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

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA589/2022
[2023] NZCA 499

BETWEEN	B (CA589/2022) Appellant
AND	THE KING Respondent

Hearing:	21 June 2023
Court:	Brown, Peters and Mander JJ
Counsel:	J B Wickliffe for Appellant Z A Fuhr for Respondent
Judgment:	16 October 2023 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

C Order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, B, was convicted of five charges of sexual offending, following a jury trial before Judge D J Orchard in the District Court at Whangārei in September 2022.

[2] B now appeals against conviction, and against his sentence of 10 years and three months' imprisonment, which he contends is manifestly excessive.

Background

[3] B faced six charges at trial, all alleged to have been committed against H over a three-year period. H stayed with B on occasions during this period.

[4] The first two charges against B were of sexual violation by rape. B was found guilty of the first of these charges, but acquitted of the second, representative, charge.

[5] B was found guilty of the remaining charges, being one of sexual violation by unlawful sexual connection, the connection being occasioned by digital penetration, and three of sexual conduct with a child under 12, two of the latter charges being representative. The sexual conduct alleged was kissing H, touching her buttocks, and rubbing his genitalia against hers.

Appeal against conviction

[6] The Court must allow an appeal against conviction if satisfied a miscarriage of justice has occurred, that is if any error, irregularity, or occurrence in or in relation to or affecting the trial has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.[1] A "real risk" arises if "there is a reasonable possibility another verdict would have been reached" if nothing had gone wrong.[2]

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1 Criminal Procedure Act 2011, s 232(2) and (4).
2 *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [48].

Grounds of appeal

[7] Counsel for B, Ms Wickliffe, submits that the Judge made two errors which, individually or together, have given rise to a miscarriage of justice in the sense they created the real risk referred to above. Ms Wickliffe submits first that the Judge failed to put the defence case properly in summing up. Secondly, Ms Wickliffe submits that the Judge made impermissible use of counter-intuitive evidence presented at trial.

Failure to put the defence case properly in summing up

[8] Although B denied all of the offending, he did acknowledge that there had been an occasion when he had masturbated and ejaculated in front of H when H was about eight years old. Although these acts were not the subject of any charge, the incident is relevant to this ground of appeal.

[9] B's account of this incident was that he had woken up one morning to find that he was masturbating himself. H woke up at about the same time and wanted a cuddle. B lifted H up so that she was sitting on his stomach, facing him, and with her legs either side of his torso. B's account was that he then lifted or rolled H off him but continued to masturbate until he ejaculated. B denied that anything more than this had occurred on that occasion, and also denied that there had been any other occasion in which anything of a sexual nature had occurred.

[10] The Crown disputed this account. It alleged that B had committed the offending covered by charges three and six in the course of this particular incident, and that he had offended against H on other occasions. Charge three was the sexual violation by unlawful sexual connection to which we have referred, and charge six was the non-representative charge of sexual conduct with a child under 12, the particulars of which were that B had rubbed his genitalia against H.

Submissions

[11] Ms Wickliffe's submission on this ground of appeal is that, in parts of her summing up, the Judge suggested to the jury that B had acknowledged or admitted more than he had, and in this way the Judge had failed to properly put the defence case.

[12] Ms Wickliffe referred us to the following passages in the Judge's summing up, and particularly to the words we have italicised:

> [7] In addition to that, you have heard that the defendant acknowledges that there was *at least one episode* where he behaved in a sexual manner at least in the presence of [H] to put it at its lowest, and again, that might have excited feelings in you, but what you have got to realise is that you need to put the feelings aside and focus on the evidence and the issues in this trial. And in a nutshell, what the issues here are … did [B] do the things that [H] has alleged that he did or was his misconduct, and I think I can fairly call it that, restricted to one episode only, and that is [it] in a nutshell.
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> ...
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> [22] So, let's perhaps get down to the nitty-gritty, if you like, the fundamental issues that you are going to be dealing with in this case. Now, I would start by saying that this is not a case where the defence is that [H] has made a totally false allegation against [B] because, of course, he has admitted *doing some of the acts* she says he did, albeit he gives *them* a different context …
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> (Emphasis added.)

[13] Ms Wickliffe submits that when the Judge referred to "at least one episode" in [7] and said, in [22], that B admitted "doing some of the acts", the Judge went beyond that which B had in fact acknowledged. Ms Wickliffe also submits that the Judge's remarks would have created the impression that B admitted the conduct which was the subject of charges three and six, which he did not.

