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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA547/2022
[2023] NZCA 476

BETWEEN	BRETT OWEN TAYLOR Appellant
AND	THE KING Respondent

Hearing:	24 August 2023
Court:	Wylie, Ellis and van Bohemen JJ
Counsel:	S Brickell for Appellant H G Clark for Respondent
Judgment:	2 October 2023 at 10 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 van Bohemen J)

[1] Mr Brett Taylor was convicted after being found guilty by jury of 18 charges of sexual offending against his stepdaughter when she was aged between about seven and 14. The charges comprised nine charges of sexual violation by rape,[1] five charges

[1] Crimes Act 1961, ss 128(1)(a) and 128B; maximum penalty, 20 years' imprisonment.

of sexual violation by unlawful sexual connection,[2] and four charges of doing an indecent act on a young person.[3] Four of the rape charges and two of the unlawful sexual connection charges were representative charges. Mr Taylor was sentenced by Judge Grau in the District Court at Manukau to 17 years and one month's imprisonment, with a minimum period of imprisonment (MPI) of eight years.[4]

[2] Mr Taylor appeals his conviction and the MPI of eight years imposed by Judge Grau.

[3] The grounds of appeal against conviction are that the Judge misdirected the jury on the consent element in the charges for rape and unlawful sexual connection and that this resulted in a miscarriage of justice.

[4] The grounds of appeal against sentence are that the sentence is manifestly excessive because the MPI of just under 50 per cent of the total sentence was imposed in circumstances where the criteria in s 86 of the Sentencing Act 2002 had not been satisfied.

The offending

[5] We adopt the Judge's summary of the offending when sentencing Mr Taylor:[5]

> [7] You began a relationship with A's mother in … moving in with her and her two children, A, the victim, as I will call her, and her brother. In … you married her mother. Between … you lived as a family at an address in .... At that address you began touching her sexually. When she was about six or seven years old you penetrated her genitalia with your fingers. You raped her as well, unsurprisingly causing pain to a small child's body on that first occasion.
>
> [8] At the second address where the family lived between … you raped A a number of times and committed other sexual offending against her that year.
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> [9] At the last address you lived at with the family, between … you regularly persistently sexually abused A in her bedroom, in a spa pool and when you would take her out with you in your truck and then in the garage at the address after you had moved out of the main dwelling, when your relationship with her mother broke down. You were raping her with increasing

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2 Sections 128(1)(b) and 128B; maximum penalty, 20 years' imprisonment.
3 Section 134(3); maximum penalty, seven years' imprisonment
4 *R v Taylor* [2022] NZDC 19290 [sentencing notes].
5 Sentencing notes, above n 4.

> frequency towards the end of this time. It was not until you were gone from the family home that A was able to tell someone what you had been doing to her; first a family friend and then her mother.

[6] It is also relevant to record the next paragraph of the Judge's sentencing notes:

> [10] You still deny the offending despite being found guilty by a jury. You say you intend to continue to fight these charges and that of course is your right. You told the pre-sentence report writer that the jury had made up their mind before you could defend yourself. But you did defend yourself, Mr Taylor, with the help of your very experienced and skilled lawyer who thoroughly and robustly challenged all of A's evidence.

Appeal against conviction

[7] Under s 232(2)(c) of the Criminal Procedure Act 2011, the court must allow an appeal against conviction if a miscarriage of justice has occurred for any reason. Otherwise, the court must dismiss the appeal.[6] A miscarriage of justice includes any error, irregularity or occurrence in the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.[7]

Submissions on behalf of Mr Taylor

[8] Mr Brickell, counsel for Mr Taylor, first submitted that the Judge misdirected the jury on consent despite Mr Taylor's defence at trial being that the sexual activity did not occur. Mr Brickell said that the Judge appropriately directed the jury that there is no presumption in law that a person is incapable of consenting because of their age. However, he said that direction was significantly diminished by the subsequent directions that there are some circumstances where allowing sexual activity does not amount to consent, including where the complainant's intellectual and mental development is such that she should not consent or refuse to consent or where the complainant is mistaken about or incapable of comprehending the nature and quality of the act of sexual activity. Mr Brickell also said that the Judge's directions were not firmly founded in the wording of s 128A of the Crimes Act and that, in the Question Trail given to the jury, the Judge quoted selectively from s 128A.

