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

PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA472/2021
[2022] NZCA 472

BETWEEN	RICHARD JUNIOR RATU Appellant
AND	THE KING Respondent

Hearing:	17 February, 17 July and 11 August 2023
Court:	Katz, Whata and Davison JJ
Counsel:	P I Pati for Appellant Z R Johnston for Respondent
Judgment:	29 September 2023 at 9:00 am

JUDGMENT OF THE COURT

A The application for leave to adduce fresh evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Davison J)

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Introduction

[1] Mr Ratu (the appellant) appeals his convictions on one charge of sexual violation by rape,[1] and five charges of doing indecent acts on a girl aged between 12 and 16 years.[2] He was found guilty of the charges by a jury at a trial which was held in the Manukau District Court in March 2021, and convictions were entered on 31 March 2021. On 2 July 2021 he was sentenced by Judge R J Earwaker to 10 years' imprisonment on the sexual violation by rape charge and concurrent sentences of three years' imprisonment on each of the indecent act on a young person charges.[3]

[2] Mr Ratu appeals on the grounds that fresh evidence from two witnesses shows that the verdicts of the jury cannot reasonably be supported and should be quashed. Ms A, the partner of the appellant's son Mr B, gave evidence at his trial and has since sworn an affidavit stating that her trial evidence on an important issue was incorrect. The second witness, Ms C, is a cousin of the appellant who was not called as a witness at trial. She has sworn an affidavit stating that she was present on an occasion when the complainant said she was indecently assaulted by the appellant. She says that she did not see the appellant behaving in the manner the complainant said.

[3] The appellant applies for leave to admit the two witnesses' affidavit evidence for the appeal.

[4] The Crown opposes the admission of the affidavits as fresh evidence for the appeal. The Crown says the evidence of the two witnesses is not admissible, and furthermore, even if admitted does not create a real risk of any different outcome of the appellant's trial.

The offending

[5] The complainant was 14 years old in May 2018 when the first indecent act committed against her by the appellant occurred. In May 2018 the appellant was aged 50.

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1 Crimes Act 1961, ss 128(1)(a) and 128B. Maximum penalty: 20 years' imprisonment.
2 Section 134(3). Maximum penalty: seven years' imprisonment.
3 *R v Ratu* [2021] NZDC 13205 at [33]. The appellant filed an appeal against sentence, but subsequently filed a notice of abandonment for that appeal, dated 1 February 2023.

Charge 1 (indecent act on young person)

[6] On 19 May 2018 the appellant and complainant, together with a number of their family members, were staying the night at a marae. After the family group returned to the marae the appellant was drinking alcohol. The complainant said that that evening dinner was served at a large table in the marae. She said that while she was seated at the dinner table on a bench with other family members the appellant sat beside her and put his hand on her leg before slowly sliding it up towards her inner thigh. She said she was wearing baggy shorts and the appellant's hand went up under her shorts. The complainant said that she pushed the appellant's hand away, and told him stop. She said that the appellant's response was to say "okay I'm sorry".

Charge 2 (indecent act on young person)

[7] That same evening the complainant said that she got up and went to get some dessert, returned to the dinner table where she had been sitting, and the appellant who had also left the table returned to sit beside her. She said that he again touched her on her leg with his hand. She said that on this occasion his hand on her leg was more forceful than the first time, and it was harder for her to push it away. She said that she told him to stop, that she did not want him to touch her, and that he was drunk. She said that his arms were big and she found it hard to push his hand away and off her. She said that when she was pushing his hand away, her movements made the dinner table shake and the appellant stopped touching her. The complainant said that while this was taking place one of her cousins, Ms D, who was 15 years old, was standing behind her and commented to the complainant that she had seen what the appellant had done.

Charge 3 (indecent act on young person)

[8] The complainant said that she then moved away from the dinner table, and later that same evening was in another part of the marae playing a game of cards with a group of her younger cousins. They were all lying on mattresses on the floor. While this was taking place the adult members of the family were outside, and there were no adults in the room. The complainant said that the appellant entered the room and was standing beside her as she lay on a mattress. He proceeded to rub his foot against her

leg, moving from the calves of her legs to her thighs. The complainant described the rubbing as "rough and weird". She said that when she turned and saw that it was the appellant touching her, she stood up and went to the bathroom where she started crying.

Charge 4 (indecent act on young person)

[9] The complainant said that after being in the bathroom for a short time she returned to re-join her cousins playing cards. The complainant said that after she had returned to the group, the appellant returned and said that he wanted to join in the card game. She said that the appellant then sat and lay down beside her. She said that she was sitting on the floor and had a pillow on her lap, and while she was dealing out the cards, the appellant put one of his hands on her shirt and her breasts. She said that she shook him off. The complainant said that to make it appear to the others present that nothing untoward had taken place, she proceeded to finish the card game that was underway. She then stood up and went to the bathroom where she started crying again. She said that when she returned to the marae, she saw that the appellant was asleep.

Charge 5 (indecent act on young person)

[10] The complainant said "lots of times" between 20 May 2018 and 6 October 2018, when she was at the appellant's son's address, the appellant would squeeze or slap her bottom before walking off. She said that the appellant only did this when he and the complainant were alone in the room together.

Charge 6 (sexual violation by rape)

[11] The complainant said that on an occasion around 6 or 7 October 2018 she was staying the night at the appellant's son's residential address, who lived with his partner, Ms A. She was 15 years old at the time. She said she often visited the address and sometimes stayed the night, and when she stayed the night she slept on a mattress in the lounge. She said that on this particular night she had made her bed in the lounge and after having a shower had got into bed and had fallen asleep. The appellant's son, Mr B, and his partner, Ms A, had gone out to spend the evening at the Auckland Casino, and she had been alone in the house. She said that although the appellant often

visited his son and his partner at the address, he was not at the house that night when she went to bed. She said sometime later she woke up and saw the appellant standing beside her, but went back to sleep. She said she then realised that the blanket of her bed was being pulled off her and the appellant proceeded to take off her shorts and underpants. The complainant said that the appellant told her that everything was okay and not to tell anyone. The complainant said she was scared and that the appellant then lay on top of her and was trying to put his penis into her vagina. She said when she tried to push him away and stop him he became angry. She said the appellant then forcibly put his penis into her vagina and started "humping [her] and raping [her]". She said that she told him to get off her, but could not say it properly, and when the appellant finished and got off her, she went to the bathroom and realised that she was bleeding from her vagina which was very sore. She said that when she went to the bathroom she was crying and the appellant told her to shut up. She said that when she returned from the bathroom the appellant was asleep on the couch.

