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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA426/2012
[2013] NZCA 226

	BETWEEN	BRUCE FRANKLIN CHARNLEY Appellant
	AND	THE QUEEN Respondent

Hearing:	21 February 2013
Court:	Arnold, Simon France and Dobson JJ
Counsel:	P M Keegan for Appellant P K Feltham and M R Davie for Respondent
Judgment:	12 June 2013 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal against conviction on count 4 is allowed and the conviction is quashed. We make no order for retrial.

B In all other respects, the appeal is dismissed.

REASONS OF THE COURT

(Given by Arnold J)

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Introduction

[1] The appellant, Mr Charnley, appeals against his conviction, as a party, on one count of sexual conduct with a young person under the age of 16 (ss 66(1) and 134(1) of the Crimes Act 1961) (underage sex) and one count of meeting a young person following sexual grooming (s 131B(1)) (sexual grooming). He also appeals against the sentence of preventive detention, with a minimum period of imprisonment of five years, imposed upon him by Heath J.[1]

[2] Mr Charnley was tried with an associate, Mr Selby. Mr Selby suffers an intellectual disability and, by his own account, is functionally illiterate. Both men, who were in their late 40s at the time, were alleged to have committed various sexual offences against two complainants, one a girl aged 15 and the other a boy aged 12, during the course of a particular Saturday.

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1 *R v Selby and Charnley* [2012] NZHC 1541.

[3] Although they were acquitted of most of the charges they faced, Mr Charnley and Mr Selby were each convicted of several offences. In Mr Charnley's case, he entered a plea of guilty to the sexual grooming count following a ruling by Heath J.[2] In addition, he was found guilty as a party to one count of underage sex in respect of the female complainant, to which Mr Selby had pleaded guilty. This was an alternative count to a count of sexual violation by rape, of which Mr Selby was acquitted. Mr Charnley appeals both convictions.

Factual background

[4] The following narrative is based largely on the outline of the facts given by Heath J in his sentencing notes.

[5] Mr Selby lived near the home of, and knew, the male complainant. He had earlier asked the male complainant's mother if the male complainant could stay with him over night. The mother refused permission but did allow the male complainant to visit Mr Selby during the day and to go to Housie one evening. The male complainant was the female complainant's uncle, even though he was younger than she was.

[6] On the day before the offending, the complainants' mothers were at the male complainant's house with Mr Selby. They gave permission for the two complainants to go over to Mr Selby's place the following day, a Saturday.

[7] The complainants arrived at Mr Selby's place sometime between 10 am and 10.30 am on the Saturday. There was no dispute that Mr Selby knew how old they were. Mr Selby telephoned Mr Charnley on two occasions before the complainants arrived at his home. The calls, made at 9.47 am and 9.48 am, lasted 36 seconds and 52 seconds respectively. Mr Charnley went to Mr Selby's home on foot at some stage after those calls. The exact time of his arrival at Mr Selby's house was not clear but it was probably in the late morning. In any event, the trip would have taken him somewhere between 30 and 40 minutes. On the evidence, the Judge was not

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2 *R v Selby and Charnley* [2012] NZHC 228.

prepared to conclude that Mr Charnley went to Mr Selby's house knowing that the complainants were there.

[8] Mr Charnley said in his video interview that when he arrived at Mr Selby's place he could hear loud music playing and the curtains were drawn. He said the three occupants were drinking and the male complainant's fly was open. At some stage, Mr Charnley learnt that the female complainant was 15.

[9] When the alcohol ran out, Mr Selby took the two complainants in his car to a liquor outlet to replenish supplies. Mr Charnley stayed at Mr Selby's house in the meantime.

[10] Mr Selby admitted in his evidence at trial to engaging in a number of sexual acts with both complainants during the course of the day, all of which were, he said, consensual. In relation to the female complainant, he admitted having both anal and vaginal intercourse and in relation to the male complainant, anal intercourse and oral sex. The jury's verdicts indicate that the jury accepted that the sexual acts were consensual or at least that Mr Selby reasonably believed that they were.

[11] Some of the sexual activity between Mr Selby and the complainants may have occurred before Mr Charnley's arrival at Mr Selby's house. However, at least one act of vaginal intercourse occurred between Mr Selby and the female complainant while Mr Charnley was at Mr Selby's house. This was the subject of a count of sexual violation by rape and, in the alternative, of underage sex. The jury found Mr Charnley liable as a party to the underage sex charge (count 4).

[12] The background to this finding is that the female complainant offered to have sexual intercourse with Mr Charnley. He agreed and they went into the bedroom for that purpose. It is unclear how long they remained there: Mr Selby thought it might have been as long as 30 minutes but it may have been less. In any event, they did not have intercourse. This was because the female complainant advised Mr Charnley that she was having her period and this caused him to change his mind and refuse to have intercourse with her. Heath J was satisfied that this was the only reason that Mr Charnley changed his mind and that if the female complainant had

not been having her period, Mr Charnley would have had sexual intercourse with her.

[13] Shortly after this, Mr Selby went into the bedroom with the female complainant to have intercourse with her. Mr Charnley had told Mr Selby that the female complainant was having her period and was aware that they were going to the bedroom to have sex. While Mr Selby and the complainant had vaginal intercourse in the bedroom, Mr Charnley remained in the lounge with the male complainant.

[14] Following that, Mr Charnley and the female complainant discussed the possibility that he might arrange for her to have a lesbian encounter with an acquaintance of his. Mr Charnley then walked back to his house. He telephoned Mr Selby's house and spoke to the female complainant, advising her that the acquaintance was at his place and was willing to have a lesbian encounter with her. He arranged to meet the female complainant at a local shop and take her to his home. Having brought her to his home, Mr Charnley introduced the female complainant to his acquaintance, who enquired as to the complainant's age. Both the female complainant and the appellant indicated that she was 18. Thereupon the two women went into a bedroom where they engaged in sexual activity. Mr Charnley was present for some of the time and helped the female complainant to use a vibrator on his acquaintance.

[15] To complete the account of the factual background, we should mention that both complainants alleged that Mr Charnley and Mr Selby threatened them in the event that they told anyone about what had happened at Mr Selby's house. Mr Selby strongly denied this in his evidence. As is clear from the verdicts, the jury did not accept that the Crown had proved that the threats occurred.