[14] Ms Wickliffe submits this was an error on the Judge's part, and that it created a real risk the jury did not fully appreciate the very confined nature of B's acknowledgment.

[15] Crown counsel, Ms Fuhr, submits that, viewed as a whole, it would have been clear to the jury that B admitted a single episode, comprising only what is described in [8] and [9] above, and that he denied all other offending.

[16] Ms Fuhr acknowledges that, in isolation, the Judge's reference to "at least one episode" in [7] of the summing up may have been imprecise. However, Ms Fuhr submits that it would have been clear to the jury from the closing words of [7] (B's misconduct was "restricted to one episode only"), and also from [23] of the summing up, that B acknowledged only the events/incident described in [8] and [9] above.

[17] Paragraph [23] of the summing up is as follows:

> [23] *So, the issues are, first of all, was his misconduct limited to that one occasion as he says that it was?* Second, what did he actually do on that occasion? Third, if you reject that there was only one episode, what other acts are you sure that he performed on [H], and specifically, of course, are you sure, as is alleged against him in the charges, first, that on one specific occasion, some part of his penis actually penetrated part of [H's] vagina? That is count 1. You will remember [H] said that there was one occasion when his boxershorts were off and his penis actually penetrated her vagina.
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> (Emphasis added.)

[18] Quite aside from this, Ms Fuhr also referred us to [38] to [43] of the summing up. Amongst other things, the Judge made it clear to the jury in these passages that B denied all of the offending alleged against him:

> [38] … you could perhaps begin by starting with what is actually conceded in this case because, as I said at the beginning, this is not the case where the defence is that there was no basis for suggesting there was any sexual misconduct. Some sexual contact is accepted. It has been conceded that on one occasion, that he says on one occasion only there was sexual conduct or contact consistent with some of the contact that [H] talked about in her interview. Specifically, [B] concedes that he was masturbating his penis which was erect and he says that that happened, he awoke to find that happening and that [H] was in bed with him at that time.
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> [39] Second, he acknowledges that he … put [H] on his stomach with her legs on either side of him shortly after that, after she had woken and they had said good morning.
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> [40] Third, in his interview at least, he conceded that his penis at that stage was erect, and I think in his evidence he conceded at least partially erect, and in his interview, I think at least inferentially, it would have been pointing in the direction of her bottom given the position that he said that she was in.
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> [41] Fourthly, in his evidence, he conceded that his penis may have come into contact with the complainant's inner thigh, although he maintains, of course, that there was never any contact with her genital area generally.
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> [42] Fifthly, his evidence was that after [H] rolled off him or he rolled her off him, whichever it was, he did, in fact, masturbate to ejaculation in front of her, and you will remember that [H's] allegation is that there was an occasion when he ejaculated in front of her …
>
> [43] What is denied, of course, is that his penis ever, and I have already said that, rubbed or touched her general genital area. What is denied is that he ever rubbed or smacked her bottom in that context or in the context of rubbing her against him or indeed, I suppose, in any other context. He has emphatically denied that any part of his penis ever penetrated her genitalia and he has also denied that he put his finger in her vagina on that or any other occasion.

[19] Lastly, Ms Fuhr referred us to the Judge's "tripartite" direction, in which she made it clear to the jury that, if they accepted B's evidence as to the confined nature of any sexually related conduct, they would need to find him not guilty.

Discussion

[20] We agree with Ms Fuhr that in summing up the Judge made it clear to the jury what B did and did not acknowledge.

[21] The critical issue throughout was whether the acts addressed by the charges had occurred in fact. We do not consider the Judge could have made B's denial clearer.

[22] We refer in particular to the Judge's reference in [41] and [43] of her summing up to B's (emphatic) denial of penetration and of any sexual connection or any contact with H's genital area generally. The other matters to which the Judge referred in her [43] — rubbing and smacking H's bottom — were particulars of two of the three charges of sexual conduct with a child under 12. In [67] of the summing up, when discussing the question trail, the Judge said that B denied charge four. This was the third charge of sexual conduct with a child under 12, the particulars of which were that B had kissed H. Lastly, when summarising the defence case, the Judge repeated Ms Wickliffe's submission to the jury that, although B had admitted his conduct on that single occasion was wrong, he had not admitted the offending with which he was charged.

[23] Given these matters, we do not consider there is any substance in this ground of appeal.

Use of counter-intuitive evidence

[24] As we have said, B's offending was alleged to have occurred over a three-year period. H continued to associate with B throughout and subsequently. In addition, H did not report the offending until two years after it had ended, and even then in the first instance disclosed it to one of her friends, rather than a parent or caregiver.

