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

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA412/2014
[2014] NZCA 599

BETWEEN	JASON JOHN RUA Appellant
AND	THE QUEEN Respondent

Hearing: 10 November 2014

Court: Miller, Lang and Clifford JJ

Counsel: C J Tennet for Appellant
J E Mildenhall for Respondent

Judgment: 8 December 2014 at 11.30 am

JUDGMENT OF THE COURT

A Application for extension of time granted.

B The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Following a retrial before Judge Barry in the Wellington District Court the appellant, Jason John Rua, was found guilty by the jury on six counts of doing an indecent act on a young person, two counts of sexual violation by unlawful sexual connection and one count of attempted sexual violation by unlawful sexual connection. All the offending was against the single complainant, P. Judge Barry subsequently sentenced Mr Rua to five years' imprisonment.[1]

[2] Mr Rua now appeals against his conviction and sentence. The notice of appeal was filed over four months out of time. There being no objection we grant the application for an extension of time.

[3] As regards his conviction Mr Rua says that the Judge intervened inappropriately during the complainant's evidence in chief, with the effect of promoting sympathy for her and illegitimately bolstering her credibility, that he wrongly directed the jury on the question of inferences and erroneously failed to direct on reliability and demeanour so that a miscarriage occurred. To consider properly those points, it is necessary to outline in some detail aspects of Mr Rua's trial.

[4] Mr Rua's appeal against his sentence is on the basis it is manifestly excessive.

Mr Rua's offending – the facts

[5] Mr Rua was a kaiarahi i te reo (teacher's aide) at the kura kaupapa Māori (Māori language immersion school) at which P was a pupil. The behaviour which constituted Mr Rua's offending occurred between February and December 2010 at that school, and on one weekend in November that year when P, who was a friend of Mr Rua's stepdaughter who was also a pupil at that school, slept over at Mr Rua's home.

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[1] *R v Rua* DC Wellington CRI-2011-078-1632, 11 February 2014 [sentencing notes].

[6] Mr Rua was found guilty on three counts of committing three indecent acts on P at school:

(a) as a representative charge, touching her under her clothing during school sports on the netball courts;

(b) a specific charge of kissing her on the mouth in the school costume room following a performance; and

(c) a representative charge of kissing her on the mouth in the school's art storage room on a number of occasions.

[7] On the Friday evening of the sleepover, and after his stepdaughter had gone to sleep in the lounge, Mr Rua pulled P close to him, kissed her on the mouth and touched her breasts. He took P into his bedroom. He lay on top of her, clothed, and rubbed his genital area against her. He kissed her, inserting his tongue into her mouth. When P woke up the next morning, Mr Rua took her into the bathroom where he digitally penetrated her. From there he took her into his bedroom area, laid her on the bed, pulled down her pyjama pants and licked her genital area. While P was still lying on the bed he stood up, took his penis out of his trousers and pulled her head towards him, attempting to get her to perform oral sex on him.

[8] As a result of those events Mr Rua was found guilty of:

(a) three indecent acts (lying on top of P and rubbing himself against her, kissing her on the mouth and touching her breasts, putting his tongue in her mouth;

(b) two instances of sexual violation (licking P's genitalia and penetrating her genitalia with his finger); and

(c) one instance of attempted sexual violation (attempting to put his penis in her mouth).

The evidence

[9] In addition to evidence from investigating police officers, evidence was given by P, P's mother and brother, the principal and one other teacher of the school, and three of P's girlfriends who were also pupils at the school. P's evidence in chief was given by way of DVD record of two evidential interviews conducted with her, as was the evidence in chief of one of her friends. Each of P and her three friends gave their evidence at trial by way of CCTV link to the courtroom. Nothing in particular turns on those matters, although in the case of P they do provide the context for one of Mr Rua's grounds of appeal.

[10] P's first evidential DVD interview contained the substance of the allegations against Mr Rua. In that interview P also gave evidence as to how she had, at different times and to differing extents, told her three friends what had occurred between her and Mr Rua and how, with the encouragement of one of those friends (R), she had come to tell her mother of these allegations.

[11] The second DVD interview concerned text messages that P had exchanged with Mr Rua in 2010, including after the events which formed the basis of the charges Mr Rua faced.

