NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA63/2009
[2009] NZCA 205

THE QUEEN

v

JAMES FRANCIS ALLETSON

Hearing: 23 April 2009

Court: O'Regan, Hugh Williams and MacKenzie JJ

Counsel: M Goodwin and J R Smith for Appellant
N P Chisnall for Crown

Judgment: 25 May 2009 at 11.30 am

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by O'Regan J)

Introduction

[1] The appellant, Mr Alletson, was found guilty after a jury trial at which Judge Bouchier presided on seven counts of sexual offending against two young girls, six of which were representative charges. He was found not guilty by the jury on nine further counts involving the same complainants.

[2] The charges on which the appellant was found guilty relating to the elder complainant (to whom we will refer as A) occurred between June 2003 and May 2005, when A was between eight and ten years old and the appellant was between 15 and 17 years old. The appellant was convicted of one representative count of sexual violation by way of unlawful sexual connection involving digital penetration of A's vagina, and two representative counts of indecent assault involving A.

[3] In relation to the younger complainant (to whom we will refer as B), the appellant was convicted of one specific count of indecent assault, two representative counts of indecent assault, and one representative count of inducing an indecent act. The offending against B happened in the period between May 2003 and May 2005, when B was between six and eight years of age.

[4] Judge Bouchier sentenced the appellant to imprisonment for a term of two years and ten months.

[5] The appellant appeals against both conviction and sentence.

Grounds of appeal

[6] The grounds of appeal against conviction are:

(a) The Judge refused leave for the appellant to call evidence that A had told lies about him in the past;

(b) The Judge prevented the appellant from calling evidence of incidents of violence perpetrated against the complainants by their father;

(c) The Judge refused leave for the appellant to call evidence of his good character;

(d) The Judge failed to give an identification warning in accordance with s 126 of the Evidence Act 2006 (the 2006 Act);

(e) The summing up was unbalanced because the Judge failed to mention a number of significant points made by defence counsel;

(f) The Judge required defence counsel to commence his closing address towards the end of a day. This meant that it was interrupted by an overnight adjournment, which undermined the closing address.

[7] The sentence appeal is pursued on the basis that the sentence was manifestly excessive and did not adequately recognise the youth of the appellant at the time of the offending.

[8] We will deal with these grounds of appeal in the above order. Before doing so, we provide some context for the discussion which follows by reproducing the summary of the facts of the case set out in Judge Bouchier's sentencing notes.

Facts

[9] Judge Bouchier stated the facts as follows:

> [4] In my view, the facts upon which the jury found are a basic acceptance of the complainants in its broadest terms, but not in some of the detail of the number of charges that were before the Court. The complainants said that the offending occurred between 2003 and 2005. This was at the time that the prisoner, who was their neighbour, was aged between 15 and 17. He was turning 17 just shortly after the period in which the offending ceased.
>
> [5] As said, they were his neighbours. His sister was a friend of the two girls, or the elder of them in particular. What is clear from much of the facts that came out is that this particular area where the parties lived was a large area where houses were on bush sections. At the rear of the property there was bush that belonged to the section of the prisoner's parents, and all of the children used to play games in the bush.

> [6] I find that it was accepted by the jury that he would engineer opportunities to be with each of the girls alone and the offending concerned happened in either the bush, or the disused sauna, which was at the rear of the household. [A] was aged between eight and 10 at the time and there was indecent assault of her by putting his hand down her pants, touching her genitalia and lying on her simulating intercourse, plus sexual violation by digital penetration.
>
> [7] In respect of [B] I accept that she, then aged six, was indecently assaulted by touching breasts and buttocks and that continued until she was eight, plus fondling genitalia, rubbing his finger between buttocks and inducing her to fondle his penis.

Evidence of lies allegedly told by A

[10] During the trial the Judge ruled inadmissible proposed evidence about lies told by A in past occasions. The appellant argues that this ruling was wrong.

