

NOTE: SUPREME COURT INTERIM ORDER PROHIBITING PUBLICATION OF THE APPELLANT'S NAME, ADDRESS AND OCCUPATION REMAINS IN FORCE: N (SC 79/2023) v R.

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

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAME OF THE SCHOOL PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE: [2022] NZDC 23942.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE OCCUPATION AND SPORT OF THE APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE: [2022] NZDC 23942.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF CERTAIN EVIDENCE AND SUBMISSIONS IN [2022] NZDC 23942 PURSUANT TO S 205 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA28/2023
[2023] NZCA 378**

BETWEEN N (CA28/2023)
Appellant

AND THE KING
Respondent

Hearing: 25 July 2023

Court: Collins, Lang and Woolford JJ

Counsel: I M Brookie and R A van Boheemen for Appellant
Z A Fuhr for Respondent

Judgment: 22 August 2023 at 9.00 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] In July 2022, N was convicted of three charges of sexual violation by unlawful sexual connection, two charges of sexual conduct with a young person and one charge of common assault. All offences concerned the same complainant (V). N was sentenced to six years and six months' imprisonment by Judge Northwood, the trial Judge.¹

[2] N currently has name suppression as a consequence of orders made by the Supreme Court.² He appeals his conviction and sentence.

[3] The grounds of appeal against conviction contend:

- (a) The trial Judge erred by not directing the jury to disregard impermissible opinion evidence given by V's mother, Ms S.
- (b) The prosecutor misused counter-intuitive evidence in her closing address.
- (c) The trial Judge erred when he did not properly instruct the jury about the prosecution's submission that V had no reason or motive to lie.

¹ *R v [N]* [2022] NZDC 23920 [Sentencing notes]. The sentence was composed of six years and six months' imprisonment on the sexual violation charges, and concurrent sentences of three years' imprisonment for the sexual conduct charges and six months' imprisonment for the assault charge.

² *N (SC 79/2023) v R SC 79/2023*, 21 July 2023 (Minute of Williams J) at [3].

- (d) The trial Judge erred when he did not direct the jury on reasonable belief in consent in relation to Charge 6, which alleged sexual violation committed by way of oral sex.

[4] The appeal against sentence is based on the submission that the starting point of seven years' imprisonment was too high and led to a manifestly excessive sentence.

Background

[5] In 2017, N, who was then aged 24, became involved with V through sport. At the time, V was 13 years old. A friendship developed between N and V and members of V's family. During the course of 2017, N started to perform massages on V. The frequency of those massages increased from two to three times a week to an almost daily event by mid-2018. The massages were initially designed to assist with a calf injury suffered by V. However, towards the end of 2017 the massages became sexual and included N:

- (a) rubbing V's penis on an almost daily basis; and
- (b) inserting his fingers into V's anus on two occasions.

[6] In October 2018, N accompanied V and his family to Christchurch where V was participating in a tournament. One evening N asked V to accompany him on a walk. V told N he did not wish to be with him, but nevertheless accompanied N on the walk. N became angry with V and punched him twice in the chest, knocking him to the ground. V told his mother about the assault when he returned to the family motel room. This incident led to the charge of common assault.

[7] In late 2018, N went into V's room where V was in bed pretending to be asleep. N pulled back the bed covers and started rubbing V's penis. N then started to perform oral sex on V. When V told him to stop, N responded by saying words to the effect that he thought V would enjoy the oral sex. This incident formed the basis of Charge 6, which is examined in more detail when we consider the fourth ground of appeal.

[8] In mid-2019, V told his mother that N had touched him in a sexual way. When V's mother telephoned N and put V's allegations to him, he denied any wrongdoing. The telephone conversation between N and V's mother forms part of the first ground of appeal. N and V's mother remained friends after the telephone call.

[9] In 2021, V confided to his girlfriend that he had been sexually assaulted by N. Subsequently, he told his school counsellor that he had been sexually abused by N. This in turn led to the police becoming involved and the charges we have summarised at [1] being laid against N.

[10] During the trial both V and N gave evidence. N denied that he had sexually offended against V and he said that the massages he performed on V were legitimate therapeutic procedures. N suggested that V may have fabricated the allegations in order to get N out of his life.

[11] In her closing address the Crown prosecutor relied upon 14 matters, which she said established that V's allegations were the truth. We shall briefly summarise those strands:

- (a) V's evidence was detailed and comprehensive.
- (b) There was no reason for a teenage boy to fabricate the allegations.
- (c) The way N had "insinuated himself" into V's family home, which involved him spending most evenings with V and his family, and then commenced sexually offending against V.
- (d) Early in the massage sessions an incident occurred in which N said he accidentally touched one of V's testicles. N left the room crying and told V's parents what had happened. The prosecution suggested N's reaction to accidental touching was unbelievable and part of a pattern designed to ingratiate himself into V's family.
- (e) The pattern of the massages, which involved N first massaging V in the presence of his mother in the family home but later in a garage and a

standalone apartment on V's family property with only N and V present was, the prosecutor said, consistent with N creating the opportunity to offend against V.