The trial

[16] The trial was a difficult one for a number of reasons. For example, the female complainant fled the Court for a period during cross-examination and significantly changed her account of the offending at issue in this appeal while under cross-examination, as we will shortly explain.

[17] The Crown's theory of the case was that both Mr Charnley and Mr Selby had carried out various forms of sexual violation on the two complainants. In respect of most of the counts the non-participating adult was alleged to be a party to the principal's offending. Heath J recorded that there were two bases on which the Crown sought to establish secondary liability, namely:[3]

(a) During the course of the day, Mr Charnley and Mr Selby encouraged each other to engage in conduct amounting to sexual violation (s 66(1)(c) of the Crimes Act); or

(b) The non-participating adult deliberately refrained from taking any steps to prevent the sexual violation from occurring, to enable it to occur (s 66(1)(b)).

[18] Mr Charnley had initially been charged on the basis that he had had both anal and vaginal intercourse with the female complainant and Mr Selby on the basis that he was a party to those events. However, under cross-examination the female complainant ultimately accepted that it was Mr Selby who had had anal and vaginal intercourse with her, not Mr Charnley. This and other aspects of the evidence caused the Crown to apply to amend the indictment. In addition, Mr Charnley and Mr Selby applied under s 347 of the Crimes Act to be discharged on some counts. The outcome was that:[4]

(a) Messrs Charnley and Selby were discharged on three counts;

(b) the Crown was granted leave to amend the indictment by naming Mr Selby as the principal offender and Mr Charnley as a party to one count of sexual violation by rape of the female complainant (count 3) and one count (in the alternative) of underage sex with her (count 4); and

(c) the Crown was granted leave to add a further count (count 11) alleging sexual violation of the male complainant by Mr Selby.

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3 *R v Selby and Charnley* [2012] NZHC 270 at [7].
4 *R v Selby and Charnley*, above n 3.

[19] We set out in the table which follows the charges that each man ultimately faced in respect of each complainant, the outcome and how it was reached.

Count	Offence	Complainant	Principal	Party	Outcome
1	Sexual violation (anal intercourse)	FC	Selby		NG
2	Underage sex (alternative to count 1)	FC	Selby		G (plea)
3	Sexual violation (rape)	FC	Selby	Charnley	NG
4	Underage sex (alternative to count 3)	FC	Selby	Charnley	G (Selby – plea, Charnley – verdict)
5	Sexual grooming	FC	Charnley		G (plea)
6	Sexual violation (oral)	MC	Selby	Charnley	NG
7	Sexual violation (oral)	MC	Charnley	Selby	NG
8	Sexual violation (anal)	MC	Charnley	Selby	NG
9	Sexual violation (oral)	MC	Charnley	Selby	NG
10	Abduction for sexual connection	MC	Selby		NG
11	Sexual violation (anal)	MC	Selby		NG

[20] It is noteworthy that the Crown did not charge either accused with underage sex as an alternative to the sexual violation charges in relation to the male complainant. Presumably this was because it was thought that consent would not arise as an issue in relation to that complainant. As it turned out, that was an erroneous assessment. The Crown did seek leave in the course of the trial to have alternative counts added in relation to count 6 alleging sexual violation of the male complainant. Heath J declined leave.[5]

[5] *R v Selby and Charnley* HC New Plymouth CRI-2011-043-569, 27 February 2012.

Basis of conviction appeal

[21] For the appellant, Mr Keegan raised two points on the conviction appeal.

(a) First, he submitted that Mr Charnley had entered a plea of guilty to the sexual grooming charge following a ruling by the Judge as to the meaning of s 131B. The appeal against conviction on this count is brought on the basis that the Judge's ruling is wrong.

(b) Second, in relation to the underage sex conviction, Mr Keegan submitted that Mr Charnley had been convicted on the basis of "mere presence" and that something more was required to sustain liability as a party for encouraging another to commit an offence.

Sexual grooming

[22] Mr Charnley entered a plea of guilty to the sexual grooming count on the basis of Heath J's ruling concerning the scope of the offence in dealing with an application for discharge under s 347. Consideration was apparently given to reserving a question for this Court but Heath J ultimately considered that the Court would be prepared to deal with the appeal as the guilty plea was entered on the basis of a legal ruling. There was no opposition from the Crown to the matter being dealt with in this way. The Court accepts that because it was based on a ruling by the Judge, this is an appropriate case to entertain a conviction appeal following a guilty plea.[6]

[23] Section 131B(1) of the Crimes Act provides:

> (1) Every person is liable to a term of imprisonment for a term not exceeding 7 years if,—
>
> (a) having met or communicated with a person under the age of 16 years (the **young person**) on an earlier occasion, he or she takes one of the following actions:
>
> (i) intentionally meets the young person:

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[6] See the discussion in Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA385.17].

(ii) travels with the intention of meeting the young person:

(iii) arranges for or persuades the young person to travel with the intention of meeting him or her; and

(b) at the time of taking the action, he or she intends—

(i) to take in respect of the young person an action that, if taken in New Zealand, would be an offence against this Part, or against any of paragraphs (a)(i), (d)(i), (e)(i), (f)(i), of section 98AA(1); or

(ii) that the young person should do on him or her an act the doing of which would, if he or she permitted it to be done in New Zealand, be an offence against this Part on his or her part.

The background to this section was explained in this Court's judgment in *R v S (CA706/2008)*.[7]

[24] Mr Keegan's submission was that the relevant facts could not support a conviction for sexual grooming under s 131B. Before Heath J he had argued that there could be no liability under s 131B(1) if the action intended does not result in the commission of a crime. He submitted that there was no crime in this case because the appellant's acquaintance had not been charged (apparently because it was accepted that she could avail herself of the defence to s 134).[8] He also argued that the appellant did not commit an offence because there was no evidence that he had an intention of participating in the lesbian activity at the point when he introduced the female complainant to his acquaintance; in other words, liability under s 131B(1) depended on the groomer intending to carry out a crime himself against the young person – the groomer had to intend to be a principal, not a party.

[25] As can be seen, s 131B(1) has two sets of requirements. Relevantly to this case, the first set is that the offender must have:

(a) met or communicated with the young person on a previous occasion; and

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7 *R v S (CA706/2008)* [2009] NZCA 64.
8 See [26] below.