[11] The proposed evidence was:

(a) Evidence from a visitor to the appellant's house that A's grandfather had raised with the appellant's mother a concern that the appellant and the visitor had thrown stones at the home of A's family. The witness believed that A had lied about this, and denied that she and the appellant had been involved. She would also have said that A had later blamed the appellant and others for throwing stones at another neighbour's house when this was untrue;

(b) Evidence from another young visitor to the appellant's home in relation to the latter incident. His evidence was to the same effect;

(c) Evidence from the appellant's father that the appellant's mother had banned A from their home several times because she was making up tales and causing trouble;

(d) Evidence from the appellant's sister that A had told lies. The first instance was in 2002 – 2003 where A was said to have lied to neighbours that the appellant and his sister had been over to the neighbour's house when they were away and taken stuff and played

on their trampoline. The second was when A told the sister to tell the appellant that A's father was angry that the appellant had broken a window by throwing a rock, when in fact A herself had pushed on the window and caused a crack five to six months earlier. Another instance was when A said the appellant had used a hammer to smash a hole in the wall of A's bedroom, when in fact the door handle had caused the hole. Another example was when A said that A's father was angry as the appellant had stolen a playstation game, when this was not true as the appellant had his own copy of that game. She would have said that the appellant's mother banned A from the house after this incident and that the appellant's mother also banned A subsequently for lying, the details of which she could not remember;

(e) Evidence from the appellant's mother that she had banned A from the appellant's family's home because A had lied. She would have confirmed the daughter's evidence about the smashed window, the hole in the wall, the playstation game, the incident involving the use of the neighbour's trampoline and stealing things from their home. She intended to give evidence showing how the allegation of the use of the trampoline and stealing things from the neighbour's home while they were away could not have occurred. Her proposed evidence was that A had apologised about this incident to the appellant's sister. She would have said the second ban had arisen after the lies about the stones on the roof.

[12] These matters had been put to A in cross-examination (without leave being sought and without objection from the prosecutor or intervention by the Judge). A said she did not recall any of the matters put to her. She did, however, accept she was banned once (not twice) from the appellant's family's property but not that it was because she had told lies.

[13] Judge Bouchier ruled that the appellant's mother could give evidence that she had banned A on two occasions from her property for her perception of lying, but that nothing more could be said than that. Counsel for the appellant, Mr Goodwin,

said that this prevented the appellant from calling admissible veracity evidence. He said that the Judge had erred in three respects, namely:

(a) In characterising the proposed evidence as evidence of reputation and not veracity;

(b) Placing undue reliance on the criteria set out in s 37(3) of the 2006 Act;

(c) By characterising the proposed evidence as "childhood tittle-tattle" and therefore not substantially helpful in assessing A's veracity.

[14] We will consider these in turn. Before doing so we briefly summarise the law relating to veracity evidence.

[15] Section 37(1) of the 2006 Act provides that a party may not offer evidence about a person's veracity unless the evidence is "substantially helpful" in assessing that person's veracity. Under s 4, putting a question to a party in cross-examination is offering evidence, so that s 37(1) governs all aspects of a witness's evidence.

[16] Section 37(3) sets out a number of factors which may be considered in determining whether the offering of evidence is substantially helpful. These are:

(a) Lack of veracity on the part of a person when under a legal obligation to tell the truth;

(b) One or more previous convictions indicating a propensity for dishonesty or lack of veracity;

(c) A previous inconsistent statement;

(d) Bias on the part of the person;

(e) A motive on the part of the person to be untruthful.

[17] Section 8(1)(b) also empowers a judge to exclude evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding.

[18] The combination of s 37 and s 8(1)(b) replaces the collateral issues rule that applied prior to the 2006 Act.

[19] The requirement that the evidence be substantially helpful calls for more than relevance, as defined in s 7(3). This higher threshold is consistent with the equivalent Australian provision, s 103(1) of the Evidence Act 1995 (Cth), which provides that credibility evidence is admissible only if it "could substantially affect the assessment of the credibility of the witness".