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6 Criminal Procedure Act 2011, s 232(3).
7 Section 232(4).

[9] Secondly, Mr Brickell says that there was a reasonable basis for believing that the victim consented as a result of Mr Taylor's grooming. He said the Judge should have referred this possibility to the jury and should have explained that grooming does not vitiate consent.

[10] Thirdly, Mr Brickell said that the Judge undermined her correct statement of the law with regard to age by saying in her summing up that, if the jury found that the sexual activity had taken place, consideration of the elements of consent and reasonable belief in consent would not take the jury very long.

[11] In support of his overall submission that there was a miscarriage of justice, Mr Brickell referred to the Supreme Court's decision in *Christian v R*,[8] and said the Court could not be assured that the jury carefully considered the elements of consent and reasonable belief when there was a credible narrative available that there was such consent. Mr Brickell also referred to decisions of this Court in *R v Accused* and *R v Herbert*, where the Court directed that care should be taken in directing juries on the question of consent, particularly when dealing with sexual violation charges involving females of around 14 years of age,[9] because that is a sufficient age for consent to have been reasonably possible. Mr Brickell also referred to *Bian v Police*, where the Court held the trial Judge's directions on consent in relation to sexual violation of a 14-year-old to be inadequate.[10]

Submissions for the Crown

[12] Ms Clark for the Crown summarised the victim's evidence of Mr Taylor's offending at the three addresses and what the victim had said and not said to others about the offending. Ms Clark also summarised the victim's responses to cross-examination conducted on the basis that the offending had never occurred and that, if it had, the victim would have told her mother. Ms Clark also summarised the evidence of other witnesses, including Mr Taylor, who had denied any of the offending had occurred.

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

9 *R v Accused (CA494/97)* (1998) 16 CRNZ 149 (CA) at 157; and *R v Herbert* CA81/98 12 August 1998.

10 *Bian v Police* [2015] NZCA 595, (2015) 27 CRNZ 627 at [47].

[13] Ms Clark submitted that the Judge appropriately directed the jury to consider consent and reasonable belief in consent and did not err in not pointing the jury to consider a reasonable possibility that the victim consented. Ms Clark disputed that there was an evidential foundation relating to grooming similar to that in *Christian*, which involved quite different facts. Ms Clark said there was minimal if any evidence to support a potential consent narrative and said that to direct the jury to such evidence as might have supported such a narrative would have risked drawing attention to the evidence of Mr Taylor's episodes of violence. Ms Clark noted that the Judge had directed the jury that the evidence of violence could not be used as a basis for inferring that it was more likely that Mr Taylor had sexually abused the victim.

[14] Ms Clark also submitted that there was no error in the Judge's observation that the consent elements would not take very long.

The Judge's Question Trail

[15] Before summing up, the Judge handed out to the jury a 20 page Question Trail which set out the questions the jury had to consider with respect to each of the 18 charges when deciding their verdicts.

Charge 1

[16] Under charge 1, which concerned sexual violation by unlawful sexual connection, the Question Trail read as follows:[11]

> **QUESTION 1** Are you sure that between … at … Mr Taylor introduced his fingers into the genitalia of [A]?
>
> *The slightest degree of introduction of the fingers into the genitalia is sufficient*
>
> If NO Find Mr Taylor not guilty
>
> If YES Go to Question 2
>
> **QUESTION 2** Are you sure that [A] did not consent to that act.

[11] Note: The explanatory notes included with the questions were set out in red typescript. In this judgment, we have italicised the explanatory notes.

"Consent" means true consent freely given by a person who is in a position to make a rational decision. There is no presumption of law that a person is incapable of consenting to sexual connection because of age. Lack of protest or physical resistance does not, of itself, amount to consent. There are some circumstances where allowing sexual activity does not amount to consent, including:

(a) the application of force to the complainant or the threat or fear of such application of force; or

(b) the complainant's intellectual or mental development is such that she cannot consent or refuse to consent to the activity; or

(c) the complainant is mistaken about or incapable of comprehending the nature and quality of the act of sexual activity.

