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

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA665/2014
[2015] NZCA 566

BETWEEN	K (CA665/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	12 October 2015
Court:	Ellen France P, Asher and Collins JJ
Counsel:	J C Gwilliam for Appellant A Markham for Respondent
Judgment:	24 November 2015 at 10 am

JUDGMENT OF THE COURT

A **An extension of time to file the notice of appeal is granted.**

B **The appeal against conviction is dismissed.**

C **The appeal against sentence is allowed. The sentence of 11 years imprisonment on the rape charge is quashed. In its place a sentence of nine years imprisonment is imposed. The sentences on the remaining charges are also quashed and sentences substituted as set out at [77] below. All sentences to be served concurrently.**

D Order prohibiting publication of name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Ellen France P)

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Introduction

[1] The appellant was convicted after a jury trial of various counts of historic sexual offending and injuring with intent to injure.[1] He was acquitted of a count of attempted rape and a count of assault with intent to injure. The appellant was sentenced by the trial Judge, Judge Tompkins, to 11 years imprisonment.[2] He appeals against conviction and sentence.

[2] The conviction appeal raises three issues:

(a) Whether a miscarriage of justice has arisen because of delays in bringing the matter to trial;

(b) Whether the Judge misdirected the jury as to the proof required of some of the dates specified in the indictment; and

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1 The injuring charge was brought under s 189(2) of the Crimes Act 1961.

2 *R v [K]* DC Wellington CRI-2012-85-8611, 6 October 2014 [sentencing remarks].

(c) Whether a miscarriage of justice has arisen because of the Judge's failure to give a warning as to reliability under s 122 of the Evidence Act 2006.

[3] On the sentence appeal, the question is whether the Judge's approach to historic offending has resulted in a manifestly excessive starting point.

Background

[4] The incidents giving rise to the charges in the indictment covered the period from 1972 to 1983. There were four complainants: the appellant's two daughters D and A, his son S, and a neighbour's daughter, E. E's brother, T, gave evidence of a propensity nature. Most of the offending occurred in the appellant's family home.

[5] As the Crown's submissions note, all four complainants described repetitive sexual and/or violent conduct from a very young age. However, because the appellant was extradited from Australia for the trial, the Crown was restricted to specific counts[3] and to the charges included in the extradition request.[4] We describe the Crown and defence cases in turn.

The Crown case

[6] E, the neighbour's daughter, was the eldest complainant. She was born in 1964. Because of her mother's friendship with the appellant and his wife, E often spent time next door.

[7] She described going into the basement in the appellant's house where the appellant would sit her down on the couch and start to undress her. She said the appellant would masturbate himself until ejaculation. He would massage her, touching her breasts and genital area. He told her this was a secret and whispered sexually explicit things to her. The first incident of abuse described occurred when she was about two years old.

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3 *Bannister v New Zealand* [1999] FCA 362, (1999) 86 FCR 417 at [28]–[29]; *New Zealand v Moloney* [2006] FCAFC 143, (2006) 154 FCR 250; and *KBT v R* [1997] HCA 54, (1997) 191 CLR 417.

4 Extradition Act 1999, s 64.

[8] When E was older, about five or six, she said the appellant did the same things to her brother, T, and to A. A (born in 1967) would have been about two years old then and did not have any independent memory of these events.

[9] One count in the indictment related to E. This was the specific count of attempted rape on which the appellant was acquitted. E said this occurred in the tent while she was on a camping trip with the appellant and his family. She was about nine years old at the time. Her evidence was that she was screaming and the appellant stopped what he was doing when T woke up.

[10] T, who was born in 1966, gave evidence about the camping incident. He said he woke to find the appellant on top of his sister rubbing up against her. He said on their return from the trip he told his mother about what had occurred. The result was they were no longer allowed over to play at the appellant's house. E and T's mother confirmed this in her evidence.

[11] T, who gave evidence of a propensity nature, also said he was sexually abused in the basement by the appellant.[5] He explained the appellant would say this is a "big secret" and T was not to tell anyone. He also described the appellant getting the girls — his sister as well as A and D — to drop their pants and would then abuse them. He said he was probably about six or seven years old when this began. He said it happened about three or four times to him and on a similar number of occasions to his sister.