(b) intentionally met the young person (again).

Clearly these requirements are met in this case: the appellant met the female complainant for the first time at Mr Selby's house and then arranged to, and did, meet her subsequently at the bakery.

[26] The second set is that at the time of the (second) meeting or communication, the offender must intend one of two things, including "to take in respect of the young person an action that, if taken in New Zealand, would be an offence against [Part 7 of the Crimes Act]". Part 7 includes sexual offences, in particular underage sex (s 134). An offence under s 134 is committed when it has been established that a person has, or attempts to have, sexual connection with, or commits an indecent act on, a person under 16 years of age, not being married to him or her. However, under s 134A(1) the person charged has a defence if he or she can prove three things:

(a) he or she took reasonable steps to find out whether the young person was 16 or older;

(b) he or she believed on reasonable grounds that the young person was 16 or older; and

(c) the young person consented.

[27] Turning to Mr Keegan's first argument (that Mr Charnley could not be liable because his acquaintance was not charged with any offence against s 134), a person can commit an offence against the section either as a principal or as a party. Although secondary liability is derivative, the fact that the person who committed the actus reus of an offence under s 134 is able to avail herself of the statutory defence does not necessarily mean that a person charged as a party cannot be convicted of the offence.[9] In the present case, Mr Charnley arranged the lesbian encounter knowing that the female complainant was under 16. As a consequence, he would be guilty (as a party) of an offence against s 134 if his acquaintance committed the actus reus.

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9 See the discussion in Bruce Robertson (ed) *Adams on Criminal Law*, above n 6, at [CA66.04].

[28] That brings us to Mr Keegan's second argument (that Mr Charnley could not be liable under s 131B(1) unless he intended to commit an offence against the female complainant as a principal). This argument is based on the words "to take in respect of the young person an action that ... would be an offence against this Part" in s 131B(1)(b)(i). We consider that, for the purposes of s 131B(1), Mr Charnley did intend to take an action in respect of the female complainant that was an offence against pt 7. That is, he intended that the female complainant would engage in underage sex with another person in circumstances where he would be a party to the offending by virtue of arranging it. We reach this conclusion for two reasons:

(a) First, it is consistent with the structure of s 66(1) of the Crimes Act. That section provides that everyone is party to and guilty of an offence who actually commits the offence or aids, abets, incites, counsels or procures its commission. Accordingly, despite the fact that there are different pathways to liability, the liability is still for the offence.

(b) Second, there is no policy reason that we can discern to exclude from liability under s 131B a person who grooms not so that he personally can commit a sexual offence against the victim but so that someone else can. Indeed, the policy considerations go the other way: the interpretation advanced by Mr Keegan would leave a significant gap in the legislation.

[29] In addition to this, Mr Charnley actually participated in the s 134 offending by assisting the female complainant to use a vibrator on his acquaintance. Had he gone to trial on the sexual grooming count, the Crown might well have argued that his participation in the offending supported an inference that he had the necessary intention at the time he organised the offending.

[30] In the result, then, we agree with Heath J's ruling and dismiss the appeal against the grooming conviction.

Party liability

[31] To set the background for this ground of appeal, we must set out Heath J's instructions to the jury in relation to party liability. The Judge gave a detailed issues sheet to the jury. In relation to count 4 it said:

> **Sexual conduct with a young person (alternative count to count 3)**
>
> **(a) Mr Selby**
>
> **Verdicts are only required on count 4 if you find Mr Selby and Mr Charnley not guilty on count 3**
>
> Mr Selby has pleaded guilty to count 4. Therefore, no verdict is required in respect of him.
>
> **(b) Mr Charnley**
>
> **Note: A verdict is required only if Mr Charnley has been found not guilty on count 3.**
>
> Has the Crown proved, beyond reasonable doubt that on 19 February 2011, at [location]:
>
> [a] Mr Charnley knew that Mr Selby was having or intended to have sexual connection with [the female complainant] in Mr Selby's house?
>
> [b] Mr Charnley,
>
> [i] by words or conduct, intentionally encouraged Mr Selby to engage in sexual connection with [the female complainant]? or
>
> [ii] deliberately refrained from doing anything to prevent Mr Selby from engaging in sexual connection with [the female complainant], in order to enable him to commit the offence of having sexual connection with a minor?
>
> If your answers to those questions are "yes", your verdict is guilty. If your answer to any one of those questions is "no" your verdict is not guilty.

The parties' direction was in the same terms as in relation to other counts where party liability was alleged.

[32] In addition to the issues sheet, Heath J provided the jury with some notes. In relation to party liability the notes said:

Party liability

9. In relation to questions of secondary liability:

   (a) It is enough for the Crown to prove either that the alleged secondary party encouraged the other to commit non-consensual sexual violation or that he deliberately took no steps to prevent the conduct in order to facilitate commission of the crime of sexual violation. On the sexual conduct with a young person charge the issue of consent is irrelevant. You must approach count 4 on the different basis set out in the questionnaire.

   (b) If (for example) five of you were satisfied beyond reasonable doubt that the Crown had proved intentional encouragement beyond reasonable doubt and the remaining six were satisfied beyond reasonable doubt that the alleged secondary party deliberately took no steps to prevent the conduct, in order to enable the crime to be committed, that is enough to find the relevant accused guilty as a party. In other words, all eleven of you must agree that one or other of the two limbs has been proved beyond reasonable doubt.

10. It is not enough for a person to stand by without doing anything to prevent the commission of an offence. Mere presence is insufficient. What is required is that the inaction amounts to an encouragement of another to commit an offence.

[33] The record indicates that the Judge provided the issues sheet and notes to counsel in draft in advance of the summing up. Presumably, then, they were agreed by counsel.