Reputation

[20] The Judge accepted a submission by the Crown that the proposed evidence was evidence of a reputation to lie, which was not admissible. She referred to *R v C (CA391/07)* [2007] NZCA 439 in which this Court noted that s 37 of the 2006 Act, which deals with veracity evidence, did not provide for the admission of evidence tending to show that a person has a reputation for being untruthful (a provision allowing such evidence had been removed from the equivalent clause in the Bill as introduced to the House). With respect to the Judge, we think that the proposed evidence in this case was not intended to be evidence that A had a reputation for lying, but rather evidence that A had in fact lied about the appellant in the past, and therefore had a disposition for lying. We therefore disagree with this aspect of the Judge's ruling.

Non-exhaustive list in s 37(3)

[21] Mr Goodwin said the Judge had placed too much emphasis on the list of factors in s 37(3), which is not an exhaustive list. We see nothing in this point. The Judge considered the evidence in terms of s 37(3)(d), which refers to bias on the part of a person. In essence, the evidence was that A's false allegations against the

appellant in the past indicated bias against him on her part. Of course, some of the allegedly false allegations implicated the appellant's sister and/or one or more of his friends as well, but in some cases they related to the appellant only. Initially Mr Goodwin suggested that the evidence should be admitted on some other basis (not one of the factors listed in s 37(3)), but in oral argument he was content to rely on the bias element. We therefore take this aspect of the argument no further.

Childhood tittle-tattle

[22] The Judge described the allegations as childhood tittle-tattle, and expressed the view that it did not show either a bias on the part of A or a motive for her to be untruthful. She said that childhood tittle-tattle could not pass the test of "substantially helpful", which is a higher test than that of relevance.

[23] Mr Goodwin said that it was inappropriate of the Judge to dismiss the allegations in this way, and that the assessment of the nature, substance and weight to be placed on the earlier alleged lies was a matter for the jury. We disagree. The Judge was required to address the substantial helpfulness test to ensure that evidence which did not meet that standard was not placed before the jury. She therefore had to make an assessment, which was part of her task and not that of the jury.

[24] The allegations of A's lying involved relatively trivial conduct allegedly committed by the appellant and, in many cases, others. The proposed evidence was to the effect that A had blamed the appellant (and others) for acts which, in reality, she and others were responsible, ie that she lied to avoid getting into trouble herself. That motive was different from what the defence said was the motive for the allegations of sexual misconduct, namely attention-seeking.

[25] The allegations of lying had been squarely put to A in cross-examination (so that the appellant had already "offered evidence" about these in terms of s 4 of the 2006 Act prior to the Judge's ruling). The Judge was obviously concerned to ensure that the focus of the jury was not diverted to collateral issues, and rightly focussed on whether the proposed evidence would meet the substantial helpfulness test in s 37. We see no error in the Judge's assessment of the evidence of what were relatively

trivial incidents and the unlikelihood that, even if A had lied about the actions of the appellant, his friends and his sister, this showed some kind of predisposition to make false allegations of sexual offending on the part of the appellant which would call into question the veracity of the allegations made by A in the present case. We accept they may have some relevance to the assessment of A's veracity. But we are clear that the substantial helpfulness test was not met.

[26] In our view, the cross-examination of A on this topic and the appellant's mother's evidence of the banning of A from the appellant's family's home also failed to meet the substantial helpfulness test. But both were favourable to the appellant so did not give cause for concern about the fairness of the trial.

Evidence of alleged violence in the home

[27] A was cross-examined extensively about alleged violence in her home. In reply to questions from defence counsel, she denied that her parents argued frequently, that she had ended up with bruising on her arms, that she had told the appellant's sister that her parents had been hitting her, that she had seen B being hit on the arm and that she had seen B being hit on another occasion. However, she did accept that her parents had hit her on the bottom when she was naughty. She denied that they ever beat her anywhere else.

[28] Though there had been no objection to this cross-examination, the Judge was concerned that evidence was to be led from defence witnesses to contest the complainants' answers. Defence counsel explained that the point of the cross-examination and the proposed evidence was to show that the complainants came from an unstable and violent household and were therefore more likely not to be telling the truth because their behaviour was for the purpose of seeking attention. The Judge cited the decision of this Court in *R v Smith* [2007] NZCA 400, in which this Court said that the combination of the substantially helpful test in s 37 and the prohibition on evidence which would needlessly prolong proceedings in s 8(1)(b) meant that there would be little difference between the situation pertaining under the 2006 Act and the previous law on evidence relating to a collateral issue.

[29] Mr Goodwin explained that it had not been contended that a person from a violent or unstable home was more likely to lie, as the Judge had stated it. Rather, he said that the defence wished to say that the background against which the complaints were made should have been assessed by the jury as providing a reason as to why the complainants may not be telling the truth in the present case. We had some difficulty in deriving any meaningful distinction between these two propositions. Mr Goodwin said that evidence should have been admitted on the basis set out in s 37(3)(e) of the 2006 Act, and that it showed a motive to be untruthful. He said that refusing to permit evidence to be led by defence witnesses having earlier allowed cross-examination in respect of those same incidents meant that the jury was wrongly left with the impression that there was a lack of defence evidence available in respect of those incidents. He said the Judge's ruling was wrong and the error was compounded by the timing of the ruling.

[30] We do not accept that the evidence of the complainants' home environment was substantially helpful in assessing their veracity. The idea that a child who is subject to strict discipline and violence is more likely to seek attention by making a false allegation of sexual misconduct against a neighbour than a child from a better family environment does not appear to us to be valid. We do not see how the jury would have been assisted by this evidence.

[31] Accordingly, we agree with the Judge's ruling against such evidence being called. However, we note that, as was the case in relation to the allegations of A telling lies about the appellant, evidence had already been offered in terms of s 4 because of the questions asked of A in cross-examination. The offering of this evidence (ie cross-examining A) also failed to meet the substantial helpfulness test and should not have been permitted. In this respect, the law now differs from the pre-2006 position when cross-examination was permitted but, where denials resulted, evidence contesting those denials was not permitted under the collateral evidence rule. Now, an assessment of the proposed evidence needs to be made both in relation to questions being asked in cross-examination and evidence led by the defence contesting the answers given in cross-examination.

[32] We accept therefore that it was unfortunate that the Judge permitted the cross-examination but not the evidence contesting the answers given in cross-examination: both should have been excluded. However, the point needs to be made that trial counsel also has a responsibility to ensure that inadmissible evidence is not given. At the stage where proposed evidence is put in cross-examination, counsel will have a better appreciation than the judge of the proposed evidence and of the issues on which it is said to be substantially helpful. In cases where that test may have to be applied by the judge, counsel should ensure that the matter is raised early so as to avoid what happened here. More importantly, we do not see this as having had any material impact on the fairness of the trial. Indeed, the position which resulted was not unlike that which commonly arose in trials before the passing of the 2006 Act, where cross-examination was permitted but evidence contesting the answers in cross-examination was not.

Character evidence

[33] The appellant argues that the Judge wrongly prevented him from calling evidence of good character. The proposed evidence was to come from Reverend Ian Woodman, the Vicar-General and Canon of the Traditional Anglican Communion in New Zealand. The proposed evidence related to Reverend Woodman's knowledge of the appellant and his character. He had known the appellant for some 11 years. His evidence was to include statements that:

(a) he had baptised the appellant and trained him for confirmation;

(b) the appellant had been a regular church-goer from the age of nine or ten until about three or four years before the trial;

(c) the appellant had helped out at the church;

(d) the appellant attended mass at high and holy days;

(e) the appellant seemed to have a very strong faith, and, at the age of about 13, he had considered entering the priesthood.

[34] Reverend Woodman would have expressed the following opinion:

> I believe James to be a very decent and honest young man. I would certainly trust him in the company [of] my young child. I was completely shocked when I learnt of the allegations…

[35] At the trial the defence advanced the admissibility of the evidence on the grounds of both veracity and propensity. However, before us, Mr Goodwin accepted that the reference to the appellant being "an honest young man" was likely to be inadmissible because it was evidence of the appellant's reputation for being truthful that would not be substantially helpful in assessing the appellant's veracity. With that reference deleted, Mr Goodwin argued that the remainder of the evidence was properly characterised as evidence of propensity and should have been admitted.

[36] Section 40(1)(a) of the 2006 Act defines propensity evidence as evidence "that tends to show a person's propensity to act in a particular way or to have a particular state of mind…". Section 40(3)(a) says that propensity evidence about a defendant in a criminal proceeding may be offered only in accordance with ss 41, 42 or 43, whichever is applicable. In the present case reliance was placed on s 41(1), which provides that a defendant may offer propensity evidence about himself or herself. Mr Goodwin did not say what propensity the evidence would have tended to prove, but it was implicit in his submissions that the jury would have been asked to infer that the appellant, being a religious person (at about the time the alleged offending was said to have occurred) and being, in Reverend Woodman's view, a decent person, was not the sort of person who would have committed sexual offences against young girls.

[37] Evidence of good character was routinely admitted prior to the coming into force of the 2006 Act. Indeed, a failure to call evidence of good character where available (and where the prospect of the Crown responding with negative evidence was not present) was sometimes seen as depriving an accused of a fair trial: see, for example, *R v Tamanui* [2007] NZCA 19.

[38] The directions which judges were required to give in relation to good character evidence emphasised the fact that the evidence was relevant both to the credibility of the accused's denial of the offending and to his or her propensity to

offend in the way alleged: *R v Falealili* [1996] 3 NZLR 664 at 666 – 667 (CA). The Court expressed the view in that case that both limbs (credibility and propensity) "are relevant to the ultimate question of proof of guilt, which is why the evidence is admissible".

[39] In Australia, specific provision is made for evidence of good character. Section 110 of the Evidence Act (Cth) provides:

> The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

[40] The Australian Law Reform Commission justified retaining a provision protecting the ability to call evidence of good character in its report, *Report 26 – Volume 1: Evidence (Interim)* (ALRC 26 1985) at [802]:

> There is a danger that the fact-finder will wrongly estimate the probative value of evidence of the accused's good character. More importantly, it may decide the case simply on the basis that any crime he may have committed has been balanced by his previous good behaviour. But there are grounds of policy which may justify admission of evidence of good character if adduced by a criminal defendant. A fundamental principle of our accusatorial criminal trial system has been encapsulated in the maxim: "Better that ten guilty men go free than one innocent man be wrongly convicted". If the legal system is to minimise the risk of wrongful conviction, it may be necessary to give the accused an absolute right to introduce evidence of his good character, subject to the relevance discretion. On some occasions this option may be vital to an accused. In a mistaken identity situation, where the accused has no alibi but his own, good reputation may be the only thing that can save him from mistaken identifying witnesses. On balance it is wise to retain this kind of protection notwithstanding the low probative value of such evidence.

[41] The New Zealand Law Commission initially reached a similar conclusion to that of the Australian Law Reform Commission and proposed that the Evidence Code should have a provision specifically allowing defendants to offer evidence of good character: see *Character and Credibility* (NZLC PP27 1997) at 57 – 59. However, such a provision did not find its way into the Commission's draft Evidence Code or the 2006 Act. In its final report, *Evidence, Report 55 – Volume 1: Reform of the Law* (NZLC R55 – Volume 1 1999) the Commission referred only to evidence of bad character. It concluded (at [155]) that veracity and propensity "are the only aspects of character that are relevant in civil or criminal proceedings".

[42] In those circumstances, it seems clear that the admissibility of evidence of good character falls to be determined under the rules relating to veracity evidence and propensity evidence. It will therefore be necessary to decide whether the evidence proposed to be adduced is veracity evidence (in which case the substantial helpfulness test will apply) or propensity evidence (in which case the evidence will be admitted only if it is relevant). That is a substantial departure from the previous law under which evidence of good character of an accused was generally admissible as going to both credibility and propensity, without reference to those tests.

