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 SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA393/2017
[2019] NZCA 58

BETWEEN	P (CA393/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	2 October 2018
Further submissions:	5 March 2019
Court:	Gilbert, Mallon and Dunningham JJ
Counsel:	Appellant in person M H Cooke for Respondent
Judgment:	19 March 2019 at 11 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The application to adduce further evidence is declined.

C The appeal against conviction is dismissed.

D The appeal against sentence is dismissed.

E 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 Mallon J)

Introduction

[1] The appellant was convicted of sexual violation by unlawful sexual connection[1] and sexual conduct with a person aged 12 to 16 years[2] following a jury trial in the Gisborne District Court before Judge Cathcart. He was sentenced to four years' imprisonment. He appeals against his conviction and sentence.

[2] His conviction appeal is on the basis that his trial counsel, Mr Phelps, inadequately pursued inconsistencies in the complainant's evidence. He also contends that evidence relevant to his defence, primarily concerning the family dynamics and the complainant's ongoing contact with him, was not sufficiently advanced.

[3] The appellant's sentence appeal is on the basis that his sentence was manifestly excessive. He also contends that he should not have been given a first strike warning.

[4] The appeal was filed one day out of time. In the circumstances, it is appropriate that we grant an extension of time for the appeal.

Background

[5] The appellant faced trial on five charges relating to one complainant. He was discharged on charge three during the trial.[3] The jury returned guilty verdicts on charges one and five and not guilty verdicts on charges two and four (charge four being an alternative charge to charge five).

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1 Crimes Act 1961, ss 128(1)(b) and 128B [maximum penalty 20 years' imprisonment].
2 Section 134(3) [maximum penalty seven years' imprisonment].
3 *R v [P]* [2017] NZDC 3063 at [8].

[6] Charge one concerned sexual violation by unlawful sexual connection offending. At sentencing the Judge described this offending as follows:[4]

> [3] With respect to the unlawful sexual connection, that occurred sometime between 1 January 2011 and 31 December 2012 at a time when it is accepted that the victim was eight years of age. It occurred when the family was living at the address in Hamilton. She was sleeping in the lounge of that house. You, her mother, and aunty had been drinking outside. You went into the lounge where she was sleeping on a mattress on the floor and lay down next to her. She moved away from you and went back to sleep. She awoke and saw you still next to her. You put her on top of you. She tried to roll off you. But you held her there trying to take her clothes off. You then laid her on her back. You put your middle finger inside her vagina and started pushing it in and out. She began to cry and tried to scream, but could not, she said. She slapped you on the face and threatened to break your fingers. It is said that you laughed at her. She said she was "going to tell". You said to her that no one would believe her and they would think she was attention-seeking. She said that you threatened to bash her mother. Her position was that because of that threat she did not tell anyone.

[7] Charge five was for sexual conduct with a person aged 12 to 16 years. The Judge described this offending as follows:

> [4] The other separate offence occurred sometime later between 1 October 2014 and 31 December 2014. You, the victim, her mother and two siblings were living at an address in Gisborne. You and the victim's mother were trying to reconcile after a short period of separation. You were visiting them at that Gisborne address.
>
> [5] The victim, her younger sibling, and you were sitting on a couch watching television. The victim said that she was trying to squash up on the couch because she did not want you near her. She eventually went to sleep. She awoke to find you with your hand down her pants between her legs, touching her on the outside of her vaginal area. You told her that if she told anyone she would be sorry and would not see her family again. ...

[8] Charge two was for sexual conduct with a child aged under 12.[5] It alleged that between 1 January 2011 and 31 December 2012 (the same timeframe as charge one) at Hamilton the appellant had committed an indecent act on the complainant by touching her genitalia with his hand. The appellant was found not guilty of this charge.

[9] Charge three alleged a similar indecent act as charge two. This was alleged to have occurred on a second occasion in Hamilton between 28 June 2011 and 11 July 2011. The appellant was discharged on this charge after the complainant

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4 *R v [P]* [2017] NZDC 13154 [Sentencing notes].