[34] In his summing up, Heath J dealt with counts 3 and 4 in the following way:

> [44] If I go to count 3, this is where it gets a little more complicated and this is the allegation that Mr Selby raped [the female complainant]. The first part which relates to Mr Selby follows the same format as the earlier part. There are three questions and the only difference from count 1 is that we are dealing with a situation in which Mr Selby put his penis into [the female complainant]'s vagina. The more tricky issue relates to the secondary liability of Mr Charnley. You need only to consider these questions if you find Mr Selby guilty on this charge. If Mr Selby is found not guilty on this count, Mr Charnley must also be found not guilty. So the questions here are "Has the Crown proved beyond reasonable doubt that on 19 February 2011, at [location], Mr Charnley knew that Mr Selby was having or intended to have non consensual sexual connection with [the female complainant] in Mr Selby's house. Second, that Mr Charnley by words or conduct intentionally encouraged Mr Selby to engage in non-consensual sexual connection with [the female complainant]. Or, deliberately refrained from doing anything to prevent Mr Selby from engaging in non-consensual sexual connection with [the female complainant] in order to enable him to commit the offence of having unlawful sexual connection". So that is how the

person who does not do the physical act can be made liable for it through actively or passively encouraging what is being done by the person who performs the physical act.

[45] Now, in relation to the charge in count 4, this is an alternative to the rape charge in count 3. Mr Selby has pleaded guilty to this charge so you do not need to return a verdict in respect of him. However, you do need to address this issue in respect of Mr Charnley but only if Mr Charnley has been found not guilty on count 3. So we have got the same incident but two different charges, alternatives. First, rape. Second, sexual conduct with a young person. So you only need to consider sexual conduct with a young person if you find Mr Charnley not guilty of the rape as a party. And, the questions there are similar but not identical to that relating to the rape and that is because the elements of the offence are different. So, here consent is not an issue. *So, the first question becomes whether the Crown has proved beyond reasonable doubt that Mr Charnley knew that Mr Selby was having or intended to have sexual connection with [the female complainant] in Mr Selby's house and secondly, Mr Charnley by words or conduct, intentionally encouraged Mr Selby to engage in sexual connection with [the female complainant] or deliberately refrained from doing anything to prevent Mr Selby from engaging in sexual connection with her in order to enable him to commit the offence of having sexual connection with a minor*.

[46] Now, sorry that is so wordy but it is actually quite important to be precise on these charges involving Mr Charnley and Mr Selby as parties because here you are dealing with someone who is not alleged to have committed the physical act in issue so you need to be sure that there is an active encouragement or a deliberate omission to do something to stop what is known to be a criminal offence.

(Emphasis added.)

[35] The Judge then discussed party liability as follows:

[58] *In relation to party liability, it is enough for the Crown to prove either that the alleged secondary party encouraged the other to commit non-consensual sexual violation or that he deliberately took no steps to prevent the conduct in order to facilitate commission of the crime of sexual violation.* On the sexual conduct with a young person charge the issue of consent is irrelevant. You must approach count 4 on the different basis set out in the questionnaire. Now if, for example, five of you were satisfied beyond reasonable doubt that the Crown had proved intentional encouragement and the remaining six were satisfied beyond reasonable doubt that the alleged secondary party deliberately took no steps to prevent the conduct, in order to enable the crime to be committed, that is enough to find the accused guilty as a party. As long as all eleven of you agree that one or the other of the two limbs has been proved beyond reasonable doubt, that is enough.

…

[60] *Now, finally on party liability, it is not enough for a person to stand by without doing anything to prevent the commission of an offence.* You can imagine, for example, the person who is standing at the side when street

> violence is taking place and does not go in to do anything about it. That does not make that passer-by liable for what happens in the street violence. *But if it is a deliberate step designed to enable the offence to be committed, that is different, and that is what we are talking about in the context of this case*.
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> (Emphasis added.)

[36] Mr Keegan made two submissions. The first was that the Judge should not have refused the defence application that the female complainant be recalled having permitted count 4 to be amended to allege that Mr Charnley was a party to offending by Mr Selby.[10] He said he wanted the opportunity to cross-examine the female complainant as to Mr Charnley's actions during Mr Selby's encounter with her. The second was that Mr Charnley had been convicted on the basis of "mere presence" at the scene of the offence. We deal with each submission in turn.

Amendment to count 4

[37] When addressing the Crown's application to amend, Heath J said that the real issue was whether Mr Charnley was prejudiced in putting his case, given that he denied being present in the house while any sexual activity was occurring. The Judge noted that Mr Keegan had cross-examined the female complainant on the basis that Mr Charnley was not involved in any sexual activity with her beyond the occasion when she offered to have sexual intercourse with him. Having reviewed the female complainant's evidence, the Judge said that because Mr Charnley's defence was a complete denial, there was no prejudice to him that could justify refusal of an amendment to conform with proof.

[38] In his written submissions, Mr Keegan said that further cross-examination was necessary to establish:

> a. whether the appellant was in the house at the relevant time;
>
> b. where the appellant was and what he was doing at the time that [the female complainant] and Mr Selby went into the bedroom;
>
> c. whether the appellant for instance was occupied doing anything;

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[10] Count 4 had originally alleged that Mr Selby was a party to offending committed by Mr Charnley.

d. whether there was music playing and whether there was any conversation or interaction between the appellant and Mr Selby from which an inference of intended encouragement could be derived;

e. confirmation that he was not in the bedroom;

f. if there was any conversation afterwards with the appellant which again would indicate knowledge and intended encouragement.

[39] The evidence indicated that the female complainant had offered to have sexual intercourse with Mr Charnley, who knew that she was underage. When Mr Keegan cross-examined the female complainant, she accepted that she had only gone to the bedroom with Mr Charnley on one occasion and that, although they had discussed having sex, no sexual activity had occurred. This was because she was having her period. In his closing address, Mr Keegan put Mr Charnley's case to the jury on this basis. Mr Selby said in his evidence that when Mr Charnley and the female complainant came out of the bedroom, Mr Charnley told him that the female complainant was having her period. Shortly after, and before Mr Charnley had left the house, Mr Selby and the female complainant went into Mr Selby's bedroom where they had intercourse.

[40] Mr Keegan accepted in the course of argument that the first requirement identified in the issues sheet under count 4 (that Mr Charnley knew that Mr Selby was having or intended to have sexual intercourse with the female complainant in the bedroom) was met. That could only have been on the basis that Mr Charnley was present in the house when Mr Selby and the female complainant went into the bedroom to have intercourse.