- (f) N made unusual comments about V's body, including how V got erections when being massaged. The prosecutor said this demonstrated his sexual interest in V.
- (g) The fact N travelled to Christchurch to be with V and manipulated V to go for a walk was also consistent with N's desire to control V.
- (h) V was angry towards N and also scared of him before he complained to his mother. The prosecutor said this was consistent with V having been abused by N.
- (i) N's behaviour was also consistent with him having exerted control over V. That behaviour included N confiding to V that he wished to have a relationship with him. N also told V's mother that he may be in love with V. N wrote a letter to V, in which he said that he was sorry for everything else that he had done.
- (j) N's response to the sexual offending when it was put to him by V's mother.
- (k) The way V told three people about the sexual abuse he had suffered.
- (l) N had the opportunity to offend against V.
- (m) V was consistent in his accounts about what had happened.
- (n) V gave his evidence in a reasonable way, making concessions where appropriate and presented his evidence in a respectful manner.

[12] The defence case included the following submissions from Mr Winter, N's trial counsel:

- (a) V's evidence was implausible and inherently contradictory, particularly as the sexual offending allegedly occurred when V's mother was close by.
- (b) V may have fabricated his allegations because of his concerns about the ongoing friendship between N and V's mother or because he no longer wanted to be involved in competitive sports events.
- (c) V's emerging story of sexual abuse was triggered by N telling V that he had feelings for him.
- (d) V's complaint to his mother occurred only after she asked V if N touched him.
- (e) N's reaction when he accidentally touched V's testicle was entirely consistent with his innocence. A guilty person would not have raised the issue with V's parents.
- (f) The punching did not happen. There were no marks on V and Ms S took no action when V supposedly told her that N had assaulted him.

[13] General counter-intuitive evidence about how victims may react to sexual abuse was produced by consent pursuant to s 9 of the Evidence Act 2006. The admitted facts were read by the prosecutor and will be examined in further detail when considering the second ground of appeal.

[14] We will first address the four grounds raised by N in relation to the conviction appeal before turning to the sentence appeal.

Conviction appeal ground one: opinion evidence directions

The evidence

[15] Ms S told the jury that in mid-2019 V told her he had woken up in bed and found N touching “his private parts”. Ms S telephoned N. Her evidence-in-chief was:

A. ... So I went down to the flat that’s on the other side of our garage and I rang [N] and I said to him: “I need to talk to you about something,” and I told him what [V] had said, I said: “[V] has just told me that he woke up twice to find you touching him,” and there was a, a long silence and it was kind of – I didn’t know whether to – it was a silence where you want to, to break it but I didn’t and [N] said eventually: “What am I meant to say to that?” And I said: “Just tell me the truth. If you did it, just tell me and we’ll get you help, we’ll get [V] help and we’ll work through it,” and then he said: “Well it couldn’t have happened,” um, “how could it, [V] sleeps on his tummy,” or – yeah.

Q. And how did he seem when he said that?

A. Together, um, yeah, yeah. A little bit surprised I guess that we were having that conversation then but, but he wasn’t upset, he wasn’t angry.

[16] Mr Winter broached the subject of N’s reaction to the telephone call with Ms S. In cross-examination, Ms S said:

Q. Now moving to the conversation that you thought I was talking about, and apologies for that, you then went and telephoned [N]?

A. Correct.

Q. And can you recall again for us please what it is that you said to him at the start of that conversation?

A. I said: “I need to talk to you. [V] has just told me that you’ve touched him, um, that he woke up and found that you were touching him in his private parts,” um, yeah.

Q. And there was a delay?

A. A long delay.

Q. Did that surprise you?

A. It did because I was expecting his response to come back as: “Yes, I did,” because of the delay.

Q. Did it occur to you that he might just be in shock from having that allegation put to him out of the blue?

- A. I was surprised by his response which was: “How do I reply to that?” and that’s why I thought that we were going down the “yes, I did” track because I would’ve expected an immediate denial.
- Q. Okay, well that’s what you expect but –
- A. That’s what I expected.
- Q. Thinking back then, and you know [N] very well, his answer was: “How do I reply to that?” is that –
- A. Yes.
- Q. Thinking now back, would you – is that consistent with what you know about him being surprised, taken aback by your question?
- A. I’m not sure.
- Q. It’d be a bit of a shock, wouldn’t it, to something to, like that to be said to you out of the blue no matter who you were?
- A. Yes. If, if you were expecting it to come at some point it wouldn’t be so much of a shock.

[17] When he gave his evidence N said his first reaction when confronted by Ms S was one of shock. He said when cross-examined:

- A. I, I, I was in shock to be honest. I was not prepared for that at all. I, I – it just [came] out of the blue. Yeah, I’m like (inaudible).
- Q. So your first reaction wasn’t to deny it, was it?
- A. I, I, I was just in shock.