[12] Each of P's friends provided evidence as to what P had told her and when. In the case of R, evidence was given that R herself had been the victim of sexual abuse and involved in a sexual abuse trial in 2011. Those matters provided part of the background for the conversations between P and R relating to Mr Rua's offending.

[13] P's mother gave evidence of having seen P and Mr Rua on the evening of the school production, shortly after the alleged kiss in the costume room, including the feeling of unease she said she had when she saw her daughter and Mr Rua together.

[14] P's mother also gave evidence of her perspective of the events of the weekend in November, how she had very reluctantly allowed P to sleep over at Mr Rua's place, how she had become increasingly uneasy when P did not return on the Saturday as previously planned and how finally, when she picked P up she had a

sickening feeling and felt that something was wrong, that something had happened to P.

[15] During the playing of P's first DVD interview, and out of sight of both the jury and counsel, P became upset. The Judge ruled that P could follow a copy of the transcript of the DVD while it played silently, unless she chose to turn the volume up. The same procedure was followed when the second DVD was played.

[16] During the second DVD interview P was questioned at some length by the interviewer with regard to the text messages that P had sent to Mr Rua in August 2011. P showed considerable difficulties in answering those questions. During that interview she became very upset. Towards the end of the interview, the interviewer showed P a copy of some of the messages the police had recovered from Mr Rua's phone. P confirmed that the numbers on the piece of paper were those of her phone and of Mr Rua's. She was then asked to read out part of those text messages. She said she did not want to. At that point the transcript shows her head was in her hands, and she was crying.

[17] P also became upset during the trial whilst watching the DVD of that interview.

[18] The playing of that DVD finished late in the day. That was followed by a brief period of examination in chief. The prosecutor asked P about one message in particular, which he read out to her. As recorded in the transcript of evidence, that message read as follows:

> Kia ora uncle J, can we please have a chat? I really just want to sort things out with us. I don't want to have to deny you all the time. It just makes me feel bad.

[19] The gist of the prosecutor's questions was to ask P to explain what the message meant, in what way was she denying Mr Rua and what was making her feel bad. P found it difficult to answer those questions. The following exchange between her and the prosecutor occurred, after she failed to reply to the question of what the text message meant:

Q. Are you thinking, [P], or you don't want to answer?

A. I don't know what to say.

Q. What's really important you just do your best to tell us the truth, okay?

A. Um, just that at the time, um, I was just a bit confused and didn't know what to do.

Q. You didn't know what to do about what?

A. Um, about the situation.

Q. The situation being?

A. (no audible answer …)

Q. Just do your best for us, [P].

A. Um, about the incident that happened in 2011

Q. 2011 is when you sent the text. Do you mean that year or –

A. Oh...

Q. The incident –

A. Um, about the incident that happened at his house, sorry.

Q. Okay.

[20] At that point the Judge then addressed P. The following exchange occurred:

THE COURT

Q. Hi [P]. You can see and hear me all right?

A. Yep.

Q: Look, we're not going to keep going tonight. The other lawyer, Ms Hunt, will no doubt have some questions for you tomorrow, but it's just on 5 o'clock and it's been a big day for you and for everyone. So we'll just start against in the morning at 10 o'clock, all right? Can I just say this to you, [P]. You know what whakamā means, don't you?

A. Yes.

Q. And are you feeling whakamā?

A. (no audible answer …)

Q: Yes. Look, I know it's difficult, but this is not the place. This is a place you can put aside feelings of being whakamā, of shame or guilt

> and it's really is a time to be strong. You understand what I'm talking about? So when people are asking you questions just try and remember that and you tell them what happened and what is the truth, all right?
>
> A. Thank you.

[21] In a minute obviously recorded at that time, the Judge made the following comments:

> [3] The point of this minute is firstly to comment on the second DVD interview. For many years I have never heard such an excruciatingly inappropriate piece of interviewing. It is reminiscent of a badgering and belittling suspect interview, not an evidential interview of a 12 year old girl. It is pervaded by a barely disguised form of cross-examination, presumably motivated by having this text communication from the complainant. As the interview develops and until the penultimate stages of it, it is undisclosed to the complainant. That text transcript is to be exhibit 3.
>
> [4] While an interview about that text messaging itself may well have been appropriate, the way that it was carried out was not. The effect of it was to engender palpable discomfort and shame in this complainant. Far from using the technology to minimise stress, it put her through an ordeal that verged on an inquisition.
>
> [5] The criticism is one thing that I feel compelled to note for the record and I will have this minute transcribed and available to those for whom it is relevant. The ultimate point of this minute is to signal that some sort of direction is going to be needed to be given to this jury about this interview because it inadvertently must have generated a great deal of sympathy for the complainant undergoing this process. At the same time it is relevant to the defence case that the complainant is not to be believed.
>
> [6] The details of that direction I will need to work out in concert with counsel. That will include the need to minimise re-emphasising its negative aspects or placing undue focus on how the complainant was treated in this, namely like a suspect or someone who was not being believed.

[22] The following morning, in the absence of the jury before the trial recommenced, Ms Hunt, defence counsel for Mr Rua, applied for the Judge to discharge the jury on the basis of those comments the Judge had made the previous evening.

[23] Judge Barry declined that application.[2] He commented:

> [6] The jury will be getting a strong and detailed direction about the need to put aside emotional responses to the evidence. That is particularly

[2] *R v Rua* DC Wellington CRI-2011-078-1632, 27 November 2013.

> important in this case where the process of even watching the DVDs has been fraught for the complainant. She has, as the minutes I have dictated revealed, declined to even listen to them and has consented only to reading the transcripts while the DVDs have been played. The DVDs themselves have seen her visibly, emotionally upset for protracted periods of time.
>
> [7] What I was asking her in terms that she could clearly relate to as a person who has been brought up in a Māori immersion education facility was to engage in the process. The reference to whakamā was followed immediately by an explanation of what it meant and a request to her to be strong, to tell people asking her questions what did happen and to tell them the truth. It goes no further but what I did say to her will be worked into a direction to the jury. That will also have to include reference to the need to put aside any feelings of sympathy for her based on her reaction in the evidential interviews, particular[ly] the second, especially her visible distress and to clinically and dispassionately assess the evidence as judges of the facts. I do not accept my comments to her went any further than that. I certainly do not accept the submission that this trial should be aborted on the basis that if there is a conviction defence counsel will be appealing. Whatever defence counsel want to do at the end of a trial is a matter for defence counsel and has got nothing to do with me and the holding out of the prospect of an appeal is not any relevant basis for decisions that I would make one way or another.

The Crown and defence cases at trial

[24] At trial the Crown put its case on the basis that P had given credible and reliable evidence which should be believed. There were, the prosecutor said in closing, four main reasons why that was so:

(a) because of what P said;

(b) because of how P had said it;

(c) because of the support for P's narrative from other evidence; and

(d) because Mr Rua's explanations as to what had happened did not stack up, did not have the ring of truth.

[25] In terms of the probative value of the way P had given her evidence, her demeanour, the prosecutor referred to:

(a) P having told the jury what happened with care, with some reluctance, with embarrassment and shame. They were not the hallmarks of a young girl making up a fantasy.

(b) The genuine shame shown by P because of what had happened to her, P's carefulness and thoughtfulness, her genuine feelings.

[26] The defence case relied on the proposition that Mr Rua had given credible and reliable evidence and, albeit that it was the Crown's obligation to prove the case and not his, he should be believed.

[27] For Mr Rua, Ms Hunt said that under pressure from the breakup of her parents' relationship, and influenced by R's own account of the sexual abuse she had suffered and the trial she had participated in, P had made up these allegations. Once she had done so, she did not retract them and they had led to her, under pressure from R, talking to her mother and repeating the false allegations.

[28] Ms Hunt also relied on Mr Rua's demeanour as a witness. As she put it: Mr Rua had been unwavering in his denial: he had appeared dumbfounded when some of the allegations were made because, in reality, he could not explain what was happening. He could not explain why P was making false allegations against him. He had given his evidence calmly, but quite firmly, he had adamantly denied the allegations but he had not been vindictive.

The conviction appeal

[29] Mr Tennet advances Mr Rua's appeal against conviction on the basis of there having been a miscarriage of justice at his trial for four basic reasons:

(a) The Judge's comments after the playing of P's second DVD interview had wrongly expressed sympathy for P and implicit support for her evidence. The Judge was, therefore, wrong to have declined Ms Hunt's application to abort the trial and his subsequent directions to the jury did not cure the problem.

(b) The Judge had wrongly directed the jury on inferences.

(c) The Judge had wrongly failed to direct on reliability and demeanour.

(d) The Judge's written summary of the defence case, included in the jury materials, amounted to a substantial misdirection.

[30] During argument, Mr Tennet abandoned that last ground of appeal. We think he was wise to do so. The summary was succinct and accurate. Its inclusion could not amount to a miscarriage of justice. We observe that provision of a written summary is not necessary and that, as this Court observed in *Singh v R*, trial Judges need to be mindful of the dangers associated with providing overly detailed or lengthy case summaries to juries.[3] But this is not such a case.

[31] Having said that, we turn to the balance of the matters advanced by Mr Tennet.

The second DVD interview – the Judge's intervention

[32] For Mr Rua Mr Tennet argued that the Judge's intervention, following the playing of the second of P's DVD interviews, unfairly bolstered her credibility and, at the same time, compounded the feelings of sympathy the jury would have for her. As such, the trial should have been aborted at that stage and the failure to do so likely resulted in a miscarriage of justice.

[33] As the minute made by Judge Barry at the time shows,[4] P was obviously very distressed both during that interview, and during the playing of it at trial, and had considerable difficulty when asked to explain by the prosecutor what the text message he read into the record meant. Ms Hunt commented on that obvious distress in her closing to the jury when she observed that P had "got the attention and the sympathy that she needed".

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[3] *Singh v R* [2014] NZCA 306 at [30]; *R v Taylor* (2005) 21 CRNZ 1035 at [137].

[4] See above at [21].

[34] Judge Barry was, as his minute also shows, very aware of the adverse impact that could have on Mr Rua. That is, the jury could wrongly rely on the feelings of sympathy for and empathy with P thereby engendered when they assessed the case against Mr Rua. The Judge was also aware of the possible relevance for the defence of the inference that could be taken from that text message, namely that P was not to be believed, and the need for that possibility not to be lost sight of because of the jury reaction to P's distress.

[35] By our assessment, the Judge intervened to assist P given the distress she was showing at the time. We do not think such an intervention is particularly unusual or, in and of itself, to be criticised. Where there are young complainants in cases alleging sexual offending, not only judges but also prosecutors and counsel for defendants will often acknowledge that the taking of the complainant's evidence requires him or her to talk about very difficult things. We do not think it is out of place for a judge, in such circumstances, to also encourage the witness to concentrate on simply telling the truth. Care of course will be required to ensure such an intervention does not go too far.

[36] As the Judge in his minute said he would, he addressed the jury in his summing-up on the significance of P's obvious discomfort during that second DVD interview and whilst it was being played, and also on the question of his intervention.

[37] Very early in his summing-up he commented on the possibility that, as argued here, his intervention could be seen as indicating his view of the credibility and reliability of P's evidence, and in that way bolstering her case. As regards that risk he said:

> [3] Now, firstly general directions – our respective functions. Now, mine deals with the law and to ensure that the trial proceeds in an orderly fashion, and when I direct you on matters of law as I will be, I need you to take those directions on board. But my job does not involve making any decisions about facts, that is entirely your job and if I appear to you to say or have said anything about the facts that might indicate a view about a fact or facts, then simply put that perception to one side. And on that, I just highlight an example. On the Tuesday last week, I spoke to the complainant and urged her not to be whakamā or shy or embarrassed and to try and answer the questions truthfully, so it is important about that to note a couple of things.

> Firstly, what I was saying was not evidence so it is not relevant but, secondly, I was not intending to indicate any view about her evidence whether it was reliable or believable or otherwise. I was simply trying to ensure that she engage in the process of answering questions, so do not take anything from that.

[38] We also note, at this point, that in his opening remarks to the jury at the start of the trial the Judge had told them that they were the judges of fact, that his job was to decide on the law, but that it had nothing to do with the facts. As the Judge put it, "I don't say what happened to who or when. That is solely your job. You are the judges of the facts".