[41] Given the state of the evidence, we are surprised at some of the matters Mr Keegan said that he wished to pursue with the female complainant in cross-examination. For example, under cross-examination by counsel for Mr Selby, Ms Pascoe, the female complainant agreed that Mr Charnley had left the house shortly after she had come out of the bedroom after having had sexual intercourse with Mr Selby. Mr Selby said the same thing. There was no indication on the existing evidence that Mr Charnley had said or done anything after Mr Selby and the female complainant had left the bedroom which might be relied on to indicate knowledge or an intention to encourage in relation to Mr Selby's offending (there

was, of course, the interaction that was part of the sexual grooming offending). Exploring that aspect with the female complainant would have been unwise as it was unlikely to have advanced Mr Charnley's position and may well have harmed it. Similarly, no one said that Mr Charnley was in the bedroom at the time of the sexual intercourse between the female complainant and Mr Selby: it was clear on the evidence that he was not. That was not something that needed to be confirmed.

[42] The critical point was whether Mr Charnley was at the house at the time when the female complainant and Mr Selby went into the bedroom and had sexual intercourse. Both the female and male complainants and Mr Selby said that he was. There has been no suggestion that there was any basis for contradicting their evidence. Mr Charnley did not give evidence at trial and this was not a matter covered in his video interview. Understandably, there has been no attempt to file further evidence. Nor has there been any suggestion that there was any basis for contradicting the evidence that Mr Charnley told Mr Selby when he and the female complainant left the bedroom that she was having her period.

[43] We think that Heath J was right to conclude that there was no reason that the complainant should be recalled if counts 3 and 4 were amended. Mr Keegan had already established the basis for Mr Charnley's defence in his cross-examination. As the evidence stood it was relatively favourable to Mr Charnley. We do not see that there was any real prospect of improving this position by way of further cross-examination of the complainant.

Conviction on the basis of "mere presence"

[44] Mr Keegan's second submission was that Mr Charnley had been convicted as a party simply on the basis of his presence at the house when the female complainant and Mr Selby had intercourse. That, he said, was insufficient to support party liability. He was critical of the directions given by Heath J. In particular, he was critical of the italicised portions of [44] and [45] of the Judge's summing up where the Judge referred to the alternative basis for liability, namely "deliberately refrained from doing anything to prevent Mr Selby from engaging in sexual connection with her in order to enable him to commit the offence of having sexual connection with a

minor".[11] Mr Keegan said that this was defective because it did not refer to the requirement for encouragement in fact. We deal first with the Judge's instructions and second with the evidential basis for party liability.

(i) The Judge's instructions

[45] As is well known, mere presence at the scene of a crime does not make a person liable as a party to the offence even if he or she could easily have done something to stop it from occurring. Liability for a failure to act may arise, however, where the bystander has a duty to act or where the circumstances establish that the omission to act was for the purpose of encouraging, and did encourage, the principal to commit the offence.[12] In *R v Duncan*, this Court considered a trial Judge's instruction to the jury that:[13]

> a person who is voluntarily and deliberately present, witnessing the commission of a crime and offering no opposition or dissent when he or she might be expected to do so, could be a basis for an inference that the person was intending to encourage and assist the commission of the offence.

The Court accepted that this direction correctly stated the legal position, although obviously it was a direction given against the background of a particular set of facts.

[46] Where party liability is alleged on the basis of a failure to act (assuming no duty to act), there must be an intention to encourage. As to encouragement in fact, this Court held in *R v Schriek* that this requirement could be met provided there was some connection between the encourager and the principal.[14] The Court said:[15]

> If "by his countenance and conduct" the secondary party intentionally is giving encouragement of which the principal offender could be aware, even if only by virtue of being conscious of the presence of a group of people behaving in a similar fashion, in the generality of cases there will be sufficient evidence of abetting.

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11 See [34] above.

12 See AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at [6.4.1(2)] and [6.4.3]; Jeremy Finn "Culpable Non-Intervention: Reconsidering the Basis for Party Liability by Omission" (1994) 18 Crim L J 90.

13 *R v Duncan* [2008] NZCA 365 at [15]. See also *R v Inoke* [2008] NZCA 403 at [26]–[32].

14 *R v Schriek* [1997] 2 NZLR 139 (CA) at 146–150.

15 Ibid, at 150.

[47] We have carefully considered the instructions and the other material that the Judge provided to the jury in relation to parties. We acknowledge that there are sentences which, taken in isolation, did not fully state the law. For example, the last sentence of the note on party liability – "What is required is that the inaction amounts to an encouragement of another to commit an offence" – is incomplete because it suggests that encouragement in fact is sufficient: it should refer to an *intentional* encouragement. The same is true of the last sentence of [44] and the last sentence of [46] of the summing up.[16]

[48] Despite that, the material taken as a whole did convey to the jury that they could not convict Mr Charnley as a party to Mr Selby's offending unless they were satisfied that he intended to encourage Mr Selby to have sex with the female complainant. The jury were told several times that mere presence could not be a basis for conviction; rather, the jury had to be satisfied that Mr Charnley either intentionally encouraged Mr Selby to engage in underage sex or deliberately took no steps to prevent the underage sex between the female complainant and Mr Selby *in order to enable it to occur*. (The Judge also referred to "a deliberate step designed to enable the offence to be committed".)[17] In our view this language adequately expresses the requirement for an intention to encourage and a connection between what Mr Charnley did and Mr Selby's offending.

(ii) Evidential basis for party liability

[49] As we have said, the trial presented a number of difficulties. One was that the female complainant's version of the incident giving rise to counts 3 and 4 changed dramatically under cross-examination. Partly as a consequence of that and partly because the Crown presented the events of the day as an interrelated whole, the Crown did not articulate precisely what the factual basis for the party allegation against Mr Charnley was in relation to count 4. Moreover, given that Mr Selby admitted that he had engaged in sexual activities with both the female and male complainants, the jury's acquittal of him of any offending against the male complainant and of any sexual violation of the female complainant must have been

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16 Quoted at [34] above.
17 At [60] of the summing up, quoted at [35] above.

based, at least in relation to the admitted activities, on an acceptance that they were consensual.

[50] Mr Charnley was alleged to have participated in sexual activity with the male complainant, which he denied. In acquitting Mr Charnley on those charges, the jury may have accepted either that the sexual activity did not occur, that it did occur but was consensual or a combination of the two. If they considered that such activity did occur, that would have been relevant to the party allegation. As we see it, the only basis on which we can safely proceed is that the jury found that the sexual activity with the male complainant did not occur (although we note Heath J's finding at sentencing that Mr Charnley had been present in the house during some of the sexual activity between Mr Selby and both complainants). We consider that we should approach the matter on the factual basis that is most favourable to Mr Charnley, given the evidence.