5 Crimes Act, s 132(3) [maximum penalty 10 years' imprisonment].

accepted under cross-examination that the appellant had not touched her genitalia on this occasion.[6]

[10] Charge four alleged sexual conduct with a child aged under 12. It was laid in the alternative to charge five due to uncertainty about how old the complainant was when the offending occurred. In closing, the Crown's position was that charge five was the more appropriate one because the complainant said she was 12 when the incident occurred. The appellant was acquitted on charge four.

[11] The defence was that none of the offending had occurred. The defendant gave a police DVD interview denying any of the alleged activity had taken place. At trial, the defence was focussed on challenging the credibility and reliability of the complainant.

The complainant's evidence

The issue

[12] The complainant was 14 years old at the time of the trial. Her evidence in chief was given by playing her police DVD interview. That interview took place two years earlier, when she was 12 years old. However, the sound quality of the DVD recording was poor and so her evidence was supplemented with questions from the Crown. In supplementing her evidence some elaboration and some inconsistencies in the narrative arose. The appellant contends his trial counsel did not make enough of these inconsistencies in cross-examining the complainant and in addressing the jury.

The law

[13] When trial counsel's conduct is criticised, the ultimate question is whether the conduct of the trial has resulted in a miscarriage of justice. In considering this question, there is a distinction between fundamental trial decisions and those which involve judgement. The extent to which matters should be covered in cross-examination or in a closing address are ones of judgment.[7]

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6 *R v [P]*, above n 3.
7 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.

[14] Cross-examination of vulnerable witnesses, such as a complainant in a sexual case, requires particular judgement. The evidence must be tested, but there is a risk of alienating the jury by subjecting a young and vulnerable witness to what may be viewed as unnecessary brow-beating. A degree of sensitivity is required. There is also a risk that, with further questioning, the complainant will provide further evidence harmful to the defence.[8]

[15] Because the counsel conduct at issue here concerns questions of judgement, and providing Mr Phelps put the appellant's defence and adhered to any particular instructions given on fundamental decisions, the appellant's appeal on this ground can only succeed if Mr Phelps' decisions were not ones a competent lawyer would have made and if this could have affected the outcome.[9]

What happened at trial

[16] On charge one the complainant's evidence on the central allegation was consistent. The touching had involved digital penetration of her vagina in the lounge after a party when the appellant had been drinking. There were however some inconsistencies on some matters. Specifically:

(a) In her DVD interview she described the appellant putting his "finger" in her vagina three times whereas in her supplementary evidence in chief she said he put his "fingers" in her.

(b) In her DVD interview she said he had a bottle of beer with him and he spilt it. In her supplementary evidence in chief she said she could smell alcohol but the appellant did not have anything with him when he lay down beside her.

(c) In her DVD interview she said there had been heaps of people at the party but they had all gone home when the appellant came inside. Later in that interview she said there was loud music and she could hear

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8 *S (CA361/2010) v R* [2013] NZCA 179 at [60]; and *Hall v R*, above n 7, at [197].

9 *Hall v R*, above n 7, at [77] and [126]–[127]; *Z (CA589/2011) v R* [2013] NZCA 118 at [30]; and *W (CA272/2017) v R* [2018] NZCA 11 at [15].

bottles being thrown in the bin and the appellant was laughing and she did not think he stopped laughing when he started touching her. She was crying but she did not think anyone could hear her because of the loud music.

(d) In her DVD interview she said she was scared and crying, told him she would break his fingers and slapped him on the cheek, and he said that if she told anybody she would be sorry and would not be seeing them again and then he laughed and walked away. In her evidence in chief she said the appellant had said: "Do you like it?" and "You can't tell anyone" and when she woke up in the morning he was gone.

[17] The appellant's trial counsel put questions to the complainant suggesting matters which made this offending unlikely to have occurred. During the party there were "heaps" of people coming and going in the house (the complainant agreed with this). During the night her mother would often need to get up to tend to her baby brother (the complainant agreed with this).

