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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA453/2022
[2023] NZCA 353

BETWEEN	JAMES LEWIS HORN Appellant
AND	THE KING Respondent

Hearing:	10 May 2023
Court:	Mallon, Moore and Fitzgerald JJ
Counsel:	H B Leabourn for Appellant C P Paterson for Respondent
Judgment:	8 August 2023 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] In the Auckland District Court, a jury found the appellant James Horn, guilty of one charge of sexual violation by rape.

[2] On 5 August 2022, Judge Dawson sentenced him to five years and 11 months' imprisonment.[1]

[3] He appeals both his conviction and sentence.

Background

[4] Mr Horn's four-day trial commenced on 10 May 2022. At that time he faced two charges: disabling[2] and sexual violation by rape.[3] In respect of the first charge, the Crown's case was that Mr Horn administered the complainant a substance contained in a glass of orange juice, likely a sedative, which caused her to lose consciousness. This deprived her of the ability to give consent to the sexual intercourse that followed and formed the basis of the second charge. The factual background follows.

[5] Mr Horn and the complainant, A, were known to each other for some years through A's former partner, B. B and Mr Horn had been close friends since school. Mr Horn operated a fishing charter business out of Sandspit, near Warkworth, using a launch called Rosemary Fishing Charters. A had previously helped Mr Horn in the business doing various administrative and marketing tasks. She trusted Mr Horn and enjoyed spending time on his boat.

[6] On 13 April 2019, B assaulted A in their Whangārei home. The police were called. A was relocated to a local Women's Refuge facility.

[7] That evening, Mr Horn rang A, apparently in an attempt to contact B. Learning of her situation, he offered to pick her up from Whangārei and take her back down to Sandspit, ostensibly to be in the company of friends she knew and trusted. A accepted the offer and so Mr Horn drove to Whangārei and brought her back to Sandspit. They then got in a dinghy and went out to Mr Horn's charter boat which was moored out in the bay.

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1 *R v Horn* [2022] NZDC 14970.
2 Crimes Act 1961, s 197; maximum penalty five years' imprisonment.
3 Sections 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.

[8] A's evidence was that she was very tired. She said that Mr Horn handed her a glass of orange juice which she drank. She began to feel dizzy and a little sick. She apologised to Mr Horn for being unsociable. She went down inside the cabin and onto a bed. She was fully clothed and went straight to sleep. When she woke up, she discovered she was naked. It was still dark. Lying directly behind her, also naked, was Mr Horn. He was cuddling her. She could feel his genitals sticking to the back of her body. Her vagina was sticky and sore. She could smell semen.

[9] She gathered up as many clothes as she could and went up onto the deck where she spent the rest of the night waiting for Mr Horn to wake up and return her to shore.

[10] It was not until well into the next day that Mr Horn woke up. A asked him to take her to the local medical centre at Wellsford, apparently to register as a patient. Mr Horn drove her there. En route, he apologised several times, without saying why.

[11] As it transpired, A did not register at the medical centre. Instead, she went with Mr Horn to a friend's home where Mr Horn left her. At that address there was some kind of altercation. A called the Whangārei Women's Refuge and, through them, the police were notified. A returned to Whangārei. Her clothing was taken for evidential purposes and she underwent a medical examination. Genital swabs revealed the presence of semen. DNA linked to Mr Horn was recovered.

[12] Mr Horn was not spoken to by police until November the following year. His account was that it was A who asked him to pick her up from Whangārei. He said he took her back to Sandspit and they went out to his boat where he made a bed for A on the deck. However, A complained that she was too cold and asked if she could sleep in the cabin bed with him. He agreed. He said it was A who initiated the sexual advances. He said he was woken up by her performing oral sex on him which he reciprocated. He denied any penile penetration but said that at one point, he digitally penetrated her vagina.

Disabling charge dismissed

[13] At the end of the Crown case, counsel for Mr Horn, who was not counsel on the appeal, made an oral application in the absence of the jury seeking a discharge of

the disabling charge under s 147 of the Criminal Procedure Act 2011 (CPA). This was on the basis that there was no evidence or no sufficient evidence that Mr Horn had given the complainant a glass of orange juice that contained a drug or other disabling substance.