[43] Accepting for the purpose of argument that the proposed evidence of Reverend Woodman was propensity evidence, the issue for determination would be whether it would have tended to prove anything of consequence at the trial: s 7(3) of the 2006 Act. We do not believe that it would. The jury would have been asked to adopt the following chain of reasoning: the appellant was a religious person in his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.

[44] While we accept that the evidence proves that the appellant was religious in his younger days (possibly at the time the offending occurred) and at that stage appeared to have a strong religious faith, we do not see this as tending to prove anything in issue in the present case. We do not see any logical connection between evidence of religiosity and general good character and the likelihood of a person having those characteristics committing sexual offences. In our view the chain of reasoning which the jury would be asked to follow is no more logical than the obviously impermissible chain of reasoning that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls. In those circumstances we see no error on the part of the Judge and no miscarriage arising from the Judge's decision not to admit the evidence.

[45] That is not to say that evidence of good character will never be relevant as propensity evidence (or, for that matter, substantially helpful as veracity evidence):

this decision is limited to the proposed evidence in the context of the facts of this case. Good character evidence that does provide a basis for a logical deduction that the accused is not the type of person who could be expected to offend in the manner alleged by the Crown will be admissible. This Court expressed the view in *R v Kant* [2008] NZCA 194 at [41] that it would be desirable for the permanent Court to address issues relating to evidence of a lack of previous convictions. We note that in *Wi v R* [2009] NZSC 39 the Supreme Court has now granted leave to appeal on this issue. We make the same observation as the Court in *Kant* about the broader topic of evidence of good character.

Lack of identification warning

[46] In her evidential video interview, A referred to an incident in which she said that she saw the appellant through the bathroom window on one occasion when she was having her shower. She said he was sitting on the fence with a camera phone and when he saw her he ran off. She was cross-examined about this and said that she had seen a figure through the "blurriness of the window", but that she had opened the window and had seen the appellant running away. At the end of the extensive cross-examination on this topic she was asked if she accepted that she may have been mistaken about who it was and answered "I guess so. Can I have a break?"

[47] There was no charge against the appellant in relation to this incident. The purpose of the evidence is not entirely clear. Mr Goodwin suggested that the Crown relied on it as propensity evidence, but counsel for the Crown, Mr Chisnall, denied this and said that it was simply background evidence of the kind described in *R v MacDonald* CA166/04 8 April 2005 at [14].

[48] While Mr Goodwin described A's evidence that the appellant was the person she saw on this occasion as identification evidence, it would more properly be described as recognition evidence because, of course, she knew the appellant well at the time this incident occurred. It is also clear that the Crown's case against the appellant was not dependent on the correctness of A's evidence that the appellant was the person she saw on that occasion. Nevertheless, Mr Goodwin argued that a judicial warning about identification evidence of the kind described in s 126 of the

2006 Act ought to have been given. He said that he had expected a warning to be given and had referred to it in his closing address to the jury. He requested that the Judge provide such a warning and she refused.

[49] There is no doubt that s 126 was not engaged in this case: the case against the appellant did not depend "wholly or substantially on the correctness of one or more visual or voice identifications". Mr Goodwin accepted that the statutory test was not met. In those circumstances we cannot see that any error of law has occurred here. Parliament has determined the circumstances in which an identification warning is required, and there is no reason for this Court to impose any additional requirements on trial judges in that regard.

Balance of summing up

[50] Mr Goodwin said that the Judge had not given a balanced summing up because she had omitted a number of the points raised by the defence in support of the appellant's case. He identified 21 points which he said were key points of the defence case as outlined in his closing address, and said that 14 of these had not been dealt with by the Judge. He said this meant the summing up was unbalanced.

[51] It was common ground that there is no necessity for the Judge to deal with the matters raised by the defence counsel in closing in the same degree of detail as counsel: *R v Keremete* CA247/03 23 October 2003 at [21]. Many of the 21 key points referred to by Mr Goodwin were examples of what he said were inconsistencies in the evidence of the complainants. The Judge referred to the defence submission that there were significant inconsistencies, that inconsistencies developed when a witness is not telling the truth, and that the confusion of the complainants, particularly in relation to counts where the complainants were unsure of the dates, were exposed in cross-examination. The Judge then mentioned some of the examples of alleged inconsistencies, but not all of them.

