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NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: HIGH COURT INTERIM ORDER SUPPRESSING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE APPELLANTS REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA294/2021
[2023] NZCA 6**

BETWEEN JAMES HAY WALLACE
Appellant

AND THE KING
Respondent

CA311/2021

BETWEEN MUSTAFA ERINC YIKAR
Appellant

AND THE KING
Respondent

Hearing: 28–29 September 2022

Court: Collins, Ellis and Dunningham JJ

Counsel: D P H Jones KC and G P Aspell for Appellant Wallace
Y Y Mortimer-Wang for Appellant Yikar
M J Lillico for Respondent

Judgment: 9 February 2023 at 9.30 am

JUDGMENT OF THE COURT

- A The Crown’s application to adduce further evidence is declined.**
- B Sir James’ appeal against conviction and sentence is dismissed.**
- C Mr Yikar’s appeal against conviction is dismissed.**
- D We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until further order of the Court.**
- E The order granting bail pending the determination of the appeal is quashed. Sir James is to surrender himself to Corrections at 12 noon on 14 February 2023.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Following a trial by jury in the High Court at Auckland, Sir James Wallace was convicted of three charges of indecently assaulting three young men who were guests in his house. He was also convicted in relation to two charges of attempting to dissuade H, one of the complainants, from giving evidence. Sir James was sentenced to a term of two years and four months’ imprisonment.¹ He appeals his conviction and sentence.

[2] Mr Yikar, an employee of Sir James, was also convicted of attempting to dissuade H from giving evidence. He was sentenced to home detention for 12 months.² Mr Yikar appeals his conviction.

¹ *R v Wallace* [2021] NZHC 1213.

² *R v Yikar* [2021] NZHC 985.

Narrative

Complainant S

[3] Sir James is a well-known philanthropist and patron of the arts. During the course of the summer of 2001, S, who was 33 years old at the time, went to Sir James' home for dinner. The purpose of S's visit was to persuade Sir James to provide sponsorship for a charitable foundation that was soon to be launched and with which S was associated.

[4] During dinner S tried to broach the subject of Sir James assisting the foundation he was associated with, but Sir James kept diverting the discussion to personal matters saying that the foundation had sent "the right messenger", namely, "an attractive man", to present its proposal. S said he was flattered but he was there to discuss support for the foundation that was soon to be launched.

[5] After dinner Sir James took S into another room to examine part of Sir James' art collection. In due course, Sir James said he would allow the foundation with which S was connected to use his home to launch the new entity, but that he would not give any money to the foundation.

[6] Towards the end of the evening, when they were in the foyer of the house, Sir James asked S if he would like to go upstairs to his bedroom "for a cuddle". S declined the invitation and said he needed to leave. As S turned towards the door Sir James grabbed S from behind in a tight embrace saying, "let's just go upstairs and just have a cuddle". S managed to free himself from Sir James' embrace and walk out of the house.

[7] When S was standing on the driveway, he turned to Sir James to shake his hand and say good night. At that stage Sir James grabbed S's trousers and placed his hand inside S's underwear and clutched S's penis and testicles. S managed to extract Sir James' hand from inside his underpants. Sir James then placed S in a "bear hug". S managed to break free. He got into his car and drove home. In 2005, S told his long-term partner about the events we have just summarised.

[8] S made his complaint with the police in 2019 after reading about a trial that he surmised involved Sir James and another complainant.

[9] Sir James gave evidence. He said he could not remember S and he was very certain he had never touched the complainant.

Complainant B

[10] In February 2008 when B was about 25 years old, he wrote to Sir James to seek funding.

[11] On Sunday 17 February 2008, Sir James telephoned B and invited him to his house that evening to discuss B's sponsorship proposal. B accepted the invitation.

[12] When B arrived at Sir James' home he was provided with a gin and tonic and told he would be staying for dinner. During and after the meal B tried to direct the conversation towards his sponsorship proposal. However, Sir James kept turning the conversation towards personal topics, including B's partner. After dinner Sir James took B on a tour of the house to look at the artwork. The tour included a visit to Sir James' bedroom. At this stage B was feeling dizzy and nauseous. Sir James approached B from behind and squeezed B's bottom whispering "God, you've got such a sweet arse". Sir James then began to kiss the back of B's neck and rhetorically asked why B had to have a partner.

[13] B managed to leave the house and catch a taxi home. He vomited when he arrived at his apartment. The following morning, he told his partner what had transpired. In 2017 B heard Sir James had been charged with indecently assaulting another complainant. Thereafter B went to the police.

[14] Sir James denied having offended in any way against B and maintained B's allegations were a fabrication.

Complainant H

[15] In 2016, when he was 24 years old, H moved into Sir James' house. At the time H's employment had come to an end because of an injury. H accepted the opportunity to live in Sir James' home on the basis he would undertake cleaning, gardening and maintenance work in exchange for free meals and accommodation.

[16] Although not the subject of a charge the jury heard evidence that soon after H began living at Sir James' home he was subjected to an indecent event when Sir James pulled down H's pants, exposed his genitals and made a comment about H's penis.