[12] A said when she was about seven or eight years old her father would rub his penis against her back or buttocks, arousing himself. He would also frequently masturbate himself to ejaculation in her presence and taught her how to masturbate him.

[13] A and D shared a bedroom. A described waking up to find the appellant masturbating over her. He always had a hanky or a rag.

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5 He described oral sex and the appellant masturbating in front of him.

[14] When A was 14 she had her first period and told her mother. The appellant came to her afterwards and said she was ready for making babies. She said he put the tip of his penis into her. She screamed because it hurt. This incident gave rise to the sole count in the indictment relating to A, a count of rape.

[15] A said the abuse in relation to her stopped when she was around 14 or nearly 15, when she stood up to her father.

[16] A gave evidence she told her mother about what was going on first when she was aged nine and again when she was about 11 years old.

[17] A also describes seeing her father lying on top of D, moving himself up and down. A said she would have been about 12 at the time and D aged about nine or 10.

[18] Finally, A gave evidence of the appellant punching and kicking her brother, S.

[19] D, who was born in 1969, spoke in her evidence of her father touching her bottom and breasts from as young as she could remember. She said when she was older she would be sent out to make the tea or coffee and her father would use a toilet visit as a pretext to come into the kitchen to touch her. Her evidence was that while they were in the basement her father would get her to masturbate him until he ejaculated. She also gave evidence of oral sex occurring in the basement and described the appellant ejaculating into the "proverbial hanky". Her account also included simulated sex and the appellant masturbating in the car.

[20] D and S ran away from home when D was 15. She said she told a social worker what had happened.

[21] S, who was born in 1972, told of regular physical abuse by the appellant. He talked about two specific incidents giving rise to the two charges in the indictment relating to S. The appellant was acquitted of a first count involving holding S's head under water in the pool. He was convicted of the second count in which S said he was hit by the appellant and "just about knocked … out".

The defence case

[22] The appellant gave evidence. He described having been sexually abused as a child and said he had a chronic problem with compulsive masturbation. He said this would sometimes occur in public and may have taken place in front of the children although not intentionally. The appellant denied any sexual abuse. He denied any violence beyond normal discipline. The appellant accepted he had been in the children's tent during the camping trip described by E. He said he was straightening the tent pole which had come loose in the weather.

[23] The appellant's wife gave evidence for the defence as did the appellant's youngest son, C.

[24] The appellant's wife gave evidence of limited opportunity for the events described by the complainants to have occurred. For example, she said that the children were left in the appellant's care at night on two occasions over 13 years because she was always at home in the evening. She also said she and the appellant went to bed together and he did not move from the bed during the night for any period of time. She also said that D never made tea or coffee for her parents as D had described.

[25] The appellant's wife accepted that A had complained to her on two separate occasions about "something that was indecent of some description" taking place. The first occasion was when A was about nine years old. She could not recall the details of what A said and had not pressed her for details. In answer to a question from Judge Tompkins, she acknowledged that A might have complained about being sexually abused by the appellant. She said it was "something sinister … It could've been anything from masturbating in front of her to touching her or something". She stated, "[t]hese things had happened to me when I was a child so I had an idea what things can happen". She described speaking to the appellant about it at the time, that he denied it, and she said she was "hoping it had stopped". She agreed she "didn't want to know" as she was busy running a household with five children and there was no one she could ask for help.

[26] C, in his evidence, described a normal childhood.

[27] It was suggested in closing for the defence that the older children may have been resentful at the impact on them of their father's public masturbation. Further, that these "festering" feelings may have come to the fore when, in 2004 and 2005 formal complaints to the police were made by D, E, A and then S. Mr Antunovic, trial counsel for the defence, also suggested there was an opportunity for collusion and that the complaints reflected recent (2004/2005) fabrication.

