NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SECTION 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: ALL HIGH COURT ORDERS PROHIBITING PUBLICATION OF IDENTIFYING PARTICULARS OF THE VICTIMS, WITNESSES AND OTHER PERSONS REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA122/2020
[2021] NZCA 117

BETWEEN	VENOD SKANTHA Appellant
AND	THE QUEEN Respondent

Hearing:	24 November 2020
Court:	Miller, Cooper and Gilbert JJ
Counsel:	JHM Eaton QC, T A Simmonds and H C Coutts for Appellant R P Bates, R D Smith and S E Trounson for Respondent
Judgment:	14 April 2021 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] Venod Skantha appeals his convictions for the murder of Amber-Rose Rush in Dunedin on 2 February 2018, and for threatening to kill four people to secure the silence of a witness.[1]

[2] In exchanges of Facebook messages with Mr Skantha that began around 7.30 that evening, Ms Rush accused him of indecently assaulting her, engaging in sexual

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1 *R v Skantha* [2020] NZHC 442. An appeal against the minimum period of imprisonment, 19 years, was abandoned.

activity with minors and supplying minors with alcohol. She threatened to go to the Police and his employer with her allegations. She was aged 16. He was aged 30 and employed by the Southern District Health Board (DHB) as a doctor. Some months earlier he had been given a final warning for misconduct at work.

[3] Sometime before 10 pm Ms Rush uploaded to Instagram screenshots of her Facebook exchanges with Mr Skantha. The posts were noticed by W, a young man of 16 years who was a follower of Mr Skantha's and frequently acted as his driver.[2] W drew the posts to Mr Skantha's attention. There followed a further exchange of messages between Mr Skantha and Ms Rush in which he complained about the posts and she expanded on her claims that he was in the habit of preying on young people. She said she would make sure everyone knew about his behaviour, including his employer and the Police. She insisted she was serious about it. The exchange of texts ended at 11.34 pm.

[4] The Crown contends that Mr Skantha moved at once to silence Ms Rush. He picked W up at about 11.40 pm and W drove him to her home. Ms Rush was in her bed when she was murdered at about midnight. Her jugular vein and windpipe were severed with a knife.

[5] W was the Crown's principal witness at trial. His account was that Mr Skantha went into the house and returned about five minutes later with Ms Rush's cellphone, which she had last used at 11.55 pm and, with W's assistance, Mr Skantha set about destroying evidence, beginning with the cellphone and including his bloodstained clothes. W, who went to the Police two days later, was never charged with any offence relating to the killing. The Crown alleged rather that to secure W's silence Mr Skantha threatened to kill W and three members of his family.

[6] Mr Skantha's case — he did not give evidence at trial — is that it was W who became agitated about the texts and killed Ms Rush out of misplaced loyalty to him. At the same time, he contends, W set about ensuring that Mr Skantha would be accused

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[2] W's name was suppressed by the High Court. We were not asked to revisit that order or any other suppression order made by the High Court, and have anonymised the names of witnesses accordingly.

of her murder. Mr Skantha maintains that he remained in the car and had no idea what W was going to do. On appeal, he complains that the trial Judge, Nation J, refused to treat W as an accomplice and refused to admit the hearsay evidence of two witnesses who would have recounted Ms Rush's complaints that W had previously entered her bedroom late at night.

[7] At trial a number of witnesses were called to give evidence of motive. They deposed to unsavoury conduct of the kind that Ms Rush had alleged in her Facebook messages. The evidence of most of these witnesses was ruled admissible by this Court in a pretrial decision.[3] On appeal, Mr Skantha complains that much of the evidence actually given at trial was both inadmissible and highly prejudicial, and further that the evidence was mishandled by the Judge. He also says that the summing-up lacked balance and in myriad ways was unfair to him.

Narrative facts

[8] We begin with an account of the facts, which we preface by noting that the Crown does not accept its case rested on the evidence of W. It maintains rather that its case was substantially circumstantial and the circumstantial evidence pointed overwhelmingly to Mr Skantha's guilt. Many of the facts are not in dispute; they are confirmed by texts or social media communications, or location data, or CCTV footage, or the evidence of eyewitnesses.

[9] Mr Skantha took employment as a House Officer with the Southern DHB in 2016, after completing his medical studies in Auckland. He was initially based in Invercargill but moved to Dunedin in May 2017. He was bound by the DHB's Code of Conduct and Integrity, which required among other things that he must avoid situations where his behaviour could reflect badly on the DHB or impact on his workplace and ensure that his use of alcohol or other substances did not impair his work performance or endanger others.

[10] On Mr Skantha's account he was drinking excessively in 2017 and was socially isolated. He was certainly in the habit of associating with teenagers, some as young

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3 *Skantha v R* [2019] NZCA 478 [Pre-trial Appeal].

as 14. His flatmate at his Dunedin home, at Forbury Road, described a lot of small social gatherings, often involving alcohol and drugs. W quickly became an acolyte of Mr Skantha, who hosted a birthday party for him in June. W took it upon himself, apparently without telling Mr Skantha, to issue a general invitation on social media, promising free alcohol for 16-year olds. Ms Rush, a friend of W's, attended the party and met Mr Skantha. Thereafter she and several of her friends hung out regularly with Mr Skantha and W. There is a good deal of evidence that Mr Skantha supplied the young people with alcohol on a number of occasions, some of which were the subject of propensity evidence led at trial.

[11] Mr Skantha was investigated and disciplined for misconduct at work in July 2017. While on sick leave, he came to the hospital with two friends who were to support him at a meeting with his educational supervisor. He was told that the meeting was scheduled for the following day. Rather than leave the hospital he went to a ward with his friends. He was in an emotional state and smelt of alcohol. On the ward he flushed a patient's cannula, taping it very tightly and dating it with the previous day's date. This led to a formal investigation, during which he explained his behaviour by stating that his mother had just passed away. But for that claim, which was false, he would have been dismissed. Instead he was given a final warning. His actions were considered particularly serious due to an earlier incident where Mr Skantha had responded to a nurse's telephone request for advice about a patient while he was on sick leave and accordingly unsupervised, which was considered inappropriate.