[52] The Judge's summing up followed immediately after the conclusion of the defence counsel's address, and in those circumstances it was not incumbent on the Judge to mention every single point raised by the defence. We are satisfied that the

summary by the Judge was adequate to meet the requirements of fairness and balance. The Judge identified the fundamental facts in issue and treated opposing contentions as to these facts in a balanced way: *Keremete* at [18].

Splitting of defence counsel's closing address

[53] The defence counsel's closing address commenced at about 3.50 pm on Thursday afternoon in the second week of the trial. This immediately followed the Crown prosecutor's closing address which had commenced at 2.15 pm and concluded at 3.35 pm. Defence counsel asked the Judge to defer the commencement of his closing address until the following morning but she declined. Rather, defence counsel was instructed to choose a point at which it would be convenient to interrupt his address at or close to 5 pm. He did this and recommenced his address the following morning.

[54] Mr Goodwin said that this undermined his closing and exacerbated the unbalanced summing up by the Judge. He said that the trial had not been extremely lengthy, and the closing addresses of counsel had each taken under two hours. He said that in those circumstances it was unfair to require him to be subjected to the disadvantage of a disjointed closing address.

[55] A similar argument was made to this Court in *R v Wi* [2009] NZCA 81 and rejected at [34]. In *Wi*, the defence closing address began at 3.50 pm and concluded after 6 pm, so it was not interrupted but it continued well past the normal adjournment time. However, the jury was consulted in *Wi* before the decision to continue after 5 pm was taken. There was no such consultation in this case.

[56] We do not see this case as any more compelling than *Wi*. There is no indication that the jury was confused or was any less attentive than they otherwise would have been. While it is not ideal to interrupt a closing address in this way, it is not appropriate to impose hard and fast rules on trial judges, who must be left to deal with management issues of this kind in the trial context. It is not unusual for a closing address to be presented over more than one day, particularly in a long trial.

We see no material prejudice to the appellant from this situation and in those circumstances we reject this ground of appeal.

Cumulative effect

[57] Having rejected each of the individual points raised by the appellant, we now turn to consider whether cumulatively they give reason for concern that a miscarriage of justice occurred. Having done so we are satisfied that they do not, and in those circumstances we dismiss the appeal against conviction.

Sentence appeal

[58] The sentence appeal is founded on three grounds, namely:

(a) The Judge was wrong to decline to import youth justice principles in fixing the starting point;

(b) In any event the starting point was too high;

(c) The Judge was wrong to conclude that the sentence of two years and ten months imprisonment was outside the realm of contention for home detention.

District Court sentencing

[59] Having considered the submissions from the Crown and the defence, the Judge referred to the pre-sentence report. This recorded that the appellant had a good upbringing, a good relationship with his family members and no criminal history. The appellant told the probation officer that he accepted the jury's decision (but the present appeal would appear to indicate the contrary). He was recorded as being co-operative throughout the interview. He indicated a willingness to undertake programmes if necessary. The probation officer assessed him as having a low risk of re-offending, but said that this could be high if the underlying causes of his

offending behaviour remained unaddressed. The probation officer recommended home detention and community work, with provision for counselling as directed.

[60] The Judge then identified the following aggravating features:

(a) The harm caused by the offending in relation to both complainants and their family, as outlined in their victim impact statements;

(b) The abuse of a position of trust (which the Judge acknowledged was "small"), as the appellant was a neighbour approximately ten years older than the youngest complainant;

(c) The vulnerability of the complainants;

(d) The number of victims (two);

(e) The premeditation that was inherent in offending that had occurred over a significant period.

[61] The Judge said there were no mitigating features of the offending.

[62] As to mitigating features of the offender, the Judge identified youth as the prime mitigating feature, but also referred to his lack of previous convictions and considerations of rehabilitation. She noted his strong family support and his good employment record.