Delay

[28] The appellant says the delay in the prosecution of the charges is such as to amount to an abuse of process. The appellant emphasises the following features:

(a) D said she complained to the social worker in 1984 after she and S ran away from home;

(b) There was a lengthy delay in the extradition process; and

(c) The defence were prejudiced by the fact the appellant's other son, G, did not give evidence.

[29] The timeline of events is as follows:

30 March 1972 – 31 May 1973	Earliest incident leading to charge relating to E
1984	D (aged 15) complains to social worker after she and S ran away from home
December 2004	D makes formal complaint to police
11 May 2005	E makes formal complaint to police
June 2005	A and S make formal complaints to police
19 December 2005	File submitted to Interpol so extradition process from Australia could begin — Detective Sergeant responsible suffers from ill-health so file languishes
18 October 2011	Appellant declines police request he

	return to New Zealand for questioning saying he had no money or passport
14 August 2012	Extradition commenced
April 2013	Appellant arrested
4 August 2014	Trial commenced in District Court

[30] We agree with the submissions for the Crown that the 1984 complaint to the social worker was not one triggering consideration of prosecutorial delay. There is nothing to suggest the police were involved at that point. Rather, D said this was her explanation for running away. The social worker gave evidence and said she asked D whether someone was interfering with her because she wanted to understand why the children were running away.

[31] We accept there is a particular concern about the delay once the file was referred to Interpol. That said, for the reasons which follow, we are satisfied this is not a case where a fair trial was not possible because of a delay.

[32] The relevant principles are discussed in *CT v R*.[6] In delivering the judgment of Elias CJ, McGrath J and himself, William Young J said this:

> [31] The policy considerations in favour of permitting trial despite delay are most cogent in the case of serious offending and are less so in the case of comparatively minor offending, particularly where the defendant was very young at the time. Also material is the strength of the Crown case. The stronger the case, the less likely it is that delay actually caused prejudice to the defendant. But if the case is weak, the risk of prejudice is likely to be more substantial. Where the Crown case is weak, very lengthy delay may justify a stay despite the defendant not being able to identify tangible specific prejudice.
>
> (Footnote omitted)

[33] William Young J also said the approach in *R v O* remained appropriate with some additions, in particular he noted a decision as to a stay "depends on a judicial assessment as to whether the risk of prejudice is such as to render a trial unfair and this requires an evaluative judgment based on all relevant circumstances".[7]

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6 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465.
7 *R v O* [1999] 1 NZLR 347 (CA) at [29].

[34] Applying that approach to this case, the first point we make is that this was serious offending.

[35] Second, the Crown case was a strong one. Putting to one side the neighbour's daughter, E, there were three complainants each describing similar conduct with, as Ms Markham for the Crown submits, recurrent themes such as the appellant telling the complainants the conduct was a secret. All of the complainants describe the appellant masturbating, sometimes into a handkerchief or a rag. This activity was consistent with the appellant's admitted problem.

[36] E and A said they saw sexual abuse of one or more of the other complainants.

[37] The appellant's wife confirmed A's evidence that A had complained to her mother when aged about nine and then when she was about 11. The social worker confirmed D complained to her in 1984. E and T's mother said T told her after the two returned from the camping trip that the appellant "was dirty" to E.

[38] Although the defence advanced collusion, there was no evidence to support that allegation. A gave evidence of meeting T at a party when she was about 17 years old. She said they talked about her father's masturbation problem but that was as far as it went. There was nothing otherwise to suggest the two families had anything to do with each other after these events took place. E said she had not spoken to any of the appellant's family before going to the police. T confirmed he had not spoken to E about the offending. In 2005 A was living in Australia and D and S were living in different parts of New Zealand.

[39] Third, there is nothing to indicate any forensic prejudice. The appellant says his other son G could have given helpful evidence about the injuring count against S. To put this in context, in his evidence on this count S said G was "winding [him] up a little bit" and so he went to his father and told him. S's evidence was that his father said he should go and hit G, so he did. His father then hit S with what he said was a "king hit" because it almost knocked him out. The appellant says that attempts to contact G have been unsuccessful.