[17] On the night of Friday 30 September 2016, H became unwell. He began vomiting. At about 1.30 am he decided to go to bed in a guest room because the bed in that room was more comfortable than the bed in his room. H alleges that, at about 2.00 am, Sir James came into the guest room. He was naked. Sir James told H he could not stay in the guest room and should return to his own room but apparently changed his mind and invited H into Sir James' bedroom. H managed to return to his own bedroom and got into bed. H alleges that Sir James came into his room wearing only underpants. H told Sir James that he was alright, and that Sir James should leave but, according to H, Sir James got into H's bed and "spooned" H from behind. While doing this Sir James allegedly reached into H's shorts and fondled his penis.

[18] H's evidence was that when Sir James was in his bed, he discreetly telephoned his immediate manager, Mr Lugo-Sharpe, in order to get help. Mr Lugo-Sharpe, who slept in the adjoining bedroom, did not answer the telephone call. The phone was made at 2.29 am on 1 October 2016.

[19] H then managed to break free from Sir James and went into Mr Lugo-Sharpe's room and told him Sir James was in his bedroom. This occurred about five minutes after Sir James had entered H's bedroom. Mr Lugo-Sharpe went to H's bedroom and called out to Sir James and asked him to come out to the corridor. When Sir James came out of H's room Mr Lugo-Sharpe asked him what he had been doing there. Sir James' response was confusing. He appeared to be asking where Mr Yikar, one of his staff, was at that time. Sir James then went back to his room. He was still wearing only underpants.

[20] Mr Lugo-Sharpe asked H what had happened. The response was “he touched me”. When asked where he had been touched, H said “you know where”. At this stage H was in a distressed state, crouched in a foetal position near Mr Lugo-Sharpe’s bedroom door.

[21] Mr Lugo-Sharpe assisted H back to his own room. After checking the house, Mr Lugo-Sharpe took H to hospital where he was seen by Dr Baker. H complained to her Sir James had come into his room naked and attempted to undress H and lie on top of him. H spoke to police at about 6.00 am and made a statement consistent with the evidence we have summarised at [15] to [18]. He was then seen by a police medical officer later that morning. That doctor said that H alleged to him Sir James had come into H’s bedroom and started spooning him from behind and that Sir James grabbed his penis saying, “let me hold you, let me embrace you”.

[22] Sir James said he had gone into H’s bedroom in order to assist H when he became unwell, but not at the time alleged by the Crown. He denied having touched H. Points made by Sir James in his defence included:

- (a) It was significant that security camera footage of Sir James entering the staff quarters showed he did so after H made his telephone call to Mr Lugo-Sharpe.
- (b) There was no evidence of his DNA on swabs taken from H at the hospital.
- (c) Six “bread sticks” were found intact on H’s bed. Sir James argued those bread sticks would have been crushed or broken if H’s description of the assault was correct.

[23] It was acknowledged by the Crown in a statement of facts presented pursuant to s 9(2) of the Evidence Act 2006 that Sir James entered the staff quarters at 2:31:47 am, two minutes after H telephoned Mr Lugo-Sharpe. That time was calculated after making adjustments to time recordings on the security camera footage from inside Sir James’ home. The Crown has applied to adduce further evidence,

which, if accepted might suggest an error was made when the Crown agreed Sir James entered the staff quarters at 2:31:47 am. We will return to the Crown's application to adduce further evidence at [35] to [48].

Attempting to dissuade witnesses

[24] In February 2017 Sir James was charged with indecently assaulting H.

[25] Sir James had a connection through his charitable foundation with a singer known as Mika X, who in turn knew H. Mika X had previously employed H. On 7 April 2017, Mika X met with H, supposedly to discuss future work opportunities for H. Unbeknown to Mika X that conversation was recorded by H. Mika X spoke to H about his complaint to the police against Sir James, saying that if his complaint "disappear[ed]", Mika X would arrange work for H and that he would also receive a payment. Mika X gave H a cheque for \$15,000 and told him that once the complaint disappeared, the cheque would clear. Mika X also arranged for H to meet a lawyer to assist in having his complaint withdrawn. Although H met with the lawyer he refused to withdraw his complaint.

[26] About a month later Sir James and Mika X approached Goulter and Associates, a public relations firm, to assist in persuading H not to pursue his complaint against Sir James. By this time, H was living in Australia.

[27] Mr Goulter met with Mr Yikar, who was Sir James' house manager. Mr Yikar told Mr Goulter he was to work with Mika X to persuade H to not give evidence against Sir James. Mr Goulter quoted a fee of \$30,000 plus disbursements for his services. Sir James accepted the quote and arranged for two payments totalling \$36,000 to be paid to cover Mr Goulter's fee and disbursements. The payment was made through a bank account associated with Mr Yikar.