Relevant law

[18] Section 23 of the Evidence Act provides that statements of opinion are not admissible except as provided in ss 24 and 25. Relevantly, s 24 states:

24 General admissibility of opinions

A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

[19] This Court has drawn a distinction between expressions of opinion and evidence that conveys a witness’s observations about a defendant’s demeanour. For example, *R v Warner* concerned the admissibility of evidence of a witness who

said that the defendant, who was accused of rape, was “looking down in shame”.³

This Court explained this was not an expression of opinion. Rather:

[31] ... [The witness] was conveying her observations of Mr Warner’s demeanour when he [was] confronted following the incident. That was admissible evidence. A fact witness is entitled to tell the Court what he or she saw, including how a person appeared to him or her e.g. “he looked pale” or “she appeared to be very upset”.

Closing address and summing up

[20] In her closing address, the prosecutor referred to Ms S’s evidence about the telephone conversation with N. The prosecutor said:⁴

The defence might say to you “well, shock, people act, they freeze up, they act differently when they’re really shocked” but he also put that to [Ms S] who said, “well, he wasn’t even shocked” and she said “well, he was a little surprised, not angry, not upset” and **she said “but if you’re expecting that phone call to come at some point, it wouldn’t be such a shock, would it”**.

[21] Mr Winter also addressed Ms S’s evidence about her telephone conversation with N. He said:

Members of the jury, just as there is no handbook for how children should disclose sexual abuse, neither can there be any handbook about how a male who still has the presumption of innocence should or has to reply to an allegation like that and certainly it’s my submission to you that if there is a silence nothing can be read into that silence. Out of the blue [N], who was innocent at this point in this proceeding, is alleged to have sexually interfered with a young man ... who he had been friendly with. We cannot and should not ever expect a pat cookie-cutter reply to an allegation like that. And it’s my submission that in fact it’s completely consistent with being hit with something of that importance and you now know [N] a little bit from hearing from him that he would take time to think about it, that he would be in shock and that there would be a silence.

I really don’t care how anybody else reads that but it’s important members of the jury, for you to consider whether that is in fact exactly the sort of reaction there might be if you were hit with such an allegation completely out of the blue.

[22] In his summing up, the trial Judge said:

[105] [The prosecutor] Ms Davies outlined her submission about how [N] responded to the allegations being put to him by [Ms S]. She pointed out and

³ *R v Warner* [2009] NZCA 172 at [30].

⁴ Emphasis added.

reminded you that there was no immediate denial and instead [N] simply asked how should he react to that.

[23] Later, in his summing up, the trial Judge explained the defence argument in the following way:

[111] He asked you to take a balanced view when assessing how people might react to certain situations. He agreed that the agreed facts document is helpful to explain how a victim of sexual abuse might react but asked you not to expect [N] to respond in any given or predetermined way to the raising of the sexual abuse by [Ms S].

Analysis

[24] In this Court, Mr Brookie submitted on behalf of N that Ms S had expressed inadmissible opinion evidence and that she had suggested two unfairly prejudicial propositions:

- (a) that a long delay in N's response to Ms S's allegation, as opposed to an immediate denial, amounted to an acknowledgment of guilt; and
- (b) N did not seem shocked because he was expecting to be accused of sexual offending against V. The lack of apparent shock was consistent with N being guilty.

[25] Mr Brookie acknowledged that Ms S's evidence-in-chief was unobjectionable. This was a proper concession. Ms S's evidence-in-chief comprised a legitimate description of N's reaction to having been accused of sexually offending against V. Specifically, Ms S described N's long pause before responding and that he seemed surprised (but not upset or angry) about the allegations. Ms S's evidence-in-chief did not involve any expression of opinion. Furthermore, Ms S's evidence was entirely consistent with N's own evidence on this topic, which we have set out at [17].

[26] The thrust of Mr Brookie's submission in relation to the first ground of appeal concerned the evidence elicited from Ms S in cross-examination and the way the Judge dealt with that evidence in his summing up.

[27] We make the following points about the cross-examination of Ms S:

- (a) Almost everything Ms S said in cross-examination concerned her description of N's response when he was accused of having sexually offended against V.
- (b) Ms S's description of N being shocked was consistent with his own evidence.
- (c) Ms S's final answer, which we have set out at [16], may have involved an expression of opinion.
- (d) N's trial counsel was able to effectively address any concern about Ms S having possibly expressed opinion evidence when he said to the jury:
 - (i) N did not have an answer readily available for Ms S because the allegations came as a shock to him; and
 - (ii) he was in shock because he was innocent.

[28] We are not persuaded the trial Judge was required to go further than he did when directing the jury about the evidence from Ms S concerning her telephone conversation with N. Our reasons for this conclusion are:

- (a) N's trial counsel was a very experienced criminal defence lawyer, who appropriately emphasised the inferences that could be drawn from the evidence in question that were favourable to N.
- (b) N's trial counsel did not ask the Judge to give further directions to the jury on the evidence in issue. This was probably because trial counsel had already dealt effectively with the evidence in question. The trial Judge was justified in not appearing to criticise the cross-examination of Ms S in this case because of the careful way Mr Winter cross-examined the witness and dealt with her evidence.