[40] The jury asked why G was not questioned by the police nor appeared as a witness. The Judge answered as follows:

> Detective Evans' evidence was there was no indication on the file that G had ever been spoken to, so the evidence you do have is he was not contacted or spoken to by police, but other than that, that is the only evidence you have about that. You cannot and you must not speculate as to why G is not here. As I said to you, you must decide each count on the evidence that is put before you in this courtroom and only on that evidence. You cannot speculate or guess. Speculation and guesswork has no part to play in your deliberations.

[41] Importantly, the defence at trial in fact relied on the absence of any evidence from G. The Judge in summing up recorded the defence case that "[t]here was no evidence called from [G] as to the argument which is said to have triggered [the assault], the defence say it simply did not happen". The appellant cannot now say that G's evidence would have been supportive. In any event, there is nothing before us to indicate what he might have said.

[42] As we shall discuss in the context of the omission to give a reliability warning, the appellant and his wife gave quite detailed evidence about events and their timing. To illustrate, in describing what happened in the tent on the camping trip the appellant referred to the weather starting out "all right" but a storm came across the lake in the early evening. His wife confirmed the weather was "windy and wild" although she did not remember a problem with the tents because of the wind. The absence of any forensic prejudice may well have influenced the decision of the appellant's very experienced trial counsel not to seek a stay.

[43] Finally, a consequence of the delay was that the Crown had to rely on specific charges because of the extradition requirements. This was no doubt helpful to the defence.

[44] In this context, the appellant also makes something of what is said to be a change in D's evidence and increasing vagueness as to when the indecencies occurred. The Crown had to pick specific dates as part of the arrangements for extradition. The Crown chose random Thursday nights during 1981 and 1982 when D had told the police the appellant's wife was not at home because she was attending Jehovah's Witness meetings. However, as Ms Markham submits, what D said was

that the appellant would often abuse her while her mother was attending these meetings which she did regularly on Tuesdays, Thursdays and Sundays. There was no dispute that the appellant's wife attended these meetings and, while the appellant's wife maintained she would almost always take the children with her, D and A said that occurred only on some occasions.

[45] When all the circumstances are taken into account, we consider a fair trial was possible.

Directions on dates

[46] The appellant says the evidence on the rape charge involving A did not establish a rape occurred within the dates set out in the indictment. The argument is that the Judge misdirected the jury as to the proof required of these dates.

[47] The appellant also says that in relation to the counts involving D, Judge Tompkins misdirected the jury as to the proof required for the particular dates. It is further submitted that the evidence was insufficient to establish the various indecencies alleged by D occurred on the dates specified in the indictment.

[48] On this aspect we essentially adopt the submissions for the Crown. As the authors of *Adams on Criminal Law* observe, the usual principle is that a date set out in the indictment "is not an essential element" and the jury may convict as to a different date regardless of whether an amendment was sought.[8] Further, there is authority from this Court that a charge adopting the "on or about [a certain date]" approach will maintain a conviction if the evidence is that the offence was committed within a reasonable period of that date, reasonableness turning on the circumstances.[9]

[49] There are occasions when dates may be essential. Ms Markham gives two examples, namely, where there are issues of limitation or law changes. The Court

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[8] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CPA17.06] citing *H v Police* (1994) 11 CRNZ 632 (HC); *R v James* (1924) 17 Cr App R 116 (CA); and *R v SD* 2011 SCC 14, [2011] 1 SCR 527. See also *R v Hughes* [1998] 1 NZLR 409 (CA).

[9] *R v Wae Wae Uatuku* [1948] NZLR 648 (CA) at 652; and see *R v Crime Appeal CA271/92*, CA271/92, 18 November 1992.

will also consider specific prejudice to a defendant in considering whether a miscarriage has occurred. However, in this case, D's evidence was of regular sexual abuse throughout her childhood. There were four counts of indecency in the indictment. Two alleged indecent acts when she was under 12 and two when she was 12 or older. As we have noted, the Crown chose random Thursdays over the period. The Crown closed to the jury on the basis the offending occurred either on the specified Thursdays or within a reasonable period of those dates.