[14] Counsel for Mr Horn submitted that A's evidence, taken at its highest, was that she thought she must have been drugged because she did not feel well and that the glass of orange juice must have been spiked because that was the only thing A could think of that might explain her dizziness, drowsiness, nausea and waking up to find herself "stuck to a filthy man … when [she] couldn't understand how the hell … that happened".

[15] The Crown submitted it was a reasonable inference the orange juice contained a sedative because A had a clear of recollection of arriving on the boat, but after she consumed the orange juice she felt dizzy and unwell, having never felt that way previously. Because of how she felt, she made her way down into the cabin and promptly fell asleep. When she woke up she found herself naked with Mr Horn and had no memory of what had happened in the interim.

[16] The Judge delivered a brief oral judgment. He determined that the charge should be dismissed for three reasons. First, there was no toxicological evidence that A had any disabling drug in her system, or evidence from a third party as to her condition. Secondly, there was no evidence that Mr Horn had any drugs in his possession other than for legitimate medicinal purposes. Thirdly, there were alternative explanations available, consistent with innocence, to explain why A felt disabled, including the trauma of recent events, the time of night, and possible alcohol and methamphetamine consumption.

[17] The jury returned and the Judge addressed them in the following terms:

> Members of the jury, one of the things I've been talking about with the lawyers is the continuation of charge one. You'd know there are charges, one of disabling and one of rape or a second of rape that you need to make decisions upon.
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> Having heard argument from the lawyers I am satisfied there is insufficient evidence for the charge of disabling to go to you to make a decision upon so I

> am dismissing that charge now. The only charge you need to focus upon is charge two, the charge of sexual violation by rape.

Conviction appeal

Grounds of appeal

[18] On the conviction appeal, Mr Leabourn, for Mr Horn, submitted, that once the disabling charge had been dismissed, the correct course would have been for the Judge to declare a mistrial and discharge the jury because the illegitimate prejudice associated with the evidence on charge one was so significant that Mr Horn could not receive a fair trial. He submitted that a retrial on the sexual violation charge was the only safe option. Alternatively, the Judge should have stopped the Crown from cross-examining Mr Horn on whether he had drugged A and intervened to prevent Crown counsel from advancing its case to the jury on the question of lack of consent on the basis that A had been drugged or stupefied.

[19] In any event, Mr Leabourn submitted that the Judge failed to give sufficient direction and guidance to the jury as to how they should deal with the allegations of stupefaction, or the use of drugs by Mr Horn, both at the time the charge was dismissed and in his summing up. He should have directed them that any evidence suggesting A may have been drugged by Mr Horn was inadmissible on the sexual violation charge and the jury must ignore it.

Appeal jurisdiction

[20] To succeed in his conviction appeal, Mr Horn must show that a miscarriage of justice has occurred.[4] "Miscarriage of justice" is defined in s 232(4) of the CPA. It requires a two-step enquiry.[5] First, the appellant must establish an error, irregularity or occurrence relating to or affecting the trial. Secondly, he must establish there is a real risk this affected the outcome of the trial or rendered it unfair or a nullity.

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4 Criminal Procedure Act 2011, s 232(2)(c).
5 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [23]–[24].

Discussion

[21] It is plain from a reading of the prosecutor's cross-examination of Mr Horn and his closing submissions to the jury that the principal thrust of the Crown's case was that Mr Horn administered a stupefying substance or sedative to A contained in a glass of orange juice. This, the Crown submitted, had the effect of rendering A effectively unconscious and thus unable to consent to sexual intercourse.

[22] This approach is consistent with the way the prosecutor opened the Crown's case to the jury. At two distinct points in his opening, the prosecutor referred to A being drugged. First, when introducing A's evidence and, secondly, when addressing the elements of both charges.

