one side and you consider the charges individually. If you thought he carried this characteristic and you are sure of it, then you would be entitled to consider it on the basis of whether this was either an unlikely coincidence of similar allegations or whether that might add support to what the complainant had told you.

[89] It is very important that you do not take this form [of] reasoning as the main way that you consider it but one part of the evidence, and I would go so far as to say that your consideration of the credibility and reliability of the complainants is more important than applying any form of propensity reasoning and that should be your primary consideration, but the law allows you to consider the evidence in that way provided the safeguards are:

(a) firstly, one of the events must be proven beyond reasonable doubt; and

(b) secondly, you must consider it had elements such as the nature of the event, the nature of the allegations, the circumstances of the complainant, the type of approach that was made that meant that the person was shown to have this characteristic.

[90] If those safeguards were present and you did not allow this to overwhelmingly influence your consideration, then you are properly using the evidence and that is the only way you would be allowed to use it.

[91] You also should consider whether the circumstances have been influenced. That is the question of contamination or collusion. It was not put directly to the complainants that they had got together and made up a story against Mr Jago, and their evidence was they had not spoken about this directly between one another. We do know that there was information around the surf club after the 1999 charges. Many of the surf club members were interviewed by police, that a lot would be known about the complaints.

[92] Mr Brookie asked you to consider whether the influence or contamination of one to the other may have led to a second and untrue series of allegations from Mr Oliver to come out of the woodwork when in fact they were really just the product of knowing that someone else had made allegations and if that was the situation you arrived at, then you absolutely could not use propensity reasoning. So, you need to consider whether that may or may not have been the case.

…

> [110] The defence say that to rely on any form of propensity evidence is risky and that similarities are basic and the allegations themselves are not of why it varies [sic], and striking similarity cannot be seen between the different occasions and that they are separated by a considerable period of time.

Submissions

[43] Mr Brookie submits the defence case at trial was that there were significant differences between the two complaints, there could have been contamination from the second complainant's complaint being common knowledge at the Club from 1999, and only one other person made the complaint that was said to establish the propensity. The Judge's direction did not sufficiently explain the concepts of "tendency" or "pattern of behaviour". It did not detail the defence position on the similarities and differences between the sets of offending. And the directions did not accurately summarise Mr Jago's position on possible contamination of the evidence between the witnesses. The jury should have been directed that, if they considered there was a reasonable possibility of contamination between the witnesses, they must not rely on propensity reasoning. The jury should have been directed not to jump to conclusions regarding a tendency or pattern of behaviour. The directions should have referred to there being two complainants, not three events.

[44] Mr McCoubrey submits the propensity directions were fulsome and tailored, identifying the evidence and explaining the legitimate respects in which it could be taken into account. The Judge was not required to explain the concepts of "tendency" or "pattern of behaviour". There were directions about the jury not using the propensity evidence if they considered there was contamination or collusion. There would have been no ambiguity for the jury from the directions framing the offending as three events.

Adequacy of propensity directions

[45] The Judge's directions about the propensity evidence were comprehensive and tailored to the evidence and case. They met the requirements in *Mahomed* in identifying the evidence, explaining why it had been led and the legitimate respects in

which it might be taken into account.[23] The directions put the competing contentions of the parties, including the defence arguments about the risk of contamination, and cautioned the jury against reasoning which carried the risk of unfair prejudice.[24] It was obvious to the jury there were only two complainants. The Judge's directions were orthodox and entirely adequate.

[46] The Judge did not err in giving these directions and they did not lead to a miscarriage of justice. This ground of appeal fails.

Issue 4: Sentence appeal

The sentence

[47] In sentencing Mr Jago, the Judge set a starting point of two years and 10 months' imprisonment.[25] He identified the breach of trust and the complainants' vulnerability because of their age and intoxication, and psychological harm, as aggravating factors.[26] He adjusted the sentence downwards by three months for Mr Jago's previous good character, which the Judge said was tempered by his offending over the years and breach of trust.[27] He adjusted the sentence downwards by another month to take into account two emotional harm payments of $1,500 each.[28]

Law

[48] Under s 250(2) of the Act, we must allow the appeal against sentence only if satisfied there is an error in the sentence imposed and a different sentence should be imposed. Otherwise, under s 250(3), we must dismiss the appeal. The Court will only intervene and substitute its own view on appeal if the sentence is manifestly excessive, wrong in principle, or there are other exceptional circumstances.[29] The focus is on whether the end sentence is within the available range.[30]

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23 *Mahomed v R*, above n 22, at [95(a)].
24 At [95(b)–(c)].
25 Judgment under appeal, above n 1, at [71].
26 At [60]–[67].
27 At [72]–[75].
28 At [75].
29 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30] and [35]. See also: *Ripia v R* [2011] NZCA 101 at [15]; and *Te Aho v R* [2013] NZCA 47 at [30].
30 *Tutakangahau v R*, above n 29, at [36]. See also: *Tamihana v R* [2015] NZCA 169 at [14].