[28] Mr Goulter, his associate Ms Edmonds, and Mika X went to Australia where they met H. Mr Goulter and Ms Edmonds posed as international entertainment agents. They tried to persuade H not to pursue his complaint against Sir James. Part of that conversation was recorded. It appears H told Mr Goulter, Ms Edmonds and another

person that he would consider withdrawing his complaint against Sir James upon being paid \$700,000. This attempt to dissuade H from giving evidence also failed.

[29] On returning to Auckland, Mr Goulter and Ms Edmonds met with Mr Yikar. Their meeting was recorded at a venue called the “Family Bar”. During the meeting Mr Goulter and Ms Edmonds told Mr Yikar about the discussions that had unfolded with H in Australia. Mr Goulter also explained he required a further \$20,000 for his services and disbursements. The discussion also included the following features:

- (a) Mr Yikar confirmed he spoke on behalf of Sir James who, Mr Yikar said, was concerned about his reputation.
- (b) Mr Goulter spoke about intimidating H “to make sure he [did not] turn up to [the] court case”.
- (c) Mr Goulter also said he was opposed to giving H cash, and that it would be better if H got a job opportunity.
- (d) Mr Goulter said they were “exposed” by the situation concerning H.
- (e) Mr Yikar said Sir James “had full confidence” that Mr Goulter and his associates would “sort it out”.
- (f) Mr Yikar spoke about Sir James feeling “burnt” when the efforts by Mika X to dissuade H giving evidence failed.
- (g) Mr Yikar said Sir James had been “bleeding” by paying money and getting nowhere.
- (h) Ms Edmonds explained the penalty for perverting the course of justice was seven years’ imprisonment. Mr Goulter said that he, Mr Yikar and Mika X were “exposed”.

[30] Mr Goulter told Mr Yikar that unless he was paid \$20,000, Mr Goulter would not continue to work on the case.

Prosecutions and immunity from prosecution

[31] Mr Goulter and Ms Edmonds were granted immunity from prosecution and gave evidence about the payments made to Mr Goulter and the partial recordings of the conversations that had taken place in Australia. Mika X was charged with two counts of attempting to dissuade H from giving evidence. He pleaded guilty to those charges.

[32] Mr Yikar was charged with one count of attempting to dissuade H from giving evidence. Sir James was charged with indecently assaulting B as well as H after B had also complained to the police. Sir James was also charged with two attempts to dissuade H from giving evidence. After this trial commenced in the District Court in March 2019, Ms Edmonds revealed to the police the recordings of the conversations at the Family Bar. This resulted in the trial in the District Court being abandoned.

[33] The proceedings were then transferred to the High Court. By this stage S and another complainant, A, had alleged to the police Sir James had committed sexual offences against them. Two charges based on A's allegations were severed from the charges based on the allegations made by S, B and H.³

[34] The convictions which are the subject of this appeal were entered on 23 March 2021 following a four-week trial. During the trial, Sir James unsuccessfully applied to have Charge 3 (the alleged offending against H) dismissed pursuant to s 147 of the Criminal Procedure Act 2011.

Crown's application to adduce further evidence

[35] As we have noted at [23], the parties agreed that the security camera footage taken from inside Sir James' home showed him entering the staff quarters at 2:31:47 am on 1 October 2016. The time actually recorded on the video footage was 1:31:47 am. The Crown and police concluded, however, that the time recorded on the video footage was one hour slow as the time recording equipment had not been adjusted for daylight saving.

³ Sir James was found not guilty in relation to two sexual offence charges he faced that were based on A's allegations.

[36] Mr Burton, an employee of Sir James', secured and reviewed the security video footage. When he examined the video footage on 2 October 2016, he concluded the "camera time [was] behind by 50 minutes" and said so in a statement he made to the police on 14 October 2016.

[37] The Crown's case was likely to have been enhanced if it had relied on Mr Burton's assessment that the time on the video footage was 50 minutes slow. If that calculation as correct Sir James would have entered the staff quarters at 2:21:47 am, which is consistent with the amount of time H says Sir James was in his room before H tried to telephone Mr Lugo-Sharpe at 2.29 am.

[38] In his evidence before us Mr Burton said that he examined the video footage again on 21 September 2017 and concluded the times on the video recording were 43 minutes slow. In other words, if the second assessment made by Mr Burton were correct, Sir James would have entered the staff quarters at 2:14:47 am. That time is not as helpful to the Crown as Mr Burton's first assessment when he thought Sir James entered the staff quarters at 2:21:47 am. In his evidence before us, Mr Burton said his second assessment was likely to be more accurate than his initial assessment.

[39] We also heard evidence from Mr Benson-Pope, one of the lawyers for the Crown at Sir James' trial. The essence of Mr Benson-Pope's evidence was the Crown made a mistake when it agreed Sir James had entered the staff quarters at 2:31:47 am.

[40] On 26 November 2021, the Crown filed a notice of application for leave to adduce the proposed evidence of Mr Burton and Mr Benson-Pope. The purpose of the application was to show that Mr Burton had calculated the security footage time was slow by 50 minutes and to explain how the parties agreed to the security footage time being set at 2:31:47 am.