[12] Late in 2017 Mr Skantha purchased a home at Duxford Crescent in the suburb of Fairfield, taking possession around 15 December. It is not in dispute that about this time there was a suggestion that Ms Rush and her friend C were planning to move in with him. It is also agreed that Mr Skantha and Ms Rush had a falling out on 7 January 2018 after he offered her money to have sex with him and she refused. He ordered her to leave the house. It was also at Duxford Crescent, likely on 3 January, that Ms Rush was allegedly indecently assaulted by Mr Skantha; she went to sleep on a couch after she had been drinking and claimed that she woke to find her bra off and Mr Skantha with his hands down her pants.

[13] It does not appear that Ms Rush met Mr Skantha after 7 January, but she did obtain access to a wallet that he had left in his car. On 29 January she texted a friend, M, to say she had Mr Skantha's credit card. She claimed she had spent $300 on the card so far.

[14] The messages between Mr Skantha and Ms Rush on the evening of 2 February 2018 began with him asking whether she had spent money on his credit card. The first set of messages were sent between 7.34 pm and 7.50 pm.

Friday 02.02.2018, 7:34 pm	Venod Skantha: U there? Important
Friday 02.02.2018, 7:36 pm	Amber Rose: What
Friday 02.02.2018, 7:37 pm	Venod Skantha: Did u use 48 bucks on wish.com?
Friday 02.02.2018, 7:38 pm	Amber Rose: No haha but I should have 😊 😊
Friday 02.02.2018, 7:39 pm	Venod Skantha: Hmm. I wonder who did
Friday 02.02.2018, 7:41 pm	Amber Rose: After what you did you're lucky thats all that happened lol
Friday 02.02.2018, 7:42 pm	Venod Skantha: I've always given u stuff. U shouldn't be a drama queen and talk shit about me to everyonr
Friday 02.02.2018, 7:43 pm	Amber Rose: Stuff doesn't mean shit when you did that to me, wasnt talking shit hun you should own up to what you did, fkn perv
	You're lucky i dont go into the hospital and tell them how you turn up to work drunk, and supply minors with alcohol, touch them up without consent, grow up vinny you're 30 for fuck sakes
Friday 02.02.2018, 7:44 pm	Venod Skantha:

	Ur horrible amber
	U know I din mean it
Friday 02.02.2018, 7:45 pm	Amber Rose: Mate im not horrible, i dont care how much you say “I didn't mean it” you fucking did it
Friday 02.02.2018, 7:46 pm	Amber Rose: own up to it and be an adult not acting like a damn teenager
	Venod Skantha: Alright stop it
Friday 02.02.2018, 7:50 pm	Amber Rose: no, fuck you

[15] Ms Rush then uploaded a screenshot of the conversation to Instagram, where W noticed it and informed Mr Skantha, who messaged Ms Rush at 11.07 pm. The following exchange occurred:

Friday 02.02.2018, 11:07 pm	Venod Skantha: Not cool. What's up with that?
	Amber Rose: You're just fucking me off now aye
	You act like you done nothing
Friday 02.02.2018, 11:08 pm	Venod Skantha: Then talk to me. Why be childish about it. Wtf u doing posting things like that
	Amber Rose: Because fuck you thats why
Friday 02.02.2018, 11:09 pm	Venod Skantha: Don't u have anything better to do?
	Amber Rose: Yeah actually, take it to the police like i should have in the first place
	Venod Skantha: Yea and they guy who broke ur arm all good ay?
Friday 02.02.2018, 11:10 pm	Venod Skantha:

	I don't have time for u. I ignored u like u wanted. U better remove that post
Friday 02.02.2018, 11:11 pm	Amber Rose: id like everyone to know what a scum bag you are actually so nah (emoji)
	Venod Skantha: I have my own life to deal with
Friday 02.02.2018, 11:12 pm	Amber Rose: yeah, supplying minors with alcohol and offering them money for sex, what a life to like aye
	Venod Skantha: Wtf. Ur the one drinking. Wats that got to do with md
	Venod Skantha: Me
Friday 02.02.2018, 11:13 pm	Amber Rose: Who was the one supplying it to [A], [M], [B], they're all underage aye vinny. Open your fucking eyes
	Venod Skantha: Why din u say anything then
	All high and mighty then. I din make anyone drink
Friday 02.02.2018, 11:15 pm	Amber Rose: Oh dont you worry, i will. And you supplied it bro thats an offence that can be taken to prison. Enjoy your life with KIDS since thats all you seem to do

[16] At 11.15 pm Mr Skantha called W and spoke to him for a little more than eight minutes. At the time W was with friends, who deposed that they overheard the conversation, in which Mr Skantha sounded stressed and angry about the Instagram post. W tried to reassure him, promising that the post could be taken down. He also told the friends that the post could be really bad for Mr Skantha's job and remarked that he wanted his ashes pressed into vinyl when he died. The oddness of that remark was pressed by the defence at trial. W then left to meet Mr Skantha.