[12] Later, when Mr B and Ms A arrived home from their visit to the Auckland Casino, the complainant asked Mr B if he would stay with her and sleep in the lounge, which he did.

Trial evidence

[13] We provide a brief summary of the evidence of two Crown witnesses to provide the context and relevance of the affidavit evidence the appellant seeks to have admitted.

Ms D's evidence

[14] Ms D is a cousin and close friend of the complainant. She was 17 years old at the time of the appellant's trial. Ms D said that she was present at the marae on the occasion when the family had gathered. She gave evidence that everyone ate together at the same time seated around the table. She said she did not notice anything happening to the complainant during dinner, but said she saw her get up and go to the bathroom. She said that she saw the appellant enter the wharenui where the young members of the family had gathered one or two hours after dinner. She said he was "walking very funny" and appeared to be drunk. She said he walked over to where

the group were playing cards and sat down beside the complainant. She said that she saw the appellant trying to put his hands "by her private part" through the blanket.

[15] Ms D said that when this happened she saw the complainant's whole face change, but she just stayed there. After the appellant had left the room and returned she said that she could see him standing where the complainant's legs were as she was lying down and that he was playing with her feet with his feet. Ms D said that the complainant then ran into the wharekai where dinner had been served earlier, and she followed her to see if she was alright. She said that the complainant disclosed to her that the appellant had touched her when they were playing cards and that she was upset.

Ms E's evidence

[16] Ms E is Ms D's younger sister who was around 12 or 13 years old at the time of the events she described in her evidence. She said that she was present in the marae on the occasion when she and several of her cousins, including the complainant, were sitting or lying on the mattresses on the floor and playing cards. She gave evidence that around 10 to 15 minutes after they had started playing cards she had noticed the appellant come into the room. She said she saw him placing his hand on the complainant's upper chest and "then rolling it down to her waist and stuff". She gave evidence that he did this for around 10 seconds, and in response the complainant grabbed a pillow and placed it where he was touching her, after which the appellant started laughing and then put his hand by her thighs, trying to push his hands into the pillow.

[17] Ms E said that at that point the complainant walked out of the room and went to the toilet. She said that she could see that the complainant was uncomfortable and so she ran after her and asked her if she was alright. She said that the complainant "just looked frightened" and told her not to say anything.

The evidence sought to be admitted on appeal

Ms A's evidence

Ms A's trial evidence

[18] As we have noted, Ms A is the partner of the appellant's son, Mr B. They reside at the address where the complainant gave evidence that she was raped by the appellant.

[19] Ms A made a written statement to the police on 8 May 2019, and was called as a prosecution witness at the appellant's trial. She gave evidence that on 1 January 2019 she and Mr B were at a family gathering when she overheard the complainant talking to some of the other girls present. Ms A said that as a result of what she overheard she spoke to Mr B, and he then spoke privately with the complainant. She said that after Mr B had spoken to the complainant he told Ms A that they had to go and speak to the appellant immediately. Ms A said that she and the complainant left the family gathering and were driven by Mr B to the appellant's residence. She said that Mr B was in a state of "rage" on the way to the appellant's house, and the complainant was trying to get her to stop Mr B from confronting his father. She said that when they were nearly at the appellant's residence, Mr B shouted at the complainant, saying that she should tell Ms A what she had told him. Ms A's evidence at trial was that the complainant disclosed to her that the appellant "touched [her]" and when she asked how, the complainant responded "[h]e put it in". Ms A said that was all the complainant had said.

[20] Ms A was not cross-examined by the appellant's trial counsel regarding what she said the complainant had said to her in the car.

[21] Ms A's evidence about what the complainant said to her in the car while being driven by Mr B to the appellant's residence was consistent with the statement she made to the police on 8 May 2019, in which she said:

> When we got to [the appellant's address] [Mr B] said to [the complainant], "You better tell her or else I will." That's when [the complainant] said, "[The appellant] touched me." I clarified, "What do you mean touched you?" [The complainant] replied, "He put it in me."

Ms A's evidence on appeal

[22] In her affidavit sworn on 12 January 2022 which the appellant seeks to have admitted as fresh evidence, Ms A said that she was at her home on the night that the complainant says she was raped, but at a time after the complainant said it occurred. Referring to the conversation in the car on 1 January 2019 she states:

> When I was in the car, this was the first time that I had been told about the rape. My partner was very angry and was telling the victim to tell me exactly what had happened.
>
> She was reluctant at first, but my partner told her to tell me otherwise he would tell me himself. She then said that the appellant had "put it in [her]". … I immediately started to think what exactly did she mean because abuse can mean a lot of things.
>
> She then went on to say that the appellant had raped her by putting his penis in her rear end or more accurately her "bum". She then said it was bleeding after it happened.
>
> I tried to ask her more details about what happened because I did not know whether to believe her or not.
>
> I remember when meeting with the police that I did say this about the victim saying that she was raped in her rear end. However in my statement that I had signed it does not have this detail in it. All it says is that I said that the victim told me that the appellant put his penis in her without any other detail.
>
> If I knew that this was the case earlier I would have told the police about this error. As I've said earlier, at the time when I signed my statement I did not read it properly before I signed it.

[23] The respondent required Ms A for cross-examination at the hearing of the appeal. Ms A confirmed that the complainant responded to her question about what she meant by her statement that the appellant had "put it in [her]" by saying that "he put it in … her bum".

[24] Ms A said that when she was making her statement to the police, the interviewing officer Detective Sergeant Mark Jamieson was typing the statement and during this process, at her request, he made a number of amendments and produced several printed versions which were further amended before she signed what became the final version. The cross-examination transcript states:

> Counsel: Obviously you got asked about the rape allegation with [the appellant] and the complainant.