[18] The complainant was cross-examined about the discrepancy in her DVD interview and evidence in chief about how many fingers the appellant had used. She was first asked how good her memory was. She said it was a "bit mixed up". The cross-examination proceeded as follows:

Q. And you say that he actually put fingers in your vagina?

A. Yes.

Q. More than one?

A. Yeah.

Q. So that's a bit different to what you showed the interviewer on the video, isn't it?

A. Yeah.

Q. You said one finger, didn't you?

A. Mmm.

Q. So why – can you explain why you're telling us that it's more than one today now?

A. Refreshed my memory watching the video.

Q. Well you said one finger and now you say fingers. Do you see how that's a little bit sort of inconsistent?

A. Yeah.

Q. Do you actually have any memory about whether it was one finger or two fingers? Or more?

A. It'll be like one, then two, then one, then two.

Q. So what you're telling us now, you say that's the truth of what happened?

A. Yeah.

Q. Rather than on the video?

A. Yeah that's still the truth.

[19] This topic was revisited in re-examination. The complainant was asked what she meant about there being "one, then two" fingers in her vagina. She said the appellant would put one finger in, then two, then one at different times. She did not see the fingers going in but she could feel it.

[20] The complainant was also cross-examined about what the appellant was alleged to have said to her:

Q. And he was laughing at some stage you say?

A. Yeah, 'cos I told him that I'll tell.

Q. And he basically said to you, "No one will believe you," is that correct?

A. Yeah, 'cos I'm a little girl.

Q. You told us today that he also said something to you, "Do you like it?"

A. Yeah.

Q. That wasn't something you said on the video was it?

A. No.

Q. So where's that little nugget of information come from?

A. The first time.

Q. Right okay, so – I mean it puts quite a different spin on it, doesn't it?

The Court:

Q. Do you understand that question, [T]?

A. Yeah.

Q. What's your answer?

A. I don't have one.

Cross-examination continues: Mr Phelps

Q. So would you agree with me that that's the first time that you've ever said that [P] said, "Do you like it?"

A. No I told my mum that he said that to me.

Q. You told your mum that he said that to you?

A. Yeah.

Q. You just didn't mention it to the DVD interviewer, is that right?

A. No, I didn't think it was relevant.

Q. You didn't think it was relevant?

A. Mmm.

Q. If you think really carefully about things, would you agree that this incident did not happen?

A. But it did happen.

Q. And no matter how many times I ask you, in so many different ways, you'll tell me that it happened, right?

A. Yes it happened.

Q. And am I right in thinking that you didn't tell anyone after this because you didn't think they'd believe you?

A. Yeah, because of what [P] said.

Q. And that was, "No one will believe you, you're just a little girl"?

A. Yeah and, "They'll think you're seeking attention."

[21] The complainant was also tested more generally about her memory and why she had not told anyone earlier about what had happened. She accepted she was not really sure how long ago before she went to stay with her grandmother that this incident happened. She accepted she had not told her grandmother about this even though she was close to her grandmother. She accepted her grandmother would have been supportive of her.

[22] Charge two concerned an occasion described by the complainant in her DVD interview when she was living with her grandmother and she went to Hamilton on holiday. She was sleeping on her mother's bed. When she woke up the appellant's hand was on her "private". The complainant's evidence of this central allegation was consistent. Again, however, other aspects of the narrative were not.

[23] For example, the complainant gave a slightly varying account of where the appellant was when she first went to her mother's bed. The complainant was cross-examined about this:

> Q. And on the video you've said that [P] was in the sitting room and you thought that he'd gone to sleep?
>
> A. Yeah.
>
> Q. Would you have been able to see him from the sitting room from your mum's bedroom?
>
> A. No.
>
> Q. So is that why you told us today that he was in the kitchen?
>
> A. At first he was in the kitchen, I could see him from the room 'cos the table was sorta across the hall from the door and I could see him sitting on the table. Went in there, had a Milo with him, went back to bed, got up again and he was sitting on the couch, on the seat thing.

[24] Counsel also put to her that the event had not occurred:

> Q. And you say that on this occasion you woke up and [P] is asleep, right?
>
> A. Yeah.
>
> Q. And his hand is on your privates?
>
> A. Yeah.
>
> Q. That just didn't happen, did it?
>
> A. But it did.

[25] In the witness box the complainant had also become confused about whether this alleged incident had happened when she was visiting from Gisborne or whether it was later when the family were in Hamilton for the funeral. As described by the complainant in her DVD interview, the incident alleged when they were in Hamilton for her aunty's funeral was the subject of charge three (not charge two).