[17] In the meantime, the exchange of messages between Mr Skantha and Ms Rush continued:

Friday 02.02.2018, 11:16 pm	Venod Skantha: What does that have to do with u
Friday 02.02.2018, 11:17 pm	Amber Rose: YOU'RE PREYING ON YOUNG KIDS VINNY, WHAT THE FUCK IS WRONG WITH YOU
	YOU'RE 30 AND A DOCTOR FOR FUCK SAKES
	Venod Skantha: Leave me alone mate. No I don't
	Amber Rose: ARE YOU ACTUALLY FUCKED IN THE HEAD?
Friday 02.02.2018, 11:18 pm	Amber Rose: Btw read up, you're the one contacting me first, imma make sure EVERYONE knows what a sick cunt you are, including your work AND the police
Friday 02.02.2018, 11:19 pm	Venod Skantha: Savage matr
	Mate
Friday 02.02.2018, 11:21 pm	Venod Skantha: So ur serious?
	Amber Rose: best believe i am
	Venod Skantha: Thanks
Friday 02.02.2018, 11:22 pm	Amber Rose: Im doing the world a favor, people like you don't deserve to walk freely
Friday 02.02.2018, 11:23 pm	Venod Skantha: Ur taking it way out of proportion
Friday 02.02.2018, 11:24 pm	Amber Rose: Nope im not

Friday 02.02.2018, l1:25 pm	Amber Rose: You're clearly to thick to realize shit like that is traumatising especially to me, so a big fuck you for that
	I hope you pay for it and I hope you go to sleep at night hating yourself
Friday 02.02.2018, l1:30 pm	Venod Skantha: Why din we talk about this earlier?
	Amber Rose: you think i want to talk to you? Clearly fucking not
Friday 02.02.2018, 11:3l pm	Venod Skantha: Better than back stabbing
Friday 02.02.2018, 11:32 pm	Amber Rose: Back stabbing? BACK STABBING? BITCH ARE YOU KIDDING ME?
Friday 02.02.2018, 11:34 pm	Amber Rose: You knew what you were doing when you did it, for that you deserve everything you're gonna get

It will be seen that Ms Rush was angry and made it plain that she was determined to see Mr Skantha punished.

[18] Mr Skantha and W exchanged calls at 11.36 pm and 11.40 pm. Mr Skantha picked W up at Glen Road and W drove to Ms Rush's home at Clermiston Avenue. W claimed that Mr Skantha was wearing old, dark clothes, gloves and a beanie, and en route he asked W about the layout of Ms Rush's house. Both men had been to the house previously, but W knew it well and he also knew where the front door key was hidden. W said he pulled over and drew a plan on the car's dashboard. What he described as the plan was visible in dust on the dashboard and photographs of it were in evidence at trial.

[19] What happened when Mr Skantha and W arrived at the house is obviously controversial. W claimed that Mr Skantha left the car, saying he would be about five minutes. There was evidence that at 11.54 pm W called a friend, SC, who overheard the earlier call between Mr Skantha and W. W told SC that he was worried and he

thought he might be an accomplice to murder. W claimed he made that call while waiting for Mr Skantha, who returned carrying a knife and Ms Rush's cellphone, which he proceeded to try to smash. There is evidence that is consistent with an attempt to destroy the phone: at 12.01 am on 3 February it took what appears to be a burst of photos, apparently when being smashed. Mr Skantha's case at trial was that the call was part of a "master plan" by W to make it appear that Mr Skantha was the guilty party.

[20] On W's account Mr Skantha had him open the passenger door for him and fasten his seatbelt, evidently to avoid leaving trace evidence on the car. Blood spatter, signifying that the blood was fresh, was later found on the inside passenger window. It was Ms Rush's blood. Blood transfer was found on the inside passenger door. It contained mixed DNA of Ms Rush and Mr Skantha. Nothing was found on the driver's side. It is not in dispute that Mr Skantha was in the passenger seat when the car left Clermiston Avenue. At trial W was accused of planting the blood on the passenger side.

[21] W drove the car to Blackhead Quarry, where the phone was thrown into a swampy area, and then to Duxford Crescent. W told the Police he arranged to have it dumped there because he knew it could be retrieved.

[22] Ms Rush had also been in contact with others that evening, including her boyfriend at the time. They exchanged Snapchat messages in which he discouraged her from going to sort the matter out with Mr Skantha. When she stopped replying to his messages he was sufficiently worried that he went to her house and knocked on her bedroom window. The time was likely shortly after midnight.

[23] On W's account, at Duxford Crescent Mr Skantha told him to clean the car and the knife. No trace of blood or Ms Rush's DNA was found in the house, or on the knife allegedly used as the murder weapon, a point which Mr Skantha pressed at trial. W also deposed that Mr Skantha changed his clothes and put the clothes he had been wearing into a plastic bag.

[24] In 2016 Mr Skantha formed a relationship with a lawyer resident in Balclutha, Brigid Clinton. The relationship appears to have come to an end by the end of 2017 but they maintained contact. He had arranged to come to Balclutha on 2 February to see her and sign some documents, but he did not respond to a message from her asking that he confirm he was coming. At 1.10 am the next morning he texted to say he was coming. She was offended by his failure to respond earlier and said she did not want to see him, but he showed up at her house between 2.00 and 2.30 am with W. It is not in dispute that Mr Skantha drove to Balclutha, allegedly because W did not have a driver's licence and Mr Skantha was concerned about being stopped by Police. Mr Skantha and W stayed at Ms Clinton's house overnight.

[25] Ms Rush's body was found by her mother on the Saturday morning. Bloodstains indicated there had been no struggle, suggesting that she had been swiftly disabled and bled out on the bed. Transfer stains around a light switch were consistent with the use of gloves. Subsequent forensic analysis yielded no trace of Mr Skantha or of W.

[26] When everyone at Ms Clinton's house in Balclutha got up on the Saturday, Mr Skantha, who on her evidence had shown up the night before in shorts and a t-shirt, borrowed some clothing from Ms Clinton. On W's account, he was instructed to clean Mr Skantha's shoes but deliberately left blood on them and placed the shoes in the garage for later discovery by the Police. W also alleged that it was at Balclutha that Mr Skantha threatened to kill him and his family if he told anyone.