[25] At trial, the Crown called "counter-intuitive" evidence from Dr Yvette Ahmad to the effect that, amongst other things, a continued association with an offender, and a delay in reporting sexual offending, with the first disclosure being to someone other than a parent or caregiver, is not unusual. Dr Ahmad's evidence was that such circumstances do not make an allegation of sexual offending more or less likely to be true.

Submissions

[26] Ms Wickliffe submits that, in [18] of her summing up, the Judge drew a direct link between Dr Ahmad's evidence and the circumstances of this case, such a link being impermissible.[3]

[27] Paragraph [18] of the summing up is as follows:

> [18] Now, the issues that [Dr Ahmad] addressed were as follows. You will remember that [H] did not say anything about the sexual abuse she said she experienced at the hands of [B] until after the talk that [the] Constable … gave to her class in, I think, 2018, but I stand to be corrected on the year, and this was even though the abuse she said had continued for three years when she was regularly visiting [B] … and when she continued to visit him after the abuse began. Now, Dr Ahmad's evidence was to the effect that research has shown that it is not uncommon for victims of sexual abuse to delay reporting abuse for some time or, in fact, sometimes not to report it at all, even if they have opportunities to tell people about the abuse, even members of their family, even members of their family as close as their parent … It is also, she said, not uncommon for victims of abuse to continue to have contact with the abuser, and that again particularly is the case where it is a family member, and finally, she said it was not uncommon for a peer or friend to be the first person to whom a complainant confided rather than a parent or family member.

[28] Ms Wickliffe submits that this passage in the summing up would have left the jury with the impression that H's delayed reporting was justified, and that her continued contact with B and her first report being to a non-family member, were understandable. Ms Wickliffe also submits the Judge's remarks had the effect of bolstering H's credibility.

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3 *DH (SC9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30(b)].

Discussion

[29] Ms Fuhr rejects this submission, as do we in light of all the directions the Judge gave to the jury regarding Dr Ahmad's evidence, which we set out below. Before we do so, we note that in *DH (SC9/2014) v R*, the Supreme Court said a trial judge should give the following instructions to a jury in a case in which counter-intuitive evidence is led at trial:[4]

> [30] The Court of Appeal has held in a number of cases that counter-intuitive evidence may be admissible under the Evidence Act. We summarise the relevant factors that emerge from two of those cases, *M (CA23/2009) v R* and *OY v Complaints Hearing Committee*. Those points are:
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> …
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> (e) Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

[30] The Judge directed the jury accordingly, as appears below. In [19] and [20] of the summing up the Judge said Dr Ahmad's evidence said nothing about H's credibility and cautioned the jury against the improper use of the evidence, for instance by reasoning it supported H's credibility or that the offending had occurred in fact. This latter point negates the submission Ms Wickliffe made as set out in [28] above. The Judge's directions were these:

> [17] … The relevance of Dr Ahmad's evidence basically is to address any possible misapprehensions you may have about matters involving sexual abuse of children because there are some myths in this area. Now, Dr Ahmad, I think, made a point of saying some people might have the beliefs that she is addressing or the misapprehensions that she is addressing and others might not. So, nobody is suggesting you necessarily have them; it is just her evidence is just to make sure that you do have an understanding of some matters.
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> [18] Now, the issues that [Dr Ahmad] addressed were as follows. You will remember that [H] did not say anything about the sexual abuse she said she experienced at the hands of [B] until after the talk that [the] Constable … gave to her class in, I think, 2018, but I stand to be corrected on the year, and this was even though the abuse she said had continued for three years when she

[4] *DH (SC9/2014) v R*, above n 3 (footnotes omitted).

> was regularly visiting [B] … and when she continued to visit him after the abuse began. Now, Dr Ahmad's evidence was to the effect that research has shown that it is not uncommon for victims of sexual abuse to delay reporting abuse for some time or, in fact, sometimes not to report it at all, even if they have opportunities to tell people about the abuse, even members of their family, even members of their family as close as their parent … It is also, she said, not uncommon for victims of abuse to continue to have contact with the abuser … and finally, she said it was not uncommon for a peer or friend to be the first person to whom a complainant confided rather than a parent or family member.
>
> [19] Now, as I have already said, the purpose of this evidence is to counter any thoughts you might have that delay in complaining, complaining not to a parent but to a peer or continuing to associate with the alleged abuser are matters which make the truthfulness of the person alleging the abuse more or less likely, make it more or less likely the abuse happened, and what she is basically saying is that it is neutral, it does not make it more likely that the abuse happened or less likely that the abuse happened when you look at the research in this area.
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> [20] Now, it is important for you to remember at all times that the purpose of Dr Ahmad's evidence is, as I guess I have laboured, educative. She is not saying anything at all about this case or expressing any view at all on whether or not the abuse alleged happened in this case. She is simply here to explain to you what the research shows to help you avoid perhaps falling into any pitfalls along the lines of reasoning that if X happened or didn't happen then it is less likely or more likely that the abuse happened, so that is what her evidence is all about.