[51] Approaching the matter on that basis, we consider that there was more to Mr Charnley's involvement in Mr Selby's underage sex offending than mere presence at the scene. Mr Charnley said in his statement to the Police that when he arrived at the house he noticed that the curtains were drawn, the male complainant's fly was open and the two complainants were drinking alcohol. More importantly, shortly before the underage sex between the female complainant and Mr Selby, Mr Charnley acted in a way that showed unequivocally that he was prepared to commit that same offence. He accepted the female complainant's offer of sex, knowing that she was underage, and went with her to the bedroom to have sex. He declined to proceed only when told that she was having her period. He subsequently passed that information on to Mr Selby. At sentencing, Heath J said that he was satisfied that this was the only reason that Mr Charnley did not have sexual intercourse with the female complainant.

[52] So, immediately before Mr Selby committed the offence to which Mr Charnley was alleged to be a party, Mr Charnley had demonstrated a willingness to commit the same offence himself. He acted in a way that made it clear that he thought it acceptable to have sexual intercourse with a girl under the age of 16. Mr Selby was aware of Mr Charnley's attitude before he went to the bedroom with

the female complainant to have sexual intercourse. Given Mr Selby's limited intellectual ability, of which Mr Charnley was well aware, we consider that an inference was available on the basis of the established facts that Mr Charnley intended to, and did, encourage Mr Selby to have underage sex.

[53] However, as we have said, the case was not put to the jury in this way either by the Crown in its submissions or by the Judge in summing up. It is plausible to say that despite his willingness to commit the offence himself, Mr Charnley was essentially indifferent as to whether Mr Selby went ahead or not, that is, he had no intention to encourage. We cannot say that the jury must inevitably have reached the verdict that it did had the requirements for party liability been spelled out in terms of the factual decisions they had to make rather than in more abstract terms.

[54] Mr Charnley was under no legal duty to intervene to prevent sexual conduct between the female complainant and Mr Selby. Accordingly, the Crown had to explain precisely why Mr Charnley's presence at the scene and his failure to act manifested an intention to encourage Mr Selby, in the particular circumstances of the case. We have attempted to articulate a basis for liability at [51]–[52] above. But we are left with a residual concern that, because this was not articulated for the jury, they may have convicted Mr Charnley simply because he failed to intervene. In many cases, the way in which a person is said to be a party will be obvious from the circumstances. Here, however, the Crown's original theory of the case underwent a dramatic change in the course of the trial, with the consequence that the basis for Mr Charnley's liability was quite different from that originally alleged. Given that different and relatively unusual basis for liability, a careful exposition on the facts as ultimately alleged was required.

[55] Accordingly, we have concluded that Mr Charnley's conviction as a party to Mr Selby's underage sex offending must be quashed.

Sentence appeal

[56] Mr Charnley has appealed against his sentence of preventive detention. The fact that he has succeeded on his appeal against his underage sex conviction does not

necessarily mean that his sentence appeal must be allowed. There are two reasons for this:

(a) Sexual grooming is punishable by imprisonment for up to seven years and is therefore a qualifying offence for preventive detention purposes. The sentence of preventive detention imposed by Heath J was in relation to both charges of which Mr Charnley was convicted.

(b) There is no dispute on the facts that Mr Charnley was prepared to have underage sex with the female complainant. He refused only when he realised that she was having her period (as will be recalled, the Judge said that this was the only reason he refused). As previously noted, Mr Charnley's conduct showed a willingness to commit the same offence as principal for which he was convicted as a party.

[57] Accordingly, we propose to consider the sentencing process followed by the Judge given the outcome at trial and then to assess the position in light of our decision on Mr Charnley's conviction appeal.

Preventive detention

[58] Preventive detention is dealt with in s 87 of the Sentencing Act 2002. Section 87(1) describes the purpose of the sentence as being "to protect the community from those who pose a significant and ongoing risk to the safety of its members". Section 87(2) sets out the qualifying requirements, only one of which is at issue in this case. That is whether the Court could properly be satisfied that Mr Charnley was likely to commit another qualifying sexual or violent offence if he was released at the expiry date of the sentence that otherwise the Court would have imposed.[18] Section 87(4) sets out a range of considerations that the Judge must take into account in considering whether to impose a sentence of preventive detention:

(a) any pattern of past serious offending;

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[18] Sentencing Act 2002, s 87(2)(c).

(b) the seriousness of the harm to the community from the offending;

(c) information indicating a tendency to commit serious offending in the future;

(d) the absence or failure of efforts by the offender to address the cause(s) of the offending; and

(e) the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society.

[59] As this Court said in *R v Dean*:[19]

> Where the facts indicate that preventive detention may be appropriate, the court's focus is not on the impact of the present offending but rather is on whether the offending, when seen in context, demands a special reaction for the protection of society or a group within society.

Sentencing in High Court

[60] Heath J described the sentencing process in this case as "complex" and said that he thought it the most difficult sentencing exercise that he had undertaken. In considering whether to impose a sentence of preventive detention, the Judge obtained reports from a psychiatrist and a psychologist. Having received their initial reports, the Judge sought further material from them and each provided a supplementary report. In addition, the Judge heard evidence from the psychiatrist.

[61] Having considered the terms of s 87, the Judge noted that from the time he was an adolescent, Mr Charnley had exhibited disruptive and aggressive behaviour. He spent time in a Boys' Home and in the adolescent unit at Sunnyside Hospital. He had built up a considerable record of previous convictions, involving violence, dishonesty and traffic and sexual offending.

[62] In terms of sexual offending, in 1987 Mr Charnley was convicted of indecently assaulting a female under 12 years of age and was sentenced to

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[19] *R v Dean* CA172/03, 17 December 2004 at [74]. Leave to appeal to the Supreme Court declined: *R v Dean* [2005] NZSC 15.

imprisonment. In the 1990s Mr Charnley was convicted of one count of doing an indecent act with a girl under 12 years of age, three counts of unlawful sexual connection with a girl under 12, two counts of indecently assaulting a girl under 12 and one count of attempting to induce an indecent act. Most of these offences related to his then partner's daughter and her friend. In 2001 Mr Charnley was convicted on a representative count of indecently assaulting a female over 16 in the period July–August 2000. Apart from that, in 1979 he was convicted of homosexual behaviour, prior to its decriminalisation. In the 1990s he attended the Kia Marama programme and after his conviction for the 2000 offending, he attended the STOP programme. In addition, he had one-on-one counselling in 2003.