[23] As for the first, he said:

> … when they got [to] Mr Horn's boat he seized an opportunity. He gave her some orange juice. Shortly after [A] felt tired and went to sleep in the cabin of the boat.
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> …
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> … When [A] got to the boat she had a glass of orange juice that Mr Horn had poured her. She felt quite tired, she apologised to Mr Horn for being unsociable but she was exhausted from the past 24-hours so she climbed down into the cabin and went to sleep.

[24] Secondly, when discussing the elements of the two charges, the prosecutor said:

> … the first charge is disabling. In other words the allegation is that Mr Horn drugged [A] so she was incapable of resisting his sexual advances while they were on the boat. The boxes that you would need to tick for that charge are that Mr Horn gave [A] a drug, that as a result of that drug she became unconscious. That he intended her to become unconscious when he gave her that drug. That she did not consent to ingesting that drug and that Mr Horn believed that [A] was not consenting to ingesting the drug and had no lawful justification or excuse for giving her the drug.
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> ...
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> So the second charge on that is sexual violation by rape. So the tick boxes for that charge are that the Crown is required to first prove that the act happened, that is that Mr Horn penetrated [A]'s genitalia with his penis. Secondly, that it occurred without [A]'s consent and thirdly, in the absence of a [reasonable] belief on the part of Mr Horn. Now that third box, that is an absence of [reasonable] belief on the part of Mr Horn, can be proved in one of two ways.

> The first is to prove that he did not genuinely believe she was consenting, or that no [reasonable] person in his shoes would have believed that she was consenting.

[25] Following the Judge's ruling on the s 147 application, Mr Horn gave evidence. He said that the reason he went out to the boat was to collect some painkillers and it was A who asked to join him. On the boat he said he had a "couple of Norflex" pills and a couple of bourbons. He said that Norflex has a calming effect. After that he went to sleep. He said that because he'd taken the pills he was quite dozy. In cross-examination, he accepted that Norflex was a strong painkiller which can assist sleep. It was put to him that the side effects included dizziness, nausea and sleepiness. Mr Horn accepted this was sometimes the case. It was put to him that Norflex and other prescription drugs he was taking at the time cause tiredness and can sometimes make a person feel relaxed. He denied giving A any orange juice. He said that he did not drink orange juice because it gave him indigestion.

[26] In his closing address the prosecutor first referred to the evidential effect of the disabling charge being dismissed. He said:

> So as his Honour advised you yesterday Mr Horn now faces one charge and one charge only. Sometimes that happens in trials. Charges get changed or dismissed before you retire to deliberate. Now the Crown case is still that Mr Horn drugged her, but you do not need to consider the elements or tick boxes for that stupefying charge, rather you need to decide the rape charge alone.

[27] Then, when discussing consent, the prosecutor said:

> … The second box is to do with consent and so the Crown must prove that it happened without [A]'s consent and the allegation here is that [A] was asleep, ah, was unconscious, unconscious at the time she was, because she'd been drugged by Mr Horn. And the law provides that a person cannot consent to sexual activity if they're so intoxicated or affected by another drug that they cannot consent or refuse to provide consent.
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> So given [A] spoke about how she can remember climbing down into the cabin after drinking that orange juice and her next memory is waking up, you can be sure that she must have been affected by this drug during that and that's in brief and I'll talk about that in further detail, I'll expand on that.

[28] As foreshadowed, the prosecutor returned to the topic when discussing the facts:

> … Once they get [onto the boat] they get on to the deck and [A]'s sitting on the deck looking at the stars and other boats smoking cigarettes. She asks [then] for a drink. Mr Horn gives her an orange juice. She doesn't see him pour it. It might be that Mr Horn went into the cabin and got it from the fridge or that chilly bin by the bed and you've got photos of that in the cabin.
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> We know he has access to strong pain killers and the side effects of those pain killers [he] accepted are dizziness and sometimes feeling nauseous. After she drinks this orange juice, she starts to feel dizzy and sick. A feeling that she's never had before she told the interviewer when drinking orange juice. Why has she had that feeling? Because Mr Horn's drugged her. She excuses herself as she's feeling unsociable. Because she's dizzy she needs to hold the railing to get down into the cabin where she knows the bed is.
>
> Now, I'm sure my learned friend will point you to the fact that the only drugs located in [A]'s system were cannabis and methamphetamine. To be clear the Crown don't allege that Mr Horn spiked her drink with methamphetamine or cannabis. What the Crown allege is that he used another drug, that he used some of those pain killers that he had access to, strong pain killers that might make you feel sleepy.
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> Now importantly the toxicologist, Helen [Poulsen], who you remember appeared via CCTV or AVL on the TV, she said that the toxicology test would have involved testing for sedatives, pain killers, several hundred drugs I think she said and she said that most medicinal drugs she wouldn't expect them to be detected 24 hours after they were ingested and you'll recall that the urine and blood samples were taken 40 hours after [A] was raped. 40 hours.
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> So of course, those blood or urine samples weren't going to show up any medicinal drugs or it was very unlikely that they were going to show up any and interestingly the toxicology results didn't even pick up on the [Pamol] I think as [A] called it that she'd taken at Women's Refuge earlier that same night.
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> So, I suggest you can't really place any weight on any suggestion by my friend that if she'd been drugged by Mr Horn you might have seen it in her blood or urine because the fact is … that those samples were taken too late after the fact to show any trace of it. So, coming back to [A]'s version of events the next thing she remembers is waking up naked next to Mr Horn, who's also naked and cuddling her. She can feel his genitals sticking into her back. She feels sticky and sore between her legs. She could smell semen.
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> …
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> So if you believe [A], then Mr Horn after she's gone down to that cabin, Mr Horn's undressed her while she's asleep in that boat. Not an impossible task for a physically much bigger male than a smaller female who only weighed 46 kilograms at the time. You know, something you might expect her to wake up from had this been a natural sleep which might assist you in reaching that earlier decision whether or not Mr Horn did drug her in any way.

[29] It is quite apparent from these extracts that, from the earliest stages of the trial, the prosecutor linked the question of consent to whether or not A had been drugged or stupefied by Mr Horn to the point that she lost consciousness and was thus incapable of giving consent. His invitation in closing that the jury could be "sure" A was affected by drugs placed in the orange juice makes this position clear.

[30] In our view, this was an unnecessarily high standard for the Crown to adopt for itself. The Crown did not need to pitch its case as high or as narrowly as that. In the context of this case, all the jury needed to be sure of was that A did not consent to sexual intercourse with Mr Horn because, on A's account, she was not conscious at the time. The jury did not need to be sure of the reasons she was unable to give consent; only that she did not consent. As the Judge observed in his oral decision on the s 147 application, there were alternatives to explain A's tiredness and nausea other than being drugged by Mr Horn. Plainly, the jury by its verdict rejected Mr Horn's evidence and believed the complainant that she did not consent and Mr Horn did not have a reasonable belief that she did consent.

[31] Relevant to Mr Horn's account of consensual sexual activity initiated by A, was A's evidence that, even if she had the capacity to, she would not have consented. She gave her reasons which the prosecutor put to the jury in his closing address. These included that she still had feelings for B despite the events that led her to complain of assault to the police, that a sexual liaison with anyone else was the last thing on her mind at the time, and that she regarded Mr Horn as a trusted friend rather than a potential sexual partner. She described herself as "horrified at losing … [B] ... that [she] wouldn't sleep with his friend". She said that she did not find Mr Horn at all attractive and, relatedly, that there was a significant age difference between them (she was in her mid-twenties and he was a man in his fifties). There is also the evidence of Mr Horn's repeated apologies as they drove to the Wellsford medical centre and the comments he apparently made to A about needing to get over B, as they drove down to Sandspit. Plainly, the jury disbelieved Mr Horn and his account. As the Crown highlighted in its closing submissions, there was an evidential basis for that disbelief.

[32] Against that background, we turn to examine whether the Crown should have been permitted to continue to advance its case on the basis it did following the

dismissal of charge one. The answer to that question will inform the other grounds advanced on the conviction appeal.

[33] We do not accept that a consequence of the Judge's decision to dismiss charge one was that all the evidence supporting that charge became inadmissible in tending to prove the rape charge.

