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

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

I TE KŌTI PĪRA O AOTEAROA

CA231/2017
[2018] NZCA 137

BETWEEN	B (CA231/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	14 February 2018
Court:	Cooper, Ellis and Katz JJ
Counsel:	N P Chisnall for Appellant I R Murray for Respondent
Judgment:	4 May 2018 at 10 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is allowed.

D The sentences imposed on the charges of sexual violation by unlawful sexual connection and sexual violation by rape are in each case set aside and sentences of seven years four months' imprisonment, to be served concurrently, are substituted. The sentence of 18 months' imprisonment

imposed on the arson charge by the District Court is to be served cumulatively on the sentences on the sexual offending.

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

REASONS OF THE COURT

(Given by Cooper J)

[1] The appellant B was found guilty at his trial of rape and sexual violation by way of unlawful sexual connection. He pleaded guilty to a separate offence, arson, as a result of events that occurred after the alleged sexual offending. He was sentenced on all three offences by the trial Judge. Judge Treston imposed an effective sentence of nine and a half years' imprisonment.[1]

[2] He now appeals both his conviction and sentence. The conviction appeal is advanced on three grounds. The first is that comments made by the Judge in the summing-up concerning the evidence of an expert witness called by the defence, Dr Paul Glue, undermined the defence case that the complainant was an unreliable witness, and in particular that she might have anterograde amnesia in relation to the sexual activity that took place. In support of this ground, the appellant seeks to adduce further evidence in the form of an affidavit sworn by Dr Glue.

[3] The second ground of the conviction appeal alleges a miscarriage of justice as a result of the failure of the Judge to provide a reliability warning under s 122 of the Evidence Act 2006 (the Act) concerning the complainant's evidence. The third ground focuses on the Judge's directions on the relevance of demeanour. It is said they could only have applied to the complainant R and they were erroneous.

[4] The sentence appeal proceeds on the basis that the Judge made material errors regarding the relevance of the appellant's age and mental health, both of which should

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1 *R v [B]* [2016] NZDC 24381.

have attracted a reduction in sentence. It is contended that those errors necessitate the substitution of a lower sentence under s 250 of the Criminal Procedure Act 2011.

Background facts

[5] The Crown case was that R and the appellant lived in the same block of flats and had known each other for around two months at the time of the alleged sexual offending. The appellant first touched the complainant in a sexual way in early July 2015. At the time she told him forcefully not to touch her in that manner. Some days later, around 6 July, the appellant and R were together when he said that if he wanted to he could put her "back in TWA," a reference to an institution where she had stayed for three weeks while being treated for post-traumatic stress disorder. She attributed the post-traumatic stress disorder in large part to the way she had been treated in a previous relationship.

[6] From time to time the appellant would bring a television set to R's flat and they would watch films together in her bedroom. On the night of 7 July the appellant and R had exchanged texts about watching a movie together. During a conversation between them after he arrived at the flat he recounted incidents when he claimed to have committed violent acts on dogs. This caused her to have a "flash back" to her previous relationship and she retired to her bedroom where she sat on the floor for a period in a distressed state. The appellant left.

[7] The alleged offending occurred in the early hours of the following morning. After a further exchange of texts the appellant returned, entered R's bedroom and spoke with her. He went into the lounge to speak on his mobile phone, and then returned to the bedroom. While there he was able to observe R taking her prescription medication. It was her evidence that she had earlier in the day used marijuana. On this occasion, she took significantly more than the prescribed dosages because she was hoping the pills would put her to sleep and enable her to forget the earlier incident. She took two tablets of 7.5 mg of zopiclone and 275 mg of quetiapine. This made her feel drowsy.

[8] It appears that she fell asleep. However, she could remember the appellant forcing his penis down her throat. In relation to this incident, she remembered her

"eyes watering, choking and just feeling really out of it. Like I don't feel like I was … like I was awake but I wasn't [conscious]." The Crown case was that after the incident of oral sex took place there was vaginal intercourse which she could not remember. She awoke with a sore vagina. She could remember "flashes of things happening" but felt like she "wasn't fully conscious, like fully there."

[9] R accepted that she had sent the appellant a text at 3.57 am asking if he was "okay". She said that after the incidents occurred, she was not sure if it was a dream, or had actually happened, although the more she thought about it "it just looked and felt too real." Under cross-examination she adhered to her evidence that at no stage had she given consent to sexual activity.

[10] Later on 8 July, R asked the appellant whether they had had sex. He said they had. She asked him why he had done that; he replied that she had "come on to him". She denied she would have done so. There was also an exchange of text messages, in one of which she said they could not be friends anymore and that he had taken advantage of her when she "O'Dd". The appellant responded that he had asked her. She replied: "Asked me what? If it was alg to fuck me when [I'm] drugged up and got no sense of judgment?" The appellant did not reply.

[11] That night, R told a support worker what had happened, and the following day went to see a doctor. After that she spoke to police. When he was spoken to by the police, the appellant declined to make a statement. He did not give evidence at the trial.

[12] Turning to the arson, that offence occurred on 15 March 2016. The appellant was in respite care at the time. He disconnected the smoke alarm in his room before setting fire to rolls of toilet paper that he had placed on his bed. He then left. The fire was extinguished but only after some damage had already occurred.

The conviction appeal

Comments on expert evidence

[13] The Crown's case was that R did not in fact consent but in any event, given the state she was in after taking the medication, she could not have given her consent. The defence sought to raise a reasonable doubt that she had in fact consented. It was also submitted there was a reasonable doubt that the Crown had established that the appellant did not have a reasonable belief in consent given that, while under the influence of drugs, R might have acted in a way that suggested she was awake and consenting.

[14] The defence expert Dr Glue gave evidence about the effects of zopiclone and how it might have affected R's nervous system. He explained that zopiclone is a sedative drug, and that once swallowed it takes about half an hour to one hour to be fully absorbed, and send the user to sleep. He was asked how the drug might affect someone over the two hours following its consumption which appeared on the evidence to have been the time period during which the sexual activity must have occurred. Dr Glue said that in most cases the person would become sleepy and fall asleep. Asked about the possible adverse side effects, he said:

> A less common side effect but which may be relevant in this case is a condition called anterograde amnesia. So amnesia is difficulty remembering things or inability to remember things and with anterograde amnesia, this is a condition where patients may appear to be awake, may appear to be interacting with people or objects around them but be unable to remember any of these things. It's – in the case of [Zopiclone], factors associated with anterograde amnesia include being, taking a tablet and then forcing oneself to stay awake. So not going to sleep having taken it can be associated with appearing to be awake but having no ability to retain memory. And the sorts of cases that have been reported are things that might appear for people to be sleep-walking, in which case they may appear to be groggy, sleep cleaning, sleep sex. I think there were 14 cases in the literature of situations where people have driven cars and been unable to remember the driving process.

Dr Glue also said:

> They may appear to be fully functional and rational. They may speak coherently, they may make good eye contact, they may be able to use objects. For example, if there's some sleep cleaning, they may be able to use cleaning materials appropriately.

[15] It was Dr Glue's evidence that if these effects were to occur, that would happen between half an hour to four hours after taking the drug. He also gave evidence that:

> It's important to realise that this is a condition that happens uncommonly and the reports are generally from sort of notable clinical examples, so that they're reports that patients will make to their doctors. "Something happened last night, I don't remember doing it," and it'll get written up as a journal article. In where I work on an acute admission ward, we may see one or two cases in 12 months, so out of 700 admissions, where people will get up during the night and appear to do purposeless things. So it's — I wouldn't say that that's a scientific sample but it gives you an idea of it's still relatively uncommon.

[16] Mr Chisnall acknowledges that the Judge gave a standard direction concerning expert evidence. However, he complained about what the Judge said when explaining that it was not a "trial by expert". The Judge reminded the jury that Dr Glue had at no stage examined R and had only had access to her medical records in "heavily redacted" form. Then, addressing Dr Glue's evidence about anterograde amnesia, the Judge said:

> [There] was talk by Dr Glue of anterograde amnesia which he said was relatively uncommon and there was no reference in the highly redacted documents that he had about the complainant having suffered from that before. He said that it had only happened two times with every 700 patients or something, that is one out of 350 people but he made his conclusions in relation to what he could and what he knew about and you'll be able to read that again and you'll listen to what I have to tell you about what the counsel had said in relation to that aspect of the case.

[17] Mr Chisnall submits that these comments of the Judge concerning the limitations of Dr Glue's evidence would have been taken by the jury as indicating the Judge had an unfavourable view about the plausibility of the defence case. That could have undermined the defence case, even though the Judge told the jury to disregard any apparent view of the facts that he might indicate. He claimed that the observations were of the kind described by this Court in *R v Hoko*:[2]

> [19] There is a point, however, when comments from a Judge, even accompanied by frequent reminders that factual matters are for the jury, so press the jury towards a particular finding that the essential fairness and balance are lost …

[18] Mr Chisnall submitted that given the centrality of Dr Glue's evidence to the issues in dispute, that "essential fairness and balance" referred to in *R v Hoko* was lost

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2 *R v Hoko* (2003) 20 CRNZ 464 (CA).

through the Judge's comments emphasising both the limitations of Dr Glue's inquiries and the relative rarity of observed cases of anterograde amnesia.

[19] A further point Mr Chisnall seeks to make in this part of the case rests on the additional evidence that he seeks to adduce in the form of an affidavit of Dr Glue. In the affidavit, Dr Glue claims the Judge made a significant error by emphasising the relative rarity of anterograde amnesia. He observed:

> In my opinion, the Judge made a significant mistake when he emphasised the relative rarity of this condition. Anterograde amnesia is the defining memory problem of benzodiazepines and zopiclone. The medical studies that have been undertaken in respect to the condition over the past 30 years demonstrate that anterograde amnesia is not rare at all. A comprehensive summary of zopiclone's clinical profile, including side effects is provided in the World Health Organization's 2006 summary from the Expert Committee on Drug Dependence (ECDD 2006).

[20] Later, after referring to various studies related specifically to the adverse effects of zopiclone on memory, he said:

> I confirm that in evidence I provided the "1 in 350" estimate that the Judge repeated in the summing up. However, this estimate was provided in relation to the more extreme effects that zopiclone can have — what I would describe as "complex" behaviours such as, for example, "sleep driving" or "sleep sex". These extreme manifestations are uncommon.
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> I would describe anterograde amnesia as a frequent, or defining side effect, of zopiclone. To repeat what I said at trial, it is a state where patients are awake but are unable to recall memories of events that occurred after taking zopiclone. To clarify, effects on memory of this type, which are discussed in the three papers I have referenced, above, are very common and to which, therefore, the "1 in 350" figure would not apply.

[21] Mr Chisnall submits that Dr Glue's evidence satisfies the three-fold admissibility threshold established in *Lundy v R*.[3] He concedes that the evidence is not fresh, as it simply refines and clarifies the opinion that Dr Glue gave at the trial. However, he submitted it was credible and cogent, and that in applying *Lundy v R* those are dispositive considerations. He contends that the evidence casts doubt on the safety of the verdicts, and consequently it is in the interests of justice to admit it.

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3 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

[22] The crux of Mr Chisnall's submissions is that the jury was not obliged to find that there was a reasonable possibility that R's use of zopiclone manifested itself in an uncommon "complex" form of anterograde amnesia or "sleep sex" for it to hold a reasonable doubt about guilt. While there had been a focus by the parties "on a more complex example on the anterograde amnesia continuum", the defence case was not dependent on the reasonable possibility there had been consensual sex. Another possibility was that R's fragmented memory about what was said and done after she took her medication gave rise to a "reasonable doubt" on the elements of consent and the appellant's reasonable belief in the same.

[23] We consider there are a number of difficulties with this argument. First, as Mr Murray for the Crown pointed out, Dr Glue in fact said a number of times in his evidence that anterograde amnesia as a result of taking zopiclone was uncommon. For example, he was asked in his evidence in chief to describe the possible side effects or adverse effects which could be caused by zopiclone. His answer was as follows:

> A. So in terms of short-term effects, a side effect can be that it doesn't work. Another possibility, and the most common side effects are that when people wake up in the morning, they feel groggy, they feel a bit hungover and that may be because of residual drug in the body. A less common side effect but which may be relevant in this case is a condition called anterograde amnesia. So amnesia is difficulty remembering things or inability to remember things and with anterograde amnesia, this is a condition where patients may appear to be awake, may appear to be interacting with people or objects around them but be unable to remember any of these things. It's — in the case of [Zopiclone], factors associated with anterograde amnesia include being, taking a tablet and then forcing oneself to stay awake. So not going to sleep having taken it can be associated with appearing to be awake but having no ability to retain memory. And the sorts of cases that have been reported are things that might appear for people to be sleep-walking, in which case they may appear to be groggy, sleep cleaning, sleep sex. I think there were 14 cases in the literature of situations where people have driven cars and been unable to remember the driving process.
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> Q. And so all of the matters that you referred to, the individuals have been subject to anterograde amnesia?
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> A. Correct, that they will have taken a sleeping pill and then the next day they'll either find that they've driven somewhere, which is an unusual case, or that they've engaged in sex. They may have got up and cleaned the house, they may have got up and eaten a meal and they simply have no recollection for these things having happened.

Q. And if someone, if an individual is suffering from this condition of anterograde amnesia, could you explain to us how they might appear to other people?

A. They may appear to be fully functional and rational. They may speak coherently, they may make good eye contact, they may be able to use objects. For example, if there's some sleep cleaning, they may be able to use cleaning materials appropriately.

Q. So just so that we're clear for the jury, doctor, when would a person who has taken [Zopiclone] potentially be affected by this condition, anterograde amnesia?

A. So in my estimate, it's going to be in the first, say, half hour to four hours. So while blood levels are at their highest. It's important to realise that this is a condition that happens uncommonly and the reports are generally from sort of notable clinical examples, so that they're reports that patients will make to their doctors. "Something happened last night, I don't remember doing it," and it'll get written up as a journal article. In where I work on an acute admission ward, we may see one or two cases in 12 months, so out of 700 admissions, where people will get up during the night and appear to do purposeless things. So it's — I wouldn't say that that's a scientific sample but it gives you an idea of it's still relatively uncommon.

[24] The tenor of this evidence was repeated in cross-examination, in the following passage:

Q. The adverse effect of [anterograde] amnesia is described as a rare adverse effect of Zopiclone, is that fair?

A. Yes, it's certainly very — it's uncommon. I don't think there's any good estimate of its incidence, and again, the only data I can look at to try and quantify this would be that on a couple of occasions a year in the inpatient unit we'll see patients who get up in the middle of the night and are moving around and talking, and doing things, and when they're questioned the next morning they have absolutely no memory. So, again, I think the, if we're talking about an unscientific incident, perhaps one in 350.

[25] In the circumstances, what the Judge said in his summing-up was an accurate reflection of what Dr Glue had said in his evidence. It appears that, perhaps because of the focus of the parties, Dr Glue considers his evidence has not been properly understood. However, as the emphasis of the case was on sexual activity that took place after R had taken zopiclone, it is unclear why the case is not properly seen as being in the "uncommon" category of complex behaviours which are not remembered. We agree with Mr Murray that, in these circumstances, it is difficult to see how the new evidence from Dr Glue is cogent in relation to the issues on appeal.

[26] As to Mr Chisnall's submission about the defence seeking to rely on R's unreliability as a witness because of memory impairment, it was inherent in the complainant's own evidence that she had a poor recall of the events constituting the rape. As to the possibility of consent, or the appellant's reasonable belief in consent, the narrative was very thin. We have already noted the appellant made no statement and gave no evidence that R had consented, or that he reasonably believed she was consenting. R's own evidence reported an assertion he made to her that she had "come on to him" and she also referred to the text exchange in which he claimed that he had asked her (presumably if she wanted to have sex). The assertion that she came on to him was not put to R in cross-examination. We do not consider that anything said by the Judge about Dr Glue's evidence would have altered the jury's assessment of that evidence.

[27] We are satisfied that the Judge's observations about Dr Glue's evidence did not have the quality criticised in *R v Hoko* of pressing the jury towards a particular factual finding.

[28] While we have discussed Dr Glue's affidavit for the purpose of considering this ground of appeal, in the end we consider it neither fresh nor cogent in the sense that would justify its admission. We decline leave to call the evidence accordingly.

[29] This ground of appeal must fail.

Reliability warning

[30] The second ground of appeal is that the Judge did not give a reliability warning under s 122 of the Act nor did he provide a standard direction on imperfect memory, the need for which was triggered by R's self-reported issues about difficulty recalling the events.

[31] It is correct that there was no explicit warning about the complainant's reliability. However, as Mr Murray submitted for the Crown, the taking of the prescription drugs and their possible effects on R were clearly ventilated during the trial. Further, the Judge commented on them in summing up. One of the major planks of the Crown case was that R had taken drugs to such an extent that she could not

consent to the activity and that issue was necessarily dealt with by the Judge in summing up. In addition, it was clear from the nature of R's evidential interview and her evidence at the trial that she had only a very sketchy memory of the incident which formed the basis of the charge of rape.

[32] At one stage, in addressing the defence that the sexual activity was consensual or the appellant believed on reasonable grounds that R consented, the Judge said:

> The complainant simply doesn't remember what happened therefore it was possible she consented. Her memory was fragmented but you can't be sure because she doesn't know what happened. That's for you to decide and grapple with, whether or not she didn't know because she was in such a condition that she didn't remember, whether that was the amnesia situation or not is a matter for you to grapple with.

[33] Later in the summing-up the Judge said:

> [39] As to the next heading the complainant's reliability. You've got to factor in her previous abusive and violent relationship when she had been, suffered from degrading activity from her previous partner. She was still recovering from it. You've got to look carefully at her diagnosed health issues and factor those in and again Dr Glue's evidence, it was submitted to you, particularly about memory impairment, was important.
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> [40] And finally, the [medication] aspect and the reliability of the defendant. Dr Glue was called and gave significant evidence and there was a careful analysis of that by the defence that I'm sure you will recall about why his evidence would indicate that there could have been amnesia. A number of reasons given why she didn't recall whether she'd given consent or not. Pay particular attention, the defence reminded you, about the time that the drugs took effect and place that in the context of the time, limited time period over which the actions had occurred. She may have been affected by anterograde amnesia and simply because of the fact she was groggy and that is not the same as unconsciousness. It was drug induced impairment but not sufficient that would preclude her from giving consent and relatively narrow window of time and groggy is not the same as being asleep. As I say, there was a careful analysis done by the defence in relation to Dr Glue's evidence which I'm sure you listened to carefully and you will be able to check up on the actual notes of evidence.

[34] This was not a case where in accordance with s 122(2) of the Act the Judge was *obliged* to consider whether to give a warning under subs (1). Rather, it was a case where the Judge was *empowered* to give a warning by s 122(1) if he was of the

opinion that any evidence given in the proceeding might be unreliable. In giving such a warning, the Judge would not be obliged to use any particular form of words.[4]

[35] In this case, the issues that might affect R's reliability as a witness were her admitted inability to recall the lead up to the oral sex and to recall the sexual intercourse, combined with the effect of the recreational and medicinal drugs she had taken. The potential causes of unreliability were clearly before the jury and we do not consider in the circumstances that there was any need for any further direction.

[36] We agree with Mr Murray that this case is readily able to be distinguished from *Bruce v R*, on which Mr Chisnall sought to rely.[5] In that case, the defence had not been permitted to lead expert evidence of the kind given in this case about the impact of intoxicants (alcohol and cannabis) on memory, and the trial Judge noted that a reliability warning would play the role that such evidence was otherwise intended to play.[6] This Court concluded that in the circumstances the warning given should have been fuller.[7]

[37] By contrast, in this case, the matters referred to in the summing-up (including the directions about the burden and standard of proof) would have done all that was required to focus the jury's mind on any relevant reliability issue affecting R. We do not consider that the Judge erred on this ground.

Demeanour direction

[38] In this part of the appeal, the appellant complains that the Judge emphasised the potential utility of demeanour in general observations he made near the outset of the summing-up. He told the jury that in considering the oral evidence that had been given they should:

> *… take into account not only what has been said but how it has been said because it is important and sometimes the demeanour of a witness can be a valuable aid in judging his or her reliability and credibility.* But demeanour

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4 Section 122(4).
5 *Bruce v R* [2015] NZCA 332, (2015) 28 CRNZ 150.
6 At [25].
7 At [26].

> only is one part of the whole process that you need to take into account when you are considering a particular witness. Demeanour really means the witness' conduct, bearing, behaviour, even their delivery and inflection. In short, anything which characterises the witness' mode of giving evidence and of course that doesn't appear in the written transcript. *So you will recall having seen the witnesses who have given evidence and that is a value judgement you've got to make.* So demeanour has some relevance in assessing credibility but it should not be the determinative or dominant consideration.
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> (Emphasis added.)

[39] Mr Chisnall focused on the passages we have emphasised in the quotation above. Shortly afterwards, however, the Judge gave a direction in the following terms:

> [5] And what you need to look at is an assessment of the credibility and reliability of a witness which is broadly based taking into account the evidence as a whole and such of the factors that may be relevant to the case. Demeanour of course may properly be taken into account but is best not considered in isolation but is only one factor in the broader assessment. And the broader assessment involves matters such as this, the consistency of the witness' evidence with what is agreed or shown by other evidence, the internal consistency of the witness, consistency with what the witness may have said on a previous occasion, and here I think there's an example of that with what the complainant said to the officer on the night, and then there was the evidential video recording, and consistency can be looked at in relation to comparing those two parts of the evidence. I think it was Detective Constable Pinfold who took down what the complainant had said initially on the night of the occurrence or the night after and then there was the evidential video that we saw played to us at some length because it was quite a lengthy one. So the credit of a witness is important and the inherent plausibility of the evidence is important, in other words, does it make sense and, where appropriate, consistency with any other documentary evidence that may be available.
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> [6] So you're not to jump to conclusions based entirely on how a witness has testified, looks can be deceiving. Giving evidence in a trial is not a common occurrence for many witnesses. It is for people like policemen who come along to Court and give evidence frequently or a doctor or even the other expert. They have different abilities, values and life experiences and there is simply too many variables to make the manner in which the witness testifies the only or most important factor in your deliberations.

[40] Directions in the terms set out in the last two paragraphs quoted above were consistent with this Court's judgment in *E (CA799/2012) v R*.[8] However, Mr Chisnall drew attention to observations made by the Supreme Court in *Taniwha v R* to the effect that the type of direction provided by the Judge in the italicised passages of the first

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

paragraph quoted above, about the value of demeanour, are misleading. Writing for the Court in that case, Arnold J said:[9]

> [47] Two things follow from what we have said. First, the references that judges sometimes make to the help to be obtained from observing demeanour or body language when determining credibility are likely to be misleading and are better avoided, for the reasons explained above.

[41] Mr Chisnall submitted that based upon the Supreme Court's reasoning in that case, Judge Treston's direction was misleading. He argued that what the Judge said may have led the jury to make an illegitimate or demeanour-based assessment of R's credibility.

[42] We do not accept that submission. First, although R's demeanour in giving evidence was mentioned in the closing address of Crown counsel and in the Judge's summing-up, we consider that overall what the Judge said was broadly consistent with the approach which this Court explained in *E (CA799/2012) v R*.[10] Second, the Judge adequately directed the jury on the need to consider their verdicts "calmly and dispassionately" and in an "almost clinical" way, avoiding feelings of prejudice against or sympathy for the complainant or the defendant. As was noted in *Taniwha v R*, such instructions reduce the risk that juries may place undue weight on demeanour.[11]

[43] Mr Chisnall submitted that this was the type of "he said/she said" case where demeanour was likely to assume greater importance because of the absence of other meaningful credibility assessment factors such as inconsistency or any inherent implausibility in R's account. The risk of a miscarriage of justice because of illegitimate reasoning based on demeanour was consequently greater. The considerations we have already mentioned answer this concern. In any event, in the absence of any statement or evidence from the appellant, there was of course no risk of any unfavourable comparison being drawn between him and R on the basis of demeanour.

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9 *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116.
10 *E (CA799/2012) v R*, above n 8, at [43] and [51].
11 *Taniwha v R*, above n 9, at [51].

[44] For these reasons, we have concluded that this ground of the appeal must also fail.

[45] That means that none of the issues advanced in support of the conviction appeal has succeeded and that appeal will be dismissed.

The sentence appeal

[46] The Judge sentenced the appellant to concurrent terms of eight years' imprisonment on the two sexual violation charges, with a cumulative term of one and a half years for the arson.

[47] He took a starting point of eight years for the sexual offending, placing it in the overlap between categories one and two in *R v AM*.[12] He referred to R's vulnerability, being "subject to the effect of drugs and sleep"; breach of trust; and the fact that the offending had happened in her home. He considered there were no relevant mitigating factors stating:[13]

> … I have got to say that despite the earnest submissions made by your counsel, that there is no real discount available for that sexual offending. I accept your age, I accept your mental difficulties but of course, the victim had to go through the trauma of a trial and no real remorse for her has been demonstrated in any of the matters that I have heard about.

[48] The Judge took a starting point of two years and four months for the arson. He considered that there should be a full discount of 25 per cent for the guilty plea, and eight per cent for the appellant's mental health and youth.[14] Applying that discount (a total of 32 per cent) the Judge arrived at a final sentence for the arson of 18 months' imprisonment. He directed that that sentence be served on a cumulative basis. He observed:[15]

> I understand that because of your age that the sentence will be a burden upon you but that is as it may be, because of the serious nature of this offending.

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12 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
13 *R v [B]*, above n 1, at [30].
14 At [32].
15 At [32].

[49] The principal issue advanced on appeal turns on the fact that the Judge allowed no discounts on the sexual charges for the appellant's youth and mental health issues. Mr Chisnall submitted it was "artificial" to provide a modest discount for youth and mental health factors in respect of the arson, but not in respect of the sexual offending. The appellant was only 21 at the time of sentence, and the offences were committed relatively close in time to each other. In the circumstances, logic dictated that the issues identified in the psychological report, and the appellant's receptiveness to rehabilitative and reintegrative measures were relevant on both sets of charges.

[50] For the Crown, Mr Murray submitted that the essential question is whether the overall sentence of nine and a half years' imprisonment was manifestly excessive for a serious sexual assault and an unrelated serious arson. He submitted that was not the case. Further, the Judge had not erred by not giving discounts in respect of the appellant's age and mental health difficulties insofar as the sexual charges were concerned. At the age of 20 (and approaching the age of 21 when he committed the arson) the appellant was at the upper limit of the age where credit for youth could conceivably be expected. While accepting that the appellant has some mental health issues, they were not causatively related to the sexual offending. Therefore it could not be said that the Judge erred by not taking this into account in respect of the sexual offending.

[51] The sexual offending and the arson were separated by a period of a little over eight months. The psychological report on the basis of which the Judge allowed a deduction in the sentence that would otherwise have been imposed on the arson was prepared for the purposes of assessing whether the appellant was fit to stand trial. The report writer concluded that he was, although describing him as a "twenty year old male with a history of mental health problems, substance abuse and aggressive and destructive behaviour and other antisocial behaviour some of which have led to criminal convictions." The author noted that after several years of drug abuse at the age of 18, the appellant had first presented to mental health services in the context of "life stressors with low mood, suicidal thinking, psychotic symptoms" for which he was hospitalised and successfully treated over several weeks in hospital.

[52] It is possible to infer from the report as a whole that the author was sceptical about the extent of the appellant's mental health issues, but there is nothing in the report to suggest that the various problems discussed had arisen in the period between the sexual offending and the arson. Consequently, if there was to be a discount, there was no apparent reason for distinguishing between the arson and the sexual offending. Similarly, if the arson was to attract a discount related to the appellant's youth, it is not apparent why there should not also have been a discount in respect of the sexual offending.

[53] As has been seen, the Judge expressed the discounts afforded in percentage terms, allowing eight per cent for mental health and youth. We see no reason why a similar approach should not be taken in respect of the sexual offending. With some rounding, this would reduce the sentence on each of the sexual offences to seven years four months' imprisonment, to be served concurrently. Overall, the effective sentence would be eight years' ten months imprisonment.

Result

[54] The application to adduce further evidence is declined.

[55] The appeal against conviction is dismissed.

[56] The appeal against sentence is allowed.

[57] The sentences imposed on the charges of sexual violation by unlawful sexual connection and sexual violation by rape are in each case set aside and sentences of seven years four months' imprisonment, to be served concurrently, are substituted. The sentence of 18 months' imprisonment imposed on the arson charge by the District Court is to be served cumulatively on the sentences on the sexual offending.

[58] To protect the identity of the complainant, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Respondent