[50] The charge of rape relating to A covered the period from 13 October 1981 to 13 October 1982. That was the period during which A was aged 14 years of age. In her evidence-in-chief A said that the rape occurred after she had her first period at 14 years of age. Later she said it was when she was "roughly 13 I think" and in cross-examination she said she was "approximately 13".

[51] Mr Antunovic in closing submitted on this basis this count was not proven.

[52] The Judge's initial directions in summing up about the dates in the indictment related only to the rape charge concerning A. He said:

> So if members of the jury however you are satisfied that the Crown have proved that [A's] vagina was penetrated by the [the appellant's] penis, without her consent, but if you are unsure when that happened, then the date range given in the count in the indictment, it does not require to be proved to the same standard of beyond reasonable doubt. So if you are sure that penetration occurred as [A] described but you are unsure of the date, but nevertheless that is sufficient for you to return a verdict of guilty on count 5.

[53] The jury in deliberating asked a question about dates in these terms:

> In reference to count 5, you note that we do not need to be concerned about the dates. Does that same reason apply to the other counts?

[54] Judge Tompkins responded in this way:

> The short answer is yes. In respect of count 1, 2, and 5, I have already talked about. 1, 2 and 6 where there is a date range, that is initially provided so that the accused is fully aware of the case that he has to answer, so that he knows what the case is against him. But the law is that proof of the actual date in these kinds of circumstances is not required beyond reasonable doubt, so the same reasoning I gave you in respect to count 5 – and I apologise if this has caused some confusion, I should perhaps have been clearer – applies to those other counts where there is a date range. In respect to counts 3, 4, 7 and 8,

> which are the on or about counts, the position is slightly different because those counts have included in them an age limit. Some are when [D] was aged under 12. Some are when she was aged 12 to 16. That is a part that requires proof beyond reasonable doubt, so on those counts you need to be satisfied so that you are sure that the offending occurred when, in the case of counts 3 and 4, [D] was aged under 12 and in the corresponding counts 7 and 8 when she was aged between 12 and 16. So the "on or about" means that it is on that date or within a reasonable time period in all the circumstances.
>
> Now, here, of course, the defence is that none of these happened at all ever at any time. So in respect of the counts with a date range, then if you are satisfied that the offending occurred, you do not have to be satisfied beyond reasonable doubt as to when that occurred if you are satisfied it did occur. But in the on or about counts, 3, 4, 7 and 8, you do have to be satisfied beyond reasonable doubt that in counts 3 and 4 it occurred when she was aged under 12 and counts 7 and 8 aged between 12 and 16.

[55] We do not consider that any issue can be taken with these directions. They covered the key points, namely, it was not necessary to prove the exact date; it was sufficient if the jury was satisfied the offending took place "within a reasonable time period [of the date specified] in all the circumstances"; the age of D, that is whether she was under 12, or 12 and older, needed to be proved beyond reasonable doubt in relation to the four counts of indecency; and the defence case was that none of these events happened at all.

[56] As Ms Markham submits, apart from the need to be satisfied that D was under or over 12 at the relevant times, the dates were not material. Both women gave evidence of repetitive regular abuse from a young age. The appellant does not point to any material prejudice advanced as a result of the directions on the date.

Absence of s 122 warning

[57] Section 122(1) of the Evidence Act states that if, in a criminal jury trial, the Judge is of the opinion that admissible evidence may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it. Section 122(2)(e) provides the Judge must consider whether to give a reliability warning when there is evidence about the conduct of the defendant "if that conduct is alleged to have occurred more than 10 years previously".

[58] The trial in this case was completed prior to the decision of the Supreme Court in *CT v R*.[10] The Supreme Court in that case said this Court's previous approach of generally discouraging the giving of warnings was wrong.[11] The Court also noted that where prosecution is long-delayed "there will almost always be a risk of prejudice".[12] The Court said that it will not always be appropriate to leave it to counsel to highlight the risks associated with particular types of evidence.[13] Accordingly: [14]

> Unless the judge takes personal responsibility for pointing out [the risk of prejudice] and adds the imprimatur of the bench to the need for caution, the jury will be left with competing contentions from counsel and without any real assistance in addressing them.