[27] Later that day Mr Skantha, W and Ms Clinton went to The Warehouse in Balclutha to purchase items for a bonfire, ostensibly because Mr Skantha wanted to toast marshmallows. He bought a terracotta pot and manuka chips. Back at Ms Clinton's house he and/or W lit a fire in the pot. Mr Skantha told Ms Clinton that he was burning his "daggiest" clothes to get the fire going. The items included a jersey and sweatpants and, on W's account, Ms Rush's driver's licence which had been in her phone case. W or Mr Skantha later tossed the ashes into the garden and filled the pot with potting mix. Nothing of evidential significance was recovered from the pot and the ash. A plastic bag placed in a rubbish bin was found to contain traces of Ms Rush's blood.

[28] Ms Skantha and W again stayed at Ms Clinton's that night and returned to Dunedin on Sunday 3 February. She accompanied them in her own car.

[29] In Dunedin Mr Skantha and W went to see Ms Rush's mother, Lisa Mills, who had asked to speak to them. Ms Mills insisted on meeting them at a motel. That was done because the Police were already treating Mr Skantha as a person of interest. The meeting was attended by a plainclothes detective who was introduced as a friend of Ms Mills. No admissions were made. Mr Skantha and Ms Clinton then dropped W off at his home at about 3.00 pm.

[30] Once at home W called his family to warn them they were at risk from Mr Skantha, who had killed Ms Rush. That revelation led to W calling the Police. He underwent an interview in which he gave his account of what had happened. We interpolate that the clothing W had been wearing in Balclutha that weekend was later examined but no traces of human blood or Ms Rush's DNA were found. However, the possibility that he too had changed clothes on the Friday night cannot be excluded.

[31] Mr Skantha tried repeatedly to contact W during the next few hours, without success. At 8.20 pm the Police stopped Mr Skantha while he was driving in Dunedin with Ms Clinton. He was interviewed and arrested.

[32] With W's aid Ms Rush's phone was retrieved. Despite the efforts that had been made to destroy it, Police were able to access its circuit board and retrieve data and messages. Mr Skantha's phone was also searched. Text messages and Facebook Chat messages on her phone had been deleted from his, and it appeared that his Facebook account may have been deactivated. Analysis also showed that someone had accessed location data on his phone and that its location history was switched off, or records deleted, on 2 and 3 February.

The trial process

Propensity evidence ruled admissible before trial

[33] In its decision of 3 October 2019, this Court ruled on the admissibility of several categories of evidence going to motive or propensity:[4]

(a) The first was evidence that Ms Rush had complained of being indecently assaulted by Dr Skantha (the complaint evidence). This was ruled admissible.

(b) The second was evidence that Mr Skantha had indecently assaulted other young women in similar circumstances (the similar fact evidence). This was ruled admissible.

(c) The third was evidence that Mr Skantha had offered to pay Ms Rush and other young women money for sex (the solicitation evidence). This was ruled admissible.

(d) The fourth category was what Mr Eaton described as classical propensity evidence, that Mr Skantha had a propensity to behave violently when he did not get his way, and that he often started fights and assaulted others. The Court accepted that this category would be relevant, and thus admissible, if the defence either contested the Crown proposition that W was afraid of Mr Skantha or contended that W had a general propensity for violence and so was more likely to be the killer.[5] It was ruled provisionally inadmissible. Following that ruling the defence agreed not to challenge evidence that W feared Mr Skantha.

(e) The final category, also classical propensity evidence, was evidence of Mr Skantha threatening to slit a woman's throat with a machete and regularly waving it around. This was ruled admissible due to its

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4 Pre-trial Appeal, above n 3.
5 At [102]–[103].

similarity to the facts of Ms Rush's murder, not as general evidence of Mr Skantha's violence.

[34] The admissibility of evidence falling into the last of these categories is not now in issue and we say no more about it. We summarise the Court's reasons for the first, second and third categories because, while Mr Eaton did not argue that the decision of 3 October 2019 was wrong, in our opinion he substantially sought to relitigate arguments that were dismissed there. We are prepared to revisit this Court's reasons where anything material changed at trial, but to the extent that the argument went further it is properly the subject of an appeal to the Supreme Court.

[35] We need not expand on the ruling with respect to the fourth category because the evidence was not led at trial, but we do draw attention to the ruling because it provides context for some of the grounds of appeal, notably the omission of an accomplice warning.

[36] So far as the complaint evidence is concerned, it is noteworthy, having regard to some of the grounds of appeal, that the Crown had initially charged Mr Skantha with the indecent assault of Ms Rush but Nation J had ruled hearsay evidence of her complaint inadmissible so far as it went to the truth of her complaint.[6] That ruling was not challenged by the Crown on appeal and the charge was withdrawn. The Judge ruled the complaint evidence admissible to show she had made the allegations, reasoning that the evidence was an integral part of the narrative of events and also bore on motive.[7] This Court reasoned that motive would be a very important issue at trial and the complaint evidence was probative because there was evidence that Mr Skantha knew Ms Rush had complained of being indecently assaulted.[8] Another witness deposed that Ms Rush told her she had been indecently assaulted by Mr Skantha, and the witness directly asked Mr Skantha if the allegations were true.[9] There were also passages in his statement to the police indicating that he knew of the allegation before

6 *Skantha v R* [2019] NZHC 519 [High Court decision] at [104].
7 At [103]–[104].
8 Pre-trial Appeal, above n 3, at [49]–[50].
9 At [52].