Submissions

[49] Mr Brookie submits the sentence was manifestly excessive. The starting point was slightly too high. The breach of trust was overstated, because Mr Jago socialised with the complainants outside of the Club. The complainants were not children. The three-month adjustment for previous good character failed to recognise the huge contribution Mr Jago had made to his communities, both in terms of surf lifesaving and internationally. It should have been 15 to 20 per cent. The Judge gave little weight to the psychologist's report regarding Mr Jago's risk of reoffending, without justification. There was no need for specific deterrence here and it is commonplace that general deterrence does not work. The overall sentence should have been 24 to 25.5 months' imprisonment. There is no authority that imprisonment is the norm for sexual offending against children over 12. The 2007 restriction that home detention is only available for a sentence of under two years' imprisonment does not apply because the previous law applies here.[31] Home detention was available and appropriate, and it was plainly wrong not to have been imposed.

[50] Ms Thompson, for the Crown, submits the starting point was well within the available range. There was a breach of trust of two victims on three separate occasions by committing highly intrusive indecency offending (especially in relation to the offending against Mr Oliver) when they were vulnerable because they were intoxicated or asleep. The starting point was appropriate having regard to other cases. The previous good character discount was generous. A custodial sentence was appropriate for this offending.

Appropriateness of the sentence

[51] The starting point of two years and 10 months' imprisonment was open to the Judge. There was a clear breach of trust by a senior member of the Club towards junior members who trusted him. The complainants' age, intoxication and being asleep clearly made them vulnerable. Other similar cases set starting points at up to three years' imprisonment.[32] As Ms Thompson submits, in relation to the cases

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31 See Sentencing Act 2002, s 15A. This was inserted by the Sentencing Amendment Act 2007, s 10.

32 See, for instance: *Pattison v R* [2019] NZCA 103 (starting point of two years and six months' imprisonment, involving a 14-year-old victim, using the first indecent act charge as the lead offence); and *Morgan v R* [2013] NZCA 530 (starting point of three years' imprisonment using

Mr Jago relies on, while the complainants were younger and the offending more intrusive in *Milne v R* and *R v Richards*, where the starting points were set at two years' imprisonment and 21 months' imprisonment respectively, there were two complainants here.[33] The offending was significantly more serious than in *R v Lindsay* where the starting point was 2 years' imprisonment.[34] The starting point adopted by the Judge in this case was stern but within the available range.

[52] The three-month discount for previous good character was generous and took account of Mr Jago's community contributions after the offending. The offending occurred over the course of around four years. It was made possible because of Mr Jago's involvement in surf lifesaving. As this Court stated in *R v Shone*, an unblemished record carries little weight where offending occurred over a considerable period.[35] Furthermore, Mr Jago has previous convictions for speeding, drink driving, driving while suspended, and failing to answer bail, so he does not have a clean criminal record to which to point, particularly given some of that prior offending was alcohol-related as was the offending here.

[53] In *Kennedy v R*, this Court stated that imprisonment is likely for sexual offending against children, which was later affirmed in *Fairbrother v R* and *Hopkins v R*.[36] In *Tai v R*, which concerned the indecent assault of a 14-year-old girl, this Court described imprisonment as the "ordinary sentencing response in cases of indecent assault of this kind".[37] The Judge had explicit regard to the psychologist's assessment of Mr Jago's risk of reoffending, but was not bound to accept it. In particular, he was entitled to take into account Mr Jago's continued protestations of innocence.

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leading offences of seven charges of doing an indecent act on a young person, who was 14 years old).

33 *Milne v R* [2023] NZCA 483; and *R v Richards* HC Auckland CRI-2010-004-6987, 15 December 2011. The Judge in *Richards* adopted a starting point of 18 months' to two years' imprisonment and used the midpoint in calculating the end sentence: at [19] and [27].

34 *R v Lindsay* [2021] NZHC 2160.

35 *R v Shone* [2009] NZCA 183 at [25], citing *R v Zhang* (2004) 20 CRNZ 915 (CA) at [26].

36 *Kennedy v R* [2011] NZCA 569 at [8]; *Fairbrother v R* [2013] NZCA 340 at [32]; and *Hopkins v R* [2022] NZCA 317 at [9].

37 *Tai v R* [2011] NZCA 270 at [22].

[54] This was serious and repeated sexual offending against a child on one occasion and young persons on two others, that has had significant and long-lasting effects on the complainants. It was open to the Judge to consider that imprisonment was the least restrictive sentence appropriate in these circumstances. It is orthodox to consider both specific and general deterrence as, indeed, "deter[ring] the offender or other persons from committing the same or a similar offence" is included as a purpose of sentencing in s 7(1)(f) of the Sentencing Act 2002.

Result

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

[56] The appeal against conviction is dismissed.

[57] The appeal against sentence is dismissed.

Solicitors:
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