[39] Returning to the Judge's summing-up, the Judge then immediately turned to the questions of sympathy and prejudice, and the need for the jury to put any emotional responses to one side. In doing so, he specifically referred to P's reaction both during the second DVD, and when that interview was played in court. He said to the jury:

> [5] As part of that, you need to be careful that you reach your decision uninfluenced by non-evidential influences, and those influences are to some extent inevitable and understandable and simply part of being human; that is, you might feel sympathy for people involved in the case or you might feel prejudice about people involved in the case or about simply the tenor or the flavour of the things that you have heard about. Well, it is really important that you recognise emotional responses to that case and the evidence that you have heard, and that you just park those and put them to one side, and it is particularly important in a case such as this, and in this specific case, because some of the evidence has been wrought with emotion. For instance, the complainant, in her DVDs was sometimes tearful and overcome with emotion, in that second DVD in particular when that interview took nearly three hours to closely question her about text messaging, she became upset, and you are also aware that she became emotional and would not listen to the soundtrack of the DVDs when they were being played in Court and she was in the other room, but she would, at my direction, read the transcripts while they were being played. Well, again, none of that is evidence, but it is something that may have some subtle, almost subconscious influence on your mindset and you need to guard against feelings of sympathy that her emotion might have engendered.

[40] It is, in our view, difficult to see what more the Judge could have done without risking drawing undue attention to these matters.

[41] In our assessment, the Judge recognised and addressed the risk of prejudice to Mr Rua that arose from the way in which the second DVD interview was conducted,

and how P responded at the time and at trial. We are also satisfied that it is most unlikely that any juror would, at the time, have seen the Judge's intervention as some form of confirmation of the truth of P's complaints. To the extent that may have been a possibility, the Judge directly addressed that in his summing-up. We are therefore satisfied that no risk of miscarriage arises by reference to those matters.

Directions on inferences wrong?

[42] Mr Tennet recognised that the Judge had addressed the question of inferences: Mr Tennet argued, however, that the Judge's remarks did not go far enough, either legally or factually. The Judge had failed to use the "fair, logical and reasonable conclusions" wording, approved by this Court in *Subritzky v R*,[5] when categorising inferences that the jury could properly make, and had also failed to sufficiently particularise his inferences direction in the context of the case.

[43] Again, the Judge addressed the question of inferences at an early point in his summing-up, immediately after he had dealt with the issues of sympathy and prejudice. He said:

> [7] Related to that topic, but slightly different, is the issue of inferences which are conclusions that you might draw from the evidence that you hear. For instance, the complainant's mother referred to her daughter's change in attitude and behaviour over the period where these things were alleged to have been happening, including becoming withdrawn and surly and over-dressing and frequent showering, and oversleeping. Well, you might have taken from that, that [P's mother] was implying that this behaviour may have been a result of the actions of the defendant. That would be drawing an inference if you did decide that, and on that point you need to be really careful before coming to any conclusions.
>
> [8] On the one hand you are certainly entitled to draw inferences or conclusions based on facts that you find to have been reliably established, but the important thing about drawing inferences is that it cannot involve speculation or guesswork, for that would simply be making an assumption or a guess. If there are a number of possible reasons for something, then you cannot draw a conclusion about any one of them, and the defence on that point submit that there are other factors that could account for her change in behaviour, that she was going through a troubled, an unsettling period with her parents separating after a history of domestic trouble, and that she was briefly sent away to stay with whānau in the Hawke's Bay and then return back to the school … , and the defence submit she was a young teenager at an awkward and self-conscious age where behavioural change might be seen as common anyway. Well, whatever you make of any of that, you must be

5 *Subritzky v R* [2010] NZCA 531 at [63]–[64].

> very careful that any conclusions that are implied or you are asked to draw does not involve any guesswork or speculation.