[59] Here no s 122 warning was sought or given.[15] Not surprisingly, the absence of a warning was the primary focus of the appellant's case. The Crown accepts a direction should have been given and we agree. We are however satisfied that the failure to do so has not given rise to a miscarriage. We explain our approach below.

[60] First, it is relevant the Judge gave the orthodox directions as to the need for the jury to be satisfied as to the credibility and reliability of the witnesses. The Judge also repeated the parties' submissions on delay and made it clear that this was part of the defence case. For example, after setting out the chronology, the Judge noted that if the events occurred at all they occurred in the appellant's house and "in particular the defence stress some number of decades ago now". Again, later in the summing-up, Judge Tompkins said:

> Decades after the defence point out the events so that at this trial the adult witnesses have been recounting events from their long ago childhood in [X] Street in [Y town].

[61] The Judge also reiterated Mr Antunovic's submission about the failure to prove the count of rape against A because of her variations in evidence as to her age at the time.

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10 *CT v R*, above n 6.
11 At [46] and [50].
12 At [51].
13 At [50].
14 At [51].
15 We note here that we have checked the transcript and there is no reference to the Judge giving specific consideration to a s 122 warning.

[62] Second, the appellant does not point to any specific prejudice arising. By contrast in *L (SC28/2014) v R*, the Supreme Court referred to the fact there were real issues about the complainant's credibility and the passage of time had affected the appellant's ability to advance his defence.[16] In those circumstances, the Supreme Court said the trial had miscarried. Glazebrook J for the Court said "[t]he issues of reliability were not merely related to peripheral matters but went to the heart of the charges".[17]

[63] In allowing an appeal because of an insufficient reliability warning in *DST v R*, this Court noted the need in that case to acknowledge the effect of the effluxion of time on memory and the "resulting unfairness to [DST]".[18] The offending in that case dated back to 1982. The Court noted also there was "[no] reference [in the warning] to any other specific respects of prejudice to him, such as the evidence relating to the size of the bathroom, which might have been raised by his trial counsel if the judgment in *CT* had been available".[19]

[64] This case has some similarities to *Oquist v R* where the defence case was that the evidence was fabricated.[20] This Court considered that in the circumstances there would be "little purpose" in a reliability warning.[21] We acknowledge the trial in *Oquist* took place some 12 years after the alleged offending so that the length of delay reflected in the present case was absent.[22]

[65] In *D (CA95/2014) v R* this Court accepted reliability was "sufficiently in issue to warrant a warning, having regard to the passage of time since 1997 and the discussions between the complainants".[23] However, the Court concluded there was no miscarriage in not giving a warning where there was a very strong Crown case,

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16 *L (SC28/2014) v R* [2015] NZSC 42 at [27]–[32].
17 At [32].
18 *DST v R* [2014] NZCA 602 at [22].
19 At [22].
20 *Oquist v R* [2015] NZCA 310.
21 At [60].
22 In *Hall v R* [2015] NZCA 403 at [151]–[152] this Court also found the absence of a warning was not critical although there the delay was some 11 years.
23 *D (CA95/2014) v R* [2015] NZCA 171 at [46].

no specific disadvantage "by the loss of contextual details" and the defence alleged recent collusion.[24]

[66] In the present case even general prejudice is assuaged because of the appellant's very good recall. His approach was to say "I remember these events and my wife does too". It is somewhat incongruous now in those circumstances to say that the absence of the reliability warning was critical.

[67] Third, this was as we have said, a strong Crown case. The complainants' accounts were supportive of each other's accounts in a situation where there was no evidence of collusion and those accounts were also supported by evidence of recent complaints as accepted by the appellant's wife. Further, the defence in relation to A and D focused largely on recent fabrication.

[68] In all these circumstances, we are satisfied that although a warning should have been given, failure to do so has not had an impact on the outcome.

Sentence appeal

[69] The approach adopted in setting a starting point was one largely agreed by counsel. That was to take a starting point for the rape of three to four years imprisonment with an uplift for totality of two years and then further uplifts for indecency and for injuring, taking the starting point to ten years imprisonment. The only disagreement between counsel was whether there should be a further uplift for previous convictions. The Judge accepted a further one year was an appropriate uplift leading to a starting point of 11 years imprisonment.