[29] When we evaluate the evidence given by Ms S during the course of her cross-examination, and the adequacy of the summing up, we are satisfied that there was no risk that the outcome of the trial was affected by Ms S's evidence, or that a miscarriage of justice arose through the absence of further directions to the jury concerning her evidence. Accordingly, this ground of appeal fails.

Conviction appeal ground two: counter-intuitive evidence

The counter-intuitive evidence

[30] A copy of the s 9 statement of agreed facts was provided to each member of the jury. It is sufficient for us to summarise the key aspects of the counter-intuitive evidence.

[31] First, the evidence traversed in general terms circumstances in which children and young persons may choose to disclose sexual abuse. The evidence included information about delays that can occur in reporting sexual abuse and that disclosure may be incomplete.

[32] Second, the s 9 statement of facts covered reasons why a child or a teenager may not immediately report sexual abuse.

[33] Third, the evidence explained that sexual abuse can occur when other persons, including family members, are in the same house or in close proximity to where the offending occurs.

[34] Fourth, the s 9 statement explained that a victim of abuse might continue to have contact with the offender.

[35] The s 9 statement concluded with the following important rider:

This Notice does not prove or disprove that sexual offending has occurred in this case. This evidence is about the behaviour of children who have been sexually abused, the behaviour of those with whom they interact, and the dynamics of sexual abuse of children.

[36] In her opening address the prosecutor emphasised that the purpose of the counter-intuitive evidence was to correct any misconceptions the jury might have had. For example, the prosecutor said:

People might think that a child or teenager can't be sexually abused when other people are close by however in fact, it's not uncommon for a child or teen to be sexually offended against while others are in the same house ... Some people might think that when children or teenagers are offended against, they would resist or call out for help and they wouldn't continue to have contact with their offender however in fact it's common for a child or teen not to do those things ...

Crown closing address

[37] In her closing address, the prosecutor made four comments about the counter-intuitive evidence when discussing the sexual offending charges. We have emphasised below the principal words used by the prosecutor that are challenged by Mr Brookie as being an impermissible use of counter-intuitive evidence:⁵

(a) When a sexual abuser has a close relationship with members of the teen's family, the young person may be concerned that disclosing the sexual abuse will get negative reactions from family members. **Do you think that might be what happened here?**

...

(b) Of course, we know from the notice of facts that offending can occur with other people around **and here it did**. But it did move away from the house and it did allow the defendant the ability to see the door open, be able to pop the blanket back up over [V].

...

(c) Each of those three times when [V] told [his mother, his girlfriend and the school counsellor] there was a reason for telling. The Crown suggest look at those reasons and you can be sure it was the truth each of those times. Note the research that's included in your section 9 notice of facts says it's not unusual that a person is told and still supports the defendant and not unusual that the authorities are not alerted when a child or teen discloses to somebody **and in these circumstances**, [V] has said in that 2019 disclosure to his mum he didn't want the police involved, he wanted to forget it.

...

(d) Common sense if you're going to make up a story, you go to police straight away. You're not going to wait until you tell your girlfriend and then a counsellor and then she suggests it. The reality is this is

⁵ Emphasis added.

true, and **it's unfolded in a way that's consistent with the truth and the information you have about the dynamics of sexual abuse in the section 9 notice.**

...

Why does he tell her so very, very little at this point and why does he not tell her the truth about the offending happening on the mattresses and during the massages? **Neither the Crown or the defence asked [V] that so that's simply evidence you don't have, but the Crown says consider the following evidence and I refer you to the notice of admitted facts.**

Although people might think a child or teen might tell everything, they might feel ashamed or embarrassed or worried about the potential consequences and consider it easier to minimise what occurred rather than deal with these negative consequences following disclosure. Teens around puberty may feel embarrassed discussing some details of sexual abuse.

[38] Mr Brookie also drew attention to the way the prosecutor closed in relation to the assault that took place in Christchurch. The prosecutor said:⁶

This is physical violence, not shameful sexual violence, **so [V] feels able to complain straight away** to his mum about this. He says, "he punched me". He's whisked back off to his team and the defendant storms off.

Mr Brookie said this statement also involved impermissible use of the counter-intuitive evidence.

Summing up

[39] In his summing up the Judge directed the jury in the following way:

[95] Although we look to you to use your common sense and experience of the world in reaching your decision, it is recognised that many people do not have experience of the ways that someone who has been sexually abused may react to the abuse and for that reason you have heard the expert evidence recorded in the agreed facts statement about how victims of sexual abuse can react to being in that situation. This will help you as you assess the matters relating to [V's] actions after the alleged offending. The fact that his complaints to others were not immediate and developed incrementally are all matters for you to consider when assessing the evidence.

[96] It is for you to decide whether, and to what extent, the delay in making a complaint should affect your assessment of his account. It is important for you to remember that the admitted facts statement is not concerned with the facts of this particular case and [does] not relate to the credibility of the key

⁶ Emphasis added.

witnesses in it. You cannot use the admitted fact material to strengthen [V's] evidence. They have been placed before you to correct any misconceptions you might have about how young people might respond to sexual abuse.