[63] Heath J noted the view expressed by the psychiatrist that Mr Charnley had gained knowledge and understanding of strategies to keep himself safe but had not always been able to use those strategies effectively. The psychiatrist said that Mr Charnley would benefit from further treatment and, for risk management purposes, should be assessed as at the upper end of the band between low and moderate risk of reoffending. He said that such a risk needs to be managed by some supervision and treatment.

[64] Heath J accepted that Mr Charnley had the ability to understand the strategies learnt from the Kia Marama and other programmes, but that he was not satisfied that he had the ability, in the sense of self-discipline or willingness, to apply them. The Judge identified two predictive risks:

(a) Mr Charnley's sexual offending was likely to continue, in the absence of a successful intervention; and

(b) Mr Charnley was unable or unwilling to apply strategies learnt in the past.

Both of these were, the Judge said, "suggestive of a significant and ongoing risk to members of the community of sexual offending". The Judge considered that in the ordinary course, he would have imposed a sentence of three years' imprisonment on Mr Charnley. That finite sentence would have been too short and a sentence of

preventive detention was necessary to protect the community given the significant and ongoing risk that Mr Charnley posed. Accordingly, Heath J imposed a sentence of preventive detention, with a minimum term of five years, on each of the two charges on which Mr Charnley was convicted.

Basis of sentence appeal

[65] Mr Keegan submitted that Heath J erred in imposing a sentence of preventive detention because he had:

(a) relied on irrelevant or unfounded facts;

(b) drawn an unfair conclusion that Mr Charnley was aroused by the knowledge of Mr Selby's sexual activity and this increased his culpability;

(c) incorrectly assessed the risk factors; and

(d) failed to find that the risk imposed by the appellant could be met by a finite sentence of three years imprisonment, coupled with an extended supervision order.

We deal with each of these matters in turn.

(i) Irrelevant or unfounded factual findings

[66] We begin by noting that before sentencing, Heath J issued a minute in which he set out the facts on which he proposed to sentence. There was then a telephone conference at which counsel made submissions as to the factual findings and some amendments were made as a consequence. The matters now raised do not appear to have been raised at that time.

[67] Mr Keegan submitted that Heath J's finding that Mr Charnley was present for some of Mr Selby's offending against both complainants was not supported by the jury's verdicts. Mr Keegan noted that the appellant was acquitted on all counts of

being a party to offending against the male complainant. But as we have said, all of the offending against the male complainant depended on there being a lack of consent. Mr Selby admitted that he had engaged in sexual activities with the male complainant but said the activity was consensual. In acquitting Mr Selby, the jury obviously accepted either that the activity was consensual or that Mr Selby had a reasonable belief that it was. In those circumstances, Mr Charnley could not have been convicted as a party to offending against the male complainant. Heath J's finding is therefore not necessarily inconsistent with the jury's verdict. More importantly, Heath J said that he regarded Mr Charnley's role as limited by the jury's verdict of guilty as a party to count 4. The Judge said:

> That approach gives the benefit of the doubt to Mr Charnley on whether the jury might have found him guilty as a party had counts 6, 7, 8 and 9 been charged in the alternative as sexual conduct on a young person.

That was the basis on which the Judge sentenced.

[68] Mr Keegan also submitted that the Judge should not have found that the only reason that Mr Charnley withdrew from having sex with the female complainant was that she was having her period. He said that the Judge had failed to consider that Mr Charnley may simply have decided that he did not wish to have sexual intercourse with an underage girl. However, we consider that the Judge was entitled to make the finding he did as it was consistent with the evidence at trial. There was no evidence to support the explanation advanced by Mr Keegan apart from a claim made by Mr Charnley to the psychiatrist that he had not had sex with the female complainant because she was too anxious and enthusiastic to have intercourse and he felt the situation was unusual. That explanation does not fit readily with the facts that emerged at trial and the Judge was entitled to reject it.

(ii) Unfair conclusion as to sexual arousal

[69] The essence of Mr Keegan's submission on this point was that the evidence did not support a conclusion that Mr Charnley was sexually aroused through being present in the house when Mr Selby and the female complainant were having sexual intercourse.

[70] In his written report, the psychiatrist said:

> It is noted that sexual offending does tend to decrease with age and Mr Charnley's active participation in sexual acts appears to have diminished. However, for a few offenders repeated sexual offending over the age of 40 is suggestive of an ongoing pattern that may not diminish. Sexual gratification can occur without clear physiological arousal or climax. Sexual excitement can be gained for some individuals through the act of grooming or being aware of sexual activity occurring without necessarily being actively involved in sexual contact themselves. It might be formulated that Mr Charnley living by a school would be consistent with this.

In the course of his oral evidence, he talked about sexual gratification arising not from a sexual act itself but from knowing that such an act is occurring. He also noted that Mr Charnley's prior history indicated that he had enjoyed participating in sexual acts with multiple parties. The assistance he provided to the female complainant in relation to the vibrator was consistent with voyeuristic behaviour.

[71] However, we accept that the psychiatrist raised this more as a possibility that it applied to Mr Charnley rather than as a firm conclusion.

[72] While this matter was explored in oral evidence and was clearly relevant to the decision the Judge had to make, it does not seem to have been a particularly significant factor in the Judge's decision to impose a sentence of preventive detention. When the Judge summarised his reasons for imposing the sentence he noted four factors:[20]

(a) a pattern of serious offending which had spanned a number of years despite the fact that there had been limited offending over the previous decade or so;

(b) the severity of the harm caused to the female complainant;

(c) material indicating a tendency to commit serious offences in the future; and

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[20] *R v Selby and Charnley*, above n 1, at [60].

(d) concern arising from Mr Charnley's inability or unwillingness to address the cause(s) of his offending by applying strategies learnt through programmes.

The sexual arousal point went to the third of these factors, but the Judge had other material upon which he could rely.