2 February 2018.[10] The Court reasoned that the evidence of the witnesses concerned would not unnecessarily prolong the trial, nor was it unfairly prejudicial.[11]

[37] The similar fact evidence of indecent assaults against other women involved two separate incidents. There was evidence that Mr Skantha indecently assaulted a woman who had passed out on his couch after drinking to excess. She had no memory of the incident but others witnessed it. The second incident involved a woman who passed out fully clothed in his bed from drinking too much and awoke to find she was in her underwear with Mr Skantha touching her breasts and vagina. This Court held that this evidence strictly fell within the definition of propensity evidence notwithstanding that it was being adduced not for a propensity purpose but to prove motive.[12] It was relevant because the likely ramifications of Ms Rush taking her allegations to police would have been significantly more serious for Mr Skantha if there was evidence of similar conduct toward other young females.[13] Ms Rush's threat of exposure was not limited to his behaviour toward her, and it was a reasonable inference that he was very likely to have realised the other incidents would come to light if she went to the police.[14]

[38] The solicitation evidence involved Ms Rush, who was aged 16 at the time, and other young females. This Court accepted that Mr Skantha would have little to fear from either the police or even his employer knowing that he had asked someone to find him a prostitute.[15] But offering to pay for sex is a criminal offence if the offeree is under 18 years of age,[16] and evidence that he made offers to younger females, including Ms Rush, was probative of motive. The probative value of the evidence was relatively high.[17] So too was the risk of unfair prejudice but that could be managed by appropriate jury directions. The addition of the witnesses would not unduly prolong the trial since there would only be two witnesses giving propensity evidence about

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10 At [53]–[59].
11 At [62].
12 At [77], citing *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [60].
13 At [78].
14 At [79].
15 At [83].
16 Prostitution Reform Act 2003, s 22.
17 Pretrial Appeal, above n 3, at [85].

offers to pay money for sex and four giving propensity evidence about indecent assaults.[18]

Overview of the evidence led at trial

[39] At trial, which took 17 days, some 70 witnesses were called. Most of the witnesses contributed to the narrative we have summarised or were involved in the Police investigation. Four motive and complaint witnesses whose evidence of sexual matters this Court had ruled admissible were called. One additional witness, P, was called to give propensity evidence of a similar kind. Four witnesses deposed to Mr Skantha's propensity for violence. W was the principal witness of fact. He gave evidence over three days and, as Mr Eaton emphasised, showed himself to be in various ways an unreliable witness who was very prone to forgetfulness when pressed. The defence highlighted parts of his account for which there was no support in the forensic evidence and established that he had tried to sell his story to the media. It was put to him that he murdered Ms Rush.

The competing cases

[40] As we have said, the Crown marshalled a substantially circumstantial case for the jury. It began with the timing of the messages between Mr Skantha and Ms Rush, and the motive that they supplied for him. The Crown contended that the messages left Mr Skantha in no doubt that she was going to his employer and the police to disclose behaviour which would likely lead to him losing his job and perhaps to criminal prosecution. She was already sharing her complaints and had to be silenced immediately. It was no coincidence that she was dead less than 30 minutes after her last text message to Mr Skantha.

[41] Nor was it a coincidence that the phone she had been using to publish her complaints was taken, immediately damaged and thrown into a pond. The Crown emphasised that all messages relating to Ms Rush were deleted from Mr Skantha's phone and some location data was also missing from that phone.

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[18] At [86].

[42] The Crown pointed to evidence that Mr Skantha called W for assistance, having him drive to and from Ms Rush's home and identify the location of her bedroom and clean up afterward. The knife must have been in the car when Mr Skantha picked up W; there was no reason to think the weapon was acquired and cleaned at her house, and the timeline did not allow for a detour to fetch it.

[43] The Crown contended that the attack on Ms Rush was focused and her wounds indicated that her attacker knew what was needed to silence her and kill her quickly. Blood was found on the passenger side of the car, where Mr Skantha had been sitting after the attack, and some of the blood had been fresh. It was Mr Skantha's clothes that were burned in Balclutha, and it was he who purchased the terracotta pot. Ms Rush's blood was found in the plastic bag and on Mr Skantha's shoes, which had been partially cleaned.

[44] The Crown also pointed to lies told by Mr Skantha in his police interview, in which he denied that he and W went to the quarry to do anything other than take in a view and denied burning items at Balclutha.

[45] The Crown's response to the suggestion that W had killed Ms Rush was that it was inconceivable that he would kill out of loyalty to Mr Skantha while at the same time creating evidence which would lead to Mr Skantha's conviction for murder. Rather, the Crown contended, the circumstantial and forensic evidence supported W's account. There was no forensic evidence consistent with W having been the killer.

[46] The defence case focused on W. Mr Eaton invited the jury to accept that the Crown case depended on W's evidence, which could not be accepted. W's performance in the witness box and in interview showed him to be completely unreliable. His account of a master plan in which Mr Skantha killed Ms Rush and W left a trail of evidence for the Police was absurd and it fell apart in the witness box. Indeed, W had accepted he was a compulsive liar. Counsel pointed to evidence that in December 2017 W had been interviewed and subsequently charged with sexual offending against another young woman; he had lied throughout his interview then, only to plead guilty later. Counsel also suggested that the forensic evidence was in some respects inconsistent with W's account, such as an absence of forensic evidence

at Duxford Crescent, and in other respects consistent with W himself being the murderer. The Police investigation had been blinkered from the start; W was at least an accomplice yet his account had been accepted without question and the Crown still maintained he had done nothing wrong. That blinkered approach extended to the forensic scientists, who looked for evidence that supported the Police theory of the case and did not analyse some evidence, such as (by way of example) the knives and a tea towel in the kitchen at Ms Rush's house. It was illogical that Mr Skantha would respond to Ms Rush's threats by killing her. It was W rather than Mr Skantha who was upset by her posts, W who feared for Mr Skantha's job, and W who was obsessed with her.

[47] Counsel characterised the propensity evidence as bad character evidence and invited the jury to find that it should never have been called. He remarked that Crown counsel had barely touched on this evidence in closing, for good reason; it had no probative value. It was inconceivable that the evidence of these witnesses was weighing on Mr Skantha's mind on the night of 2 February 2018. There was nothing sinister in Mr Skantha's relationship with young people and their communications with one another showed they were taking advantage of his willingness to provide alcohol and let them drink at his place.

[48] So far as the complaint evidence was concerned, counsel suggested that Ms Rush's complaint was false, suggesting the evidence of M, who was at Mr Skantha's house that night, disproved it; he saw nothing and in evidence he doubted it had happened. Counsel noted that she continued to associate with Mr Skantha after the alleged assault. The similar fact evidence was not credible either. He accepted that Mr Skantha had offered Ms Rush money for sex, but only in jest. The other solicitation evidence should be rejected as implausible, or as too trivial to supply Mr Skantha with a motive to kill.

[49] It is necessary to examine the summing-up and associated rulings in some detail, but we do so below, when dealing with each of the appeal points.

The appeal

[50] We list the grounds of appeal in the approximate order that Mr Eaton followed in oral argument. They begin with the argument that the Judge erred by refusing to treat W as an accomplice and warn the jury that his evidence might be unreliable for that reason.

[51] The second concerned the admission of propensity evidence which, counsel submitted, was inadmissible or proved to have little probative value. Counsel submitted that the evidence of P (which was not the subject of this Court's earlier decision) was inadmissible and the admissibility of the remaining evidence ought to have been revisited by the Judge, who also mishandled the evidence by failing to explain its relevance and limitations to the jury. This ground of appeal extended to the complaint evidence of Ms Rush, there being reasonable doubt in counsel's submission as to whether she was indecently assaulted at all.

[52] The third concerned the lies direction given by the Judge. It was orthodox so far as it concerned Mr Skantha's account given in interview, but the Judge erred by extended the warning to part of W's evidence.

[53] The fourth concerned the Judge's refusal to allow hearsay evidence that Ms Rush had twice complained of W entering her bedroom at night.

[54] The fifth was that the summing-up was unbalanced and unfair. Counsel submitted that the Judge repeatedly assumed that the claims of the propensity witnesses were true and unfairly elevated the importance of that evidence, that his inferences direction suggested Mr Skantha was guilty, that he did not fairly put the defence case including the assertion that Ms Rush was never indecently assaulted, that the appellant was always referred to as "Dr Skantha" while the Judge included forenames when speaking of W and Ms Rush, that the Judge repeatedly emphasised the youth of Crown witnesses, and that the Judge offered the jury explanations to rebut defence contentions. Counsel also submitted the Judge improperly took on the role of prosecutor and ignored the defence criticisms of one of the expert witnesses.

[55] Finally, it was said that the Judge erroneously warned the jury against attaching significance to W's demeanour in interview and in the witness box.

[56] Counsel acknowledged that this is not an unreasonable verdict case, recognising that the verdict was available to the jury if they accepted W's evidence. We agree. Counsel urged rather that the trial was unfair.[19] Alternatively, errors at trial created a real risk that the outcome was affected and this Court cannot be sure of Mr Skantha's guilt.[20]

The omission of an accomplice warning for W

[57] Section 122 of the Evidence Act 2006 provides so far as relevant:

> **122 Judicial directions about evidence which may be unreliable**
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> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
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> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> …
>
> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
>
> …
>
> (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
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> (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
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> (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

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19 Criminal Procedure Act 2011, s 232(4)(b).

20 Criminal Procedure Act, s 232(4)(a); and *Haunui v R* [2020] NZSC 153 at [67].

….

[58] The question is whether a reliability warning ought to have been given under s 122(2)(c) to the effect that W may have had a motive to give false evidence against Mr Skantha because he was, on the Crown's case, an accomplice if not a party and he had not been offered an immunity from prosecution. Mr Eaton made a request under s 122(3), asking that the Judge give such a warning before he delivered his summing up. The Judge declined to do so, giving his reasons in a ruling delivered after the trial.[21]

[59] We note that the Judge had earlier refused to warn W of the privilege against self-incrimination when W entered the witness box.[22] That ruling obviously affords Mr Skantha no ground of appeal but it supplies context for the Judge's subsequent decision not to give a reliability warning. Crown counsel stated that it was unlikely that W could be prosecuted as an accessory after the fact and the Judge accepted that, stating that there was virtually no prospect of W facing prosecution.

[60] We note too that in his closing address Mr Eaton told the jury that they must acquit Mr Skantha if satisfied that W was an accomplice. The Judge directed the jury in his summing-up that Mr Eaton's contention was wrong in law. That direction was plainly correct and it is not challenged on appeal.

[61] In a bench note discussing the reliability warning the Judge dealt with a number of issues. He began by recounting that the trial had proceeded on the basis that the defence accepted W was, with reason, fearful of Mr Skantha. For that reason the Crown had not sought to adduce other evidence showing that Mr Skantha had a propensity to react with unusual and disproportionate violence when angry and was skilled in the use of violence.[23] Defence counsel had been careful not to advance the defence in a way that might result in the Crown being given leave to call that evidence; for example, there was no suggestion to W that he had no reason to fear Mr Skantha. However, in his closing address Mr Eaton had suggested to the jury that if they thought W was an accomplice to murder they must acquit Mr Skantha and sought to defend

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21 *R v Skantha* HC Dunedin CRI-2018-012-000310, 5 December 2019 (Bench Note 4) at [36]–[43].
22 *R v Skantha* HC Dunedin CRI-2018-012-000310, 11 November 2019 (Minute).
23 As discussed above at [33](d).

that suggestion by saying that if W was an accomplice the whole dynamic of the trial would have been different.

[62] The Judge reasoned that the trial had accordingly proceeded in a way that benefited Mr Skantha but was potentially unfair to W. For that reason he had chosen in his summing-up to draw attention to statements in W's Police interviews in which he spoke of being fearful of Mr Skantha. This evidence had not been challenged in cross-examination.