The charge three incident, as described in the DVD interview, involved the complainant falling into a deep sleep on her mother's bed and waking up with no clothes on and the appellant lying next to her. In the witness box the complainant also confused the alleged third incident with a different occasion when she alleges she woke up to find the appellant had taken off her clothes. She said this had happened in Hamilton and happened a long time after her aunty's funeral.[10]

[26] Mr Phelps cross-examined the complainant about her confusion between the second and third incident:

> Q. Yeah, and now on the DVD you said that [P] came into the room and was talking to you and calling you names?
>
> A. Yeah.
>
> Q. And that was all that he did, right?
>
> A. Yeah.
>
> Q. Then you woke in the morning and you didn't have clothes on?
>
> A. No.
>
> Q. So in your interview you didn't talk about any hands on the privates, did you?
>
> A. No.
>
> Q. But today you talked about hands on the privates, didn't you?
>
> A. Yeah, and that was before that incident.
>
> Q. Okay. So did you just get a little bit confused and you were talking about the second incident?
>
> A. Yeah, I think I was confusing myself.

[27] Returning to the third incident:

> Q. Yeah, so just if I make it clear, on the third time around at [T's Aunty's]–
>
> A. Yeah.
>
> Q. – the funeral, the only thing that happened that you say is that [P] came in and said some things to you?

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[10] In the DVD interview the complainant mentioned another occasion but did not provide any detail and this was not the subject of a charge. This was discussed with counsel and the Prosecutor confirmed he would not make anything of this further allegation: see *R v [P]* [2017] NZDC 2959.

A. Yeah.

Q. And the next thing you remember is waking up in the morning?

A. Yeah, and no clothes.

Q. Was it that time or was it the second time, that you ran into your nan's room and stayed and jumped into bed with her – second time?

A. Yeah, the second time 'cos the third time I know I stayed in there till the morning.

[28] On charges four and five the complainant's evidence on the central allegation was consistent. The complainant was watching television with the appellant in the lounge in Gisborne. They were watching a cooking show on television. It was 4 am and she was trying not to fall asleep. She was waiting for him to fall sleep and for a cartoon to come on. She ended up falling asleep and when she woke up the appellant had his hand down her pants. She got up and walked away.

[29] In her evidence in chief the complainant was able to clarify when this had occurred. She remembered it was after they had been in Hamilton for her 12th birthday and they were living in Gisborne in the new house. They had not finished moving their things around the house and she was sleeping on a mattress in the sitting room. She said that, after waking up to find the appellant's hands down her pants, she got up and went to her mother's room where she cried herself to sleep on the floor.

[30] The complainant was cross-examined about the number of seats in the lounge. She accepted there were plenty of seats but this had happened on the mattress in the lounge. She said she had been trying to stay up all night. There was a cartoon on at 6 am but she could not stay awake any longer.

[31] It was put to her that the offending did not happen:

Q. Is this the time where you wake up on the mattress with no pants on and his hand touching you?

A. No, they were – oh yes, they weren't on but they were just pulled down.

Q. And [P's] asleep, is that right?

A. Yes.

Q. And so you get the hell out of there, is that the gist of it?

A. Yes.

Q. Now that didn't happen did it?

A. Yes it did.

Q. No touching whatsoever happened of a sexual nature?

A. Yes there was touching, his – well why would he just rest his hand on my vagina for no reason? That's just stupid.

[32] These matters, together with the inherent unlikelihood of the allegations, were the focus of the defence closing address. Mr Phelps said the evolution of the complainant's evidence was a troubling feature of the case. He emphasised that the complainant was a bright girl and the time frame between the events, her DVD interview and her evidence in chief was not extensive. He made the point that the complainant had elaborated on and altered her description of an allegation that was not the subject of a charge.

[33] As to charge one, Mr Phelps referred to (and repeated the point about) the change in the evidence about whether the appellant had put one or two fingers in her vagina, and her "amplification" that the appellant asked her "Do you like it?". He also said:

> There were lots of things that she missed out about the incident when she was asked about it the second time. No mention of the beer bottle. There was no mention of any putting him in on top of her that she had said on the DVD, no mention of holding her down and forcibly penetrating her.