If NO Find Mr Taylor not guilty

If YES Go to question 3

QUESTION 3 Are you sure that, at the time Mr Taylor introduced his fingers into [A]'s genitalia he did not believe that she was consenting?

If NO Go to question 4

If YES Find Mr Taylor guilty

QUESTION 4 Are you sure that, at the time … Mr Taylor introduced his fingers into [A]'s genitalia he had no reasonable grounds to believe that she was consenting?

If NO Find Mr Taylor not guilty

If YES Find Mr Taylor guilty

This means are you sure that no reasonable person in Mr Taylor's position could have believed that [A] was consenting.

Charge 2

[17] Under charge 2, which concerned sexual violation by rape, the Question Trail read as follows:

QUESTION 1 Are you sure that between … at … Mr Taylor penetrated the genitalia of [A] with his penis?

The slightest degree of introduction of the penis into the genitalia is sufficient for penetration to have occurred.

If NO Find Mr Taylor not guilty

If YES Go to Question 2

QUESTION 2 Are you sure that [A] did not consent to that act?

Consent: see definition above for charge 1

If NO Find Mr Taylor not guilty

If YES Go to question 3

QUESTION 3 Are you sure that, at the time Mr Taylor penetrated [A]'s genitalia with his penis, he did not believe that she was consenting?

If NO Go to question 4

If YES Find Mr Taylor guilty

QUESTION 4 Are you sure that, at the time Mr Taylor penetrated [A]'s genitalia with his penis he had no reasonable grounds to believe that she was consenting?

If NO Find Mr Taylor not guilty

If YES Find Mr Taylor guilty

Other sexual violation charges

[18] The remaining questions in the Question Trail concerning the other charges of sexual violation by unlawful sexual connection and sexual violation by rape were structured in the same manner as the questions for charge 2 but made no explicit reference to the definition of consent in charge 1. That is, the definition of consent given in charge 1 was repeated by way of reference in charge 2 but was not otherwise repeated in relation to the other charges.

The Judge's directions to the jury on consent

[19] In her summing up, the Judge took the jury through the questions in the Question Trail for the first charge. After explaining the Crown and defence cases in respect of the first question; namely, whether digital penetration occurred, the Judge addressed the next question about whether the victim consented to that act. The Judge said:

[91] Question 2 asks you: "Are you sure that [A] did not consent to that act?" Underneath this is a definition of consent. Consent means true consent freely given by a person who is in a position to make a rational decision. There's no presumption of law that a person is incapable of consenting to sexual connection because of age. Lack of protest or physical resistance does not of itself amount to consent. There are some circumstances where allowing sexual activity does not amount to consent including the application of force of the threat or fear of application of force, the complainant's intellectual or mental development is such that she cannot consent or refuse to consent, or the complainant is mistaken about or incapable of comprehending the nature and quality of the act of sexual activity.

[92] You might be surprised that this is a question for you to answer when the allegation is about sexual conduct by an adult stepfather to a child. But consent is one of the elements of the charge that needs to be proved beyond reasonable doubt. So if you do get to question 2 you must also be sure she did not consent. And on the Crown case, of course she was not consenting; she was a little child, seven or eight. And she'd also said in general if she said no, he'd be nasty and leave her out of family things. But the Crown's position is that question 1 is the key question. If you answer yes to question 1, you're sure this happened, then you'll have no difficulty in being sure she did not consent. And on the defence case, the defence is not suggesting that consent is an issue where a complainant is a young stepdaughter. But on the defence case you don't even get to this question because it did not happen, it's a false allegation, and you would have stopped after question 1. So if the answer's no, you find Mr Taylor not guilty. If yes, you go on to question 3.

[93] Question 3 asks that "Are you sure at the time Mr Taylor introduced his fingers into [A]'s genitalia, he did not believe that she was consenting?" And on the Crown case; again if you've got to the point where you're sure it did happen then you'll also be sure he didn't believe she was consenting looking at the circumstances, the relationship and her age. And, the defence case, you don't get here because this never happened. So if the answer's no, you go to question 4. If the [answer's] yes, you find Mr Taylor guilty.