[70] Judge Tompkins in sentencing accepted the submissions for the Crown that the charges were "a representative sample of allegations by the three complainants, all three being children of [the appellant] and his wife, spanning at least a decade".[25] The Judge said the evidence at the trial meant these offences could: [26]

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[24] At [47]. Leave to appeal to the Supreme Court was declined: *D (SC60/2015) v R* [2015] NZSC 119.

[25] Sentencing remarks, above n 2, at [2].

[26] At [2].

> … quite properly be described as very serious sexual and violent offending spanning at least a decade, against three young and vulnerable children who ought to have been able to, but were not able to, look to their parents for safety and security.

[71] As we have explained, the strictures of extradition meant the appellant was not charged on a representative basis. Accordingly, in terms of the lead charge of rape, the Judge had to proceed on the basis of a single charge, albeit one with a number of aggravating features as we shall discuss. The approach adopted was in error in not doing so.

[72] The correct approach in our view was as follows. The general level of sentencing for rape in the 1980's was as set out in *R v Clark*.[27] That case stated that five years imprisonment would be the starting point after conviction following trial for rape committed by an adult without any aggravating or mitigating features.[28]

[73] The present offence was a premeditated and highly predatory rape of a vulnerable child and involved an extreme breach of trust. A six year starting point is appropriate.[29]

[74] From the six year starting point there should be an uplift of two years imprisonment for the four indecency charges concerning D, two of which comprised oral sex, and a one year uplift for the charge of injuring with intent to injure S. That makes the starting point nine years imprisonment. We consider that starting point adequately reflects the totality of the offending.

[75] The Judge added an uplift of one year for the appellant's "earlier broadly analogous and related in time previous convictions".[30] These previous convictions covered the period from 1974 through to 1987 and involved various indecencies. We do not consider an uplift was appropriate. Notwithstanding that the appellant's

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27 *R v Clark* [1987] 1 NZLR 380 (CA); see also Geoffrey G Hall (ed) *Hall's Sentencing* (looseleaf ed, LexisNexis) at [I.2].

28 At 383.

29 This would put the sentence within the range of four to seven years imprisonment referred to in *R v Elwin* CA290/93, 10 August 1994 at 8 on which the appellant relies. It is also consistent with the approach taken in *R v Vollmer* CA408/91, 26 June 1992, in which this Court upheld a sentence of 10 years imprisonment for sexual offending against two separate children in a familial context. In that case the three charges of rape in 1984, 1985 and 1986 in relation to one of the complainants were regarded as representative or sample charges.

30 Sentencing remarks, above n 2, at [7].

previous history reflected offending around the same time, it was necessary to acknowledge the reality the previous convictions date back over 40 years and the appellant was being sentenced for offending dating back some 30 years. There are no convictions for offending after 1987. Without an uplift, the effective sentence is one of nine years imprisonment. The appeal against sentence is allowed. We make correlative adjustments to the terms of imprisonment imposed on the other offences.

Result

[76] The appeal was filed out of time.[31] There is no objection to an extension of time and we accordingly extend time to file the notice of appeal.

[77] The appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 11 years imprisonment on the rape charge is quashed. In its place a sentence of nine years imprisonment is imposed. The sentences on the remaining charges are also quashed. In place of the concurrent term of four years imprisonment for the indecency offending, terms of two years imprisonment for that offending are substituted. The term of three years imprisonment for the injuring with intent to injure is quashed and a sentence of one years imprisonment is substituted. All of these sentences are to be served concurrently.

[78] We are satisfied that publication of the appellant's name or details will likely to lead to the identification of his children, whose names are suppressed under s 203 of the Criminal Procedure Act 2011. Accordingly, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 of the Criminal Procedure Act.

Solicitors:
Crown Law Office, Wellington for Respondent

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[31] An unsigned notice of appeal against conviction was filed within time and a signed notice filed shortly afterwards. The notice of appeal against sentence was some six months out of time.