[63] The Judge then turned to the starting point. She did not import youth justice principles into fixing the starting point, but rather dealt with youth as a mitigating factor. She took a starting point reflecting the overall offending of five years imprisonment. She determined that a discount of 30 per cent should be applied for mitigating factors, and imposed a sentence of two years and ten months imprisonment. This sentence applied to the lead charge, being the count of sexual violation by unlawful sexual connection involving digital penetration, and concurrent sentences of two years imprisonment were imposed on all other charges. The Judge

said the sentences imposed went well outside the realm of consideration of home detention.

[64] The discount applied by the Judge was, in fact, considerably greater than 30 per cent – about 43 per cent. We were told by counsel that the prosecutor pointed this out to the Judge at the time of the sentencing but the Judge determined not to make any change to the overall sentence.

[65] We now turn to the points of appeal raised by Mr Goodwin.

Youth justice principles

[66] Mr Goodwin accepted that, because the offending had taken some time to come to light, the appellant was not a "youth" at the time of sentencing and that the youth justice principle did not strictly apply. Nevertheless he argued that the sentence needed to reflect the fact that the appellant was a youth at the time of the offending. We agree, given the immaturity and lack of judgement of a young person which may reduce his or her criminal responsibility.

[67] Mr Goodwin said that the starting point needed to reflect this. He referred to the decision of this Court in *R v Mako* [2000] 2 NZLR 170 at [34], where the Court described the starting point as "the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial". That was adopted in the later decision of this Court in *R v Taueki* [2005] 3 NZLR 372 at [8]. In *R v Takiari* [2007] NZCA 273 this Court adopted the starting point appropriate for an adult and then treated youth as a mitigating factor, which ensures that it is appropriately recognised in the final sentence. We consider this to be the correct sentencing methodology.

[68] That means that the approach adopted by the Judge in this case was correct, and the issue is therefore whether the discount which she gave was appropriate. As noted, she intended to give a discount of 30 per cent but in fact gave a discount of 43 per cent. This is clearly more than adequate recognition of the appellant's youth at the time of the offending.

Starting point too high

[69] Mr Goodwin said the starting point of five years imprisonment was too high and out of line with the authorities. We disagree. This Court said in *R v M* [2003] 2 NZLR 60 at [9] that a range of two to five years imprisonment was appropriate in cases of sexual connection by way of digital penetration. But, as the recent decision of this Court in *R v K (CA558/2008)* [2009] NZCA 107 made clear at [11], that decision was dealing with a situation of a single offence. In the present case the lead charge was a representative charge involving offending over a period of a year. In any event, the range set out in *R v M* is conservative: *R v Tranter* CA486/03 14 June 2004. It is also inconsistent with the earlier decision in *R v E (CA259/96)* CA259/96 3 September 1996. We have no doubt that a starting point of five years imprisonment was within the appropriate range for an adult offender in the circumstances of this case.

[70] Mr Goodwin pointed to a number of decisions in which a starting point of four years had been taken for offending which he argued was of similar seriousness. That may indicate some inconsistency in this area, which we hope will be ameliorated by a guideline judgment which this Court intends to issue later in the year. But, in any event, even if the Judge had taken a four year starting point and applied a 30 per cent discount, the result would not have been markedly different from that which she actually reached.

Home detention

[71] Mr Goodwin said that the Judge was wrong to say that a sentence of two years and ten months meant that home detention was not a viable option. We agree that home detention was not legally precluded, given that the transitional provisions in s 57 of the Sentencing Amendment Act 2007 applied: *R v Hill* [2008] 2 NZLR 381 (CA). We agree with Mr Goodwin that the length of the sentence was not itself a complete bar to the imposition of a sentence of home detention, but we are satisfied that it would not have been appropriate in the present case given the seriousness of the offending.

[72] We are satisfied that the sentence imposed was appropriate to the offending and we therefore dismiss the sentence appeal.

Result

[73] The appeal is dismissed.

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