[94] Question 4 asks: "Are you sure that at the time Mr Taylor introduced his fingers into [A]'s genitalia, he had no reasonable grounds to believe that she was consenting?" This means that are you sure that no reasonable person in Mr Taylor's position could've believed she was consenting. Again, on the Crown case it's a simple yes if you find this act happened, no reasonable stepfather would believe their stepdaughter was consenting to such an act. And the defence case; you would not get to this question at all because this simply did not happen, it was a false allegation.

[95] So that's how the question trail works.

[20] The Judge then discussed the questions under charge 2 as follows:

[96] And once you've gone through charge 1, you move on to charge 2; this is the allegation of sexual violation by rape, again at the first address in … in the farm shed. And the first question is the question which really asks you whether you're sure it happened: "Are you sure that between those two dates Mr Taylor penetrated the genitalia of [A] with his penis?" The slightest degree of introduction of the penis into the genitalia is sufficient for

> penetration to have occurred. And on the Crown case this is the incident where Mr Taylor's taken her to the farm shed; she said he kissed her, sucked her boobs and put his penis in her vagina. And she also said the first time he was trying to push it in, she said it wouldn't work and it was really sore. And on the defence case it didn't happen, you can't rely on her evidence about this incident. This is another lie dropped into a fact. He would take her out to the shed to look at the baby chickens and she's also unreliable when she's given various different ages at the time she says this happened and despite saying it was really sore she never said anything to her mother.
>
> [97] So if you answer no, you're not sure this happened, you find Mr Taylor not guilty. You stop there and you move onto the next charge. If the answer is yes, you go onto the following questions.
>
> [98] I think you've probably got the idea about that by now. I'm not going to keep going through them as I have done for the first one. Your key question is question 1: "Did it happen?" You do need to work through the other questions if you find that it did happen, but they would not take you very long.

[21] The Judge took the jury through the remaining questions in the Question Trail concerning the other charges in shorter fashion and did not again address the issue of consent.

Analysis on appeal against conviction

[22] Because Mr Brickell contended that the Judge's directions did not conform with the Supreme Court's rulings in *Christian v R*,[12] it is relevant to recall the facts and relevant directions from the Supreme Court in that decision.

Christian v R

[23] Mr Christian appealed three convictions of sexual violation by rape. The first count related to a specific occasion; the second and third charges were representative charges relating to when the complainant lived on the appellant's property and when the appellant lived in a house bus with the complainant on the complainant's mother's property. The appellant ran a church of which the complainant's mother was a member. The offending took place when the complainant was aged 13 or 14. The defence case at trial was that none of the sexual encounters happened.

[24] The trial Judge initially directed the jury on the elements of consent, but later directed that neither consent nor reasonable belief in consent was a live issue and said

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12 *Christian v R,* above n 8.

that if the jury were satisfied the act occurred, the verdict would have to be guilty.[13] The Supreme Court ruled that trial Judges should give directions on all elements of offences in cases of sexual offending, even if consent or reasonable belief in consent were not put in issue by the defence.[14] The Court explained:

> [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.

[25] The Supreme Court accepted that the wide difference in age between the appellant and complainant, the complainant's immature knowledge of sexual matters, the complainant's vulnerability, the appellant's status as a church leader and de facto guardian, the evidence of threats against the complainant and the appellant's provision of money and drugs to the complainant pointed against any reasonable possibility of the appellant's reasonable belief in consent.[15] However, the Court said that the jury, if properly directed, might have concluded that they could not rule out the reasonable possibility that the interactions between the complainant and the appellant involved her consenting as a consequence of the appellant's grooming, in respect of the repeated sexual activity that formed the basis of the representative charges.[16] The Court said that, while "not the most likely outcome", this needed to be left to the jury to decide, and that the jury also needed to consider whether the complainant's later retracted statement to police that "it was consensual" was true.[17] On that basis, the Court allowed the appeal, and ordered a new trial on the two representative charges.[18]

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13 At [17].
14 At [35].
15 At [66]–[67].
16 At [67].
17 At [67].
18 At [68] and [73].