Ms A: Hmm Hmm.

Counsel: Can you remember when he was asking you questions around that, whether that was the time when he needed to correct what he had typed down at all?

Ms A: Can't remember the time but after about the third time he had written it and I went back to the same spot, I said to him he still hadn't put it down. And then the fourth time he wrote it, it was there, but when I signed it, and then when I seen it in court, when I had to stand, I told that pakeha cop straight away there was something missing from there.

Counsel: Well, can I ask you this then, did you read the final version of the statement before you signed it after 12.00 o'clock?

Ms A: I think I did, I'm not sure. I think I just roughly did it because I was over it by then and just kind of signed because I had had enough.

Counsel: So, when you say "I roughly read [i]t", can you expand on what you mean by that in terms of understanding everything that was typed out, please?

Ms A: So, I kinda just went through hard and fast, signed it then left.

[25] She said that when she went to Court to give evidence at the appellant's trial she told the police officer who gave her a copy of her statement to read that something was missing from it. She said in response to questions:

Counsel: Now at court you've said to the other lawyer that there was a conversation between you and the officer about your statement. I just want to be very clear again. Are you saying that that was the only time you had read the statement you had signed since that day that you originally signed it?

Ms A: Yes, that's correct.

...

Counsel: Sorry, what was said between the two of you – you had said to the other lawyer about things not being right in the statement?

Ms A: When we came into court, I said to him there was a piece missing and the piece missing was about [the complainant] saying that [the appellant] had "put it in her bum". And then he told me that's irrelevant to the court case. It's the Crown versus [the appellant] and at the moment you're on the Crown and I said but that's not right.

[26] Ms A's cross-examination evidence was therefore to the effect that:

(a) she told the interviewing officer that on 1 January 2019 the complainant had told her that the appellant had anally raped her but that the police officer had not recorded that in the typewritten statement;

(b) after arriving at Court and shortly before she gave evidence at trial she was given a copy of her statement to read and told the police that there was a piece missing; and

(c) the police officer responded that she was a witness on the Crown side, and so when she gave evidence she did not mention that the complainant had said that she had been anally raped by the appellant.

Explaining why she did not mention in her evidence being told by the complainant that she had been anally raped she said, "[t]hey didn't ask me". Ms A accepted that despite the outcome of the trial and the appellant being sentenced to imprisonment, the first time that she had mentioned in her sworn evidence that the complainant had told her that the appellant had anally raped her was when she swore her affidavit for the current appeal.

Respondent's rebuttal evidence

[27] Ms A's evidence regarding telling a police officer that there was "a piece missing" from her statement only emerged in the course of her evidence at the hearing of this appeal and had not been referred to in her affidavit. Therefore, we adjourned the appeal to enable the Crown counsel to take instructions, and we granted leave to the respondent to file affidavits in reply by the police officers referred to by Ms A.

[28] The respondent subsequently filed affidavits by Detective Sergeants Jamieson,[4] and Taylor.[5] Detective Sergeant Jamieson interviewed Ms A at the Manukau Police Station on 8 May 2019 and prepared her witness statement which she had signed at the conclusion of the interview. Detective Sergeant Taylor was the police officer who spoke to Ms A at the Manukau District Court shortly before she gave evidence at the appellant's trial.

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4 Sworn 8 March 2023.
5 Sworn 9 March 2023.

Detective Sergeant Jamieson

[29] In his affidavit Detective Sergeant Jamieson said that the interviewing process with Ms A included asking her questions and typing her answers in the form of a narrative statement. He said that had Ms A disclosed an allegation that the appellant had put his penis inside the complainant's "bum" or "rear end", he would have recorded that information in Ms A's statement. He said that when the statement was concluded he printed off a hard copy and gave it to Ms A to read. He said that Ms A appeared to take time to read each page of the statement to herself, before writing her initials on each page, and signing and endorsing it as accurate.

[30] Detective Sergeant Jamieson denied Ms A's claim that when she questioned the accuracy of an aspect of her police statement, he had responded: "Well, this is what we're going to go off because they were against my father in law." He said that if any errors or corrections were requested to be made by Ms A, he would have made them before giving the statement to her to read. Regarding Ms A's claim that he had had to make changes to her statement four or five times, Detective Sergeant Jamieson said that while it would not be unusual for a statement to have amendments made to it, he doubted that he would have made that number of changes. He said however that having given Ms A a hard copy of her statement to read, had any changes been necessary he would have made them immediately.

[31] When cross-examined Detective Sergeant Jamieson said that on 8 May 2019, after he had finished preparing her statement, Ms A had not asked him whether she could go away and think about it before signing it. He said that unless a witness made such a request his practice was to give them their statement to read, make any appropriate changes they requested, and have them sign it. Detective Sergeant Jamieson firmly denied that Ms A had complained about the way he had written something at any time during the preparation of her statement, or that he had told her that he was not going to change what he had written. He also said that he did not recall Ms A appearing "hōhā" during the taking of her statement, and said he was

"100 per cent" sure that she had not told him at any stage that the complainant had told her that the appellant had put his penis in her "bum". He said:

> … and I spent the better part of three hours with [Ms A] taking a detailed statement from her. If something like that had been raised, I would have made those changes and I know for a fact that was not raised at all.

[32] Detective Sergeant Jamieson also denied Ms A's claim that at one stage during the process of preparing her statement he had amended it to include her account of the complainant telling her that the appellant had put his penis in her "bum", but that he had subsequently removed that detail from her statement.

Detective Sergeant Taylor

[33] In his affidavit Detective Sergeant Taylor explained his responsibilities as officer in charge of the investigation. He was not present in the interview room during Ms A's police interview.

[34] Detective Sergeant Taylor said that on 25 February 2021 when he served Mr B and Ms A with their summons requiring their attendance at the trial, Ms A told him that due to personal matters she was not in a state to deal with the witness summons and trial issues, and that she would not be appearing in court. Detective Sergeant Taylor explained:

> I did not provide the statements to either [Ms A] or [Mr B] that I had brought to the address with me. This was due to what [Ms A] had told me, that she would not be appearing in court, and the hostility I was receiving at the address. I left a short time later.