Relevant law

[40] In *DH (SC 9/2014) v R*,⁷ the Supreme Court explained the way counter-intuitive evidence may be permissibly used. The Court said:⁸

Counter-intuitive evidence [may be] admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning. ...

...

The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. ...

...

... 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 ... is itself indicative of the complainant's credibility...

[41] In *Bruce v R*,⁹ this Court found a miscarriage of justice had occurred because of the way the prosecutor had linked, in a diagnostic way, counter-intuitive evidence with the complainant's evidence. There were two "distinctive" and "unfortunate" features of the Crown's approach in *Bruce*:¹⁰

- (a) The only evidence the prosecutor closed on was the counter-intuitive evidence. This Court explained "the *only* point [the prosecutor] made to the jury, beyond references to the burden and standard of proof and other general matters, was an impermissible one".¹¹

⁷ *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625.

⁸ At [2], [30(b)], and [30(e)].

⁹ *Bruce v R* [2023] NZCA 159.

¹⁰ At [56].

¹¹ At [56] (emphasis in original).

- (b) The prosecution in *Bruce* chose not to explain to the jury why they should find the charges proven by reference to the balance of the evidence adduced during the trial.

[42] This Court concluded the magnitude of the prosecutor's errors required careful and clear directions from the Judge to correct the significant misuse by the prosecutor of the counter-intuitive evidence. The trial Judge's failure to do so caused a miscarriage of justice.¹²

Analysis

[43] Mr Brookie emphasised that in the present case the prosecutor fell into the same error as the prosecutor in *Bruce* by using counter-intuitive evidence in a diagnostic way that was designed to support the credibility of V.

[44] There are five reasons why we do not agree with Mr Brookie's submission.

[45] First, the final paragraph of the s 9 statement of agreed facts, which was read by the prosecutor to the jury, made very clear that the counter-intuitive evidence did not prove or disprove N's guilt. The jury had a copy of this important qualification as to the use it could make of the counter-intuitive evidence. The prosecutor also explained to the jury the legitimate use that could be made of the counter-intuitive evidence, as did Mr Winter and the trial Judge. The jury were told on at least four occasions how they could legitimately use the counter-intuitive evidence.

[46] Second, the prosecutor's references to the counter-intuitive evidence were in the context of a very comprehensive closing address in which the Crown relied upon the 14 matters which we have briefly summarised at [11]. This was the antithesis of what occurred in *Bruce*, where the closing address was in effect based entirely upon impermissible use of counter-intuitive evidence.

[47] Third, when properly analysed, it is apparent that almost every reference made by the prosecutor to the s 9 statement of agreed facts was not "diagnostic" or otherwise

¹² At [59]–[60].

impermissible. In particular, the statements from the prosecutor we have set out at [37(b)–(d)] were a legitimate use of the counter-intuitive evidence. Those paragraphs were anodyne explanations as to why V did not complain immediately about N’s offending and why his complaints unfolded incrementally.

[48] Fourth, the only occasion when the prosecutor may have erred was when she referred to a teenager’s reluctance to disclose that they have been the victim of sexual abuse. The prosecutor’s reference to the agreed statement of facts and her rhetorical question “Do you think that might be what happened here?” involved the prosecutor relying on the counter-intuitive evidence to specifically explain why V did not immediately complain to his family about N.

[49] We are, however, satisfied that the remarks of the prosecutor we have set out at [37(a)] were more than counterbalanced by the directions given by the trial Judge, the submissions from both counsel and the rider in the s 9 notice about the legitimate use the jury could make of the counter-intuitive evidence.

[50] Finally, there was nothing objectionable about the way the prosecutor commented on the fact V complained straight away to his mother about N having assaulted him. The statement of the prosecutor we have set out at [38] did not involve her inviting the jury to use the counter-intuitive evidence to engage in illegitimate reasoning.

[51] We are satisfied there was no risk the outcome of the trial was affected by the use the prosecutor made of the counter-intuitive evidence or that a miscarriage arose through the absence of further directions on this topic by the trial Judge. This ground of appeal also fails.

Conviction appeal ground three: lies direction

The Crown closing

[52] In her closing address, the prosecutor said to the jury that there was no reason for V to have lied about his complaints. The most detailed reference to V having no

reason to lie was contained in the following two paragraphs of the prosecutor's closing address:

So my second point is there's no reason for a young teenage [V] to lie about being sexually abused by [N]. Now, it's certainly not for the defence at any point to have any obligation to suggest a reason for a complainant to lie about sexual offending but here, by questioning the witnesses, there seems to be a suggestion that it was because of the embarrassing conversation [when N told V he had feelings for him] ... or the massages were painful but when [V] told his mum what [N] had done to him, [N] was out of his life. He hadn't been around for months to the house. ... he was completely gone from ... family, everything, when he tells [his girlfriend, his counsellor], and the police.

And [V's] a teenage boy. You might know teenage boys. You might've been a teenage boy once. Use your common sense and your life experience. What's the impact of a teenage boy having to tell his mum this, his girlfriend, the female school counsellor, and a female police officer, and give evidence in court about being sexually abused by another male? Consider how excruciatingly painful it was for him in his interview when he was talking about getting erections when [N] was working near part of his private parts. Why oh why would he make that up if it wasn't true and why oh why would he put himself through giving evidence about being sexually abused by another male if it wasn't true?