[44] Recognising that no particular formula of words is required to be used in an inferences direction, and with respect to Mr Tennet, it is again difficult to see what more the Judge could have said on the topic or how it could have been addressed more appropriately. In our view the Judge very properly first warned the jury to be very careful in relying on the extensive evidence from P's mother as to what she had inferred or taken from her observations of her daughter, and in particular of the change in behaviour. More generally, he then noted that the jury was entitled to draw inferences, but was not to speculate, guess or assume. He went so far as to say that if there were a number of possible reasons for something, then the jury was not to draw a conclusion about any one of them. This is a more favourable direction, from Mr Rua's point of view, from that which is sometimes given, which is that where two inferences are of equal weight, then it is to speculate or guess to choose between them. The Judge then went on to particularise the possibility of multiple explanations, by reference to P's mother's evidence as to her change in behaviour during the period in question.

[45] We are therefore also satisfied that no risk of miscarriage arises as regards those matters.

Demeanour

[46] As we have noted, the Crown made one of the four core planks of its case the inferences the jury could draw from P's demeanour. We think that was more than a little unwise given the developing judicial consensus as to the general limitations of demeanour as a reliable guide to assessing the credibility and reliability of witnesses.

[47] In *E (CA799/2012) v R*, this Court addressed the question of demeanour directions, in the circumstances (if any) where such directions were required or, more generally, where they might be appropriate.[6] The Court noted the developing consensus referred to, concluding that it was not persuaded that a warning should

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[6] *E (CA799/2012) v R* [2013] NZCA 678.

invariably be given to juries about the risks of relying on demeanour to assess credibility.[7]

[48] The Court went on to say however:

> [48] On the other hand, in a "she said/he said" type of case, demeanour may assume greater importance in the absence of other factors such as inconsistency or any inherent implausibility. Counsel may also have given prominence to demeanour in their addresses. In such a case, the judge may consider it appropriate to draw on the suggestions made by the Canadian Judicial Council:[8]
>
> > [10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.
>
> [49] If the judge considers a direction along these lines is appropriate in the circumstances, then it is important to tailor this to the specifics of the case rather than applying it in a formulaic manner. One suggestion is to deal with this issue in the context of counsel's closing addresses on this topic. This should ensure that any such direction is tied to the specifics of the case. If in doubt on this issue, judges may wish to raise with counsel before summing up whether a demeanour warning is required and, if so, what form it should take.

[49] We acknowledge that Judge Barry did not give a specific demeanour direction of the type that was, for example, reviewed by this Court in *E (CA799/2012) v R*.[9] But, in that context, we note two important considerations:

(a) First, this Court said that where demeanour is given prominence by counsel, the Judge *may* consider a direction appropriate.

(b) Furthermore, here the real risk of unfair prejudice for Mr Rua in the context of P's demeanour, and the reliance the jury might place on it, had been addressed in the sympathy and prejudice directions the Judge had already given.

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7 At [35].
8 *Model Jury Instructions in Criminal Matters* (Canadian Judicial Council, 2004).
9 At [94]–[96].

[50] The Judge had carefully addressed the jury on that matter. We do not think that a more general demeanour direction, namely to tell the jury that they may rely on the demeanour of a witness, but to be careful when doing so (if in fact they should do so at all) would have added anything that was of real practical help to the jury. Certainly we do not think that the jury, whose province it is to determine questions of fact, in this trial needed some general direction of that type, as Mr Tennet submitted.

[51] On that basis, we dismiss Mr Rua's appeal against his conviction, and turn to consider his appeal against his sentence.

Sentence appeal

[52] In sentencing Mr Rua, the Judge saw the lead sentences, for the charges of sexual violation and attempted sexual violation, as calling for a starting point of five and a half years.[10] In doing so, he adopted the starting point set by Judge Tuohy at Mr Rua's first trial.[11] Judge Barry saw the aggravating factors being P's vulnerability by reference to her age of 11, and the fundamental breach of trust involved when a teacher aide offends against a young pupil, both at school and at his home where she had been invited to stay over. He identified a low element of planning and acknowledged that the sexual violations, serious as they were, were brief in duration.