[31] It follows that we do not consider the Judge erred in the respects advanced and we shall dismiss the appeal against conviction.

Appeal against sentence

[32] The Judge's starting point for all of the offending was 13 years' imprisonment. From this, the Judge made a five per cent reduction for B's previous good character and 15 per cent for matters pertaining to his personal and cultural background.[5]

[33] The issue on the appeal against sentence is whether that 15 per cent was sufficient. Ms Wickliffe contends that the reduction should not have been less than 25 per cent and she seeks that on appeal. If Ms Wickliffe succeeds on this point, B's sentence would reduce to nine years and one month's imprisonment.

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[5] As noted above, this brought the end sentence to 10 years and three months' imprisonment.

[34] The documents before the Judge at sentencing that are relevant to this issue consist of an affidavit sworn by B addressing matters covered by s 27 of the Sentencing Act 2002, and a letter from one of B's sisters to the Court. This letter expressed support for B and confirmed much of what he had said in his affidavit regarding his upbringing. The effect of the affidavit and letter, and this is not disputed, is that B's upbringing was marked by physical violence, parental abandonment, exposure to sexual activity at a very young age, and sexual abuse.

[35] In addition, B submitted to the Judge a report by Mr Jim van Rensburg, a registered clinical psychologist. This repeated much of B's account of his upbringing. However, Mr van Rensburg also discussed B's performance on two risk assessment instruments, the Static-99R and the STABLE 2007 test, these being intended to predict a sexual offender's risk of re-offending. Mr van Rensburg's opinion was that:

> 52. [B] has been predestined for aberrant sexual attitudes and practices, given his exposure [to] and participation in sexual activities as a pre-pubescent child and subsequent reinforcement through regular, ongoing extraordinary sexual activities throughout his life. The extent to which aberrant sex was normalised for him from a very young age, would have been so powerful that it struck me as counter-intuitive that he would only be charged with his first sexual offence at the age of 44. The fact that he was able to mainly focus his sexual desires on consenting adult women, albeit in a promiscuous manner, has given him the opportunity to express his strong sexual drive within the confines of the law, until the offending against [H].

[36] At sentencing, Ms Wickliffe argued for a reduction of 15 per cent on the grounds of B's affidavit and the letter from his sister, and for another 15 per cent for Mr van Rensburg's report.

[37] The Judge took the view the documents covered largely the same ground and granted 15 per cent for both combined.

Submissions

[38] Ms Wickliffe does not object to the Judge's approach in awarding an overall discount, but submits at least 25 per cent was warranted given the persuasive evidence of trauma and deprivation before the Court. In support of this submission, Ms Wickliffe referred us to *Keil v R* and to *Solicitor-General v Heta* in which there

was a discussion of the circumstances in which a discount of as much as 30 per cent might be allowed.[6]

[39] Ms Fuhr submits that the Judge's 15 per cent discount was within range. She does not dispute that matters in B's background have contributed to his offending and that a discount was warranted. The issue is the extent of the discount, given the seriousness of the offending. Ms Fuhr referred us to the Supreme Court's decision in *Berkland v R*, in which the Court said the causative contribution of background may be displaced, in whole or in part, if the offending is serious, as in this case.[7] Ms Fuhr also referred us to *King v R* and *Postlethwaite v R*.[8]

Discussion

[40] In *Keil v R*, Mr Paul appealed against his conviction and sentence on a charge of wounding with intent to cause grievous bodily harm. At sentencing, the District Court Judge had allowed a combined discount of 30 per cent for mitigating personal circumstances, being 20 per cent for Mr Paul's personal and cultural background and the balance for an unrelated matter.

[41] On appeal, this Court declined to give a greater discount, taking the view that, in the circumstances of the case, including the seriousness of the offending, the discount that had been allowed was "generous".[9]

[42] *Postlethwaite v R* was a case of sexual offending against an 18-year-old woman, all committed in one episode by Mr Postlethwaite and his co-offenders, Mr Biddle and Mr Thacker. Each was found guilty of multiple charges of sexual violation by rape, and each was sentenced to a substantial term of imprisonment, with the only discounts granted being for rehabilitative prospects.