[34] Evidence in a proceeding is admissible if it is relevant and is not otherwise inadmissible or excluded by statute.[6] Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[7] The threshold set by s 7 of the Evidence Act 2006 is low. As the Supreme Court observed in *Wi v R*, in reference to s 7(3):[8]

> [8] This is not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not.

[35] A's evidence that after consuming the orange juice she felt drowsy, nauseated and fell into such a deep sleep that she was woken neither by Mr Horn removing her clothes or having sexual intercourse with her, is plainly relevant to the question of whether she consented. It is also relevant to reasonable belief in consent, particularly if the jury accepted that Mr Horn was responsible for A's state.

[36] Of course, s 7 must be read in light of s 8 of the Evidence Act. Section 8(1)(a) requires the judge to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding. However, we cannot see how that balancing exercise could operate to exclude this evidence. In dismissing the disabling charge, the Judge was not satisfied that a reasonable jury, properly directed, could convict. That was because, in his view, there were other reasonably possible causes, consistent with Mr Horn's innocence on the disabling charge, to explain A being rendered unconscious. In proving the rape charge, in

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6 Evidence Act 2006, s 7(1).
7 Section 7(3).
8 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

addition to the other essential elements, the jury needed to be satisfied that A did not give her consent because, on the Crown's case, she was unconscious. Unlike the proof required on the disabling charge (that is unanimity Mr Horn knowingly administered a sedative to A), the jury did not need to be unanimous on the mechanism that led her to be in that state; only that they were satisfied beyond a reasonable doubt that she did not give her consent for whatever reason.

[37] This is a not dissimilar situation to that which this Court encountered in *R v Win*.[9] As in the present case, the appellant in that case was originally charged with disabling and sexual violation by rape.[10] The appellant's challenge was that the jury's verdict of guilty on the rape charge was unreasonable and unsupported by the evidence.

[38] The Crown case was that the appellant administered a stupefying substance contained in drinks of vodka and orange. The complainant described having no memory of any events after consuming the second glass until she woke up the next morning naked in the appellant's bed with all the indicia that sexual intercourse had taken place, including the presence of semen. She had no memory of the intervening events. Analysis of the complainant's urine revealed the presence of the prescribed medicine, Capadex, a painkiller related to opiates with narcotic effects. The complainant said she had not knowingly taken such a substance. However, the appellant had been prescribed Capadex by his general practitioner. The Crown case was that he surreptitiously administered the drug to the complainant so that, when combined with a substantial amount of alcohol, she lost consciousness and was thus incapable of consenting to the sexual intercourse that followed.

[39] At the conclusion of the Crown case, the trial Judge, Simon France J, discharged the appellant on the stupefying charge.[11] He held that, although the Crown's expert evidence was that the narcotic was in the complainant's body during the 18-hour period between the time she first went to the appellant's room and when the sample was taken the next afternoon, it was clinically possible for it to have been

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9 *R v Win* [2007] NZCA 370.
10 Crimes Act, ss 197, 128(1)(a) and 128B.
11 *R v Win*, above n 9, at [8]. Crimes Act, s 347 (now repealed).

administered up to 24 hours before the sample was taken, that is six hours before the complainant first went to the appellant's room.[12] The Judge determined it was open to the jury to conclude that the appellant administered the drug to herself. However, the jury also had to be satisfied that the drug was a substantial and operating cause of the unconsciousness of the complainant. On the evidence, this meant that the complainant would have had to consume more than two capsules of Capadex. The Judge determined that normally the inference that the administration of the drug was a substantial and operating contributor to the unconsciousness is drawn either from the nature of the drug or its known effects on the victim on the particular occasion. He considered that, because there was an equally credible alternative explanation for the lack of memory and subsequent illness, that is from excessive alcohol intake as found in her system, the jury could not be satisfied beyond reasonable doubt that it was the drug rather than the alcohol that contributed to her state of unconsciousness in a substantial way.