[41] We make four points about the Crown's application to adduce further evidence.

[42] First, "[t]here is no general principle precluding the Crown from seeking to adduce new evidence in a criminal appeal".⁴ Applications by the Crown to adduce

⁴ *Ellis v R* [2021] NZSC 77, (2021) 29 CRNZ 749 at [27].

further evidence will normally be assessed on the same basis as an application by an appellant seeking to challenge a conviction, namely, by applying the test articulated by the Privy Council in *Lundy v R*.⁵

[43] Second, in order to be admissible, the new evidence must be cogent. Mr Burton's evidence would have been cogent if it clearly established when Sir James entered the staff quarters. Mr Burton's evidence before us, however, was not as supportive of the Crown's theory of the case when he said that it was more likely the time recording on the security video was 43 minutes slow.

[44] Ultimately, we cannot decide exactly when Sir James entered H's bedroom. This is because we cannot determine which of Mr Burton's assessments is reliable and, in any event, we cannot usurp the function of the jury whose responsibility it is to decide what evidence it accepts when deciding whether or not a defendant is guilty. As the Supreme Court noted in *Owen v R*, "[u]nder our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area".⁶

[45] Third, the new evidence is far from fresh. Mr Burton told the police in October 2016 he thought the recordings on the security footage were 50 minutes slow.

[46] Fourth, the Crown's application seeks to impugn evidence that the Crown specifically considered and agreed to when it signed the s 9 agreed statement of facts.

[47] Agreements under s 9 of the Evidence Act are always subject to judicial oversight. The whole point of such agreements, however, is to dispense with the need to prove what would otherwise be a disputed fact. Where, as in the present case, the Crown has turned its mind to a crucial question of evidence and where it has agreed to the contents of a s 9 agreement, then the agreed fact should not be set aside on appeal in the absence of conclusive evidence as to what the correct position actually is. As we have noted, this criterion is not satisfied.

⁵ *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119]–[120].

⁶ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13(e)] citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

[48] We accordingly dismiss the Crown’s application to adduce further evidence.

First ground of appeal

[49] There are two limbs to the first ground of appeal. It is argued:

- (a) There is an internal inconsistency in the Crown case when it agreed Sir James had entered the staff quarters at 2:31:47 but also said H telephoned Mr Lugo-Sharpe at 2.29 am when Sir James was in his bed. We will refer to this as the “timing discrepancy issue”.
- (b) Venning J, the trial Judge, misdirected the jury when summing up on the timing discrepancy issue.

Charge 3 — the timing discrepancy issue

[50] The essence of the timing discrepancy issue is that the jury must have put to one side the agreed fact Sir James entered the staff quarters at 2:31:47 am on 1 October 2016. In other words, if the jury had accepted Sir James had entered the staff quarters at 2:31:47 am, he would have had to have been acquitted because Sir James could not have been in H’s bed when H telephoned Mr Lugo-Sharpe at 2.29 am.

[51] Before he summed up to the jury, Venning J heard and declined an application by Sir James to dismiss Charge 3 pursuant to s 147 of the Criminal Procedure Act. The Judge noted that whether or not Sir James sexually offended against H involved an assessment of H’s credibility, which the Judge said was a question for the jury to resolve. If the time on the security camera footage did not match the time H said he called Mr Lugo-Sharpe, then this was a matter for the jury to consider when assessing H’s credibility, but it was not an essential element of the offence.

[52] The Judge also said that the evidence concerning the exact time when Sir James entered the staff quarters was “not as conclusive as Mr Jones submit[ted]”. The Judge explained:

There are at least two possible explanations for the disconnect between the times recorded on Mr Lugo Sharpe’s phone and the time stamp on the CCTV [footage]. While it is an agreed fact that the correct time on the CCTV footage

is one-hour later, as was confirmed in the evidence to the jury, that was to take account of the daylight saving adjustment. There remains the possibility that the time stamp is inaccurate; there is no direct evidence about that. It is also possible that given his distressed state, [H] was wrong about when he tried to call Mr Lugo-Sharpe.

[53] The strength of the first limb of the argument we have set out at [49] is underscored by the fact that in its closing address the Crown made no reference to the time Sir James was seen on the video footage entering the staff quarters.

[54] Rather than make reference to the agreed fact that Sir James had entered the staff quarters at 2:31:47 am, the Crown emphasised a number of other matters which it said demonstrated Sir James was guilty of Charge 3. We will briefly summarise those matters in the following five paragraphs.

[55] The Crown said Mr Lugo-Sharpe corroborated H's evidence in three material respects:

- (a) H complained to Mr Lugo-Sharpe immediately after H said Sir James had sexually assaulted H.
- (b) Mr Lugo-Sharpe described H as being in a distressed state when he summonsed help from Mr Lugo-Sharpe.
- (c) When Mr Lugo-Sharpe called Sir James out of H's bedroom Sir James was wearing only underwear and was uttering confusing statements.