Relevance of Christian to present case

[26] The above summary demonstrates that there are significant differences between Judge Grau's directions in the present case and the trial Judge's directions in *Christian*. Judge Grau did not suggest to the jury that consent was not an issue. To the contrary, in her Question Trail and in the directions in her summing up, the Judge specifically directed the jury that consent had to be proven. In her summing up, the Judge said that there is no presumption that a person is incapable of consenting to sexual connection because of age, that this was one of the elements of the charges that needed to be proved beyond reasonable doubt and that, if the jury was satisfied that Mr Taylor had committed the acts alleged in Question 1 under charges 1 and 2 (and for the other charges), they needed to be sure that A did not consent.

[27] We are satisfied that, in those directions, and in Questions 2, 3 and 4 in the Question Trail under charges 1 and 2, the Judge properly drew the jury's attention to the fact that, even though Mr Taylor's case was that the alleged acts of sexual violation did not happen, if the jury was satisfied that the acts did in fact happen, they had to be sure that A had not consented to the acts and that Mr Taylor had not reasonably believed that she had.

[28] In terms of the Supreme Court's directions in *Christian*, we are satisfied that the Judge adequately recorded that Mr Taylor had not raised an issue with consent but made it clear that the jury must nevertheless be satisfied beyond reasonable doubt that A did not consent and that Mr Taylor did not reasonably believe she had.

Did the Judge's direction draw selectively from s 128A?

[29] The criticism that the Judge quoted selectively from s 128A of the Crimes Act has no factual foundation.

[30] Section 128A of the Crimes Act provides:

> **128A Allowing sexual activity does not amount to consent in some circumstances**
>
> (1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(2) A person does not consent to sexual activity if he or she allows the activity because of—

(a) force applied to him or her or some other person; or

(b) the threat (express or implied) of the application of force to him or her or some other person; or

(c) the fear of the application of force to him or her or some other person.

(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

(6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

(7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

(8) This section does not limit the circumstances in which a person does not consent to sexual activity.

(9) For the purposes of this section,—

allows includes acquiesces in, submits to, participates in, and undertakes

sexual activity, in relation to a person, means—

(a) sexual connection with the person; or

(b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

[31] Analysis of the Judge's explanatory note under Question 2 of Charge 1 (above at [16]) shows that, in that note, the Judge summarised the contents of s 128A(1), (2), (5) and (7). The Judge did not refer to the matters described in s 128A(3), (4) or (6). It would not have been appropriate to have done so. There was no evidence to suggest that the alleged acts occurred when A was asleep, or that alcohol or drugs were involved or that A was mistaken as to who Mr Taylor was. In other words, far from

quoting selectively from s 128A, the Judge's Question Trail covered all possibly relevant elements of the section, albeit that, as s 128A(8) makes clear, there is no conceptual limit to the circumstances in which a person does not consent to sexual activity.

[32] We see no error in the way the Judge summarised the subsections of s 128A that might have been relevant. We do not accept that, in giving that summary, the Judge diminished the direction that there is no presumption in law that a person is incapable of consenting because of their age or made that direction unclear.

[33] We are satisfied, therefore, that the Judge made no error in the content of her directions on consent under charges 1 and 2. As Mr Brickell accepted, the directions on consent with respect to charges 1 and 2 applied equally to the directions for the rest of the charges and did not need to be repeated.

Did the Judge fail to draw the jury's attention to evidence relevant to consent, including grooming?

[34] Mr Brickell says there was a credible narrative that the acts that took place when A was older, when she was aged between 12 and 14, were with A's consent or that there was a reasonable basis on which Mr Taylor might have believed that A had consented. Mr Brickell said it could have been inferred that, by that stage, A had been groomed by Mr Taylor to accept his advances and that consent must be considered in those circumstances.