[40] On appeal, this Court held that proof of the sexual violation charge rested on the jury's assessment of the complainant's credibility.[13] Necessarily, the verdict meant that the jury believed her. The Court found there was ample evidential support for that outcome, which included her dislike of the appellant such that she would never have consented to sexual intercourse, the high levels of alcohol in her body far greater than any quantity she had voluntarily consumed, the presence of a prescription drug with narcotic properties in her urine, the appellant having such a prescription drug available, sexual intercourse having occurred, and the appellant's explanation in his police interview, some parts of which the jury may have regarded as incriminatory and other parts exculpatory.[14]

[41] The Court also referred to the Judge's comment in dismissing the disabling charge that there was ample evidence that may have provided an explanation for the complainant's stupor.[15]

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12 *R v Win*, above n 15, at [9].
13 At [12].
14 At [12]–[13].
15 At [13].

[42] While we accept that the present appeal is grounded on a different basis, there are obvious parallels between the cases which assist. In *Win*, neither the trial Judge nor this Court suggested anywhere that the evidence supporting the disabling charge which had been dismissed could not be used by the jury to support the proof of a sexual violation charge. Indeed, the Court specifically included aspects of that evidence in rejecting the claim that the verdict was unreasonable.[16] For the reasons discussed above, a similar approach applies in the present case.

[43] That being the case, we cannot accept the submission that, having dismissed the disabling charge, the Judge should have declared a mistrial and discharged the jury.

[44] We also cannot accept that the Judge should have stopped Crown counsel from cross-examining Mr Horn on whether he had drugged A, or that he should have intervened to prevent the Crown from advancing its case on the question of consent on the basis that A had been drugged or stupefied. In any event, it was Mr Horn himself who introduced the topic of Norflex in his evidence-in-chief. Crown counsel was entitled to explore his explanation and that evidence in cross-examination.

[45] Furthermore, although perhaps a somewhat surprising trial strategy, there was nothing impermissible in the Crown putting to the jury the proposition that they could be sure that Mr Horn had spiked A's orange juice with a substance, probably Norflex, which caused her to lose consciousness. In doing so, it seems to us that the Crown unnecessarily narrowed the range of options that might also have explained A's stupor. That factor tended to operate more to advantage rather than prejudice the defence in our view.

[46] We also regard it as noteworthy that neither the defence nor the Judge considered it necessary to intervene to stop Crown counsel cross-examining Mr Horn on the orange juice and what it may have contained. Similarly, it seems the defence did not register any complaints about the Crown's closing submissions, and neither did the Judge either to counsel or to the jury in his summing up.

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16 At [15].

[47] Finally, this brings us to the appellant's criticism that the Judge gave insufficient direction and guidance to the jury as to how they should deal with the evidence of stupefaction or the use of drugs by Mr Horn. Mr Leabourn submitted that a direction should have been given at the time the Judge advised the jury he had dismissed charge one and that he should have given tailored directions in his summing up.

[48] First, we do not agree that the Judge was required to give a detailed or tailored direction at the time he advised the jury that charge one had been dismissed. That submission begs the question as to what he should have said. It seems to us there were three options available to the Judge at that point: say nothing or tell the jury he would discuss the effect of the evidence in his summing up or give a full direction that it would still be open to the jury to consider the evidence supporting the disabling charge in relation to the rape charge in the context of consent. In the circumstances, given the stage the trial was at when the charge was dismissed, a full direction before all the evidence had been received would have been premature. The Judge elected to say nothing. That was an option available to him and the fact he went no further does not satisfy us that justice miscarried as a result.

[49] The central question is whether the Judge went far enough in his summing up in directing how the evidence might be used by the jury in proof of the rape charge. It is to that question we next turn.

[50] In *Win* this Court referred to how the trial Judge had "carefully and clearly examined the competing arguments and the pharmacological evidence", noting that the summing up was tailored to the evidence and the facts.[17]

[51] In the present case the Judge took the jury to the question trail and gave the standard directions on what constitutes consent. He made specific reference to lack of protest or physical resistance not of itself amounting to consent. He noted that a person who is asleep or unconscious has not consented to sexual activity. He noted that a person does not consent to sexual activity if the activity occurs while she, herself,

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17 *R v Win*, above n 15, at [14].

is so affected by alcohol or some drug that she cannot consent or refuse to consent to the activity.