[56] The Crown contended H's complaint to Dr Baker, the police, and police medical officer within hours of the alleged assault were all consistent with his evidence that Sir James had sexually assaulted H.

[57] The Crown also submitted attempts by Sir James and others acting at his behest to dissuade H from giving evidence against Sir James, were consistent with H having told the truth when he described being sexually assaulted by Sir James.

[58] The Crown submitted the propensity evidence of B and S supported the argument H's allegations against Sir James were correct.

[59] The Crown contended Sir James' evidence that he was only in H's bedroom to assist his ill employee was unbelievable and, in any event, simply demonstrated Sir James had the opportunity to offend in the way alleged by H.

[60] We must allow the appeal if we are satisfied "a miscarriage of justice has occurred for any reason".⁷ "Miscarriage of justice" is defined as including "any error ... that has created a real risk that the outcome of the trial was affected".⁸

[61] When analysing the evidence concerning Charge 3 we accept for present purposes the jury was required to agree with the parties that the CCTV footage showed Sir James entering the staff quarters at 2:31:47 am.

[62] Mr Lugo-Sharpe's evidence was that he had showed the time of the received call on his phone to the police and that it was recorded as 2.29 am. Although it was not an agreed fact, the evidence of the timing of the call was not challenged at trial.

[63] It does not follow however, that there was an irreconcilable conflict between the two facts we have summarised at [61] and [62] when assessing whether or not Sir James was guilty of Charge 3. The mismatch was only fatal to the Crown case if the jury needed to be satisfied that H made the phone call while Sir James was in his room assaulting him. It did not. As Venning J explained when dismissing the s 147 application, the jury could reasonably have concluded H was mistaken or lying about having tried to telephone Mr Lugo-Sharpe while Sir James was in his bed.

[64] In considering the various scenarios, it is important to consider all of the surrounding evidence:

- (a) First, Sir James acknowledged he went into H's bedroom, albeit, on his account, soon after 2:31:47 am. He therefore had the opportunity to offend in the way H alleged. The jury considered Sir James' explanation he entered H's bedroom to assist his ill employee. Clearly the jury rejected that explanation.

⁷ Criminal Procedure Act 2011, s 232(2).

⁸ Section 232(4).

- (b) Sir James' semi-naked state when he came out of H's bedroom supported H's version of events.
- (c) H's conduct immediately after the events at issue was consistent with him having been sexually assaulted by Sir James. H's complaints to Mr Lugo-Sharpe, his distressed state and his accounts to two doctors and the police within a few hours of the alleged assault were all consistent with him having been sexually assaulted by Sir James.
- (d) The determined efforts made at the behest of Sir James to dissuade H from continuing with his complaint was also a factor the jury were entitled to consider when assessing the credibility of H's allegations.
- (e) The propensity evidence from S and B were also matters that suggested H was correct when he said Sir James sexually assaulted him in the way he alleged.

[65] We accept that in order to have convicted Sir James on Charge 3, the jury would likely have concluded:

- (a) H was mistaken about Sir James having been in his bed when he attempted to telephone Mr Lugo-Sharpe.
- (b) The undamaged breadsticks and the absence of DNA evidence were factors that did not outweigh the matters we have traversed at [63] and [64].

[66] Ultimately, we are satisfied there was sufficient evidence for the jury to have concluded Sir James sexually assaulted H, regardless of the circumstances in which the phone call was made, and that Sir James lied when he told the jury he entered H's bedroom for innocent purposes.

Directions on timing discrepancy issue

[67] We reject Mr Jones KC's submission that Venning J failed to properly explain the timing discrepancy issue to the jury. Contrary to Mr Jones' submission, the Judge did not minimise that issue.

[68] When directing the jury in relation to Charge 3 the Judge said:

[95] Again, the Crown must prove beyond reasonable doubt the four elements identified in the issues sheet. First you must be sure that Mr Wallace got onto [H's] bed and fondled [H's] penis as he described. This first issue will be the focus of your attention on this charge. *In his closing Mr Jones submitted [H] must have lied because he said he called Mr Lugo Sharpe's phone during the assault by Mr Wallace but the evidence was that the call connected at 2:29 am while the date stamp on the CCTV still showed Mr Wallace going towards [H's] room at 2:31am. That aspect of [H's] evidence is something that you will need to consider carefully. The defence case is that it entirely undermines [H's] evidence about the assault. Whether it does is a matter for you. You have seen both [H] and Mr Wallace give detailed evidence about their respective versions of the incident that night ...*

(emphasis added)

[69] When summing up the defence case the Judge again emphasised the timing discrepancy issue:

[148] Mr Jones noted that [H] had said *that while Mr Wallace was on his bed and assaulting him, he had called Mr Lugo-Sharpe on the phone. Mr Lugo-Sharpe said the call was noted on his phone at 2.29 am and he had shown that phone to the Police. Mr Jones then referred you to the still from the CCTV footage which showed Mr Wallace going towards [H's] room at 2:31:47. He submitted that showed [H] could not have called Mr Lugo-Sharpe's phone when Mr Wallace was with him. He submitted that entirely undermined [H's] evidence about the assault and that you should reject all of [H's] evidence about the incident as lies.* He drew your attention also to the bread sticks. He noted [H] had said Mr Wallace had positioned himself against the wall and submitted that if that was so, given where the bread sticks were and the state they were in, they would have been broken or cracked and not left intact as they were.