(iii) Incorrect assessment of future indicators

[73] Mr Keegan argued that the Judge's analysis failed to take account of the fact that the psychiatrist and psychologist considered that Mr Charnley had a low to moderate risk of reoffending and that Mr Charnley's sexual offending had not escalated but had reduced over time. It also failed to take account of Mr Charnley's limited role in the offending at issue.

[74] Heath J noted the degree of risk that the experts considered Mr Charnley posed and that Mr Charnley's offending had reduced over time. He nevertheless considered Mr Charnley posed a significant and ongoing risk to members of the public. The reason that he reached this view was that, although Mr Charnley had learnt various coping strategies, he had been unable or unwilling to apply them. The present offending demonstrated that, despite what he had learnt at the various programmes in which he had participated, Mr Charnley was still prepared to engage in underage sex himself and was also prepared to arrange for others to engage in underage sex. We consider that the Judge was entitled to find that there was a serious and ongoing risk to members of the public.

(iv) Finite sentence adequate

[75] Mr Keegan said that the Judge had failed to articulate why a finite sentence coupled with an extended supervision order could not address any risk that Mr Charnley posed. Rather, the Judge simply stated that a finite sentence of three years would have been too short.

[76] The Judge did not specifically refer to the possibility of a finite term coupled with an extended supervision order in his sentencing notes. This Court addressed this issue in *R v Mist*.[21] In *R v Parahi* the Court summarised the effect of *Mist* as follows:[22]

> [T]he law presently is – on the basis of *Mist* – that a sentencer must take into account, when considering the effect of a determinate sentence, the possibility that an extended supervision [order] will be imposed if the relevant offender is considered to be likely to commit relevant offences after his release.

The Court said that although the possibility of such an order did not relieve the sentencing judge from making a decision about preventive detention, it had the advantage in a finely balanced case that it allowed an assessment to be made at the time of release rather than on a predictive basis.[23]

[77] Although the Judge did not specifically mention the possibility of an extended supervision order in his sentencing notes, it is clear that he did turn his mind to it. In a minute issued six weeks before the sentencing following a conference with counsel, Heath J said:

> [12] I also indicated to counsel that I would appreciate additional information on what community support is available in the event that either prisoner were sentenced to a finite terms of imprisonment. Ms Clarke has arranged for Ms Shearar to provide a general overview, to the extent she is able, of the impact of a finite terms of imprisonment over what would then be available in terms of release conditions, parole and Extended Supervision Orders. …

As we understand, the material sought was provided.

[78] In this context, an observation made by the writer of Mr Charnley's pre-sentence report is relevant:

> No overt expressions of remorse or contrition were demonstrated during [the] interview. During his many sentences with Community Probation Services over the years, the various conditions associated with his release on licence or parole have invariably been seen as 'hoops he just has to jump through'. According to Community Probation Service records, Mr Charnley has never been a willing participant in any of the processes in the past, but

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21 *R v Mist* [2005] 2 NZLR 791 (CA) at [100]–[101].
22 *R v Parahi* [2005] 3 NZLR 356 (CA) at [32].
23 At [34].

> has considered the rehabilitative aspects of such sentences imposed by the Court or the Parole Board as 'an intrusion' and [a] waste of his time.

[79] The reports of the medical experts both note that Mr Charnley does not understand the impact of his offending on the victim, nor does he empathise with her. This lack of understanding, his dismissive attitude to rehabilitative processes and his inability or unwillingness to apply strategies which he has learnt mean that Mr Charnley continues to pose a threat to the public.

[80] The Judge found this to be a difficult sentencing. His approach to the task was exemplary in the sense that he advised the parties of the factual basis on which he proposed to sentence and sought their comment; he provided the amended factual findings to the psychiatrist and the psychologist for use in the preparation of their reports; he sought further material from both experts once he had received their reports and heard oral evidence from one. Although the Judge did not specifically mention the possibility of an extended supervision order, we are satisfied that he identified and considered that and the other relevant considerations. No error of principle or approach has been demonstrated.

Sentencing afresh

[81] We have considered the Judge's approach in some detail because, as noted above, we do not think that the sentence of preventive detention must necessarily be quashed as a result of the outcome of the conviction appeal. Heath J sentenced Mr Charnley to preventive detention on the grooming charge as well as the underage sex charge. Moreover, the sentence has a preventive, not a punitive function; its focus is on the risk posed by the offender in the future, not on the present offending.

[82] Mr Charnley has undergone treatment programmes and has learnt strategies to keep himself safe. However, as the expert opinions indicate and as Heath J found, he has difficulty in utilising those strategies effectively in practice. The factual background to the current offending provides an excellent illustration of this. When he arrived at Mr Selby's house that Saturday morning, he found the curtains drawn, loud music playing, the male complainant with his fly open and the two complainants drinking alcohol. While he may initially not have realised how old the

female complainant was, it must have been obvious that the male complainant was around 12 years of age. Mr Charnley remained at the house while Mr Selby and the two complainants went to buy more alcohol. Later when the female complainant offered to have sexual intercourse with him, he agreed even though he knew by this stage that she was 15. Mr Charnley had known Mr Selby for at least 10 years and knew of his intellectual disability and yet did not seek to prevent or caution him against having underage sex with the female complainant.

[83] In addition, Mr Charnley arranged a lesbian encounter for the female with an acquaintance, lied to the acquaintance about the female complainant's age and participated in the lesbian encounter by providing instruction on the use of a vibrator.

[84] Finally, we should note that the victim impact reports indicate that the female complainant was badly affected by what occurred. She suffers violent mood swings and has found it difficult to continue at school. Her mother reports that she is a different person.

[85] In our view, the sequence of events just outlined well illustrates that Mr Charnley lacks the ability or willingness to utilise the strategies which he has learnt to keep himself out of trouble. We consider that Mr Charnley poses a threat for the future which could not be adequately met by a finite sentence and an extended supervision order. It may be that advancing age will reduce the likelihood of future offending, but we are by no means confident of that given Mr Charnley's willingness to act as a go-between. We consider that the sentence of preventive detention with a minimum period of five years remains appropriate.

Decision

[86] The appeal against conviction on count 4 is allowed. In the circumstances, we make no order for retrial. In all other respects, the appeal is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent