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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA98/2015
[2016] NZCA 263

BETWEEN	ROBERT RICHARD ROPER Appellant
AND	THE QUEEN Respondent

Hearing:	10 March 2016
Court:	Winkelmann, Peters and Collins JJ
Counsel:	D P H Jones QC for Appellant G R Kayes and A F Devathasan for Respondent
Judgment:	16 June 2016 at 11.30 am

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, Mr Roper, appeals against his conviction and sentence on 20 counts of sexual offending. Mr Roper was convicted following a jury trial before Judge Gibson in the District Court at Auckland in November 2014. The Judge sentenced Mr Roper to 13 years' imprisonment.[1]

[2] The appeal is brought pursuant to s 385 of the Crimes Act 1961.

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1 *R v Roper* [2015] NZDC 2473 [Sentencing notes] at [14].

[3] On the appeal against conviction Mr Jones QC, counsel for Mr Roper on appeal, submits that there was a miscarriage of justice on two grounds, both arising from the Judge's directions to the jury in his summing-up.[2]

[4] First, Mr Jones submits that the Judge failed to direct the jury adequately regarding statements made by Crown counsel in closing, which referred to the absence of evidence that the complainants had a motive to lie or to make false allegations against Mr Roper. He submits this essentially reversed the onus of proof in the trial.

[5] Secondly, Mr Jones submits that the Judge's directions to the jury regarding the treatment of propensity evidence were inadequate.

[6] The appeal against sentence arises if the appeal against conviction is unsuccessful. It is brought on the ground that 13 years' imprisonment was manifestly excessive, and that a sentence of 10 to 11 years should have been imposed.

Background

[7] The offending took place between 1976 and 1988 and was committed against five complainants: K, T, S, C and L.

[8] K and T were close relatives of Mr Roper. S was a friend of T. C was a friend of K. L was entirely independent of the other complainants. She worked under Mr Roper's supervision for a short period during her school holidays.

[9] At the outset of the trial, the Crown presented an indictment comprising 25 counts. The Judge discharged Mr Roper on three counts during the course of the trial. Of the remaining 22 counts, the jury found Mr Roper not guilty of two counts, but guilty of the remaining 20. These 20 counts comprised two of rape per se,[3] three of sexual violation by rape, one of sexual violation by unlawful sexual connection,

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2 Mr Roper abandoned a third ground of appeal by memorandum dated 25 January 2016.

3 "Rape" became "sexual violation by rape" as of 1 February 1986 — see Crimes Amendment Act (No 3) 1985, s 2.

one of abduction for the purpose of sexual intercourse, assaults and numerous indecent assaults. Most counts were representative, including one of rape and one of sexual violation.

[10] Mr Roper's offending against K and S was vastly more serious than that against the other complainants.

[11] The offending against K was prolonged and frequent, occurring largely at Mr Roper's will and often including physical violence beyond that inherent in the acts themselves. The offending started in about 1976, when K was six, and continued until she was 17. It consisted of two counts of rape, two of sexual violation by rape, two of assault, and indecent assaults when K was younger than 12 and when she was aged between 12 and 16. All counts, 11 in total, were representative, with the exception of one of rape, one of sexual violation by rape and one of indecent assault.

[12] Mr Roper's offending against S was committed in the course of one evening in 1986, when S was aged 12 or 13. This offending comprised the abduction of S for the purpose of sexual intercourse; two counts of sexual violation, one by rape and the other by unlawful sexual connection; and one count of indecent assault.

[13] Mr Roper's offending against T, C and L comprised indecent assaults, with two representative counts in respect of C.

[14] The sole issue at trial was whether the offending had occurred. The defence case was a straightforward denial of the conduct alleged and, in the case of L, any indecent intention.

[15] Although it does not affect the view we take of the grounds of appeal, the evidence against Mr Roper was compelling. Not only did each complainant give evidence of the offending against them, but often their accounts were supported by the evidence of others — other complainants and independent third parties to whom complaints had been made.

[16] Mr Roper denied the conduct alleged by K, T, S and C. The defence case, and his evidence, was that they were lying, that the offending K, T, S and C alleged had not occurred and that they had colluded. Mr Cooke, counsel for Mr Roper at trial, put it to each of K, T, S and C that they were lying and that they had colluded. All denied this. Likewise L was adamant that she had not misconstrued Mr Roper's actions and intentions.

[17] The defence also stressed that the complainants had delayed complaining to the police, that the alleged offending had taken place many years earlier and memories would be affected accordingly, and that some of K's actions in particular appeared inconsistent with the offending (for instance, working with or for Mr Roper for a period after the alleged offending).

Appeal against conviction

Motive to lie/reversal of onus

[18] Mr Roper's first ground of appeal concerns the Judge's directions regarding statements made by Crown counsel in her closing address to the jury. These statements were to the effect that there was no evidence that S, T, C and L had any reason to make false allegations against Mr Roper.

[19] Mr Jones accepts that it was open to Crown counsel to make such statements to the jury. His submission is, however, that these statements suggested to the jury that Mr Roper bore an onus to explain why S, T, C and L would make false allegations, so that the Judge was required to give the jury a specific direction on the issue. The Judge did not do so or did not do so sufficiently; a miscarriage of justice arose as a result.

[20] Mr Jones' first point is correct. If a prosecutor refers in closing to an absence of motive to lie, the judge is generally required to direct the jury that "regardless of the absence of evidence of motive, the onus of proof remains on the Crown throughout".[4]

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[4] *R v T* [1998] 2 NZLR 257 (CA) at 266. See also *R v M* (2000) 18 CRNZ 368 (CA) at [15]; and *Tuhaka v R* [2015] NZCA 540 at [14] and [18].

[21] In this case, however, it is important to consider the nature of the prosecutor's statements which were made in response to the defence case that K, T, S and C were lying and that they had colluded against Mr Roper. Crown counsel said:

In relation to S:

> Now [K] gave evidence that she had not seen [S] for over 20 odd years, maybe more. It certainly cannot be suggested that [S] has come to Court to make up lies to support [K's] account of offending by [Mr Roper]. [S], for her own part, could not put a time when she'd last spoken to [K] but she said it had been a very long time. On that point I need to acknowledge that there is no onus on an accused person to come up with any motive or reason why a person would want to come to Court to make up lies, because as you know the burden is on the Crown to prove all of the charges. However, the fact that there is no evidence of any reason for [S] to come to Court, to make up false allegations against ... Mr Roper whom she has not seen in so long, that it simply cannot be ignored, I suggest.
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> Highly relevant too, is the evidence of what [S] said she said to others after the offending took place all those years ago. ...

In relation to L:

> … Detective Brown contacted [L] in June 2013 after she had made some enquiries at the airport and it may well be, members of the jury that if the police had not approached [L] for example, that she never would have been prompted to make a complaint to the police. But in my submission that does not diminish her evidence or her complaint in any way. If anything, I suggest that it simply reinforces that this is a woman who simply has no beef with [Mr Roper], she has no axe to grind with him, it is someone who simply has no motive to want to come to Court to make up lies against [Mr Roper].
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> …
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> ... Now [L], has never met [K], [T], [C] and [S]. There can be no suggestion, I submit, that she's deliberately making up false allegations against a man who she has not seen since around 1987 or 1988. There is no evidence that she has any reason to want to come to Court and make up lies about this man. ...

In relation to T:

> It is a nonsense members of the jury to suggest that [T] has come to Court to give false evidence in order to support [K]. It is the case that she has only come forward after [K] made the complaint to the police, but there is nothing to suggest members of the jury, that she has done that by telling lies. ...

In relation to C:

> ... And the defence case is that the allegations made by [C] are false and that her reason for making the false allegations are linked to her close

> relationship with [K]. Now while [C] was a good friend of [K], there was nothing to suggest that the two of them had put their heads together to make up the allegations against Mr Roper. [K's] evidence was that over the past 20 years she had seen [C] three or four times tops, and [C] said that she hadn't seen or spoken to [K] since 2012. And [C] said she hadn't seen [Mr Roper] since she was about 16. [C's] explanation as to why she said nothing to anyone at the time about the touching, and why she didn't complain to the police earlier, was that she didn't think she would be believed. ...

[22] Accordingly, Crown counsel's statements were made to dispel or negate the defence case that the complainants had colluded in their allegations.

[23] We note also that when she addressed the defence evidence, Crown counsel made it clear that the onus of proof remained on the Crown throughout. For instance, she said:

> Even if you reject [Mr Roper's] evidence as the Crown says you must, then you need to turn to the Crown case to determine whether the Crown has proved the charges beyond reasonable doubt.

[24] And so it was against that background that the Judge gave the standard direction that the onus remains upon the Crown from the beginning of the trial to the end to prove Mr Roper's guilt.

[25] The Judge repeated the point when he gave the jury directions as to how to proceed as regards Mr Roper's evidence:

> [45] What I want to do now is to talk to you about the evidential directions. The first one is that in this case Mr Roper gave evidence and I say again that that does not in any way change the burden of proof. The Crown still has the same task of proving each of the allegations against [Mr Roper] beyond reasonable doubt in the sense that those allegations constitute essential ingredients of the counts.
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> [46] The fact that Mr Roper gave evidence and has also called evidence does not change who has the task of proving the allegations. ...
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> …
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> [48] … But if you disbelieve [Mr Roper's] evidence about what it is he said, that he never committed any of these acts, and that [L] simply got the wrong end of the stick and he did not intend any indecency, then don't leap from that assessment to one of guilt because to do that would be to forget who has to prove the case. Rather you must assess all the evidence that you accept as reliable and ask yourselves whether that evidence satisfies you of [Mr Roper's] guilt to the required standard.

[26] Given the nature of Crown counsel's remarks, which responded to the defence case and which were accompanied by a reminder from counsel as to the burden of proof, we consider that no further direction was required. The jury would have been in no doubt that Mr Roper was not required to explain why a complainant would make a false complaint. No miscarriage of justice arises on this ground.

Propensity evidence

[27] In closing, the Crown submitted that when considering each count, the jury could take into account whether the complainants' evidence showed a pattern of conduct by Mr Roper evidencing a tendency or propensity to offend in a particular way. Mr Roper's second ground of appeal is based on the Judge's directions to the jury regarding their use of this evidence.

[28] Mr Jones submits that, the Crown having relied on propensity reasoning, the Judge was required to give a propensity evidence direction. This direction should have identified the relevance of the propensity evidence; stated the parties' competing contentions; and cautioned the jury against illegitimate reasoning, that is reasoning which carries the risk of unfair prejudice to the defendant. These elements derive from the minority of the Supreme Court's judgment in *Mahomed v R*.[5]

[29] Mr Jones submits that the Judge failed to give an appropriate direction. First, he failed to adequately identify the "appropriate use of the complainants' evidence as propensity evidence". The direction as to the relevance of the evidence was so broad and ambiguous that it in fact created a risk that the jury would engage in global reasoning, rolling up the evidence on all of the charges, without proper regard to the strength of the Crown's case on each. Secondly, the Judge failed to warn against illegitimate reasoning, which exacerbated the risk of the jury rolling up the charges and, in Mr Jones' submission, this has led to a miscarriage of justice.

[30] The starting point for this aspect of the case is the statements that Crown counsel made to the jury. These were as follows:

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5 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [95].

> In every criminal trial members of the jury, you need to look at the evidence relating to each charge separately in a sense that in this case there were a series of 22 trials going on in relation to each of the charges. Although the charges need separate consideration, you are permitted to use evidence relating to one charge in considering another charge if you consider it to be relevant and sufficiently connected. And it is the Crown's submission that the evidence demonstrates a tendency or propensity by [Mr Roper], to offend sexually against young girls under his supervision or care when they are on their own. And there are a number of similarities in terms of the conduct by [Mr Roper] as described by the complainants.

[31] The similarities that Crown counsel identified were as follows: S, T, C and L were all aged between 12 and 16 at the relevant time, most of the offending was said to have been committed in the early to mid-1980s, to some extent each complainant was under Mr Roper's supervision at the time of the offending, and the complainants alleged similar forms of touching. Crown counsel concluded her remarks by saying that the case against Mr Roper could not be "explained away as a coincidence".

[32] We turn now to the Judge's directions to the jury on the matter. Mr Jones referred us to the following passages:

> [60] Here we have 22 different counts, and as I've said to you, towards the beginning of my summing up, 22 different trials. They are heard together as a matter of convenience. You can draw on the evidence of all the witnesses in deciding whether a charge is proved if you can find a pattern of conduct has been shown. The Crown says there is a pattern of conduct, there were similarities, young girls, [Mr Roper] was in a position of authority … The defence says they may be similarities but they're hardly the sort of similarity that point to any modus, they are just the facts as they were. But it is for you to decide the relevance of that.
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> [61] If those similar matters help you, you can take them into account but you must of course decide each of the counts on the basis of whether the Crown has proved beyond reasonable doubt each of the elements of the counts.
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> [62] You could consider the possibility of collusion. It has been raised by the defence but you have got to remember that the last complainant [L], did not know any of the other complainants. She was a complete stranger to them. And while both [S] and [C] had said while they were friends with [Mr Roper's family] when they were younger, [S] in particular had not had a lot [to] do with them for many years and [C] had not had a great deal to do with them either. …

[33] When outlining the Crown case the Judge said:

> [108] [Crown counsel] said to you that you can look at each charge separately and you should look at each charge separately, but you can also

> look at the evidence of one charge to support the evidence of others if it is relevant or connected and I have already given you a direction on that, and she referred you to the similarities of conduct, age, timing of allegations ... I have mentioned those myself in my remarks to you, but what the Crown says is these amount to allegations of similar touching and you can use those, in some circumstances, to support other counts.
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> [109] She said there is no plausible coincidence that these accounts, which are similar to each other, are unrelated and they are plainly not cooked up, because [L] had never met the other complainants and [S] had not kept up contact with the other complainants ...

[34] We note also that the Judge referred to the defence case again in the following paragraph:

> [119] [Mr Cooke] talked to you about similarities in the sense that the Crown had raised the issue and reminded you that this was not just one count, there were 22 separate counts and that there were a number of dissimilarities, for instance [L] does not give evidence to say she was kissed by [Mr Roper] in the way that some of the other complainants allege they were kissed and he reminded you of [C's] evidence when he asked her, well why didn't she move, if she had actually been sexually abused in the way that she alleged she had been, the indecency, she alleged to have been committed on her. And her evidence was, why should I move from the lounge? She kept going back …

[35] In these quoted passages the Judge identified what the propensity evidence was: evidence of similar offending given by multiple complainants. He also explained how it was relevant, being whether it established a pattern of conduct by Mr Roper, in other words a tendency that Mr Roper had.

[36] The Judge also outlined the competing contentions in respect of the evidence, highlighting the issue of collusion.

[37] We accept that the Judge did not, in these particular passages, caution the jury expressly against an "illegitimate reasoning process", by which we mean caution or warn the jury against giving undue weight to any propensity they discerned by "rolling up the counts". Mr Jones referred us to the decision of this Court in *Pillidge v R* (a case which preceded *Mahomed*) as authority for the proposition that a warning of that nature is essential.[6] Mr Jones also referred us to this Court's decision in *R v Shaw*, an appeal from an order for severance in respect of allegations

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6 *Pillidge v R* [2011] NZCA 194 at [20].

by several complainants of sexual misconduct.[7] The Court made some comments as to the type of direction required in that case to ensure that no unfairness arose.[8]

[38] However, as the Supreme Court said in *Mahomed*, and as this Court has said since, the terms of the direction and whether any deficiency has led to a miscarriage of justice must be assessed by reference to the particular case at hand.[9]

[39] We agree that the Judge should have warned expressly against the illegitimate use of the propensity evidence. But we are satisfied that in this case the absence of this warning did not create even a risk of a miscarriage of justice. In reaching this view we have weighed the following.

[40] First, having regard to the summing-up in its entirety, we do not consider there is any risk that the jury would have engaged in an illegitimate reasoning process, giving undue weight to such propensity as they may have concluded existed, or that they determined Mr Roper's guilt by reference to such propensity.

[41] That is because the Judge made it very clear to the jury that they were to determine their verdict on each count by reference to the evidence relating to that count.

[42] In addition to the passages we have set out above, during the summing-up, the Judge also directed the jury that they were to:

> [11] ... consider each count separately and come to a separate decision about it. To do that you will need to isolate the evidence and the issues of law relevant to each count. You will be asked for different verdicts on each count and you may of course reach different verdicts on different counts ... effectively what we are doing is conducting 22 separate trials in this matter ...

[43] These directions were further reinforced shortly thereafter by the question trail the Judge distributed to the jury, and which he described as a document which

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7 *R v Shaw* [2013] NZCA 142.

8 At [47].

9 *Mahomed v R*, above n 5, at [17], [94] and [105]; *S (CA289/2013) v R* [2013] NZCA 598 at [29]; *D (CA95/2014) v R* [2015] NZCA 171 at [57]; *Wang v R* [2015] NZCA 193 at [23]; *Tuhaka v R*, above n 4, at [27]; and *N (CA462/2014) v R* [2016] NZCA 63 at [35].

had "generally been found to be very helpful as a way of discussing the evidence in relation to each count".

[44] The Judge's summing-up was itself lengthy and detailed. It included a full discussion of all of the evidence, the question trail, and the prosecution and defence cases on each count.

[45] Secondly, although Mr Jones submits that the propensity evidence was "of great value" to the prosecution, in fact it was a small part of the Crown case. The passages of Crown counsel's closing to which we have referred came at the end of a lengthy address in which she addressed the evidence on each count in considerable detail.

[46] We dismiss this ground of appeal also.

[47] The appeal against conviction is therefore dismissed.

Appeal against sentence

[48] The Judge placed this offending within the most serious of cases, those for which the maximum penalty for rape and sexual violation by rape is prescribed.[10] The offending occurred over a 12-year period. The victims were young and in most cases vulnerable, in the sense that they were in Mr Roper's care. The Judge saw it as a further aggravating factor that Mr Roper subjected K and S to indignities, degradations and physical violence.[11]

[49] The Judge said that, had he been sentencing in accordance with the guidelines for rape set out in *R v AM (CA27/2009)*, he would have considered the offending within "band four", that is within the class of case in which the culpability inherent in the offending is greatest, and which can attract a starting point up to the maximum term permitted.[12]

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10 Sentencing notes, above n 1, at [6].
11 At [6].
12 At [4]. See *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

[50] The Judge adopted a starting point of 14 years on the lead offending of rape and sexual violation by rape and then allowed a one year discount on account of Mr Roper's age.[13] This gave an end sentence of 13 years on the lead offending. The Judge imposed concurrent sentences on all other offending.[14]

[51] Mr Jones submits that the Judge erred in categorising the offending as "within the most serious of cases", for which the maximum penalty is prescribed.[15] At the time of the offending, the maximum sentence prescribed on a single count of rape or sexual violation by rape, and so the maximum open to the Judge, was 14 years.[16] The offending should have been classified as near to the most serious, requiring a starting point near to, but not at, the maximum. It follows, Mr Jones says, that a starting point of 14 years was manifestly excessive and one of between 11 and 12 years should have been adopted. No issue is taken with the one year discount allowed on account of Mr Roper's age. Accordingly, Mr Jones submits that the end sentence should have been between 10 and 11 years, rather than the 13 imposed by the Judge.

[52] Mr Jones referred us to five authorities in support of his submission that the offending in this case was not within the most serious of cases.[17] Although it does not affect our decision, we put *R v GJJ* to one side because this Court subsequently quashed GJJ's convictions and remitted the matter for a retrial.

[53] We do not consider that the other four authorities to which Mr Jones referred support his submission that the Judge erred in his categorisation of the offending. In each case the offender had offended against three or more complainants, at least one (and sometimes all) of whom was a child or stepchild of the offender; the offending included four or more counts of rape, with the total number of counts ranging from 15 to 65; and the offending was committed over a prolonged period of time commencing when at least one complainant was very young. Starting points ranged from 11 years to the maximum permitted of 14, as the Judge adopted in this case.

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13 At [10] and [14].
14 At [13] and [14].
15 Sentencing Act 2002, s 8(c).
16 Sentencing Act, s 6; and New Zealand Bill of Rights Act, s 25(g).
17 *R v Accused (CA143/93)* (1993) 10 CRNZ 379 (CA); *R v KJB (CA41/07)* [2007] NZCA 292; *R v Seiuli* [2009] NZCA 315; *R v GJJ* [2015] NZHC 398; and *R v G* [2015] NZHC 2620.

[54] Mr Roper's offending is on all fours with these cases. A case may still be within the most serious of cases, even if the offending in another is more extensive or prolonged or depraved.[18] Accordingly, on the authorities to which we were referred, we do not consider there was any error in the Judge's starting point.

[55] The Judge's classification of Mr Roper's offending is also consistent with the *R v AM* analysis of the different bands of inherent culpability of offending. In *R v AM* this Court identified the repeated rape of one or more family members over a period of years as a "paradigm" band four, or most serious, case and said that such offending against children and teenagers would attract a starting point at "the higher end".[19] The higher end of band four is the maximum permissible sentence.

[56] Mr Roper's offending meets this paradigm description.

[57] We also note that the Judge's starting point was of course the maximum sentence available for a single offence. Mr Roper was convicted of multiple offences involving several victims.

[58] For these reasons, we are satisfied that the Judge's starting point of 14 years was within the available range.

[59] We dismiss the appeal against sentence accordingly.

Result

[60] The appeal against conviction and sentence is dismissed.

Solicitors:
Stafford Klaassen, Auckland for Appellant
Crown Solicitor, Manukau for Respondent

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18 *R v Xie* [2007] 2 NZLR 240 (CA) at [26].
19 *R v AM*, above n 12, at [109].