(emphasis added)

[70] The Judge's summing up on the timing discrepancy issue was balanced and complete.

[71] No miscarriage of justice arose when Sir James was convicted in relation to Charge 3.

Second ground of appeal

Consequence of the conviction on Charge 3

[72] The second ground of appeal is that the guilty verdict in relation to Charge 3 tainted the jury's assessment of the remaining charges. Mr Jones submitted that the erroneous conviction in relation to Charge 3 undermines the remaining convictions.

[73] Part of the Crown's case in relation to Charges 1, 2 and 3 relied on cross-propensity evidence. That evidence was presented on the contention that Sir James had a propensity to take advantage of young gay men by sexually abusing them in circumstances where the complainants were guests in Sir James' home, and where the complainants either had or hoped to benefit from Sir James' wealth and prominence in the arts world.

[74] The similarities between the three complainants were, on the Crown's analysis, very clear. All three complainants were young gay men who had come to Sir James for assistance because of his reputation as a philanthropist and supporter of the arts. Although the support which H obtained from Sir James was different in kind from that sought by S and B, H nevertheless hoped to be a recipient of Sir James' benevolence. All three complainants alleged that they were the victims of unwanted sexual advances by Sir James at night and in his home. B and H had the additional distinction of being physically unwell when Sir James took advantage of them.

[75] In presenting the propensity evidence, the Crown submitted that either Sir James was the victim of an unlikely sequence of coincidences or he offended in the ways alleged by S, B and H.

[76] The issue raised by the second ground of appeal is whether the jury's approach to H's allegations renders the remaining convictions unsafe. At this juncture we will focus only on the convictions relating to the allegations made by S and B.

[77] There are two reasons why we see no merit in the second ground of appeal.

[78] First, although the jury are likely to have used propensity reasoning when assessing the evidence in relation to all three indecent assault charges, the evidence concerning the complaints by B and S, by themselves, provided compelling cross-propensity evidence that supported the guilty verdicts in relation to Charges 1 and 2.

[79] The similarities between B and S's complaints were very significant. As we have explained:

- (a) Both were young gay men who went to Sir James' home to secure a sponsorship for artistic ventures.
- (b) Both stayed for dinner.
- (c) Both experienced similar unwanted sexual advances from Sir James, who acted in a self-entitled manner towards both men.
- (d) The indecent assaults in both cases were similar.

[80] Second, even if the conviction in relation to Charge 3 was set aside, that would not render the evidence in relation to Charge 3 inadmissible as propensity evidence in relation to Charges 1 and 2. On the contrary, in *Fenemor v R*,⁹ the Supreme Court recognised the potential admissibility of propensity evidence from a case in which the defendant was acquitted. Thus, even if Sir James had been acquitted on Charge 3, the evidence of H's allegations would, in all likelihood, have been admissible propensity evidence in relation to Charges 1 and 2.

[81] The second ground of appeal fails.

⁹ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4]–[5].

Third ground of appeal

Reasonableness of the guilty verdicts on Charges 4 and 5

[82] The third ground of appeal is that the finding of guilt in relation to Charge 3 was likely to have adversely influenced the jury into finding Sir James guilty of Charges 4 and 5.

[83] There is an obvious link between Charge 3 and Charges 4 and 5. As we have explained, Charges 4 and 5 arose after Sir James and his associates endeavoured to dissuade H from giving evidence in relation to Charge 3. Mr Jones acknowledged, however, that Charges 4 and 5 “stood on their own”. That was a proper concession.

[84] The convictions in relation to Charges 4 and 5 were not dependent on Sir James being convicted of indecently assaulting H. Sir James could reasonably have been found guilty on Charges 4 and 5 even if he had been acquitted in relation to Charge 3.

[85] The third ground of appeal does not succeed.

Fourth ground of appeal

Admissibility of the Family Bar recording

[86] Prior to trial, Sir James appealed a pre-trial ruling in which the High Court found the Family Bar recording was admissible as evidence that he conspired to dissuade H from giving evidence.¹⁰ The argument in the pre-trial hearing was that the statements made by Mr Yikar, Mr Goulter and Ms Edmonds during the Family Bar meeting were not admissible against Sir James. The High Court and this Court decided otherwise.

¹⁰ *W (CA664/2019) v R* [2020] NZCA 270.