The Judge's summing up

[53] In summing up, the trial Judge reinforced that there was no onus on the defence. The Judge said:

[97] In the Crown's address to you Ms Davies point[ed] out that there was no apparent reason, on the evidence, for [V] to have made these events up. I need to direct you that it would be wrong to conclude that because [N] is facing these charges, he has some sort of motive to lie. That assumes he is guilty and our law says quite the opposite. [N] is presumed innocent and does not have to prove anything. You are not to disbelieve his evidence just because he is facing charges. That would be unfair.

[98] It was suggested by the Crown that [V] has no motive to lie and that there is no evidence of reasons to do so. Now if you accept that then that is something you can weigh when deciding whether you accept his evidence. However, just because there is no motive to lie [that] has emerged in the evidence does not mean that [V] is to be believed. The issue is just one factor you take into account but you need to consider all of the issues and all of the evidence. It is critical also that you remember when considering this matter that there is no onus or responsibility on [N] to prove anything and Ms Davies reminded you of that in her address earlier on today.

...

[100] Ms Davies commenced by taking you through 14 reasons why she says that you can be sure [V] is telling the truth. She told you that the detail

of what he said could not reasonably have been made up and gave you examples from the evidence that she says amounts to compelling detail that suggests that he is telling the truth. Accepting that the defence does not have to suggest a reason for [V] to lie she does, however, point out to you that there is no reason apparent on the evidence for [V] to lie and that those that might arise do not stack up in the final analysis.

Summary of appeal

[54] Mr Brookie made a number of submissions about the appropriateness of the prosecutor's closing address. We mean no disrespect when we say that Mr Brookie's submissions can be distilled to two basic elements:

- (a) The Crown impermissibly advanced the proposition that V had no reason to lie in order to boost V's credibility.
- (b) The prosecutor's submission effectively placed an onus on the defence to produce a plausible reason why V may have lied.

Relevant law

[55] In *R v T* this Court explained that a "why would the complainant lie?" proposition should not:¹³

- (a) be presented in a way that deflects from the central question, namely whether the prosecution had proven the charge beyond reasonable doubt; nor
- (b) constitute a suggestion that there was an onus on the defence to explain why a complainant might lie.

[56] More recently, this Court has said:¹⁴

[42] It is well settled in New Zealand that it is permissible for prosecutors to question defendants (should they choose to give evidence) on a complainant's motive to lie and to close on the subject. But prosecutors must be moderate in their treatment of the subject. The risk that must be guarded against is the prospect that raising the absence of evidence of a complainant's

¹³ *R v T* [1998] 2 NZLR 257 (CA) at 265.

¹⁴ *Glassie v R* [2018] NZCA 308.

motive to lie will subtly shift the onus of proof in the minds of the jury and lead them to convict unless the defendant can offer a plausible reason for why the complainant must be lying.

Analysis

[57] As we read the prosecutor's closing address, the "no reason to lie" proposition was advanced in response to cross-examination of V in which it was suggested by defence counsel that V:

- (a) had been looking for a way to limit N's involvement in his sporting activities;
- (b) wanted N out of his life after N had expressed a romantic interest in him; and
- (c) reacted adversely to his mother continuing her friendship with N after V complained to her about N having touched him in a sexual way.

[58] As we have noted at [12], Mr Winter did in fact suggest in his closing address that V may have had reasons to lie about his complaints.

[59] The prosecutor's comments did not involve placing an onus on N to explain why V may have fabricated his allegations. On the contrary, the prosecutor properly explained to the jury that, by raising the "no reason to lie" issue, she was not suggesting the defence had an obligation to present a reason for a complainant to lie about sexual offending.

[60] Similarly, the trial Judge made it abundantly clear that there was no onus on N to explain why V may have lied.

[61] Nor do we accept that the prosecutor's submissions concerning the absence of any reason for V to lie involved an impermissible boosting of his credibility. Prosecutors are entitled to ask jurors why a complainant would lie, particularly in a case where the defence has put in issue the possibility that a complainant was motivated to fabricate his or her allegations.

[62] In this case, the prosecution anticipated Mr Winter's closing submissions concerning V's motives to lie and properly set out to negate the defence argument.

[63] The Judge's clear directions ensured no possibility of a miscarriage of justice arose from the use the prosecutor made of the "no reason to lie" proposition.

[64] Accordingly, there was no miscarriage of justice in the way in which the "no reason to lie" issue was dealt with by the prosecutor or the trial Judge. This ground of appeal fails.

Conviction appeal ground four: reasonable belief in consent direction

[65] The fourth ground of appeal is confined to the conviction in relation to the sixth charge, which alleged N had performed oral sex on V. It was part of V's evidence that when he told N to stop performing oral sex, N said "I thought you'd enjoy it".