[35] Detective Sergeant Taylor said that during the week prior to the trial he was notified that Ms A had attended the public counter of the Manukau Police Station and requested to withdraw the statement she had made to police, saying that she was going through personal issues and did not want to have any further involvement with the matter. Detective Sergeant Taylor said that on 16 March 2023 he sent Ms A an email advising that the prosecution considered her and Mr B's evidence to be essential and that the prosecution had applied to the Court for a summons requiring them both to attend. He said that he did not receive a reply to his email.

[36] The trial commenced on 22 March 2023, and after neither Ms A nor Mr B attended the Court as required, the Crown applied for the issue of warrants for their arrest. Detective Sergeant Taylor said that enquiries by the police on 23 and 24 March 2023 to locate Ms A and Mr B proved unsuccessful, and on the morning of 25 March, he had still not heard from them or located them. At around 10.00 am on 25 March Ms A and Mr B unexpectedly arrived at the Manukau District Court. Detective Sergeant Taylor describes what then happened:

> The Court adjourned and I went out and greeted them. I then took them into a breakout room at court.
>
> In the breakout room, I provided them both a copy of their statements to read.
>
> The adjournment in court, using the times listed in the notes of evidence, was 16 minutes. The court adjourned at 10:15 am. Court resumed at 10:31 am.
>
> I explained to [Ms A] that she would be the first witness to give evidence in court. I explained the process of swearing or affirming prior to giving evidence. I explained the prosecutor will ask questions first, followed by the defence lawyer.
>
> I explained that the prosecutor would ask questions in relation to the statement she had just read. I asked if there were any questions she had about her statement or in relation to giving evidence. [Ms A] confirmed that she had no questions.
>
> …
>
> [Ms A] did not at any stage mention there was a piece missing from her statement, nor did she say to me anything [to the effect] that [the appellant] had "put it in her bum". This is incorrect.
>
> If a witness would have said something was missing from her statement, I would have recorded this in my notebook, the changes to their statement. I would have raised this with the prosecutor and asked for further time to document these changes prior to court.
>
> …
>
> In response to [Ms A] stating that I told her; "that's irrelevant to the court case. It's the Crown versus [the appellant] and at the moment you're on the Crown and I said but that's not right". This is incorrect. This conversation never took place between us.

[37] In cross-examination Detective Sergeant Taylor denied each of the allegations made against him by Ms A.

Ms A's second affidavit

[38] Ms A replied to the affidavits of the two police officers in a second affidavit dated 7 April 2023. She said that only a small part of her interview with Detective Sergeant Jamieson concerned the conversation she had with the complainant about what the appellant had done to the complainant. She said that she is adamant that she told Detective Sergeant Jamieson that the complainant told her that the appellant had "put it in her bum", and said that she is unsure why the Detective did not make a record of this conversation in her statement. She said:

> When [Detective Sergeant Jamieson] eventually handed me a copy of my statement to read over and sign, I remember I had to ask him numerous times to change words in the statement. I asked [him] to change the wording of the statement as I believed that it did not sound like me, and felt as though it was trying to portray me as someone I am not. I was also unhappy with the statement because [he] was using language that I would not use, as if he was trying to mould my words. I think [his] use of language was a means of trying to sum up what I had said, as opposed to recounting the details.
>
> I recall that I had to request [him] to make changes to the statement at least three times. By the time I read the third hard-copy statement, I decided just to sign it as I was becoming more impatient and [hōhā], the longer the interview proceeded. I signed the statement so that I could leave the Police Station.

[39] Ms A said that: prior to the trial she went to try to retract her statement and gave her email address for the officers to contact her; shortly before the trial date, when she was extremely upset due to a recent bereavement, she was visited at her home by Detective Sergeant Taylor; and she explained the circumstances to the Detective who replied that she had to attend the court or she would be arrested.

[40] Describing the day on which she gave evidence at the trial Ms A says:

> On the morning in which I was called as a witness, I went to Court. I was with [Mr B] and we were taken to a room in the Court. I had what felt like five minutes to briefly skim-read my statement just before I gave evidence. This was the first time I had seen my statement since I had signed it. It was me, [Mr B] and [Detective Sergeant Taylor] in the room. We were not in there for long before I had to go into Court and give evidence.
>
> While in the room, I was talking to [Detective Sergeant Taylor] about my concerns with the statement. I am certain that I did raise the fact that [the complainant] had said that "he put it in the bum" in my original interview. He said that we are not here about that. My response to him was like "What the hell?" and he said that that's irrelevant. He then said something like "It's the

> Crown versus [the appellant] and [you are] standing for the Crown", I then said "I'm not with the Crown, I'm not with anyone."
>
> I had then told him that there were a number of [other] problems with the statement, there were things about [Mr B] and [the complainant] that were wrong. He told me that this was irrelevant and had been pushed out by the Crown. It was no longer part of the case.

[41] As Ms A was unable to attend the hearing on 17 July 2023 to be cross-examined on her second affidavit, the appeal was adjourned and resumed on 11 August 2023. Under cross-examination by Ms Johnston for the Crown, Ms A was asked why she had not said anything about the complainant telling her that the appellant had put his penis in the complainant's "bum" at the trial. She said she hadn't mentioned it, "cause they didn't ask [about] that part".

[42] In relation to her police statement, Ms A said under cross-examination that she told Detective Sergeant Jamieson a number of times that the complainant had told her that the appellant had put his penis in her "bum". She said the fourth time she raised it the Detective wrote it in her statement and that it was there when she signed it. Therefore, her evidence was that the comment was removed at some time after she signed the statement. When Ms A came to Court she said she had a brief chance to read the statement and went to that section first:

> Counsel: Why was that?
>
> Ms A: Because that was one thing that I knew she had told me and then when I had a look it wasn't in there.
>
> Counsel: And did you know at that time, the day of the trial, what it was that [the complainant] had said to police about what had happened?
>
> Ms A: No, I had no information of what she had told them.
>
> Counsel: But at that time what she had said to you about where [the appellant's] penis went was significant?
>
> Ms A: Yes, because that was the one thing that stood out to me.
>
> Counsel: And I think that you said in your second affidavit, "I knew the importance of these comments to the case", do you stand by that?
>
> Ms A: Yes, I do.
>
> Counsel: And you knew that at the time of trial?
>
> Ms A: Yes.