[87] It was held that the statements in issue were admissible under s 22A of the Evidence Act, commonly referred to as the co-conspirator's rule. That section provides:

In a criminal proceeding, a hearsay statement is admissible against a defendant if—

- (a) there is reasonable evidence of a conspiracy or joint enterprise; and
- (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
- (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

[88] In this Court it was noted:

- (a) During the Family Bar conversation Mr Yikar, Mr Goulter and Ms Edmonds discussed ways of dissuading H from giving evidence, soon after unsuccessful efforts had been made in Australia to achieve that result.¹¹
- (b) It did not matter the conversation post-dated the events that had occurred in Australia as Mr Goulter and Ms Edmonds made clear they would not be doing further work unless Sir James paid them another \$20,000.¹²
- (c) There were reported references to Mr Yikar saying that he needed Sir James to approve of any arrangements that were put in place.¹³

[89] In the present appeal, Mr Jones said that there had been a change in the evidence at trial which permitted us to revisit what this Court said in its pre-trial judgment.¹⁴

[90] The alleged change in evidence was that Mr Goulter said at the trial the \$20,000 was to cover existing debts that arose from the trip to Australia. From this Mr Jones

¹¹ At [56].

¹² At [57].

¹³ At [58].

¹⁴ Citing *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305 at [45]–[50].

said that the Family Bar recording did not implicate Sir James in an ongoing conspiracy to dissuade H from giving evidence.

[91] There is nothing in the distinction Mr Jones attempts to make between the basis upon which this Court ruled the Family Bar conversation admissible and the evidence given by Mr Goulter at trial.

[92] As this Court made very clear in its pre-trial judgment, although the Family Bar conversation took place after efforts had been made in Australia to dissuade H from giving evidence, the recording of the conversation shed light on the conspiracy, and confirmed its objective and the roles played by the parties.

[93] It was reasonable to infer from the Family Bar recording that although the \$20,000 additional payment was made after the failed efforts in Australia to dissuade H from giving evidence, that money was paid in order to ensure Mr Goulter and Ms Edmonds would continue to work on behalf of Sir James to dissuade H from giving evidence.

[94] Mr Goulter in particular said during the conversation he would only continue to work if paid. Thus, the inference could reasonably be drawn that the payment of \$20,000 was made to keep Mr Goulter and Ms Edmonds involved in the efforts to dissuade H from giving evidence. The fact that money was paid after the Family Bar conversation provided further evidence that the attempts to dissuade H from giving evidence were undertaken with Sir James' authority.

[95] Thus, the minor change in the evidence made no difference to the analysis of this Court prior to trial. The reasoning of this Court in relation to the pre-trial appeal remains unaffected by the way the evidence emerged at trial.

[96] The fourth ground of appeal also lacks merit.

Fifth ground of appeal

Prejudicial hearsay evidence

[97] During the re-examination of Mr Goulter by the Crown, the following questions and answers were asked:

Q Coming back to Mr Yikar and the problem or issue that he had that he talked to you about. Who told, who told you – this might be, sound a bit of a strange question, but how did you come to know that was the problem or issue, who told you about it?

A. Mika had sort of alluded to it, it was Erinc who really explained what had happened, yeah.

Q. When you say he explained what had happened, did he tell you anything about [H's] allegation?

A. That, yeah, and so, I'm being careful here, not, but the context of which it was in and things that had happened in the house and what the house was like, so yeah.

Q. So just explain a little more, the context of the house, what do you mean?

A. He explained that alongside other things that had, that had allegedly taken place or what have you. I'm just being careful that I don't –

Q. No, that's all right. Just tell me what did he say about what had allegedly taken place?

A. In this particular case?

Q. Yes.

A. That [H] was disgruntled and upset about the fact that he has been kicked out of the house or something, had turned up at Rannoch House. He had turned up late and, yeah, he was, he was upset and emotive. But, yeah, it was mixed in with other cases. Sorry, I am trying not to confuse this because it was talked about with other cases that were at the time, yeah.

[98] Sir James sought a mistrial. Venning J indicated he did not think it likely the said hearsay statement would influence the jury's reasoning.

[99] We agree with Mr Jones it is most unfortunate that the question and answers that we have set out at [97] arose in response to the Crown's re-examination. We do not, however, accept the submission that a miscarriage of justice occurred by reason of the inadvertent hearsay statement.

[100] Our reasons for reaching this conclusion can be distilled to the following five points.

[101] First, Venning J did not see the need to intervene at the time the evidence was given. This tends to indicate the evidence did not strike the Judge at the time as likely to divert the jury from their principal task.

[102] Second, the passages we have set out at [97] were vague. They were not specific as to time, place and content. The absence of any detail left it open for the jury to have thought Mr Goulter could have been referring to the charges that were already before the jury arising from the complaints made by S and B.

[103] Third, Mr Goulter's evidence-in-chief commenced on Thursday 25 January 2021 and concluded on the morning of 26 February 2021. Mr Jones' cross-examination commenced on the Friday morning. Ms Reed KC commenced her cross-examination of Mr Goulter during the afternoon of 26 February. The trial was then suspended because of COVID lockdown rules. When it resumed on 8 March 2021, Ms Reed's cross-examination of Mr Goulter continued for another two hours. The Crown then commenced its re-examination. The unfortunate hearsay statement is likely to have been submerged in the large volume of evidence Mr Goulter gave, which occupied more than 200 pages of transcript.