[52] Against that background the Judge developed the two opposing narratives of what was said to have occurred, noting that there were only two present and that the respective credibilities of A and Mr Horn were at issue. He gave a tripartite direction before summarising the respective submissions of counsel on the credibility of the principal players.

[53] The Judge then tied the question of Mr Horn's intent and state of mind to the drawing of inferences from proved facts. He gave the standard direction that the inferences must not be the product of speculation or guesswork. The Judge also directed that if two conclusions are equally open on the same evidence, the jury should choose that which is most favourable to the defendant. That direction does not reflect this Court's statements about such a direction,[18] but was favourable to Mr Horn.

[54] We agree that it is regrettable the Judge did not give more tailored directions in respect of the proper use the jury could put evidence that A had been drugged, if they accepted that to be the case. For example, a direction that linked the Crown's submission that A was drugged to the standard direction on how consent cannot be given by someone who is asleep or unconscious would have been helpful. Such a direction could have been quite economical with the Judge directing it was for the jury to decide whether or not they were satisfied that A was unconscious at the time sexual intercourse took place and was thus unable to give consent. Reference could have been made to the Crown's submission that the evidence supported the inference A was drugged, with the reservation the jury must not speculate. The Judge could have directed the jury that as a matter of law they needed to be sure that A did not consent because she was unconscious at the relevant time and, while the jury needed to be unanimous on that issue, they did not need to be unanimous on the cause of A's unconsciousness.[19]

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[18] *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647; *R v Hart* [1986] 2 NZLR 408 (CA) at 413; *Hutchins v R* [2016] NZCA 173 at [31]; *Edwardson v R* [2017] NZCA 618 at [77]; *Hines v R* [2018] NZCA 242 at [33]; and *Mehrok v R* [2019] NZCA 663 at [54].

[19] See the guidance on jury unanimity in *Ashin v R* [2014] NZSC 1534, [2015] 1 NZLR 493 at [173]–[189]; *Nicholson v R* [2015] NZCA 266 at [55]; and *Merritt v R* [2018] NZCA 610 at [65]–[67].

[55] However, we do not think that, because the Judge did not tailor his remarks to the evidence and the law in this way, means that justice miscarried here. Between the competing addresses of counsel and the Judge's summing up, the jury would have been left in no doubt as to the issues they needed to decide and the evidence properly available to prove the essential elements.[20] The central issue was the credibility of A. Plainly, by their verdict, they believed A and disbelieved Mr Horn. There was evidence available to support each conclusion. This led the jury, with the aid of a standard question trail, to their verdict. There was no miscarriage of justice.

[56] It follows that the appeal against conviction is dismissed.

Sentence appeal

Decision under appeal

[57] The Judge adopted a starting point of eight years' imprisonment.[21] This was calculated by reference to three aggravating factors that the Judge found present. The first was the harm caused to A and the consequential effects on her health and mental wellbeing.[22] The second was the abuse of trust implicit in the offending.[23] Mr Horn had exploited A's vulnerability as a refugee of domestic abuse. Thirdly, A was vulnerable; she was asleep and isolated on Mr Horn's boat moored some distance from the shore.[24] She was unable to remove herself without Mr Horn's assistance.

[58] In mitigation, the Judge noted that Mr Horn was a person of previously good character with no previous convictions despite his age.[25] He also referred to Mr Horn's physical ailments including chronic pain and some issues with depression.[26] The s 27 report referred to Mr Horn being bullied at school and having a difficult history of family relationships as well as personal matters the Judge took into account but did

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20 This was not a case like *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454 at [30] because in the present case it was obvious how the respective cases fitted in with the elements of the charge.
21 *R v Horn*, above n 1, at [10].
22 At [6].
23 At [7].
24 At [7].
25 At [7].
26 At [8].

not refer to explicitly.[27] He accepted there was some causal connection between Mr Horn's background and the offending, although not to a high level.[28]