[66] Mr Brookie submitted that N's response raised a reasonable belief in consent and that the trial Judge erred by not directing the jury specifically on the reasonable belief element by discussing the comment that V attributed to N.

[67] The defence case was that N did not offend against V in any way. Thus, in relation to Charge 6, N contended that he did not perform oral sex on V or say that he thought V would like receiving oral sex.

Crown's closing submissions

[68] In her closing address, the prosecutor said the following about Charge 6:

... [V] obviously carries on pretending to be asleep but when the defendant puts his mouth on his penis then he sits up and is like "what are you doing" and the defendant is [like] "I thought you'd like it".

So for that, there was no consent by [V] for those actions nor could the defendant have believed that. ...

Defence closing

[69] Mr Winter did not refer to Charge 6 in his closing address. Instead, the defence relied on its general stance that no offending of any kind occurred, and that the alleged offending was implausible.

Summing up

[70] The trial Judge directed the jury in relation to consent in the following way:

[37] [In relation to Charges 2 and 3] Although consent is not an issue in the trial, I need to tell you what that means because that remains, despite the lack of it being an issue, a matter for you to decide. Consent means true consent freely given by a person who is in a position to make a rational decision. There is no presumption that a person is incapable of consenting to a sexual connection because of age and a lack of protest or physical resistance to the sexual connection does not of itself amount to consent.

[38] Charge 6 is another charge of sexual violation by unlawful sexual connection.

[39] The Crown says, however, that this offence was committed in a different way. The Crown says that on this occasion [N] sucked [V's] penis, what we know as oral sex. So the Crown must prove beyond reasonable doubt that [N] effected or brought about a connection of his mouth with [V's] penis and that [V] did not consent to that and that [N] did not believe that [V] was consenting or [N] did not have a reasonably grounded belief that [V] was consenting. I have already told you what consent means. I am not going to tell you again. Once is enough. In any event the definition I have given to you is in writing in the questionnaire I am going to give you in a minute.

[71] The Judge returned to the elements of consent in relation to Charge 6 when taking the jury through the question trails. The Judge said:

[65] Has the Crown made you sure that either at the time [N] intentionally sucked [V's] penis that [N] did not believe that [V] was consenting to that act or at the time [N] intentionally sucked [V's] penis there were no reasonable grounds for [N] to believe that [V] was consenting? If the answer to that question is no you find [N] not guilty of charge 6 ...

Relevant legal principles

[72] In *Christian v R*,¹⁵ a majority of the Supreme Court held that a miscarriage of justice had arisen because the trial Judge failed to direct the jury on consent at all.

¹⁵ *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315.

The Court explained that even in cases of sexual violation where the defence is one of complete denial and even where the defendant does not raise consent or reasonable belief in consent, the Judge must direct the jury on the elements of consent.¹⁶

The Court said:

[36] The directions do not need to be elaborate but need to ensure that the jury is clear that a guilty verdict can be returned only if the Crown has proved beyond reasonable doubt that the complainant did not consent and the defendant did not believe on reasonable grounds that the complainant consented. For example, it would be sufficient in a case where the defendant does not raise consent or reasonable belief in consent as issues for the Judge to outline those elements of the offence, record that the defendant has not raised an issue with those elements but make it clear that the jury must nevertheless be satisfied beyond reasonable doubt that the complainant did not consent and that the defendant did not reasonably believe he or she did. The Judge's summary of the evidence should draw the jury's attention to any evidence relevant to those elements. Of course, in outlining the evidence, the Judge must not invite the jury to disbelieve the defendant's defence of complete denial that any sexual encounter occurred.

Analysis

[73] Mr Brookie properly accepts the trial Judge directed the jury on all relevant elements of consent in relation to Charge 6, including reasonable belief in consent. Mr Brookie submits, however, the Judge erred by failing to draw the jury's attention to the evidence that related to whether or not the Crown could prove absence of reasonable belief in consent, namely the statement attributed to N, that he thought V would enjoy having oral sex performed on him.

[74] There are three reasons why we are satisfied no miscarriage of justice arose through the way the Judge directed the jury in relation to Charge 6.

[75] First, as we have already stressed, the defence at trial was that N did not perform oral sex on V or suggest that V might have liked receiving oral sex. This was a case where labouring the evidence concerning N's comments at the time of the alleged offending risked inviting the jury to "disbelieve the defendant's defence of complete denial that any sexual encounter occurred".¹⁷

¹⁶ At [35]–[36].

¹⁷ At [36].

[76] Second, Mr Winter did not ask for further directions from the Judge on reasonable belief in consent. No doubt Mr Winter did not wish the Judge to risk undermining N's denial that any sexual activity occurred.

[77] Third, unlike in *Christian*, the trial Judge gave a complete direction to the jury on the requirements of consent and reasonable belief in consent when addressing Charge 6. This was not therefore a case such as *Christian* where the Judge's omission led to a miscarriage of justice. This ground of appeal also fails.

Sentence appeal

[78] Judge Northwood adopted a starting point of seven years' imprisonment. There was a six-month deduction from the seven-year starting point to reflect N's previous good character, which produced an end sentence of six and a half years. The sentence appeal relies on a single contention, namely that the starting point adopted by the Judge was far too high and that, as a consequence, the end sentence was manifestly excessive.