Ms C's evidence

[43] The appellant also seeks to have the affidavit of Ms C admitted as fresh evidence on the appeal.

[44] Ms C was 13 years old when she swore her affidavit in December 2021. She said that she was one of the young people present in the wharenui of the marae playing cards (at the time the events giving rise to charge 4 were said to have occurred). Ms C said that she remembers the appellant coming into the wharenui during the card game and asking if he could join in. She said that the appellant looked like he had been drinking because he was louder than anyone else and appeared happy. She said that she watched the complainant and the appellant the "whole time they were playing and [she] did not see anyone get up to leave at any time". She said she then saw them go "to their beds".

[45] Ms C said that she was told about the appellant's trial and what it was about, but she did not think that it was "a kid's job to come forward and talk about things to the Court for an adult". She said that her older siblings did not want to talk to anyone about the case and that she had told her mother that she did not either. She said that when she found out that the appellant had been found guilty of the charges, she spoke to her mother and a lawyer about what she had seen.

Submissions

The appellant

Ms A's affidavits

[46] Mr Pati acknowledges that Ms A's evidence about what the complainant told her and which was not included in her police statement, was evidence which was potentially available at trial. Mr Pati submits however that it was incumbent on Detective Sergeant Jamieson as the interviewing police officer to clarify the matter with Ms A and to accurately record what she said she had been told. Mr Pati submits that because of the way in which Ms A's police interview was conducted, the complainant's statement to her was not available to be utilised by defence counsel at the trial. Therefore, the apparent contradiction between the statement to Ms A to the

effect she had been anally raped, and the complainant's trial evidence that she was vaginally raped, could not be put to her.

[47] Mr Pati submits that had the contradiction between the two differing accounts given by the complainant been put to her at the trial, the jury would then have been able to make a better informed assessment of the respective veracity of the complainant and the appellant. He submits that Ms A's failure to give evidence at the appellant's trial regarding what the complainant had told her about having been anally raped, can be explained by her ignorance "regarding the use of ambiguity at trial". He submits that there is no evidence to show that Ms A's further evidence is the result of any coercion or pressure being applied on her.

[48] Mr Pati notes that Ms A's affidavit evidence, if admitted, is still inculpatory of the appellant. He submits that this is not a case of a witness seeking to recant her evidence given at trial, but rather Ms A seeking to clarify an important aspect of her evidence. And he notes that the only other person present in the car when the statement was made by the complainant was Mr B who, according to the evidence, was in a very angry state at the time and unlikely to recall the conversation clearly.

[49] Mr Pati says regardless of whether the evidence is fresh it should be admitted because it is credible and not admitting it risks a miscarriage of justice occurring. Mr Pati submits that its introduction at trial would have significantly strengthened the defence case. He submits that had the jury heard evidence that the complainant had said she had been anally raped by the appellant the jury may have come to a different conclusion on the charges because of the effect the evidence would have had on the complainant's credibility.

Ms C's affidavit

[50] Mr Pati submits that Ms C's evidence is of significance because although she did not participate in the card game she was present and had a clear view of the game being played from start to finish. Ms C therefore had an undistracted view of events. He submits that in the context of the conflicting evidence about what occurred , Ms C's evidence would provide a jury with another account of the card game and the actions of those involved.

[51] Mr Pati notes that in her evidential police interview statement which was produced and played to the jury as her evidence-in-chief the complainant said that she had left the card game to go to the toilet twice. She said she did so once after the appellant had been touching her leg up her calves right up to her thighs, and again after he had touched her around her chest and breasts. Mr Pati further notes that Ms E, one of the other girls involved in the card game, gave evidence that she had been sitting beside the complainant during the game and that the complainant left the game to go to the toilet only once after Ms E had observed the appellant touching the complainant on her upper chest and putting his hand by her thighs. Ms E said that she had followed the complainant to the toilet and spoke to her there about what had happened. Mr Pati says that the significance of that evidence is that the complainant herself did not mention Ms E following her to the toilet.

[52] Mr Pati also notes that Ms D, who had participated in the card game, gave evidence that she observed the appellant "trying to put his hands by [the complainant's] private part … through the blanket". Ms D said that when this happened she saw the complainant's whole face change but the complainant stayed there and did not do anything. Ms D said that after she observed the appellant touching the complainant's feet with his feet the complainant ran out of the room and she followed her into the wharekai to see whether she was alright. Therefore, Mr Pati submits that Ms D's evidence contradicts the complainant's account of having gone to the bathroom twice during the game.

[53] Having regard to the differences in the accounts of these two witnesses and the complainant's evidence, Mr Pati submits that the Crown witnesses do not present a clear and consistent narrative. He notes that none of the other young people present during the card game and who were called to give evidence by the defence said that the complainant had left the card game to go to the toilet at any stage. And he submits that the inconsistent evidence of those prosecution witnesses is further contradicted by Ms C's affidavit evidence in which she says that the complainant did not leave the card game at any stage.

[54] Mr Pati submits that the complainant's evidence that she went to the toilet twice, each time immediately after she says the appellant had indecently touched her,

is a crucial aspect of her version of events. He submits that the inconsistencies between the evidence of the complainant and the Crown witnesses and the defence witnesses and Ms C, are of significance and go directly to the veracity of the Crown witnesses. He says that if Ms C's evidence had been before the jury at trial, no reasonable jury could have reached a guilty verdict.

Unreasonable verdict

[55] Mr Pati submits that having regard to what he terms the extremely concerning discrepancies between the complainant's evidence and the evidence of both the Crown and defence witnesses the verdicts of the jury were unreasonable.

[56] He identifies discrepancies relating to the night when the complainant reported she was raped as being:

(a) The complainant's evidence that she first disclosed the rape when she spoke to Mr B on New Year's Day 2019. Ms E said that the complainant had told her about the rape on a different and earlier occasion.