[63] The Judge then dealt with other criticisms of the summing-up before giving his reasons for refusing to caution the jury about W's reliability:

> [40] I did not consider he had a motive to give false evidence. As the defence had highlighted, the Police had told him at the outset of his interview that he was being interviewed as a witness, not a suspect. There was strong independent circumstantial evidence indicating Dr Skantha was the killer. There was an explanation for the way [W] had assisted Dr Skantha on the night through the way he feared Dr Skantha, an aspect of his relationship with Dr Skantha I knew the defence had accepted.
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> [41] [W] was extensively cross-examined. It could be said that, in some respects, he did not perform well but, in my assessment, this did not detract from his apparent honesty and reliability as to the aspects of his evidence which were essential to the Crown case. That evidence was corroborated by circumstantial evidence independent of him. The potential for [W] to have been wrong about matters of detail had been fully exposed and, in a number of respects, acknowledged by [W]. Inconsistencies in his evidence, vagueness, mistakes, exaggerations or imaginations had been put before the jury through counsel's cross-examination of him.
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> [42] In his closing address, Mr Eaton had forcefully advanced reasons why the defence suggested [W's] evidence as to the crucial events should be rejected entirely. His general credibility was thus in issue. All the issues as to [W's] credibility were thus fully before the jury.
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> [43] On my assessment of his evidence in both the DVD interviews and at trial; in the context of all the evidence that was before the jury, I did not consider it appropriate to caution the jury in the way Mr Eaton suggested I should have done. To do so, would, in my assessment, have been unfair to [W] and unfair to the Crown.

[64] On appeal, Mr Eaton submitted that there was a significant body of evidence tending to show that W was the murderer, beginning with his obsession with Ms Rush and extending to his participation in the crime and his many lies about it. In the absence of an immunity he plainly had an incentive to give false evidence. A reliability

warning was essential. Instead the Judge effectively excused W's poor performance in the witness box by suggesting that traumatic events may have caused him to embellish facts, and by discounting W's admission that he was a compulsive liar by noting that it was a frank admission.

[65] The leading authority on s 122 is *CT v R*,[24] though it is important to bear in mind that the Supreme Court was concerned with a complainant giving evidence of sexual offending that had happened decades earlier, while in this case we are concerned with an accomplice. Speaking generally of s 122, the Court emphasised that judges should bear in mind that "the whole premise of the section is that it is not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence" and drew attention to the language of s 122(3)(b), noting that in the absence of good reason to the contrary a warning should be given when a party requests it.[25]

[66] It remains the position, however, that while a trial Judge must consider whether to give a reliability warning, they are not obliged to do so. There are a number of cases in which this Court has held that a warning was not required in all the circumstances.[26] In *B (CA58/2016) v R*, the Court recognised that the judicial imprimatur given by a warning can be important but described the decision as discretionary and stated that the essential question is whether a warning is likely to assist the jury materially.[27] The Court referred to an often-cited passage from the judgment of Richardson J in *R v Harawira*:[28]

> In the end the fundamental question must be whether the summing up met the justice of the particular case. *Difficulties will tend to arise where the potential unreliability of the witness is not obvious for the jury to see*. It must be recognised, however, that Judges are not necessarily gifted with special insight into mental illnesses and human behaviour not shared by jurors. Clearly where a warning is proper it need not be conveyed in the language of "danger", "warning" and "caution". What is essential in such a case is to bring home to the jury the need for care in relying on that evidence.
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> (emphasis added)

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24 *CT v R* [2014] 1 NZSC 155, [2015] 1 NZLR 465.
25 At [50].
26 See for example *B (CA58/2016) v R* [2016] NZCA 432; *Reddy v R* [2020] NZCA 16; *HP v R* [2010] NZCA 617; and *R v Vo* CA282/98, 14 December 1998.
27 *B (CA58/2016) v R*, above n 24, at [59].
28 At [59], citing *R v Harawira* [1989] 2 NZLR 714 (CA) at 726.

[67] The Court observed that in some cases the need for a reliability warning may not be readily apparent to a jury, instancing delayed complaints. This was contrasted against cases where witness reliability is so central, and the need for caution so obvious to the jury, that a warning cannot be said to provide them with material assistance.[29] The Court added that, where the need for caution is obvious, a warning can tip the scales artificially; it can convey the impression that the judge thinks the witness is lying.[30] The same point was made in *HP v R*[31] and *Reddy v R*.[32]

[68] In our view the Judge was unduly influenced by his concern for unfairness to W. Whether or not W was afraid of Mr Skantha, he was on the face of it an accomplice to the murder of Ms Rush, complicit at least in the destruction of evidence after the fact. However, the Judge's other reason was sound; W's reliability was a major issue in the trial and that could not have been more obvious to the jury. The entire defence case was that W was the murderer and had framed Mr Skantha, and counsel expressly invited the jury to find that W lied in the witness box to protect himself. A warning would have been redundant in the circumstances, and for that very reason it would have carried the risk that the jury would interpret it as an indication from the Judge that they ought to reject W's evidence.

[69] We are not persuaded that the omission of a reliability warning was an error, and we do not accept that its omission might have affected the outcome.

Admission and treatment of propensity evidence

[70] In the interests of brevity we respond to Mr Eaton's submissions in a slightly different order than he addressed them in his synopsis of argument, and some of the submissions, relating to lack of balance, are dealt with at [105] below.

Inclusion of P's evidence

[71] Mr Eaton submitted that the Judge's decision to admit the evidence of P was contrary to the decision of this Court, which had limited the volume of propensity

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29 At [60].
30 At [61].
31 *HP v R*, above n 24, at [48].
32 *Reddy v R*, above n 24, at [48].

evidence to manage the risk of unfair prejudice. Further, her evidence was broadly similar to most of the propensity witnesses; she claimed Mr Skantha made unwelcome sexual advances on a number of occasions. He made these advances in public and on social occasions. She rebuked him, swearing and on one occasion slapping him. She was aged 17 when she met him. Counsel submitted that Mr Skantha had no reason to fear disclosure of her relatively trivial claims.