[79] Ms van Boheemen, who argued the sentence appeal for N, relied on the following cases to support her submission that the end sentence should have been no more than five years' imprisonment.

[80] *Rua v R* involved a teacher's aide who sexually offended against an 11-year-old girl.¹⁸ Mr Rua was found guilty of six charges of committing indecent acts (kissing the complainant, touching her under her clothing, rubbing his genital area against her, touching her breasts and putting his tongue in her mouth). He was also convicted of two charges of sexual violation after he licked the complainant's vagina and engaged in digital penetration of her vagina. This Court took no issue with the starting point of five and a half years' imprisonment in Mr Rua's case.¹⁹

[81] In *R v H*,²⁰ the defendant was convicted of sexually violating his 13-year-old niece over a four-month period. The offending included stroking the complainant's

¹⁸ *Rua v R* [2014] NZCA 599.

¹⁹ At [60].

²⁰ *R v H* [2015] NZHC 657.

vagina and putting his fingers inside her vagina. He was also convicted of six charges of indecent assault on a young person, which included trying to get the victim to touch his penis. The High Court Judge adopted an overall starting point of four years and nine months' imprisonment.²¹

[82] In *A (CA731/2020) v R*, this Court adopted a starting point of five and a half years in relation to a father who was convicted of five sexual violation incidents against his daughter when she was between six and nine years of age.²² The offending included licking the victim's vagina and rubbing her genital area.

Analysis

[83] We acknowledge the importance of consistency in sentencing. As we will explain, however, there are cases similar to N's in which starting points of seven years and seven years nine months' imprisonment have been considered appropriate.

[84] In *Baldwin v R* a starting point of seven years and six months' imprisonment was adopted by this Court.²³ The offender in that case was a teacher and the victim was 12 years old when the sexual offending commenced. The victim and Mr Baldwin stroked each other's genitalia over a 20-month period. On some occasions Mr Baldwin swiped the victim's anus with his finger. The victim and Mr Baldwin both kissed each other's penises. This Court noted that there had been no penetrative conduct and that cases involving penetration are more serious than those that do not involve penetration.²⁴

[85] In *Botha v R*,²⁵ a starting point of seven years and nine months' imprisonment was adopted following Mr Botha's conviction on a representative count of sexual violation by unlawful sexual connection which involved digital penetration and a further representative count of doing an indecent act on a child under 12. The victim in that case was seven years old and the daughter of a family friend. Mr Botha

²¹ At [37]. Note the defendant's convictions were quashed on appeal, see *H (CA240/2015) v R* [2016] NZCA 57. Following retrial, the defendant was convicted of fewer offences, and a starting point of four years' imprisonment was adopted, see *R v H* [2016] NZHC 2705.

²² *A (CA731/2020) v R* [2021] NZCA 306 at [17].

²³ *Baldwin v R* [2010] NZCA 472 at [26].

²⁴ At [20].

²⁵ *Botha v R* [2015] NZCA 196.

massaged the victim's genitalia and engaged in digital penetration. The offending occurred over a nine-month period. This Court said that the starting point of seven years and nine months' imprisonment was clearly within the available range.²⁶

[86] In considering the sentence appeal, we apply the principles articulated by this Court in *R v AM (CA 27/2009)*.²⁷

[87] We agree with the trial Judge that in this case there were five aggravating factors:²⁸

- (a) A high degree of breach of trust that arose through the way N gained the trust of V and his family.
- (b) V's moderately high degree of vulnerability. The age disparity between N and V, combined with V's young age, produced a power imbalance which N took full advantage of.
- (c) The offending involved a moderate degree of seriousness and included three instances of sexual violation.
- (d) The harm caused to V by the offending.
- (e) N clearly engaged in careful planning and premeditation.

Ms van Boheemen took no issue with the Judge's assessment that these five aggravating factors were present.

[88] Normally, the existence of five aggravating factors would place N's offending in band three of *AM*, attracting a starting point of between nine to 18 years' imprisonment.²⁹ Rather than place N's offending into band three of *AM*, the trial Judge placed N's offending into the middle of band two, which normally attracts a starting

²⁶ At [18].

²⁷ *R v AM (CA 27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

²⁸ Sentencing notes, above n **Error! Bookmark not defined.**, at [50]–[57].

²⁹ *R v AM*, above n **Error! Bookmark not defined.**, at [113(c)].

point in the range of four to 10 years' imprisonment.³⁰ The starting point of seven years adopted by the Judge in this case was well within the available range once it was determined that N's offending fell within the mid-range of band two of *AM*.

[89] We are satisfied that the starting point of seven years' imprisonment was well within the range available to the trial Judge. No issue is taken with the deduction of six months made on account of N's previous good character and his fall from grace. The end sentence of six years and six months' imprisonment was therefore not manifestly excessive.

Result

[90] The appeal against conviction is dismissed.

[91] The appeal against sentence is dismissed.

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³⁰ At [113(b)].