[35] Mr Brickell referred to various passages in A's evidence which he said supported such a narrative. These included passages where A said that:

(a) Mr Taylor did not threaten her as such, but A did not want to tell anyone about the offending because she was scared that he would hurt her, her brother or her mother;

(b) she had gone out to see Mr Taylor in the garage after he and her mother had had an argument to see if he was okay, because she "genuinely

cared about him" and, even though what he was doing was wrong, that is the person A is, and she still cared about Mr Taylor;

(c) Mr Taylor had told her it was okay to say no, but that it got to the point that she was scared to tell him no because of the way he was treating her, her mother and her brother;

(d) she did what made Mr Taylor happy because she did not know any better at the time;

(e) she should have told someone about the abuse earlier but did not because she wanted a mum and a dad and did not want a broken family so she "kind [of] just let it be"; and

(f) she had lied when Mr Taylor had asked her if she liked what he had done (the sexual abuse) because she did not want to "feel like shit" because that was how he made her feel when she said no.

[36] The difficulty with Mr Brickell's submission is that, even the examples he gives provide little basis for putting to the jury the proposition that A had consented or that Mr Taylor had reasonable grounds for believing that A had consented. In almost all of the examples to which Mr Brickell referred, A qualified her evidence by referring to her fear that Mr Taylor would hurt her, her mother or her brother or gave other reasons that made it plain that A was far from being in situations that could be considered consensual, or which would provide any reasonable basis for Mr Taylor to believe that A had consented, given the disparities in their ages and positions. As Ms Clark observes, any direction to consider this evidence would have risked drawing the jury's attention to the evidence of Mr Taylor's violence and risked the jury using that evidence to support a conclusion that Mr Taylor must have sexually abused A — which the Judge had warned the jury against.

[37] We agree with Ms Clark that A's evidence is not consistent with a narrative of consent. There was little basis, therefore, upon which the Judge could have directed the jury with respect to a narrative of consent other than the fact that the acts had

occurred — which Mr Taylor disputed. As the Supreme Court said in *Christian*, the Judge could not invite the jury to disbelieve Mr Taylor's defence of complete denial that any sexual encounter occurred.[19] The case is not comparable with the situations considered in *R v Accused* or *Herbert*, in both of which the appellants had alleged that the victims had consented.[20]

[38] For these reasons, we are satisfied that there is nothing of substance in this aspect of Mr Taylor's appeal.

Did the Judge diminish the significance of consent by telling the jury that consent and reasonable belief in consent "would not take them very long"?

[39] As set out above at [18], the Judge's comment was made in relation to charges 3 to 18 and was made after she had taken the jury through the questions in relation to charges 1 and 2. The Judge's words were:

> [98] … Your key question is question 1: "Did it happen?" You do need to work through the other questions if you find that it did happen, but they would not take you very long.

[40] We consider the Judge's directions were intended to reassure the jury that the task of working through the 20 page Question Trail was not as daunting as it might first appear. We do not consider that there is any substance in Mr Brickell's contention that, in making that observation, the Judge was diminishing or downplaying the significance of consent or reasonable grounds of belief in consent.

[41] For all these reasons we are satisfied that the Judge made no error in her directions to the jury and that there was no miscarriage of justice.

Appeal against sentence

[42] Under s 250(2) of the Criminal Procedure Act, the Court must allow an appeal against sentence if satisfied that, for any reason, there was an error in the sentence

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19 *Christian v R*, above n 8, at [36].
20 *R v Accused,* above n 9, at 152; and *Herbert,* above n 9.

imposed on conviction or that a different sentence should be imposed. Otherwise, it must dismiss the appeal.[21]

[43] Mr Taylor's appeal against sentence is limited to the Judge's decision to impose an MPI, having regard to s 86 of the Sentencing Act 2002.

[44] Section 86 relevantly provides:

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
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> (1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.
>
> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.
>
> …
>
> (4) A minimum period of imprisonment imposed under this section must not exceed the lesser of—
>
> (a) two-thirds of the full term of the sentence; or
>
> (b) 10 years.
>
> …

Submissions on sentence appeal

[45] Mr Brickell says it was not necessary for the Judge to impose an MPI because the objectives of accountability and deterrence were met with the Judge's high

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21 Criminal Procedure Act, s 250(3).

sentence of 17 years' imprisonment. He says the length of the sentence means that Mr Taylor would not be eligible for parole until after six years, and that the sentence is enough to protect the community from Mr Taylor, who will not be released until he is no longer an undue risk to the community.