[104] Fourth, the responses made during the Crown's re-examination were inadvertent, and not led deliberately by the Crown.

[105] Fifth, the trial Judge had the advantage of seeing and hearing Mr Goulter give his evidence. He described Mr Goulter as:

... a flamboyant character prone to extravagance both in the way he presented and the way he spoke. Over the course of his evidence he made a number of general, and, at times, quite extreme statements and throwaway lines. His evidence was at times discursive.

[106] In these circumstances, we do not accept there is any realistic possibility the jury would have misused the hearsay statement in issue. We are therefore satisfied no

miscarriage of justice arose through the inadvertent admission of the hearsay statement during the course of the re-examination of Mr Goulter.

Appeal against conviction by Mr Yikar

[107] Mr Yikar's defence to Charge 5 was that he was instructed by Sir James to employ Mr Goulter to provide reputation protection services for Sir James. Mr Yikar engaged Mr Goulter for that purpose and accordingly had no need to instruct Mr Goulter in order to protect Sir James in relation to Charge 3.

[108] Ms Mortimer-Wang submitted on behalf of Mr Yikar that the downstream effect of the trial Judge's refusal to discharge Sir James on Charge 3 and his summing up on that charge undermined the strength of Mr Yikar's defence in relation to Charge 5, thereby causing a miscarriage of justice.

[109] We have concluded that no miscarriage of justice occurred in relation to Charge 3. In any event, it does not follow that Mr Yikar's appeal should have been allowed even if Sir James had succeeded in his appeal in relation to Charge 3.

[110] First, as we have already noted, there was no error in the way Venning J summed up on Charge 3.

[111] Second, more significantly, the record of the Family Bar meeting contains overwhelming evidence Mr Yikar was fully immersed in the plan to dissuade H from giving evidence and was even told during the course of that meeting by Ms Edmonds of the potential legal consequences of Mr Yikar's involvement.

[112] There is, therefore, no basis upon which Mr Yikar's appeal against conviction can be allowed.

Appeal against sentence

[113] When sentencing Sir James, Venning J adopted a starting point of three years six months' imprisonment in relation to the two charges of attempting to dissuade H

from giving evidence.¹⁵ That starting point was used to achieve some parity with the starting point of three years three months that had been employed in relation to Mika X. The Judge increased the notional sentence by 18 months' imprisonment for the convictions in relation to Charges 1, 2 and 3.¹⁶ This produced an aggregated start point for all offending of five years' imprisonment. The Judge then reduced the starting point to four years and three months' imprisonment under the totality principle.¹⁷

[114] When assessing discounts in favour of Sir James, Venning J made deductions to reflect Sir James' lack of offending prior to 2000, his contribution to society through his patronage of the arts, and his age and health needs. These factors, when combined, produced a reduction of 45 per cent from the notional start point of four years and three months' imprisonment.¹⁸

[115] The end result was accordingly one of two years four months' imprisonment.

[116] Before us, Mr Jones submitted that the notional start point of three years six months' imprisonment for the convictions relating to the attempts to dissuade H from giving evidence were too high and that the further uplifts in relation to the indecent assault convictions were also too high.

[117] We reject both points raised by Mr Jones:

- (a) The notional starting point of three years and six months' imprisonment for the two attempts to dissuade H from giving evidence was not excessive. The attempts to dissuade H from giving evidence were plainly carried out at the behest of Sir James and constituted a persistent flagrant attempt to "buy off" a crucial witness in a criminal trial. That offending was audacious and justified a stern response from the Court.

¹⁵ *R v Wallace*, above n 1, at [26].

¹⁶ At [28]–[30].

¹⁷ At [31].

¹⁸ At [45].

- (b) The uplift to reflect Sir James' sexual offending against S, B and H was entirely appropriate. The offending was moderately serious and justified the uplift adopted by Venning J.
- (c) The end sentence was a proportionate response. It properly reflected the mitigating factors advanced on behalf of Sir James and the seriousness of his offending.

Name suppression

[118] We have not heard further submissions on name suppression. Mr Jones asked that we defer making any decision on name suppression pending the outcome of the appeal.

[119] We will keep in place the interim order for name suppression pending receipt of further submissions on that issue. The timetable for those submissions is:

- (a) Sir James' submissions to be filed and served by 20 February 2023.
- (b) The Crown submissions are to be filed and served by 27 February 2023.

Result

[120] The Crown's application to adduce further evidence is declined.

[121] Sir James' appeal against conviction and sentence is dismissed.

[122] Mr Yikar's appeal against conviction is dismissed.

[123] We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until further order of the Court.

[124] The order granting bail pending the determination of the appeal is quashed.
Sir James is to surrender himself to Corrections at 12 noon on 14 February 2023.

Solicitors:

Doug Cowan, Auckland for Appellant Wallace
Cook Morris Quinn, Auckland for Appellant Yikar
Crown Law Office, Wellington for Respondent