[59] From the starting point, the Judge allowed a six per cent discount for previous good character, a 10 per cent discount for his ill health and, in respect of the s 27 report, a 10 per cent discount, producing a total discount of 26 per cent and bringing the final sentence to one of five years and 11 months' imprisonment.[29]

The grounds

[60] Mr Leabourn submitted that the sentence of imprisonment of five years and 11 months was manifestly excessive. He accepted that in the light of *R v AM* the commonly accepted starting point for a charge of rape is eight years which the Judge appears to have taken.[30]

[61] However, his complaint was that too much weight was placed on the impact the offending had on the complainant and other aggravating factors. In relation to the effect on the complainant, Mr Leabourn submitted that the Judge determined that the complainant had turned to drugs and alcohol as a consequence of the offending whereas it appeared she had been a user of both prior to the events. He also complained that the Judge placed significant weight on the submission that it had taken a long time for A to get her life back on track. She needed to undertake stress counselling. However, Mr Leabourn submitted that the evidence showed that A's life had been chaotic and disorganised before the events in question and it was unfair to place the blame for her predicament at the feet of the appellant.

[62] Mr Leabourn also complained that the Judge failed to place sufficient weight on Mr Horn's lack of previous convictions and other circumstances, allowing only a six per cent discount for his lack of previous convictions and otherwise good character despite him being 55 years old.

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27 At [9].
28 At [9].
29 At [10].
30 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 114.

[63] Another complaint is that the Judge allowed only a 10 per cent discount for Mr Horn's past health, his severe and chronic neck pain and associated depression, meaning that a term of imprisonment would be harder for him than others in better health.

[64] Finally, Mr Leabourn submitted that those factors, together with the favourable observations in the s 27 report, meant that a greater than 26 per cent discount was appropriate overall.

Appeal jurisdiction

[65] This Court must allow the appeal if satisfied that, for any reason, there was an error in the sentence imposed and a different sentence should be imposed.[31] The focus is on the end sentence rather than the process by which it was reached.[32] The Court will not interfere where the sentence is within the range that can properly be justified by accepted sentencing principles.[33] To this end, the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.[34]

Discussion

[66] No issue can be taken with the starting point of eight years' imprisonment which was well within the available range. Mr Leabourn accepted it was a usual starting point for a charge of rape. This detracts from his submission that the Judge placed too much weight on the impact of the offending on A. In any event, it is not uncommon for victims of sexual offending to have already had difficult lives prior to the offending. A's background does not make the impact of rape on her any less damaging.

[67] The question is whether the combination of discounts for Mr Horn's personal circumstances totalling 26 per cent was inadequate leading to a manifestly excessive sentence.

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31 Criminal Procedure Act, s 250(2).
32 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
33 At [36].
34 At [35].

[68] We cannot agree that the Judge placed insufficient weight or gave insufficient credit to Mr Horn's personal mitigating factors for the reasons that follow.

[69] While good character is obviously a mitigating factor, in Mr Horn's case this is tempered by evidence of his lack of remorse.[35] At no point has Mr Horn accepted his offending. The PAC report illustrates this. In respect of A, Mr Horn questioned how one woman could be raped eight times. The six per cent discount, in these circumstances, was within range.

[70] The 10 per cent discount for Mr Horn's poor health was in our view generous. His claim that he had broken his back and neck was self-reported although we do accept his evidence at trial that he had been prescribed a strong pain killer in the form of Norflex. We also accept, of course, that imprisonment can present a greater burden for those who suffer from ill health. In Mr Horn's case, however, there is no evidence that these issues cannot be properly and effectively managed in prison.

[71] Nor do we consider the 10 per cent discount for the factors outlined in the s 27 report inadequate. We agree with the Judge that the causal connection is not particularly strong and, in the circumstances, that discount might also be regarded as generous.

[72] It follows that we are not satisfied that the sentence was manifestly excessive and this aspect of the appeal must also fail.

Result

[73] The appeal is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent

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35 *Taylor v R* [2017] NZCA 574 at [24]; and *R v Findlay* [2007] NZCA 553 at [101].