[34] Mr Phelps referred to the complainant's changing account of when the second incident took place. He said she had also changed whether the second occasion had happened in the early evening or when it was really late. On the fifth charge he said she had changed what she said happened in the aftermath, from locking herself in her room to going into her mother's room and crying herself to sleep, which her mother did not corroborate. He submitted there were also inconsistencies as between the complainant and her mother about when they had moved to their new house and whether there was a three-seater couch in the lounge. He suggested the complainant was lying about these things to explain why she alleged the appellant indecently assaulted her in the lounge on a mattress.

[35] Mr Phelps submitted there were other inconsistencies. He referred to the contrast in her DVD interview when she said the appellant had been searching the internet about sexual abuse in order to show her that no-one would believe her because lots of men had gotten away with it; whereas she accepted in the witness box that it was she who had searched the internet for information on sexual abuse.

[36] Mr Phelps made other submissions about why the jury should not be sure the complainant was telling the truth. He described her evidence about being warned in her dreams about the appellant by her deceased biological father as raising alarm bells about her reliability. He suggested to the jury there was a problem with the alleged dates of the offending, pointing out the complainant's claim that the offending happened when she was 10 years old did not fit with the evidence that she was not yet ten by the time of her aunty's funeral by which stage the first three incidents were said to have occurred.

[37] Mr Phelps also made submissions about the allegations being inherently unlikely. This included submissions that: on all the occasions there were others around so the risk of detection was enormous; the appellant was good to the children and he had no previous history of this kind of offending and he maintained contact with; her mother had not noticed any change in the complainant's behaviour; the second and last incidents involved a "nonsense and farcical" contention that the appellant had fallen asleep with his hand down her pants or on her privates; and the implausibility of the complainant being allowed to stay up all night to watch a cartoon.

[38] He contrasted the complainant's credibility with the appellant's DVD interview. He submitted his interview revealed a truthful person who "genuinely can't reconcile the allegations with the fact they are spending time together after them".

Our assessment

[39] In relation to the first charge, the appellant submits Mr Phelps should have cross-examined the complainant on her inconsistent evidence about whether the appellant was holding a beer and spilt it, or whether he was not holding a beer but she could smell alcohol. This was a matter of judgement for Mr Phelps as to which inconsistencies to cross-examine on and which to raise in his closing address. There is

no risk of a miscarriage of justice occurring merely because he raised this particular inconsistency in his closing address rather than putting it to the complainant in her evidence.

[40] The appellant submits Mr Phelps should have cross-examined the complainant about the inconsistency of her DVD account of the first incident when she said "So then I went to my mum. And then I told him 'I'm telling mummy' and he said 'no you're not' …". He also submits that the complainant's evidence is not consistent with being scared because of threats he is alleged to have made. Again, this was a matter of judgement. These were not strong points for the defence. Some minor variation in recounting the sequence of past events is common, as is the fact a complainant may continue to seem comfortable around a person who has sexually abused her when that person is a family member.

[41] The appellant submits Mr Phelps should have made something of the complainant's evidence that the alleged digital penetration felt "yuk". The appellant considers this raised alarm bells because it would have been sore and she would have been in pain and complaining about this. We do not accept there was anything to be made of this point by Mr Phelps. The complainant was somewhere between eight and ten when this happened and "yuk" is a perfectly understandable description of how she felt about it.

[42] The appellant submits Mr Phelps should have made more of the complainant making "lie after lie". Here, he refers to the complainant saying that after the first incident the appellant asked her "Do you like it?". He submits more should have been made of the complainant saying she did not have an answer to why she had not said this in her DVD. However, Mr Phelps did in fact pursue this further as the quoted extract of this exchange shows.

[43] The appellant submits Mr Phelps should have made more of the complainant's response in cross-examination that she was not sure how long after the first incident it was that the second incident occurred. We do not accept this submission. The complainant had already demonstrated she was confused about timing and this was referred to in the closing addresses on both sides. Mr Phelps exercised judgement

in deciding how many questions to put to the complainant and what to include in his closing address about this. His closing address also made the point that the complainant's evidence was unreliable about when the events occurred because she could not have been 10 years old when the first three incidents were alleged to have occurred.

[44] In relation to the fifth charge, the appellant considers Mr Phelps should have put to the complainant and addressed the jury about whether she could have been waiting up for cartoons when at that time there would have only been infomercials on. They did not have Sky television. We do not accept this submission. There is no evidence as to what may have been on the television in the early morning if the complainant had been able to stay awake past 4 am. In any event, Mr Phelps submitted to the jury that the whole scenario, including the idea of being allowed to stay up all night, was very unlikely. It was a matter of judgement whether it was necessary to go further to ask what cartoons would have been on and when.

[45] The appellant submits more should have been made of the complainant's DVD evidence in relation to this last occasion that when she woke up the appellant "wasn't doing anything 'cause he fell asleep". However, this answer was preceded by the complainant saying that she had woken up with the appellant's hands down her pants and his hand between her legs. And, Mr Phelps did make the forceful submission in his closing address that it was very unlikely that the appellant would fall asleep if he was indecently assaulting the complainant.

[46] We therefore conclude there was no counsel error as alleged. The appellant's defence was put. The decision as to how the cross-examination was to be approached and what to concentrate on in the closing address were within "the province of counsel who is best placed by dint of trial experience to determine the most effective approach in any given case".[11]

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[11] *W (CA272/2017) v R*, above n 9, at [15].

Other topics for cross-examination

The issue

[47] The appellant submits there are other matters that should have been advanced. These concern: an alternative theory relating to charge five; the complainant's behaviour toward the appellant; and reasons why the complainant may have made up the allegations. In support of some of these he seeks to proffer additional evidence.

The law

[48] As above, topics for cross-examination and the extent to which they should be pursued are matters of judgement for trial counsel. To the extent that these grounds of appeal rely on evidence not adduced at trial, such evidence may be considered on appeal subject to the controls of freshness, credibility and cogency.[12] As the evidence the appellant seeks to rely on concerns matters known to him at the time of the trial, our focus is on whether the evidence is of real relevance to the issues at trial such that it might reasonably have led to a verdict of not guilty.[13] That is unlikely where the evidence revisits an issue explored at trial without providing a different basis for determining that issue.[14] For reasons set out below, we do not consider the additional evidence meets the test for admissibility and accordingly the application to admit it must be declined.

Alternative theory

[49] The appellant submits Mr Phelps could have made more of the possibility that the complainant mistook her brother's hand for his. He referred to the complainant's evidence that her brother is a hot sleeper. He purported to give evidence on the appeal that it is like a war zone sleeping next to the boy as he punches and kicks in his sleep and ends up the wrong way in bed or out of bed altogether.

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12 Criminal Procedure Act 2011, s 335; *R v Bain* [2004] 1 NZLR 638 (CA) at [22] (later approved by the Privy Council in *Bain v R* [2007] UKPC 33 at [34]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

13 *Redeemed v R* [2013] NZCA 61 at [20].

14 *R v A* CA 508/04, 28 November 2005.

[50] The appellant's elaboration of the complainant's evidence about this was not before the jury. However, there is no counsel error in Mr Phelps not pursuing this line with the complainant. It is a matter of judgement what questions to put to the complainant. The key defence line was that all of the incidents were unlikely scenarios. The rather far-fetched suggestion that the complainant may have mistaken her brother's hand inside her pants for that of the appellant's hand was unnecessary to advance that defence.

The complainant's motives and behaviour

[51] The appellant contends the complainant has made up the allegations because she was mirroring her mother's behaviour. He says the complainant's mother used to accuse him of having an affair and she would say "yeah, you like girls eh, you like young meat" when the complainant or teenage girls walked past him. He says he told Mr Phelps this and showed him text messages but Mr Phelps told him it was irrelevant. We can well understand why Mr Phelps would not have wanted to call evidence of this kind. Its probative value was low and it was accompanied by the risk that it would unfairly prejudice the appellant in the eyes of the jury.

[52] Moreover, the family dynamics were before the jury in a less prejudicial way than this. The cross-examination covered that the complainant did not like the appellant. The complainant confirmed she hated the appellant when he first started seeing her mother. She agreed she later started calling him "dad" because her brother was calling him that. The cross-examination also covered the fact that the appellant and the complainant's mother argued a lot and that was one of the reasons she had gone to live in Gisborne with her grandmother.

[53] Additionally, the complainant's mother gave evidence that her relationship with the appellant was "on-and-off". She agreed with the description it was a "love hate" relationship and she decided to move back to Gisborne because the relationship was abusive and it was unhealthy for her and the children. The appellant's DVD interview confirmed the mother's evidence. He said there were a lot of arguments during his relationship with the complainant's mother. Most were about her regular accusations that he was cheating on her. She would make these

accusations in front of the kids. He moved out a few times because of the arguments and accusations.

[54] The appellant submits Mr Phelps should have made more of the evidence that the complainant was not acting like a victim and was behaving normally. However, this point was advanced on the appellant's behalf. The complainant's mother gave evidence that the complainant grew to hate the appellant and started saying "I'm going to tell my family what you've done [P]" and "I'm not sleeping by him". She would ask the complainant what the matter was but the complainant would not say. Mr Phelps put to her the inconsistency of this evidence with her statement to the police that she "never picked up on any unusual behaviour at all. [The complainant] and [the appellant] were good. There [were] no signs that anything was wrong between them". She was pressed on why she said that when her evidence at trial was the complainant did have issues with the appellant. She was pressed on whether her evidence was truthful. She said that she did not want to believe her husband had been molesting her daughter but looking back she saw with a clearer vision now. It is difficult to see how pressing this point any further could have assisted the appellant and Mr Phelps was entitled to exercise judgement to leave his cross-examination of the mother on this topic there.

[55] The appellant contends more should have made more of the on-going contact between the complainant and her mother and him and her wish to move to the town where he lived. He acknowledges this was touched on but says more could have been made of it. In support of this submission the appellant provided a copy of an undated Father's Day card and an undated Christmas card from the complainant in which she described the appellant as "orsum" and gives him her love.

[56] The appellant also prepared an affidavit and provided a letter from his flatmate and a Police Family Violence report. These provide details of a visit from the family after the charges had been brought. The thrust of this evidence is that the mother's behaviour was difficult; the complainant was her old self, helping with the cooking and cleaning and so forth and, the appellant says, she apologised to him "for all the crap"; the complainant's mother's behaviour led to the police being called; and the police allowed the complainant and the rest of the family to stay that night even

though it was in breach of the bail conditions because they knew the problem was with the mother and not him.

[57] The appellant says he discussed with Mr Phelps the ongoing visits from the complainant and the incident when the police were called. He says he told Mr Phelps the allegations the complainant's mother made to him may have played a part in how the complainant's allegations arose. He also told Mr Phelps he had evidence from family friends and neighbours who advised the appellant to end his relationship with the complainant's mother. He showed Mr Phelps' messages on his phone. He says that Mr Phelps did not think the messages would help and said he did not know how helpful it would be to press this issue given it involved a breach of the appellant's bail conditions.

[58] Mr Phelps, who provided an affidavit for the appeal, said he was aware the family had come to stay with the appellant after the allegations had been made. He would have spoken to the appellant's flatmates if the appellant had asked him to do so. However, he considered he had the made the point about the complainant's ongoing contact with the appellant and he is not sure how helpful it would have been to press the issue of the appellant breaching his bail by associating with the complainant and her mother.

[59] We consider the course Mr Phelps chose to take on this issue was reasonable and appropriate. In cross-examination the complainant accepted there were several occasions when the appellant visited her and when she and the family visited him when they were living in Gisborne. This was both before and after she had disclosed the offending to her mother and the police. She accepted there were no issues between her and the appellant but explained that her mother had said there were to be no "negatives" around the new baby. She agreed she wanted to live in Hastings (where the appellant lived), but this was because she wanted to be near her uncle, not the appellant.

Letter from his sister

[60] Another topic at the trial concerned the circumstances in which the complainant had disclosed the alleged offending. She gave evidence that the first

time she told anyone about what had happened was a couple of months after this fourth occasion. She told a friend first, then the appellant's sister, then her mother. Mr Phelps put to the complainant that she had made the allegations, using her research on sexual abuse to do so, to get extra attention and because she did not like the appellant.

[61] The appellant said he had a letter of support from his sister. He said that in this letter, contrary to the complainant's evidence that she told his sister about the abuse, his sister says she did not. That letter has not been produced. Mr Phelps confirmed in his affidavit that the appellant had asked him to interview his sister. Mr Phelps said he did interview her and formed the view that her evidence was unlikely to be helpful to the appellant. He discussed this with the appellant both in advance of trial and during trial. In these circumstances, no counsel error is established on this topic.

Final comment

[62] Mr Phelps' practice is to obtain written instructions from his clients prior to the commencement of any trial. He did this with the appellant. This covered a number of matters. It included an acknowledgment from the appellant that he had fully discussed the evidence against him and that he was happy for Mr Phelps to conduct the trial "in the way that he considers to be in my best interests and I leave the tactics to be used up to him". The appellant also provided written confirmation of his instructions that he did not wish to give evidence and he did not want to call evidence.

[63] Mr Phelps said it is his practice when he is nearing the end of cross-examination to attend to his client and clarify whether there are other issues that need to be raised. While he has no recollection of whether he did this here, he says there is no reason why he would not have done so.

[64] The appellant also provided an acknowledgement of the conduct of his defence while the jury were deliberating. This acknowledgement stated:

> …
>
> (ii) The case has been conducted in accordance with my instructions.

(iii) The witnesses have been cross-examined in accordance with my instructions and I am pleased with the way that Mr Phelps has cross-examined the witnesses.

(iv) The closing address has been conducted in accordance with my instructions and all matters have been raised that I would want raised. I am pleased with the way that Mr Phelps has closed to the jury.

[65] The appellant now says he was stressed and anxious, did not recall signing some of these documents and suggested to Mr Phelps he should give evidence. We have no doubt that the appellant was feeling stressed and anxious. However, Mr Phelps has described the careful way he explained to the appellant the documents he was signing. Moreover, the appellant's signature to these documents is consistent with our review of the trial record. In our view, the appellant was well served by competent and experienced trial counsel, through whose efforts the appellant was discharged on one count and found not guilty of another. We are satisfied there is no risk of a miscarriage of justice arising as a result of the way Mr Phelps conducted the trial.

Sentence appeal

[66] The appellant initially submitted that his sentence was manifestly excessive on the basis of a case Mr Phelps had relied on which was more serious than his offending. In further submissions filed shortly after the appeal hearing the appellant advised he was no longer pursuing this. Instead, he submits he should not have received a first strike warning when this was his first offence. However, the issuing of a first strike warning is mandatory for the offending on which the appellant was convicted. The giving of the mandatory warning was not in error and is not a matter which can give rise to a manifestly excessive sentence.

Further submissions

[67] At the appeal hearing we granted leave to the appellant to file further material in support of his appeal. In accordance with this leave the appellant submitted further material and this has already been discussed in our judgment. Subsequently, the appellant made a further request to be granted the opportunity to obtain a letter in support from a witness. We granted leave to the appellant to file his further evidence by 1 February 2019. Pursuant to that leave, the appellant has provided further material.

The Crown were given the opportunity to respond to this further material but advised they had no further submissions to make.

[68] We have reviewed all the further material provided by the appellant. There are no new points advanced on the conviction appeal from that already canvassed at the hearing and pursuant to the leave we granted at the appeal hearing and discussed in our judgment already. The point which the appellant appears to place particular emphasis on, is that his flatmate heard the complainant's mother say that if she could not have the appellant then she would make it happen that no one else could have him. However, this relates to a time after the charges were brought against the appellant. This could not then have provided the motivation for the complainant's mother to persuade the complainant to make up charges against the appellant if that is what the appellant is suggesting.

[69] The further material also seeks to advance the sentencing appeal with reference to a newspaper report of another defendant who received a sentence of 11 months' home detention. From the newspaper report it is evident that there are two factors which immediately distinguish that case with that of the appellant's. First, the defendant in that case admitted his offending. Secondly, the defendant was 21 years of age. The appellant had neither a guilty plea nor youth to call upon in mitigation. In sentencing the appellant, the Judge accepted Mr Phelp's submission as to the appropriate range. We are not satisfied in these circumstances that the appellant's sentence was manifestly excessive.

Result

[70] The application for an extension of time to appeal is granted.

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

[72] The appeal against conviction is dismissed.

[73] The appeal against sentence is dismissed.

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

Solicitors: Crown Law Office, Wellington for Respondent