(b) The complainant gave evidence that the appellant was not at the house when she went to bed and fell asleep, and later woke to find the appellant standing beside her. However, Ms E's evidence was that the complainant had told her she had been in the shower when the appellant had arrived at the house. On Ms E's account, the complainant had seen him when he arrived and after her shower she had made her bed on the lounge and gone to sleep, before being woken by the appellant raping her.

(c) Ms A and Mr B gave evidence that the complainant was asleep in the lounge when they arrived back home after their night at the casino. They said that the appellant was sitting in the lounge and that the complainant did not wake up or speak to them. However although in her evidential police interview the complainant said she was pretending to be asleep when they arrived home, in her trial evidence she said that

when Ms A and Mr B arrived home from the casino she heard their car come down the driveway and when they came inside she spoke to them and asked Mr B if he would also sleep in the lounge, which he agreed to do.

[57] Mr Pati also identifies a number of other discrepancies between the complainant's evidence and other evidence, including:

(a) As regards the complainant's evidence that the appellant touched her while she was seated at the dinner table and Ms D followed her when she left the table and went to the toilet, in her evidence Ms D said that she did not see anything untoward happen at the dinner table and has no recollection of following the complainant to the toilet to console her.

(b) The complainant told the police in her evidential video interview that when the appellant touched her with his foot he was standing beside her as she was laying on the mattress on the floor playing cards, while at trial she said that this happened while they were both sitting. However, under cross-examination the complainant said that the appellant had been standing up and then he lay down, on his side with his feet facing her, and she was sitting with her legs crossed.

(c) While the complainant did not say that the appellant touched her in the area of her vagina or below the waist during the indecent touching in the wharenui, both Ms D and Ms E said that they observed him doing so.

(d) Three other young people who were present while the card game was being played gave evidence that they noticed nothing untoward as regards the appellant's conduct towards the complainant.

[58] Mr Pati therefore submits that in every instance where material aspects of the complainant's evidence against the appellant could be corroborated by evidence from other witnesses, her evidence was consistently undermined by the evidence of those

other witnesses, including Crown witnesses. He submits that the contradictory evidence of the other witnesses strikes at the heart of the material issues relating to the charges. Mr Pati submits that there is scarce reliable evidence upon which the jury could have found that the acts of the appellant at the marae occurred.

[59] Mr Pati submits that the jury verdicts were the likely product of irrational emotion rather than a forensic assessment of the evidence and an application of the standard of proof of beyond reasonable doubt. Mr Pati submits that if this Court admits and accepts the fresh evidence of Ms A and Ms C, it should find that the jury verdicts are unsafe and allow the appeal.

The s 44 ruling of the trial Judge

[60] Prior to the trial the appellant made an application pursuant to s 44 of the Evidence Act 2006 for permission to question the complainant on her prior sexual experience. The application related to a number of Facebook messages exchanged between the complainant and her cousin in November 2018, in which the complainant appears to refer to having being "touched" by several males, including one referred to in the same way she referred to the appellant.

[61] Mr Pati submits that with the admission of the fresh evidence of Ms A, there is a clear contradiction between what the complainant told a witness and what she told the police when interviewed. He submits that had the fresh evidence been available when the pre-trial s 44 application was made it would have been a factor that would have greatly assisted the appellant's application.

[62] In a ruling delivered on 10 February 2021, Judge Earwaker dismissed the application.[6] The Judge found that the defence had failed to advance any basis as to how the evidence would be relevant or suggest a motive for a false complaint.[7]

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6 *R v Ratu* [2021] NZDC 2124.
7 At [25]–[26].

The respondent

[63] Ms Johnston submits that Ms A's and Ms C's affidavit evidence should not be admitted as fresh evidence on the appeal. The respondent submits that the proposed evidence is neither fresh, credible nor cogent.

[64] The respondent submits that in substance Ms A's evidence on appeal is a recantation of her trial evidence. Ms Johnston submits that what Ms A now says about what the complainant told her during their conversation in the car about having been anally raped does not mean that the evidence that she gave at trial regarding what the complainant said to her should be considered as being unreliable. The respondent submits that the critical enquiry is whether Ms A's recantation is because her evidence at trial was either untrue or incorrect, or because other pressures have come to bear upon her leading her to change her evidence about what the complainant said.

[65] Ms Johnston notes that Ms A's further evidence relates to what she says she told the police on 8 May 2019 well prior to the trial. Ms Johnston notes that regardless of how Ms A's formal written statement was prepared, her evidence at trial was elicited in response to an open question, to which Ms A responded by saying that her account of what the complainant said was "[a]ll she said" and then she added, "that was it". The respondent submits that Ms A's trial evidence overtook any error which may have arisen from the way in which her statement was previously recorded by the police, and there was nothing preventing her from telling the jury what she is now saying that the complainant told her in the car. Ms Johnston submits that it is therefore evidence that could have been given at trial and it is not fresh evidence.

[66] The respondent also submits that Ms A's further evidence lacks credibility. The respondent disputes Ms A's claim that she told the police that the complainant told her that the appellant had anally raped her. Ms Johnston says that such an important detail would have been noted and recorded by the police officer, and that her failure to mention this detail in her trial evidence tells against her credibility on this important issue.

[67] Ms Johnston submits that Ms A's further evidence also lacks cogency, and she notes that none of the other witnesses gave evidence of the complainant saying that

the appellant had anally raped her, including Mr B who was present in the car at the time. Moreover, the complainant herself did not tell the police that she was anally raped. The respondent submits that the most that can be said regarding the possible effect of Ms A's evidence is that it would introduce another inconsistency into the complainant's account of what took place, in a case in which although the jury were invited to consider a number of inconsistencies in the complainant's evidence, it nevertheless accepted the key parts of her evidence and found him guilty of the charges.

[68] Regarding Ms C's evidence, the respondent acknowledges that Ms C was one of the young people present at the marae and in the wharenui when the card game was being played. The respondent also notes that her father was a witness called by the defence at the appellant's trial. The respondent submits that Ms C was available as a witness at the time of the trial and with reasonable diligence her evidence could have been presented at trial. The respondent accordingly submits that Ms C's evidence is not fresh, and should not be admitted for the purposes of the appeal.

