NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA605/2014
[2015] NZCA 452

BETWEEN	RILEY CAMPBELL Appellant
AND	THE QUEEN Respondent

Hearing:	6 August 2015
Court:	Ellen France P, Stevens and Winkelmann JJ
Counsel:	P L Borich and C H Bennett for Appellant S K Barr for Respondent
Judgment:	1 October 2015 at 10 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed. The sentence of five years six months' imprisonment on the charge of wounding with intent to cause grievous bodily harm is quashed. The appellant is sentenced to five years' imprisonment on that charge. The sentence of 12 months' imprisonment on the charge of indecent assault is confirmed, to be served concurrently with the wounding sentence.

REASONS OF THE COURT

(Given by Winkelmann J)

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Introduction

[1] Mr Campbell was found guilty following a jury trial on one count of indecent assault. He had pleaded guilty prior to trial to wounding with intent to cause grievous bodily harm, offending involving the same complainant and at the same time. He was sentenced to five years six months' imprisonment by Judge McAuslan.[1] He now appeals his conviction for indecent assault, and the sentence imposed upon him in respect of both the wounding and indecent assault convictions.

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1 *R v Campbell* DC Papakura CRI-2013-292-203, 17 October 2014 [Sentencing notes].

[2] His conviction appeal is advanced on the grounds that a miscarriage of justice has occurred because:

(a) A statement he made to the police was wrongly admitted as evidence at trial. It is an unusual feature of this aspect of the appeal that many of the same points now raised in support of this ground have previously been considered and rejected by this Court on a pre-trial appeal.[2]

(b) The trial Judge was wrong to prevent Mr Campbell's counsel from cross-examining the complainant about sexual conduct by the complainant prior to the incident and about post-incident contact between Mr Campbell and the complainant.

[3] Mr Campbell's sentence appeal is brought on the grounds that the overall sentence imposed of five years six months' imprisonment was manifestly excessive because the starting point adopted was too high, and the discounts for the guilty plea on the wounding with intent charge, and for Mr Campbell's youth, were too low.

Background to appeal

[4] The Crown case against Mr Campbell was that he had assaulted the complainant while walking her home on the night of 29 June 2013, and that the attack included violence and a sexual assault. He was at the time aged 16 and the complainant was 20. The two knew each other, were part of the same group of friends, and had previously been in a sexual relationship.

[5] On the night of the assault they had been at a party together. When the complainant left the party to walk home, Mr Campbell followed her.

[6] After they walked together for some time, Mr Campbell attacked the complainant. The sentencing Judge described the attack as "prolonged and extreme", and as "involving punching her about the head and body at least 10

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2 *Campbell v R* [2014] NZCA 376 [Court of Appeal decision].

times."[3] The complainant lost consciousness during the attack and when she regained it she was on her own, and was confused as to where she was and exactly how she had come to be there. She was able to call the police and with some difficulty they were able to find her.

[7] As a result of the assault the complainant suffered a fractured eye socket, severe facial contusions and swelling, and bruising and swelling all over her body, including bruises to her inner thighs. She was hospitalised for 14 days.

[8] The complainant made a preliminary statement on 30 June, the day following the attack, and in that statement she told police that she believed that it was Mr Campbell who had attacked her. Accordingly on the evening of the next day Detective Constable Tamihere went to Mr Campbell's home, where he met Mr Campbell and his father. He arrested Mr Campbell for the assault on the complainant.

[9] The Detective Constable gave evidence at a pre-trial hearing about the circumstances surrounding the arrest. He said that immediately after the arrest he advised Mr Campbell of his rights, including the right to a nominated person to support him. Mr Campbell nominated his father. The officer, Mr Campbell and his father then travelled back to the police station with the officer's superior, Detective Sergeant O'Connor, where a formal interview was conducted in connection with the assault. In the course of that interview Mr Campbell admitted assaulting the complainant.

[10] Following a break in the interview, the Detective Constable put to Mr Campbell a statement made by the complainant in the course of her 111 call that she had been "drugged and raped". He also put to him that when the police found her she had her shoes off. Mr Campbell said he could not explain why she said that she had been drugged and raped, and that he knew nothing about why her shoes had been removed. In this portion of the interview he said that the last time he had been sexually active with the complainant was a month earlier.

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[3] Sentencing notes, above n 1, at [2].

[11] Mr Campbell objected at a pre-trial stage to the admission of the statement. In a judgment dated 4 July 2014, District Court Judge Treston rejected arguments that the police had provided inadequate advice as to his rights, inadequate assistance to the nominated person, and that the nominated person had failed to properly fulfil his role.[4]

[12] This Court dismissed Mr Campbell's appeal against Judge Treston's decision.[5]

[13] Mr Campbell was charged with wounding with intent to cause grievous bodily harm, to which he pleaded guilty at the outset of trial. He was also charged with attempted rape, and in the alternative, indecent assault.

[14] The jury found Mr Campbell not guilty of the attempted rape, but guilty of the indecent assault.

[15] On appeal Mr Campbell argues that playing the interview to the jury was prejudicial because it contained the statement that he had not been sexually active with the complainant for a month prior to the night of the assault. This was prejudicial because evidence was given at trial that semen matching his DNA profile was found on the complainant's underwear and on a vaginal swab taken from her. Mr Campbell says that the presence of his semen was a critical piece of the Crown's evidence on both the attempted rape and indecent assault charges. The production into evidence of the statement undermined the defence case that the source of the semen on her underwear and her vaginal swab was consensual sexual intercourse between Mr Campbell and the complainant.

[16] Mr Campbell seeks leave to adduce evidence in the form of an affidavit detailing his claim that his relationship with the complainant resumed shortly after the attack and also incidents in which he claims he was involved in group sex with the complainant. The Crown opposes admission of that affidavit on the grounds that it is not fresh evidence and that it is not cogent. As we shortly come to, having

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4 *R v Campbell* DC Manukau CRI-2013-292-203, 4 July 2014 [Pre-trial decision].
5 Court of Appeal decision, above n 2.

considered the grounds of appeal to which this evidence is said to relate we agree that the evidence is neither fresh nor cogent.[6] The evidence adds nothing to the grounds of appeal advanced. Leave to adduce the evidence is therefore declined.

A preliminary issue: should this Court revisit its earlier decision?

[17] The first ground of appeal is put by Mr Campbell as squarely as this: that this Court was wrong, in its judgment issued pre-trial, to decline his appeal and so allow admission into evidence of his interview. He asks us to revisit the earlier judgment, raising the same arguments that he earlier advanced and this Court rejected, namely that:

(a) the police breached his statutory entitlement, arising under s 215(1)(f) of the Children, Young Persons, and their Families Act 1989 (the CYPFA), to have explained to him his right to a lawyer;

(b) the nominated person process was inadequate; and

(c) the police breached his rights under the New Zealand Bill of Rights Act 1990 and otherwise acted unfairly by withholding from Mr Campbell the details of the sexual complaint until three quarters of the way through the interview.

[18] Counsel for Mr Campbell concedes that he cannot point to any evidence that emerged at trial which materially alters the factual context for the assessment of these arguments, from that existing pre-trial. But he says the Court should be prepared to revisit its earlier decision because it has the effect of lowering the threshold for explanations of the CYPFA rights, and because the admission of the evidence has caused a miscarriage of justice.

[19] While accepting that this Court has jurisdiction to revisit previous decisions on the same issues, and in the same proceeding, the Crown says that this is not one of those cases, nor one of those situations, in which the Court should be prepared to

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[6] *R v Bain* [2004] 1 NZLR 638 (CA) at [22]; *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [125]; *Banks v R* [2014] NZCA 575 at [25].

do so. Mr Campbell is inviting the Court to revisit a decision it reached following an intensely factual analysis of an issue, and which it resolved by applying settled law to factual findings. Moreover, these were factual findings which were in large part concurrent with the findings made by the District Court Judge.

[20] This Court does not, as a matter of course, lightly embark upon a review of its own decisions, particularly within the context of the same proceedings. In *Collector of Customs v Lawrence Publishing Co Ltd* Richardson J said:[7]

> Clearly the Court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case. …

[21] In *Dahya v Dahya* Hardie Boys J agreed that the Court must be free to depart from its own previous decisions in an appropriate case, and that if there has been an error then the Court should correct it rather than simply allow the error to be perpetuated, or hope that the error will be corrected on appeal or by Parliament.[8] He stressed however, that there must be a good reason to depart from the decision, and described an approach of "cautious willingness" as the appropriate one.[9]

[22] This approach was confirmed in *R v Chilton*, where this Court declined to detail the circumstances in which it will depart from previous decisions, and highlighting the need for caution because of the need for certainty and stability in the law.[10] The Court also observed that there may be a mandate for a slightly less restrictive approach in criminal cases, particularly where the liberty of the subject or fair trial rights are at stake.[11]

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7 *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414–415.
8 *Dahya v Dahya* [1991] 2 NZLR 150 (CA) at 168.
9 Citing Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*, above n 7, at 414.
10 *R v Chilton* [2006] 2 NZLR 341 (CA) at [83]–[90] and [100].
11 At [102].

[23] The Supreme Court has commented that the Court of Appeal may be the appropriate Court to consider an appeal challenging an aspect of evidence or procedure determined pre-trial by the Court of Appeal, but raised again on appeal post-conviction. In *Ngan v R* and *Peters v R*, the Supreme Court declined leapfrog appeals because it said that the issues in both appeals would require the Court of Appeal to consider the issue of whether a substantial miscarriage of justice may have occurred by reason of, in the case of *Ngan,* the admission of the evidence, and in the case of *Peters,* the refusal of severance.[12] In *Ngan*, there were also additional points raised which had not been argued or addressed pre-trial.

[24] We do not consider that this is one of those cases where, in the context of a conviction appeal, the Court should revisit a decision on the same issue made pre-trial. Mr Campbell properly concedes that nothing that emerged at trial is material to the reconsideration he seeks. He is simply asking us to take a different view of facts to that taken by the Court in the earlier decision because he says the earlier Court was wrong.

[25] Having said that, we have now heard full argument on the appeal grounds, and so propose to consider them, although only briefly because of the view we take. This should not be seen as an indication that the Court will adopt a similar approach in future. With the benefit of hindsight we consider we should have heard argument on the preliminary issue of whether this Court should revisit its own decision in this case, before hearing full argument on the relevant appeal grounds. It may well be that approach is adopted by the Court in future in appropriate cases.

First ground of appeal: challenge to admissibility of statement

[26] It is helpful to provide the statutory context of this ground of appeal. The starting point is s 208 of the CYPFA which provides that any court which exercises any powers conferred by or under Parts 4 or 5 of the Act and certain other sections shall be guided by various principles which include:

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[12] *Ngan v R* [2006] NZSC 41; *Peters v R* [2006] NZSC 75.

> **208 Principles**
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> Subject to section 5, any court which, or person who, exercises any powers conferred by or under this Part or Part 5 or sections 351 to 360 shall be guided by the following principles:
>
> …
>
> (h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

[27] Section 215 is in Part 4 and provides that a child or young person is to be informed of their rights before being questioned by an enforcement officer:

> **215 Child or young person to be informed of rights before questioned by enforcement officer**
>
> (1) Subject to sections 233 and 244, every enforcement officer shall, before questioning any child or young person whom there are reasonable grounds to suspect of having committed an offence, or before asking any child or young person any question intended to obtain an admission of an offence, explain to that child or young person—
>
> …
>
> (f) that the child or young person is entitled to consult with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222.

[28] Also relevant is s 218, which provides that all explanations are to be given in a manner and language that is appropriate for a child or young person of that age and level of understanding.

Adequacy of advice regarding the right to counsel

(a) Pre-trial evidence as to advice given on right to a lawyer

[29] The interviewing officer gave evidence and was cross-examined at the District Court pre-trial hearing. He said that he had explained Mr Campbell's rights to him both at his house when he first arrived there, and then later at the police station during the recorded interview. Because Mr Campbell was a juvenile he paused after each new point in that recital of rights and asked Mr Campbell to explain what he had just been told. He said that in doing this he was following his

usual process, as it is a useful check on whether the young person has understood their rights.

[30] As to the response he looks for from the young person he said:

> A response that does not necessarily have to be word-for-word verbatim, what I have said, but one that explains or one that demonstrates to me an understanding of the rights. So I try and avoid a situation of a child or young person is just regurgitating a right to verbatim back to me based on what I said. I personally do not believe that that is demonstrating an understanding, so I ask them to explain what I mean by you have the right to remain silent. I then went on to the second bullet point. … You have the right to speak with a lawyer and or nominated person. … You have the right to have your lawyer and or nominated person with you while you are making a statement or answer any questions. The police have a list of lawyers you may speak to for free. So, obviously that is broken down into bullet points and as I say, I seek that the child or young person explains each bullet point back to me and demonstrates their understanding that way.

[31] On cross-examination he said that the exchange about rights he had with Mr Campbell recorded on the DVD was much briefer than that at the home address because he and Mr Campbell had only run through this 50 minutes earlier. However, he did not keep a verbatim record of the exchange he had with Mr Campbell at the house.

[32] The relevant portion of the transcript of the interview is as follows:[13]

> Q … Okay so point one um you have the right to remain silent okay?
>
> A Yeah.
>
> Q Do you understand that? What does that mean to you mate?
>
> A Um, I don't have to talk.
>
> Q Yep, that's good um point two, you do not have to make any statement or answer any of my questions okay, do you understand that?
>
> A Yeah.
>
> Q What does that mean to you mate?
>
> A Um I do not have to talk or answer any questions.

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[13] Reproduced in the Court of Appeal decision, above n 2, at [17].

Q Yep, point three, if you agree to make a statement and or answer any questions, you can change your mind and stop at any time um do you understand that?

A (Nods head)

Q What does that mean to you?

A Um I can stop any time whilst make the statement.

Q Okay. Um anything you say to me will be recorded um and that's specifically by way of the electronically recorded interview okay?

A Yeah.

Q So anything you say will be recorded and may be given in evidence in Court. This means that if you're taken to Court for um the assault, the incident that's resulted in [S] being hospitalised um what you say to me may be retold to the Judge or Jury. Okay so I'll say again, anything you say will be recorded and may be given in evidence in Court. This means if you're taken to Court for the assault, what you say to me may be retold to the Judge or Jury. Do you understand that, what does that mean to you mate?

A Um anything I say can be given oh to the Judge if I decide to make a statement.

Q Yep yep that's right okay. Point five, you have the right to speak with a Lawyer and/or any person nominated by you without delay and in private before deciding whether to make any statement or answer any of my questions. Do you understand that?

A Yeah.

Q What does that mean mate?

A Um I've the right to speak to a Lawyer or any nominated person.

Q Yep.

A Before or after making a statement.

Q Yeah and during if you so desire okay.

A Yeah.

Q If at any time you want to stop and just have a chat to your Dad um you can ask me that, ask me to do that and we can facilitate a room that doesn't have a recording machine in it and you can talk to him in private okay no problem at all, any time if … that's something that you wish to do we can make that happen alright.

Um point six, you have the right to have your Lawyer and or nominated person with you while you make any statement or questions or answer any questions. Okay, do you understand that?

A Yeah.

Q What does that mean to you mate?

A Um I have the right to have my Lawyer or nominated person with me um when I'm answering questions.

Q Yeah. Point seven, um Police have a list of Lawyers you may speak to for free, okay?

A Yeah.

Q Do you understand that?

A Yeah.

Q What does that mean to you mate?

A Um Police have a list of Lawyers.

Q Yeah.

A For me to speak to.

Q Yeah.

A For free.

Q Yeah, so it doesn't cost you or it doesn't cost Dad anything if … that was something you so desired, okay? Um are you satisfied that you understand your rights?

A Yeah.

Q Do you understand all those rights?

A Yeah.

Q Yeah. Are you happy with and understanding of those rights?

A Yeah.

Q Fantastic, I I'm pretty confident that you've got ah good grip of exactly what your rights are okay and in fact you have exercised some of your rights specifically around the nominated person and the nominated person being involved in the interview so so that's good okay that's good. If ah at any stage during the interview you think you've forgotten these rights cos these rights apply throughout okay.

A Yeah.

[33] At two points in this portion of the interview Mr Campbell says that he understands that he has a right to counsel *or* to a nominated person.

The Detective Constable was cross-examined about his failure to correct this and said it was just an oversight. Importantly he did not believe he made an oversight of that nature when he was explaining Mr Campbell's rights to him at the house.

(b) District Court and Court of Appeal judgments

[34] When dealing with this issue in the District Court, Judge Treston concluded:[14]

> … It is my view that Detective Constable Tamihere, at the home carefully gave the defendant his right to consult a lawyer in language in a way that enabled the defendant to be fully and fairly advised of his rights by asking the defendant to repeat what he had said back to him to gauge the understanding of comprehension. That clearly gave the defendant his right to a lawyer and a nominated person as expanded by the statement that "the police have a list of lawyers you may speak to for free". The fact that he did not record Riley's response to all of these matters does not diminish the fact that the defendant's rights were properly given. That is particularly so because the defendant has elected not to give evidence at his pre-trial application.

[35] The Court of Appeal took a slightly different tack on the issue. It said in respect of this ground of challenge:[15]

> [19] We accept that Detective Tamihere's use of the phrase "and/or" was arguably ambiguous in context; and that two of Mr Campbell's answers suggest that he understood the rights to a nominated person or a lawyer as alternatives, not cumulative. However, we are satisfied that any confusion was rectified by the subsequent exchange where Detective Tamihere advised Mr Campbell that the police had a list of lawyers to whom he may speak for free. The officer emphasised that it would not cost Mr Campbell's father any money if he was to speak with a lawyer. Mr Campbell clearly understood that right as a standalone right which was available if and whenever – before, during or after making a statement – he wished to exercise it, regardless of the presence of his father.

[36] In response to an argument that the officer should have explained a lawyer's role, this Court said:[16]

> [27] Third, and allied to the second ground, Mr Borich submitted that the police officers were under a duty to explain to Mr Campbell a lawyer's role in the context of questioning by police officers. In support he relies upon statements by the majority in *R v Z*. There this Court referred with apparent

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14 Pre-trial decision, above n 4, at [23].
15 Court of Appeal decision, above n 2.
16 (Footnotes omitted).

> approval to the Canadian approach of handing out a brochure at the time of questioning to parents and guardians which positively encourages them to ensure that legal advice is obtained for their children. However, we note that none of the members of this Court in *R v Z* went so far as to impose a positive obligation on a police officer to take this step.
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> [28] Detective Tamihere's statutory duty was, under s 215(1)(f), to explain to Mr Campbell before questioning him that he was entitled to consult with and make or give any statement in the presence of a lawyer. Whatever might be regarded as best practice, this provision settles the nature and extent of an interviewing officer's duties. There can be no question that Detective Tamihere complied.

(c) Argument on appeal

[37] Counsel for Mr Campbell, Mr Borich, contends that when the evidence of Detective Constable Tamihere and the content of the DVD interview is viewed together, the District Court Judge and this Court should have concluded that Mr Campbell did not understand that he had a right to a lawyer, additional, and not alternatively to, a right to be supported by a nominated person. Mr Borich submits that the evidence strongly supported a finding that Mr Campbell's misstatement of his rights reflected his understanding of them, because he made the same mistake twice and without correction.

[38] Mr Borich argues that the District Court Judge's confidence as to the accuracy and care with which the Detective Constable advised Mr Campbell of his rights back at the house was misplaced. The Detective Constable conceded he could not recall the exact words used by Mr Campbell when explaining his understanding of his rights and he did not record word for word what was said in the exchange. He also agreed it was his usual practice not to take a verbatim record of the exchange with a young person in connection with their rights. The officer's failure to record the exchange is argued to be evidence of a sloppy approach, indicating a lack of care, and further reason for the Judge to have reached a different view. Finally the officer agreed he had not asked Mr Campbell if he wanted a lawyer, and again that it was not his usual practice to do so.

[39] We have considered these additional points made by counsel for Mr Campbell. Having viewed the DVD record of the interview, and having reviewed the evidence of the Detective Constable, we see no basis to depart from the

pre-trial findings of either the District Court Judge or this Court. The evidence supported the District Court Judge's finding that the Detective Constable did correctly advise Mr Campbell of his right to a lawyer at the house. The Detective Constable's evidence reveals a careful and thorough officer who followed an established methodology for advising young people of their rights. Moreover, as this Court said, any potential confusion was cleared up when Mr Campbell was advised, in the presence of his father, of the practicalities of obtaining legal assistance.

[40] Mr Borich also argues that this Court's earlier judgment lowers the standard of advice police must give to young persons required by the Court's earlier decisions in *R v Z* and *Elia v R,* because the Court attached no weight to the fact that the role of a lawyer was not explained to Mr Campbell and that the police officer did not ask him if he wanted a lawyer.[17]

[41] As this Court said in the passage set out above, it is not a requirement of the statutory scheme that the role of a lawyer is explained to a young person.[18] It is however highly desirable that this occur, since the obligation under the CYPFA is to explain the rights to the young person. The issue for the Court will always be whether the young person has understood those rights. Evidence that the rights were fully explained to the young person in age-appropriate language is good evidence that they were understood.

[42] In this case the officer said under cross-examination that he did explain to Mr Campbell that a lawyer could give him legal representation. He agreed with counsel that he said something along the lines that a lawyer could tell him what his rights were, and could give him advice about whether or not he should answer any of the questions put to him by police. That was adequate advice.

[43] As to the suggestion that the officer was obliged to ask Mr Campbell if he wanted a lawyer, the cases of *R v Z* and *Elia* do not stand for the proposition that the advice of rights must be followed up by such an inquiry. In *Elia*, although this Court

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17 *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342; *Elia v R* [2012] NZCA 243.
18 See [36] above.

noted that it would have been good practice to ask the suspect whether they wished to have a lawyer, it was made clear that this was not prescribed practice.[19]

[44] Mr Borich also made a general submission that the explanation of rights given to Mr Campbell was of a poorer standard than in either *Elia* or *R v Z*, yet in both of those cases the statements were ruled inadmissible on the basis of a deficient explanation of rights. We do not accept that submission. As this Court said in response to the same submission made pre-trial, each of those cases is very fact-specific.[20] This was a very different case to the two authorities relied upon.

[45] The critical issues are whether Mr Campbell understood that he had a right to a lawyer and that he was given an opportunity to avail himself of that right. In this case, Mr Campbell had been taken through his rights and asked to explain them back to an officer on two occasions. His interview discloses a young man who was following the questioning and exchange and fully engaging in it. The discussion regarding the mechanics of instructing a lawyer, including that one could be provided for free, clearly indicated that the opportunity to instruct a lawyer was real, and not illusory. This is not a case, for example, where Mr Campbell asked what a lawyer was or expressed doubts about the role a lawyer might fulfil. We have no doubt that Mr Campbell had a full comprehension of his rights, and there was no necessity to follow up the advice of rights with a further query as to whether he wished to avail himself of them.

[46] There is one comment we wish make about the use of the language "and/or" in connection with the right to a lawyer and a nominated person. This is an unnecessarily complex way of presenting information to a young person. We note that the "and/or" expression appears in the nominated person form. We do not know if it also appears in any other material or standard checklists utilised by police. We encourage the use of simpler language which makes clear that these are additional and not alternative rights.

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19 *Elia v R*, above n 17, at [78].
20 Court of Appeal judgment, above n 2, at [18].

Inefficacy of the nominated person process

[47] When Mr Campbell was informed of his rights at his house, he asked that his father act as his nominated person. His father travelled with him in the police car to the station. Detective Constable Tamihere's evidence was that he handed Mr Campbell's father a standard nominated person form. This contains information for the nominated person as to their role, as well as outlining the basic rights of the person being questioned.

[48] Mr Campbell and his father were given time together alone in advance of the interview and then again prior to the topic of a possible sexual element to the offending being introduced.

[49] In his evidence at the pre-trial hearing Detective Constable Tamihere said that he had conveyed to his supervisor his personal reservation about Mr Campbell's preparedness to talk about a sex-related topic in front of his father.

(a) Argument on appeal

[50] Mr Campbell argues that the nominated person process was flawed. The nominated person must be more than just a "body" to sit in the room. Even if a nominated person is chosen, if they do not adequately fulfil the role, then the provisions of the Act are not satisfied. In this case the father was passive in the interview, providing little or no assistance to Mr Campbell. He did not seek to engage a lawyer for his son, or recommend to his son that he do so. Once the possibility of a sexual element to the offending was introduced, he met for only about two minutes with his son and on returning to the interview he volunteered, without prompting by the police, that his son provide a DNA sample. Finally, Detective Constable Tamihere had concerns about the father's suitability because the interview of Mr Campbell could traverse sexual matters. In all of these circumstances, it is argued the police should have taken steps to secure an adequate nominated person to comply with the Act.

[51] Again these issues were argued pre-trial in the District Court and on appeal in this Court. The District Court Judge said there was no evidence that the nominated

person had failed to adequately fulfil his role.[21] At the pre-trial appeal this Court said:[22]

> [25] In this case, as Mr Borich accepted, Detective Tamihere secured Mr Campbell senior's confirmation that he had read and understood his son's rights as explained in the POL338 form referred to in *R v Z*. And, in contrast to *R v Z,* the police officers allowed Mr Campbell and his father an extended period to confer before commencing the interview at the Manukau police station. Furthermore, the statutory duty on a nominated person under s 222(4)(a) of the CYPF Act is "to take reasonable steps" to ensure that the child or young person understands" the matters set out in ss 221(2)(a). We agree with Mr Downs that s 222(4) does not require a best interests approach on the part of the support person and, based on Detective Tamihere's evidence, we are satisfied that he acted reasonably in informing Mr Campbell senior about his role.
>
> [26] In any event, there is no evidence on which we could find that Mr Campbell senior failed to discharge this duty. The fact that he did not ask questions of the police or did not seek to engage a lawyer or offered his son's DNA sample does not mean that Mr Campbell senior did not take reasonable steps to ensure that the police officers had explained to his son his various statutory rights. In this respect this Court has held that the legislature did not envisage that a comprehensive judicial enquiry is required into the nature and quality of the support given in any particular case.

[52] Mr Borich raised nothing which causes us to take a different view on the matters addressed by this Court in the passage set out above.

[53] One point not addressed in the earlier judgment, is the argument that Detective Constable Tamihere's reservation about having the father as a nominated person was somehow evidence that the father was not a suitable nominated person. Again there is no merit in this point. The officer clarified on cross-examination that his concern came purely from reflecting on what he would have felt aged 16 if asked to speak about sexual matters in front of his father. The critical point is that any concerns the officer had did not flow out of anything he observed between Mr Campbell and his father, or anything he observed in connection with the father's conduct.

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21 Pre-trial decision, above n 4, at [30].

22 Court of Appeal decision, above n 2 (footnotes omitted).

Unfairness/breach of rights in how the interview was conducted

[54] Mr Campbell was arrested in relation to the assault. He agreed to an interview on that basis. Detective Constable Tamihere said that at that stage there were suspicions that the incident had sexual overtones, but the police did not have any definitive information from any source that there had in fact been a sexual assault. The victim had not been able to give a full account given her injuries and the fact that she was unconscious for much of the incident. The police did not yet have any forensic information in respect of a potential sexual assault. His instructions were to get an account from Mr Campbell about the incident and then to take a break and to "discuss the way forward in respect of giving him an opportunity to talk to what may have happened in respect of the sexual offending that was suspected".

[55] After the initial questioning about the assault Detective Constable Tamihere took a break and discussed the interview with his supervisor, Detective Sergeant O'Connor. He was instructed to provide Mr Campbell with the opportunity to comment upon the evidence they had at that point as to the incident being sexually motivated. Detective Constable Tamihere then invited Mr Campbell's father from the room and he was separately advised by Detective Sergeant O'Connor that they wanted to give Mr Campbell a chance to talk about the evidence they had. There was then a brief (two minute) consultation between Mr Campbell and his father in relation to the new direction the interview was to take.

[56] When the interview reconvened, Detective Tamihere confirmed that Mr Campbell remembered and understood his rights, and that those rights continued to apply. The complainant's statement during the 111 call and the fact her shoes were removed were then put to Mr Campbell. Mr Campbell made no admissions, other than clarifying that he and the complainant had not had sex in the last month.

(a) Argument on appeal

[57] Mr Borich argues that it is disingenuous for the police to suggest they were unaware of a non-consenting sexual component to the complaint. The initial

statement made during the 111 call by the complainant was that she was raped. The police admitted there were suspicions that the attack had been sexually motivated. Mr Borich referred us to *R v Tihi* and *R v Tawhiti* as authority for the proposition that a failure by the police to accurately state the nature of the offending they wish to question a suspect undermines the advice provided to the interviewee of his rights, and the interview will be unfairly obtained evidence.[23]

(b) District Court and Court of Appeal judgments

[58] The District Court Judge found that although Mr Campbell's jeopardy was not put to him until later in the interview, he was not prejudiced by this as he made no admissions contrary to his interests.[24] The Judge accepted the explanation of the police officers that they were not in possession of the full facts at the stage the interview commenced.

[59] This Court dealt with the matter on the pre-trial appeal as follows:[25]

> [32] However, we are satisfied that the Judge had a proper ground for accepting that the police were not then obliged to advise Mr Campbell that he was at risk on sexual charges. That was because when starting the interview the officers were not in possession of the full facts relevant to the sexual element of S's complaint. They properly advised him that he was being questioned about a serious assault which left S unconscious and caused her hospitalisation. Mr Campbell unconditionally acknowledged that he was responsible for the attack when asked about it but explained that he had acted in retaliation to provocation.
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> [33] Mr Borich's argument verged at times on allegations of bad faith which we are not in a position to determine in the absence of findings by the Judge. More importantly, we are satisfied that the police did not act improperly or unfairly by not raising the sexual element with Mr Campbell when commencing the interview. Mr Borich questioned Detective Sergeant O'Connor very closely in the District Court. In summary, while the police had the information which Mr Borich has outlined, in the detective's view it was insufficient to fairly question Mr Campbell about allegations of sexual assault in the absence of a proper evidential basis for doing so.
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> [34] One example given by Mr Borich in argument of a basis for the officer's knowledge of Mr Campbell's sexual offending at the start of the interview was a statement made by S to another officer, Constable Kumar.

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23 *R v Tihi* [1990] 1 NZLR 540 (CA); *R v Tawhiti* [1993] 3 NZLR 594 (HC).
24 Pre-trial decision, above n 4, at [25].
25 Court of Appeal decision, above n 2.

> However, Mr Borich conceded that in fact S complained that somebody else, not Mr Campbell, tried to remove her underwear.
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> [35] As Mr Downs emphasised, both Detective Sergeant O'Connor and Detective Tamihere took fair and proper steps during the interview to ensure Mr Campbell was on notice before possible sexual offending was raised with him. On one occasion the interview was suspended while Detective O'Connor spoke with Mr Campbell senior. He advised him that they wished to speak with Mr Campbell about a possible sexual element of the assault; that Mr Campbell's rights remained live, including his right to a lawyer; and that Mr Campbell senior and his son could confer as long as they wished, in private, before the interview continued. They took advantage of this offer and did in fact have a further conference before resuming the interview. Even then Detective Tamihere confirmed that Mr Campbell recalled and understood his rights.
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> [36] The purpose of this ground of challenge is unclear. Mr Borich was unable to explain to us the significance of the officers disclosing to Mr Campbell the sexual element of his offending at a later stage of the interview, when evidence of it emerged from Mr Campbell himself, or at the start. In both cases the police fully explained to Mr Campbell his rights. Furthermore, he denied any involvement in sexual offending against S.

(c) Analysis

[60] We agree with these reasons and have little to add to them.

[61] The cases of *Tihi* and *Tawhiti* are not on point.[26] In both cases the police knew that there had been a homicide and kept that from the accused during the interview. Moreover *Tihi* involved a finding of deliberate deceit used to obtain the statement.[27]

[62] Here there was nothing above a suspicion that the offence had been committed. Mr Campbell was reminded of his rights when the new topic was introduced and given an opportunity to speak to his father in the absence of the police. This did not entail a breach of Mr Campbell's rights under the New Zealand Bill of Rights Act or the CYPFA, and it was not unfair.

Miscarriage of justice

[63] Even though we have found that there is no merit in any of the arguments advanced that the evidence of Mr Campbell's police statement should not have been

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[26] *R v Tihi*; *R v Tawhiti*, above n 23.
[27] At [74].

admitted, we will comment briefly upon the proposition advanced by Mr Campbell that its admission caused a miscarriage of justice.

[64] The admission of the interview evidence is said to have fatally undermined Mr Campbell's ability to deal effectively with a critical part of the Crown's case in relation to the indecent assault, the evidence of the presence of Mr Campbell's semen on the complainant's underwear and in samples taken from her vagina.

[65] The expert's evidence at trial was that DNA from semen could be detected for up to seven days in the vaginal area, but much longer on clothing. Defence counsel put to the complainant that she and Mr Campbell had had sexual relations more recently than a month ago. She denied that. Mr Campbell argues that he should have been able to go into the witness box and provide an evidentiary basis for his counsel's submission that a continuing sexual relationship could explain the presence of his semen. However he was constrained from doing so by the content of his statement. It follows, it is argued, that the admission of the statement has caused a miscarriage of justice as Mr Campbell's inability to advance this defence may have affected the outcome of the trial.

[66] We see no merit in this argument. The complainant had been asked and denied that there had been an ongoing relationship with Mr Campbell before the attack. Mr Campbell has not sought to file any affidavit to back up his claim that his sexual relationship with the complainant continued up until the time of the attack or that this issue was significant in his decision not to give evidence. Therefore the proposition that the admission of this interview caused the claimed prejudice lacks any credible narrative to support it.

Second ground of appeal: Judge's refusal to allow evidence

Evidence of recommencement of relationship

[67] Mr Campbell claims that a miscarriage of justice has been caused by the refusal of the trial Judge to permit cross-examination of the complainant about contact of both a sexual and non-sexual nature which began some weeks after the

assault.[28] Mr Campbell says that if he had been able to pursue this issue through cross-examination it could have supported his account that he continued to have sex with the complainant right up to the time of the offending, and that the semen detected was as a result of consensual sexual relations.

[68] This ground of appeal cannot succeed. The Judge was clearly right to prevent this line of cross-examination being pursued. The complainant's evidence was that the relationship had ended months prior to the offending. It was put to the complainant in cross-examination that she continued to have sex with Mr Campbell through to the time of the assault and she denied it. In his statement, Mr Campbell said that they had not had sex for a month. There was therefore no foundation for the defence version of events that this line of cross-examination was designed to bolster, and it followed that even if a sexual relationship had recommenced, that fact was irrelevant to the issues at trial.

Evidence of group sex

[69] During trial, counsel for Mr Campbell applied under s 44 of the Evidence Act 2006 for leave to cross-examine the complainant in relation to three occasions on which Mr Campbell says that he and his friend had group sex with the complainant.[29] This evidence was said to be relevant to Mr Campbell's defence of the sexual offending charges as it would strengthen the defence position that the complainant was confusing a previous, consenting encounter with both males with what happened on the night of the attack. In reality, nothing happened that night: she harbours bondage and forced sex fantasies and imagined this to have occurred.

[70] Mr Campbell argues that the trial Judge's refusal to allow this line of cross-examination did cause a miscarriage of justice, as it meant that counsel had no evidential basis for the submission that no sexual offending at all had occurred, but rather the complainant was, in her confused state, calling to mind an occasion of group sex. In his affidavit he details the occasions of group sex he says occurred.

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28 *R v Campbell* DC Auckland CRI-2013-292-203, 12 August 2014 (Ruling 2).
29 *R v Campbell* DC Auckland CRI-2013-292-203, 12 August 2014 (Ruling 1).

(a) Background

[71] The necessary context to this ground of appeal is that following the attack the complainant gave various confused accounts of what had occurred, and some included the possibility of multiple attackers. Following on from her claim during the 111 call that she had been raped, the complainant's early account to the police of the attack on her, given in the early hours of the same morning, included a statement that there was another male with Mr Campbell and that it was this male who tried to sexually violate her and who tried to rip off her underwear.

[72] Later that morning she told a friend who visited her in hospital that she had been dragged from the roadside or path into or out of a car and was beaten up. She made no reference to a sexual assault. Subsequently on the same morning she told a doctor that vaginal penetration had been attempted by an alleged assailant.

[73] In her evidential interview given on 11 July she said she recalled being struck in the eye, begging and screaming that Mr Campbell stop and get off her, and Mr Campbell saying to her "I'm sorry [S] I have to do this". She remembered the police arriving and thinking that something was not right and that she had been raped. She recalled during her attack that she could not move her legs, the feeling of someone tugging off her clothes, pulling on her bra like it was almost being ripped, then trying to pull her pants off, and trying to rip her underwear off.

[74] At trial she accepted she had no recollection of Mr Campbell doing anything sexual to her that night.

(b) The trial Judge's ruling

[75] Section 44 of the Evidence Act provides that in a sexual case the leave of the judge is required to ask a question relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant. Section 44(3) provides that the judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the

proceeding, or the issue of the appropriate sentence that it would be "contrary to the interests of justice" to exclude it.

[76] The trial Judge, Judge McAuslan, addressed herself to this issue. She said that the application had to be seen in the light of the severity of the physical assault the complainant had suffered at the hands of the defendant, and the fact that she had never claimed to have a reliable memory of events, due to the head injuries she had suffered.[30] In declining the application the Judge said:

> … She is not giving any direct evidence of any form of sexual encounter with the defendant on this occasion at all, because she simply cannot remember. The Crown case relies therefore, to a large extent, if not totally, on the fact that the swabs that she took from inside her vagina had the defendant's semen on them and nobody else's. As I understand it there will be ESR evidence of semen on her undergarments, which we have yet to hear.
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> [11] So that is the state of the evidence. Therefore, it is not a case where her credibility is completely in issue with regard to whether or not the sexual encounter took place. It is not a case where it is essential to the defence to damage that, because she is saying she cannot remember.
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> [12] Whether or not she is trying to downplay the number of occasions or the frequency with which she had sexual activities with this accused, or anyone else, would not seem to me to be relevant and certainly not so relevant, or of such direct relevance to any facts in issue that it would be contrary to the interests of justice to exclude evidence about sexual encounters with others.

(c) Argument on appeal

[77] For Mr Campbell it argued that s 44 may not apply as the encounter included the complainant and the defendant. That argument is easily dismissed. While the alleged events may have involved the defendant and the complainant, they also involved a third named male. Section 44 was clearly engaged.

[78] It is also argued that the Judge was wrong to exclude the evidence, or in the alternative, in light of further evidence produced at trial, there is now a basis for this Court to conclude that the s 44(3) threshold is met.

[79] The reasons given by the trial Judge for declining leave are compelling. The complainant's account of the attack on her was confused. At trial she gave no

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30 *R v Campbell* above n 29, at [7]–[8].

account of a sexual attack by Mr Campbell. The evidence of a sexually-motivated attack came from the forensic evidence and the circumstances in which the police found the complainant. The forensic evidence had to be interpreted against the other evidence, which was that the complainant had not had sex with Mr Campbell for at least a month. Assessed against this background the line of cross-examination Mr Campbell wished to pursue would not have assisted his defence. It was properly disallowed. No miscarriage of justice can have flowed from its refusal.

[80] Mr Borich also argued that evidence the complainant gave later in the trial justifies a reassessment of the relevance of the topic of group sex. The complainant denied a proposition put to her in cross-examination that she had sex with Mr Campbell the day of the attack. She said that although she did not remember the day, she was in a relationship with someone else and she would not have had sex with her new partner and then sex with Mr Campbell.

[81] Mr Borich submits that was evidence of her unwillingness to have sex with more than one person and that the frequency and recommencement of the sexual relationship was therefore already before the jury. This evidence adds nothing to Mr Borich's argument. It is not evidence of group sex and the fact that the complainant denied that she would have sexual relations with someone when in a relationship with another did not render the irrelevant line of questioning about group sex relevant.

Sentence Appeal

[82] Mr Campbell submits that the sentence imposed was manifestly excessive because too high a starting point was adopted and the discounts on account of his guilty plea to the wounding charge and his youth were too low.

[83] The sentencing Judge adopted a starting point of seven years, placing the offending within band two of the guideline judgement *R v Taueki* because the offending involved extreme unprovoked violence, attacks to the head and resultant serious injuries.[31] The Judge recorded that the victim had two broken eye sockets,

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[31] *R v Taueki* [2005] 3 NZLR 372 (CA).

bruising under her eyes and on her eyeballs and bruising from her lower chest to her jaw line.[32] Although the Judge said that the victim had been hospitalised for seven days it is now common ground that it was 14 days. She was unable to walk properly for months, and had to use a wheelchair and then a walker. Damage to her teeth and the fractured eye sockets caused changes to her appearance which the victim was self-conscious about. She had prolonged concussion syndrome including ongoing difficulty with her memory, headaches and difficulty sleeping.

[84] The Judge adopted a starting point of seven years for the wounding and uplifted that by one year to reflect the fact that Mr Campbell had also indecently assaulted the victim. She noted the difficulty in characterising the latter offending because the victim could not remember it. She proceeded on the basis that it was offending which involved interference with her clothes and caused pain in the relevant bodily areas.[33]

[85] She then allowed Mr Campbell what she described as "full credit" for his guilty plea and also some credit for the fact that he was only 16 at the time of the offending to produce an end sentence of five years, six months' imprisonment on the wounding charge and 12 months on the indecent assault charge, to be served concurrently.[34]

Argument on appeal

[86] Mr Campbell appeals on the grounds that the starting point was too high. While he accepts that the offending did involve an attack to the head, he says that the other aggravating features identified by the Judge, extreme violence and serious injury, were present to a lesser degree. He relies on the case of *R v Finn,* which he says was a case involving a similar attack and similar injuries.[35] This Court characterised the offending in *Finn* as sitting at the top of band one or the bottom of band two of *Taueki*, so that a starting point of between five and six years was

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32 Sentencing notes, above n 1, at [5].
33 At [3].
34 At [15].
35 *R v Finn* [2007] NZCA 257.

appropriate.[36] The Court took into account that the appellant there believed he had been deliberately head-butted by the victim, and this provided some evidence of provocation.[37] Here Mr Campbell's explanation to the police was that the victim had kicked him.

[87] Mr Campbell submits that a full 25 per cent discount should have been allowed for his guilty plea in relation to the wounding charge and a generous discount for youth in view of the fact he was only 16 at the time, had no previous convictions, and the offending was impulsive, occurring in the context of a volatile emotional relationship with an older woman.

Analysis

[88] The sentencing Judge was correct to identify extreme, unprovoked violence, attacks to the head and resultant serious injuries as factors present in this offending relevant to assessing the seriousness of the offending. We accept the submission for Mr Campbell that the factor of extreme violence was present only to a moderate degree, but it was present. The injuries inflicted were serious, causing a two week stay in hospital and prolonged disability. As to the issue of provocation, we proceed on the basis that this was for all material purposes, an unprovoked attack. Even if Mr Campbell's statement to the police is accepted at face value, and the victim did kick him in the leg, this could not be regarded as a provocation sufficient to unleash this attack.[38]

[89] An additional *Taueki* factor not identified by the Judge was that this attack facilitated the commission of another crime, the indecent assault. We consider that it is not double counting to treat this as a *Taueki* factor for the purposes of fixing the starting point, and then to uplift that starting point to reflect the indecent assault conviction. There is different and additional criminality involved in carrying out the indecent assault.

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36 At [16].
37 At [14].
38 *R v Taueki*, above n 31, at [32].

[90] When these factors are taken into account we are satisfied that the starting point was not too high. Although a lower starting point of five to six years was adopted in *Finn,* the offending there was readily distinguishable from the present. In *Finn* there was significant provocation, the injuries caused were less severe than in the present case and the attack was not undertaken to facilitate another crime.

[91] As to the discount, the Crown clarified that the discount the Judge allowed on account of youth and the guilty plea was 31 per cent. Having done our own mathematics it seems to us that if the Judge allowed a full discount for the guilty plea of 25 per cent that would have reduced the sentence to six years. We consider that a greater discount for youth was indicated in this case than six months. Mr Campbell was only 16 and had no previous convictions. Although this was serious offending, it is very likely that Mr Campbell's youth played a role in his conduct (although we stress that it does not in any sense excuse it). We do not attach any weight to the age difference between Mr Campbell and the complainant. We accept however that he was dealing with an emotionally complex situation, the aftermath of a sexual relationship, and his conduct seems to have been impulsive. In our view a further discount of six months should be allowed to reflect his youth and prospects for rehabilitation.

Result

[92] The application for leave to adduce further evidence is declined.

[93] The appeal against conviction is dismissed.

[94] The appeal against sentence is allowed. The sentence imposed of five years six months' imprisonment on the charge of wounding with intent to cause grievous bodily harm is quashed, and Mr Campbell is re-sentenced to five years' imprisonment on that charge. The sentence of 12 months imprisonment on the charge of indecent assault is confirmed, to be served concurrently with the wounding sentence.

Solicitors:
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