[46] Ms Clark submits that neither the sentence nor the MPI of eight years was manifestly excessive given the extensive and prolonged nature of Mr Taylor's offending.

The Judge's sentencing decision

[47] The Judge said that the matters that made the offending so serious were as follows:

(a) The scale of the offending: eight years of regular sexual abuse from when the victim was very young until she was 14.[22]

(b) Planning and premeditation: Mr Taylor had taken all the opportunities he could to get the victim alone so he could engage in sexual activity with her.[23]

(c) The enormous harm to the victim and her family with devastating effects that were likely to be lifelong.[24]

(d) The gross breach of trust by a person who was effectively the victim's father.[25]

(e) The vulnerability of the victim, as shown by her inability to tell anyone what Mr Taylor was doing over such a long time.[26]

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22 Sentencing notes, above n 4, at [15].
23 At [16].
24 At [17].
25 At [18].
26 At [19].

(f) The emotional abuse of the victim, which meant the victim was scared to say "no" because of the way Mr Taylor treated her, her mother and her brother.[27]

[48] The Judge adopted a starting point of 18 years' imprisonment.[28] The Judge made no uplift for Mr Taylor's previous offending and agreed that no reduction for previous good character was available.[29]

[49] The Judge did not consider the information in Mr Taylor's psychological report and cultural report established a level of social, cultural or economic deprivation that had any connection with the offending. However, the Judge reduced the sentence by five per cent on the basis of information in the cultural report that Mr Taylor had been sexually abused by an uncle when younger, even though Mr Taylor had denied that abuse to the psychologist.[30] This resulted in an end sentence of 17 years and one month's imprisonment.[31]

[50] The Judge then stated:

> [29] I need to consider under s 86 of the Sentencing Act 2002 whether to impose a minimum period of imprisonment that would be longer than the usual period before you will be able to apply for release on parole. I can only do that if I am satisfied that the period that would otherwise apply, which is around five and a half years, would be insufficient to hold you accountable, denounce your conduct, deter you and others or protect the community.

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27 At [20].
28 At [21].
29 At [22]–[23].
30 At [28].
31 At [28].

[51] The Judge summarised the positions of the Crown and Mr Taylor on whether an MPI should be imposed and discussed decisions of this Court in *R v AM, Zhang v R* and *F v R* as they related to the imposition of MPIs.[32] The Judge then stated:

> [33] In this case I find that the test for a minimum period of imprisonment is satisfied for the purposes of denunciation, deterrence and accountability and that the ordinary minimum period of a third of the sentence would be insufficient for these purposes, given the scale and seriousness of the offending and where you do not take any responsibility for the offending that you have been found guilty of, Mr Taylor. I set a minimum period at eight years' imprisonment, which is slightly less than 50 per cent.

Analysis on appeal against sentence

[52] There is little merit in Mr Taylor's appeal against sentence.

[53] No objection was made to the starting point or the end sentence, and none could reasonably have been taken, given the nature, scale and seriousness of the offending.

[54] It is plain that the Judge did not approach the question of whether to impose an MPI as a matter of routine or in a mechanistic way. The Judge specifically turned her mind to whether to the standard release period of one third of Mr Taylor's sentence of 17 years and one month's imprisonment; that is, five years and eight months, would be sufficient, having regard to the purposes set out in s 86(2) of the Sentencing Act. The Judge concluded that that period would not be sufficient having regard to three of those purposes and set an MPI of just under half of Mr Taylor's sentence.

[55] Mr Taylor's offending was egregious. He took advantage of a young child and then young person over a prolonged period and intimidated her with actual violence and threats of violence against her, her brother and her mother in order carry out acts for his sexual gratification that no child or young person should have to endure. We see no error in the Judge's conclusion that a parole period of five years and eight months was not sufficient for holding Mr Taylor accountable for the harm done to the victim and the community, for denouncing his conduct or for deterring Mr Taylor and others from committing the same or similar offences.

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[32] At [32], citing *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; and *F (CA126/2016) v R* [2016] NZCA 611.

[56] We are satisfied that sentence itself and MPI were justified and were not excessive.

Result

[57] The appeal against conviction is dismissed.

[58] The appeal against sentence is dismissed.

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