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6 *Keil v R* [2017] NZCA 563; and *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.
7 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [111].
8 *King v R* [2020] NZCA 446; and *Postlethwaite v R* [2023] NZCA 49.
9 *Keil v R*, above n 6, at [58]–[59].

[43] On appeal, this Court allowed Mr Postlethwaite and Mr Thacker an additional six per cent, or nine-month, discount for cultural matters — plainly modest in comparison to the 15 per cent the Judge allowed B.[10]

[44] *King v R* preceded *Berkland*. Mr King, aged 32, had offended against a 16-year-old girl on a single occasion, leading to convictions for two charges of indecent assault, two of unlawful sexual connection, and one of rape. At sentencing, the District Court had allowed a discount of a little less than 13 per cent for matters pertaining to Mr King's background and his remorse. This Court did not increase that 13 per cent, even though it accepted a reduction of 15 per cent for Mr King's background might have been justified.[11]

[45] Having regard to these authorities, 15 per cent was within the available range and we are not persuaded to increase it, particularly given the serious and repeated nature of B's offending. Moreover, as the Judge observed, B, who is educated and intelligent, committed the offending when in his late 30s. His age and intelligence enable him to control his conduct, at least to some extent, and that attenuates the causative contribution required to warrant any reduction in sentence.

Name suppression

[46] This brings us to the issue of whether we should make an order suppressing publication of B's name. At our request, counsel made submissions on this matter which does not appear to have been addressed at a prior stage of the proceeding.

[47] As is well known, such an order may be made if, first, one of the "threshold" grounds in s 200(2) of the Criminal Procedure Act 2011 (CPA) is established and, secondly, if it is desirable to make such an order, having regard to all competing interests, including the public interest in open justice.[12]

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10 *Postlethwaite v R*, above n 8, at [20]; and *Biddle v R* [2021] NZCA 57 at [96].
11 *King v R*, above n 8, at [37].
12 *Robertson v Police* [2015] NZCA 7 at [39]–[41].

[48] Ms Wickliffe submits that we should make an order, on the grounds publication would cause extreme hardship to B, that being one of the threshold grounds to which we have referred.[13]

[49] We are not persuaded as to this submission but it is clear that the threshold ground in s 200(2)(f) is satisfied. Publication of B's name would be likely to lead to the identification of H, whose name is suppressed by operation of law, and in particular by ss 203 and 204 of the CPA.

[50] Despite that, Ms Fuhr submits we should not make an order for permanent suppression of B's name. Ms Fuhr has supplied us with information to the effect that H and her mother oppose the making of such an order, as they do not believe B should be "hidden" from his offending. We note that s 200(6) of the CPA requires us to take into account any views of a victim of the offence conveyed in accordance with s 16B of the Victims' Rights Act 2002 and, given H's present age, that includes her mother.[14]

[51] Also, as Ms Fuhr submits, B's offending is serious. B has been employed in the education setting, has been in contact with young people, and the risk of future offending cannot be excluded.

[52] Despite these matters, for the following reasons we propose to make an order for permanent suppression of B's name pending further order of the Court.

[53] First, we are not persuaded that there could be publication of B's name without jeopardising the statutory suppression of H's name. Although Ms Fuhr submits that this risk might be ameliorated by omitting or redacting from the judgment any reference to the nature of H and B's relationship (as we have done), a considerable risk remains as B and H have the same surname.

[54] Secondly, B's offending against H appears to have been opportunistic. The offending did not occur in the course of B's employment and he does not have a history of criminal offending, let alone of sexual offending. We note also that there is

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13 Criminal Procedure Act, s 200(2)(a).
14 Victims' Rights Act 2002, s 4 definition of "victim", para (a)(iii).

no prospect of B being released from custody for several years, and no prospect of his being employed in the education field again, as his name has been entered on, and will remain on, the Child Sex Offender Register established under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

[55] Taking these matters into account, we make an order suppressing publication of B's name, address and occupation pending further order of the Court. We have said "pending further order of the Court" given the possibility that H, when of an age to do so, may consent to publication of her own name. If she were to do so, that would be likely to affect the view the Court took of continued suppression of B's name.

Result

[56] The appeal against conviction is dismissed.

[57] The appeal against sentence is dismissed.

[58] In order to protect the identity of H, we make an order prohibiting publication of the name, address, occupation or identifying particulars of B pursuant to s 200 of the Criminal Procedure Act 2011.

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