[53] As regards personal factors, there was nothing of aggravation. The Judge recognised Mr Rua's previous good character as a mitigating factor, and from the starting point sentence of five and a half years allowed a six month discount, arriving at the end sentence of five years' imprisonment.[12]

[54] On appeal Mr Tennet recognised the aggravating features identified by the Judge. At the same time, however, Mr Tennet argued that the Judge had double counted the elements of planning, what he had termed repeated and escalating opportunistic offending. Moreover, in categorising the offending as serious, there

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10 Sentencing notes, above n 1, at [15].
11 *R v Rua* DC Wellington CRI-2011-078-1632, 9 August 2012 at [26].
12 At [16].

was a risk the Judge had overlooked the fact that the nature of the charge itself was serious, and that the task for the Judge was to assess its relative seriousness. Mr Tennet submitted, with reference to *R v AM (CA27/2009)*, that this was band one unlawful sexual connection offending, and that a starting point of four years or thereabouts was appropriate.[13] Together with a credit of six months, which Mr Tennet did not question, that would have resulted in an end sentence of three years and six months.

[55] In *R v AM* a full Court of this Court set separate guidelines for rape and unlawful sexual connection offending by reference to some 13 "culpability assessment factors". Those factors are a synthesis, in the specific context of rape and unlawful sexual connection offending, of the general aggravating and mitigating factors identified in s 9 of the Sentencing Act 2002. They include such matters as the degree of planning and premeditation, the scale of the offending, the degree of violation, the vulnerability of and harm to the victim, and any breach of trust involved in the offending.

[56] By reference to those culpability factors, the Court identified three, overlapping, sentencing bands for unlawful sexual connection offending. They are:

(a) Band one: two to five years. A sentence in this range is appropriate for offending at the lower end of the spectrum.[14] Where no culpability factors are present, a starting point at the bottom of the band is appropriate. Where one or more of those factors is present to a low or moderate degree, a starting point closer to the top of the band is required.

(b) Band two: four to 10 years. A sentence in this range is appropriate for cases of relatively moderate seriousness, involving two or three culpability factors increasing culpability to a moderate degree.[15]

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13 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [114]–[116].
14 At [114].
15 At [117].

(c) Band three: nine to 18 years. A sentence in this range is appropriate for the most serious offending.[16] Such offending encompasses cases which involved two or more culpability factors present to a high degree. Similarly, this band is appropriate where more than three relevant culpability factors are present to a moderate degree.

[57] At the same time, the Court emphasised the need for sentencing judges to evaluate all the circumstances and that taking a mechanistic approach, for example based on the number of culpability assessment factors present alone, would not be appropriate.[17] Relevant in the context of an appeal, the Court also commented that it saw judges as having a reasonable degree of latitude in the exercise. That necessary flexibility when sentencing offenders, and the great variety of factual circumstances that arise, are reflected in the way the three bands overlap with each other.[18]

[58] In adopting a starting point of five and a half years, the Judge can be seen as assessing Mr Rua's offending as falling at the lower end of band two. In our view, that conclusion is not open to serious challenge. We acknowledge that the individual acts of sexual violation and attempted sexual violation could be categorised as falling within the higher end of band one unlawful sexual connection offending. They are, individually, broadly equivalent to the offending in the cases characterised in *R v AM* as fitting into the higher end of band one.[19] We also acknowledge that they can be characterised as two separate acts of sexual violation and one attempt. None of this Court's higher end unlawful sexual connection band one exemplars share that feature. Moreover, there are here the serious culpability factors of P's age, and therefore her vulnerability, the breach of trust involved (teacher offending against a pupil) and the other indecent acts reflected in the representative and specific charges on which Mr Rua was found guilty.

[59] In *R v AM*, the Court saw the unlawful sexual connection cases of *R v C* and *R v Bell*, which involved sexual violation of an 11 and nine year old girl respectively,

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16 At [120].
17 At [36].
18 At [81].
19 At [115].

as falling, in terms of the indecencies committed, at the cusp of bands one and two.[20] It nevertheless concluded that those cases were properly to be seen in the lower end of band two because of the breach of trust of a child and the nature of the sexual activity involved. There is a very similar breach of trust of a child involved here, in this instance by a teacher against a pupil.

[60] We are therefore satisfied that the starting point of five and a half years adopted by the Judge was an appropriate one, and one which cannot be characterised as being manifestly excessive. We therefore also dismiss Mr Rua's appeal against his sentence.

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[20] *R v AM (CA27/2009)*, above n 13, at [118]; *R v C* (CA43/98), 28 May 1998; *R v Bell* CA393/05, 28 April 2006.