[69] The respondent also submits that Ms C's evidence does not add anything to the evidence of the other witnesses who gave accounts of what they observed happened in the wharenui. The Crown notes that Ms C's affidavit was sworn in December 2021, around three years after the events in question. At the time of the offending Ms C was 10 years old. The respondent notes that Ms C's evidence is inconsistent with the appellant's evidence that the group moved their game to be close to where his bed was located while he played and then moved away again towards the centre of the wharenui, and Ms D's evidence that the card game was moved to be near where her mattress was after the appellant had left the room. However Ms C's evidence is consistent with Ms E's evidence that the complainant got up and walked out of the wharenui, went to the bathroom and from there went outside to where the adults were; and the appellant's young son's evidence that the card game took place in the marae next to his father's mattress bed.

[70] The respondent therefore submits that Ms C's evidence supports aspects of the evidence given by both the prosecution and defence witnesses, and had it been before

the jury it could not reasonably have led to a different verdict more favourable to the appellant.

[71] In response to the appellant's identification of inconsistencies, the respondent notes that by the time of the trial the events at the marae were three years in the past. Having regard to that passage of time, the ages of the young witnesses when the events occurred and the nature of memories such inconsistency between their recollections are to be expected.

[72] At trial the Crown invited the jury to consider that the existence of the inconsistencies was an indication of an absence of collusion between the cousins regarding their accounts of what they said they saw and what happened. The respondent notes that these points were repeated by the trial Judge in his summing up to the jury, and he told the jury that it was up to them to assess how much the inconsistencies identified by defence counsel mattered when they were considering the main thrust of the prosecution allegations against the appellant. The Judge also gave the jury a conventional direction about human memory and recall.

[73] The respondent submits that despite the defence having identified the existence of the inconsistencies, the jury found the charges proven beyond reasonable doubt. The respondent submits that even were the fresh evidence to be admitted, it would not materially detract from the prosecution case presented at trial and accepted by the jury as having proved the charges to the required standard.

[74] Ms Johnston submits that the application under s 44 of the Evidence Act for permission to refer to the complainant's informal disclosures of sexual offending by other family members was rightly refused by the trial Judge. Ms Johnston says that there is no evidence that the complainant was lying about the allegations she made against the appellant, and that the complainant's disclosures in the Facebook messages she sent to a relative in which she said that she had been touched by several other males, is irrelevant to the allegations made against the appellant. Moreover, the fresh evidence, if admitted, would not provide any support for the appellant's s 44 application.

[75] The respondent therefore submits that the appeal should be dismissed.

Approach on appeal

[76] The Criminal Procedure Act 2011 provides for a right of appeal against conviction.[8] In the case of a jury trial the appellate court must allow the appeal if it is satisfied that having regard to the evidence, the jury's verdict was unreasonable, or if a miscarriage of justice has occurred for any reason.[9] A miscarriage of justice means any error, irregularity, or occurrence relating to the trial that has created a real risk that the outcome of the trial was affected or resulted in an unfair trial, or a trial which was a nullity.[10]

Fresh evidence

[77] The principles for the admissibility of new evidence are settled. Generally, new evidence will need to be credible and fresh.[11] The overriding criterion is the interests of justice.[12] In *R v Bain* this Court explained:[13]

> [22] An appellant who wishes the Court to consider evidence not called at the trial must demonstrate that the new evidence is: (a) sufficiently fresh; and (b) sufficiently credible. Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. … On the other hand the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.

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8 Criminal Procedure Act 2011, s 229(1).
9 Section 232(2)(a) and (c).
10 Section 232(4).
11 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; and *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
12 *Lundy v R*, above n 11, at [119]; and *R v Bain*, above n 11, at [22].
13 *R v Bain*, above n 11.

Discussion

Ms A's evidence

[78] Having seen and heard Ms A give evidence and be cross-examined we reject her account of what she says she told Detective Sergeant Jamieson regarding the complainant telling her about being anally raped by the appellant.

[79] In reaching that conclusion we note that there are significant inconsistencies between the different accounts given by Ms A regarding this issue. In her first affidavit she said that she told the police officer of what the complainant had said about being "raped in her rear end" and did not know that her statement did not include this detail. She said had she known that earlier, she would have told the police about this error.

[80] This initial evidence can be contrasted with the more detailed version she gave in evidence before us on 17 February 2023. In her evidence on that date, Ms A said that she had asked the interviewing officer four or five times to make changes to what he had typed onto the computer. She said that the police officer had made the changes but had got the words wrong regarding what she had said about being told by the complainant regarding the allegation of anal sex. She said that despite her mentioning this to the police officer he failed to write it down. Under cross-examination, she said that shortly before giving evidence at the appellant's trial she had told the police officer that there was a piece missing from her statement. However, that matter was not something she mentioned in her first affidavit.

[81] During re-examination by the appellant's counsel she said that:

> … after about the third time he had written it and I went back to the same spot, I said to him he still hadn't put it down. And then the fourth time he wrote it, it was there, but when I signed it, and then when I [saw] it in court, when I had to stand, I told that Pākehā cop straight away there was something missing from there.

[82] Further on in her re-examination she gave a yet more detailed account of her conversation with the complainant. She said:

> Counsel: And just so we are all very clear now, what did she actually say to you when you asked her about what exactly happened?

> Ms A: So she told me that [the appellant] had touched her. I said to her "what do you mean touched?" Because there's many different things to touching. Then she said to me that "he had put it in her". So, I said to her – "wait, what the fuck do you mean put it in you?" Then that's when she told me he "put it in her". I said "where, what are you talking about?" And then she said "he put it in his bum – in her bum["].

[83] We consider that these differences are a significant internal inconsistency in Ms A's evidence. Moreover, her claim to have told Detective Sergeant Taylor that there was a "piece missing" immediately before she went into Court to give her evidence is not consistent with the evidence she then gave at the trial in which she failed to say that the complainant had told her that she had been anally raped.

[84] When giving evidence at the appellant's trial Ms A had an opportunity to say that the complainant had told her about being anally raped by the appellant. If she had raised the issue of a "missing piece" with Detective Sergeant Taylor only a matter of minutes before giving her evidence at trial, it is inconceivable that she would not have given evidence to that effect when asked by the prosecutor about what the complainant had said to her. Ms A was asked directly about what the complainant said to her in the car and she said:

> Counsel: Okay, and did [the complainant] tell you?
>
> Ms A: All she said was: "[the appellant] touched me", and then I said: "How?", and then she said: "He put it in"; that was it.

[85] Her evidence that "that was it", is wholly inconsistent with the account she has given in her affidavit and evidence before us that the complainant told her on that occasion that she had been anally raped. Furthermore we agree with the respondent that it is significant that none of the other witnesses to whom the complainant spoke about the appellant heard her say that she had been anally raped, including Mr B who was in the car with Ms A and the complainant when Ms A says the statement was made.

[86] We also note that in her first affidavit Ms A said that if she had known earlier that the police had made an error by omitting her reference to the anal rape complaint, she would have alerted the police to their error. However, if her account of telling Detective Sergeant Taylor that there was a piece missing from her statement, shortly

before she went into Court to give her evidence at the appellant's trial, is a correct account of what she actually did, that would have been an occasion on which she had told the police about the "error".

[87] Ms A elaborated on her first version of what she told Detective Sergeant Jamieson in her second affidavit, explaining that she was unsure why the Detective did not keep a record of the conversation she had had with the complainant that she had told him.

[88] And when giving evidence at the resumed hearing on 11 August 2023, Ms A said she had asked Detective Sergeant Jamieson to make "quite a lot of changes" to her statement as it was being prepared, and that he had printed out hard copies of her statement for her to read, three or four times. She said that she had asked him to include her account of being told by the complainant that she had been anally raped because it was not in there from the first version. She said that the fourth time she raised the matter the police officer amended her statement and she said it was in her statement when she signed it, but when she went to court to give evidence and read her statement that piece was missing.

[89] Ms A's final version of the circumstances in which her police statement was prepared, markedly conflicts with the version she gave in her first affidavit in which she said that the statement she signed did not include her reference to the complainant saying she had been anally raped.

[90] Set against the inconsistent accounts of Ms A, is the evidence of Detective Sergeants Jamieson and Taylor, who both deny that Ms A ever mentioned that the complainant had said she had been anally raped. Having heard their evidence we are satisfied that, had Ms A mentioned that matter to them, they would have recorded it and brought it to the attention of the prosecutor responsible for conducting the appellant's trial.

[91] Having rejected Ms A's evidence as lacking credibility, we consider that it falls well short of meeting the criteria for admission as further evidence for the purposes of this appeal. Further, her evidence cannot be regarded as being fresh, there having been

a clear opportunity for her to give the evidence at trial. We find that the interests of justice do not require the admission of her evidence.

Ms C's evidence

[92] In assessing Ms C's evidence and its significance in relation to the appellant's defence at trial, we note that although she says that no-one left the card game at any stage, there was other evidence that the complainant did leave the game and go to the toilet and the wharekai where she was spoken to separately by two of the girls who had been present during the card game and was observed by them to be in a distressed state as a result of what the appellant had just done. One of those witnesses, Ms D, said that the appellant himself left the marae at one point and when he returned he proceeded to stand beside the complainant and was touching her feet with his feet shortly before the complainant got up and went out to the wharekai followed by Ms D, who went to see if she was alright.

[93] We note that the appellant said in evidence that he only played one card game in the area where his bed was located in the wharenui, and when the game finished the group involved in the game moved away back to the middle of the wharenui. He said that neither the complainant nor any of the other participants in the game left at any stage during the game.

[94] We consider that Ms C's account and evidence regarding whether any of those involved in the card game had left at any stage could have been readily obtained by the appellant and his trial counsel prior to the trial. As someone present in the wharenui during the card game, Ms C's account of what occurred could have been readily obtained with the assistance of her parents, and we note that her father was called as a defence witness. However, as there was defence evidence, including from the appellant, which contradicted the evidence of the complainant and the other prosecution witnesses regarding whether the complainant and those witnesses had left the card game at any stage and had gone to the toilet area, we do not consider that Ms C's evidence would have been of any material significance regarding that issue. The jury clearly accepted the complainant's account of what she said the appellant had done while she was playing cards as one of the group present in the wharenui, and

accepted that she had left the game on two occasions shortly after the appellant had indecently touched her. We do not consider the interests of justice require the admission of the evidence.

[95] Our finding that neither Ms A's nor Ms C's evidence is admissible also informs our finding that their evidence would not have affected the Judge's pre-trial s 44 ruling denying the appellant's application for permission to cross-examine the complainant regarding her sexual history. That ground of appeal necessarily fails as a result.

Was the jury's verdict unreasonable, or has there been a miscarriage of justice?

[96] On the basis of the jury's acceptance of the complainant's evidence and that of the other prosecution witnesses whose evidence provided support for the allegations she made against the appellant, there was clearly sufficient evidence to support the verdicts of guilty returned by the jury on all of the charges. We are well satisfied that the jury's verdict was not unreasonable despite the inconsistencies that Mr Pati has raised on appeal. The Crown was able to prove the charges to the requisite standard at trial through the case and evidence it presented, despite the defence having identified the existence of inconsistencies in the evidence from the various witnesses. Therefore, this ground of appeal must also fail.

Conclusion

[97] We accordingly find that the appellant has failed to show that any miscarriage of justice has occurred as a consequence of the jury not hearing Ms A's evidence about what she says she was told by the complainant. She was asked about that at the appellant's trial, and she gave an account of what the complainant said to her which is consistent with the complainant's own evidence. We also find that the appellant has failed to show that a miscarriage of justice has occurred as a result of the jury not having heard the evidence that the appellant says Ms C could have given at his trial. There is no basis upon which to conclude the jury's verdicts were unreasonable or that a miscarriage of justice has occurred in this case.

Result

[98] The application for leave to adduce fresh evidence is declined.

[99] The appeal is dismissed.

Solicitors:
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