[72] The Judge ruled the evidence admissible, finding that it was of high probative value and would not prolong the trial or result in unfair prejudice.[33] We are not persuaded that he was wrong. We reject the submission that this Court limited propensity evidence to the witnesses who were the subject of its decision; the Court said only that their evidence would not overwhelm the trial,[34] and we are not persuaded that the addition of P's evidence alters that conclusion. P's evidence was probative of unwanted sexual advances made in the presence of witnesses. Although she did not go to the police at the time, her allegations were sufficiently serious to warrant investigation and might have sustained charges of assault. Her evidence was credible and probative of a pattern of inappropriate conduct towards young women. It was therefore reasonable for the Judge to conclude that this incident might have contributed to the appellant's concern at Ms Rush's threats.

Failure to reconsider admissibility of propensity evidence

[73] Mr Eaton criticised the Judge for failing to revisit the admissibility of the propensity evidence having regard to the evidence led at trial. He submitted that the evidence did not sufficiently justify the inference that Ms Rush's insignificant and inaccurate threats were operating on Mr Skantha's mind at the time of her death. He supported this by reference to the evidence of specific witnesses, including P.

[74] We observe that this is a difficult argument to advance in circumstances where Mr Eaton, as trial counsel, never asked the Judge to revisit admissibility. In any event, the argument has no merit. The evidence at trial was if anything stronger than it was when this Court ruled the evidence admissible; much of the propensity evidence was

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33 *R v Skantha* [2019] NZHC 3062 [Reasons for Ruling 4 judgment].
34 Pre-trial Appeal, above n 3, at [86].

not seriously challenged. The exchange of messages between Ms Rush and Mr Skantha on the night of 2 February amply evidenced his concern about her threats. It was the imminence of those threats that led Mr Skantha and W to go at once to her home. We have mentioned at [16] above the evidence of witnesses who overheard a conversation between Mr Skantha and W evidencing such concern. Those witnesses were cross-examined on this point but maintained that they overheard a conversation about an Instagram post in which Mr Skantha sounded very stressed. There is no evidence of any other reason why Mr Skantha might rush to her house at that time. The notion that W alone was concerned about her threats, and Mr Skantha an incurious passenger, is untenable.

[75] We also understood counsel to argue that the propensity evidence was relevant only insofar as it established conduct that would amount to a criminal offence. We do not accept this submission. The question is not whether an offence could be proved, nor whether unsavoury and perhaps illegal conduct outside the workplace would justify Mr Skantha's employer in taking disciplinary action against him under his terms of employment. It is whether he took seriously the risk that Ms Rush's allegations might lead to either of those outcomes.

[76] We record that Mr Eaton made a particular point about evidence that Mr Skantha had asked a witness, J, whether a friend of hers would have sex with him for money. There was evidence that J, who was aged 16, knew this girl from school. Counsel submitted that the evidence did not justify the inference that Mr Skantha knew J's friend was a schoolgirl or a minor, and that being so, the evidence was inadmissible for the reasons given by this Court in its pretrial decision: it is not unlawful to pay a person over the age of 18 for sex. The Judge made no reference to this defence point in his summing-up, instead describing her (accurately) as a school friend of J's. We do not accept that this evidence ought to have been excluded. The inference that Mr Skantha knew she was a schoolgirl was available from the fact that she was a friend of J's. The defence did not suggest otherwise at trial; its stance was that Mr Skantha was merely joking. That being so, the Judge cannot be criticised for not making the point that Mr Skantha may have thought J's friend was 18.

Failure to direct the jury that propensity evidence was relevant only to motive

[77] Mr Eaton submitted that the Judge inexplicably focused the jury on Mr Skantha's knowledge of the complaints rather than whether those complaints were operating on his mind on the night. He developed this submission by reference to the allegations of the propensity witnesses, including the hearsay evidence of Ms Rush herself, submitting that the allegations were untrue or explicable or trivial and so would not have been operating on Mr Skantha's mind.

[78] We respond here to the submission that the Judge failed to identify the issue for the jury. We do not accept it. The Judge introduced his directions about evidence of Mr Skantha's conduct on other occasions, explaining that:

> [155] As I have already explained to you, often a jury never hears about a defendant's conduct on occasions other than he is charged with because of the way that risks a defendant's fair trial rights and might cause the jury to be unfairly prejudiced against the defendant. For you to hear evidence of Dr Skantha's conduct on occasions other than the matter he is directly charged with, there had to be some particular reason why this evidence was relevant to an issue at trial.
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> [156] The crucial issue in this trial is whether the Crown can prove beyond reasonable doubt that Dr Skantha was the killer of Amber Rush. It goes to identity. Relevant to that issue is whether or not Dr Skantha would have had a motive to kill Amber Rush. The Crown case is, as you have been told again and again, that he did have such a motive in that Amber Rush had told him she was serious about going to the Police and the hospital, and telling them about his supplying minors with alcohol, offering them money for sex and touching up minors without consent.

The Judge then went on to outline the competing contentions of the parties.

[79] In our view this direction made it very clear that the propensity evidence was relevant to motive alone and would not otherwise have been called. We do not accept the related submission that it was an error to describe it to the jury as "propensity" rather than "motive" evidence; what mattered was that they understood why it was being led and for what purpose they might rely on it.

Erroneous direction as to standard and onus of proof

[80] The Judge directed the jury that the Crown did not have to prove beyond reasonable doubt that Mr Skantha was thinking specifically about the propensity

witnesses when Ms Rush threatened to go to the police. Mr Eaton argued that this was an error. He submitted that the jury ought to have been told to decide whether they were satisfied beyond reasonable doubt that the alleged conduct occurred. Only if they were could they then consider whether the evidence assisted them at all on the question of motive. He focused this submission particularly on the question of whether Ms Rush was indecently assaulted as she had alleged.

[81] We reject this submission. The issue was not whether the allegations were true but whether they supplied Mr Skantha with a motive.[35] The distinction is important.[36] It did require, as the Judge directed, that the jury had to be satisfied Mr Skantha conducted himself in certain ways before using the evidence of that conduct as a basis for finding the Crown had ultimately proved the essential elements of the charges against Mr Skantha. It did not require the facts alleged by the propensity witnesses be proved beyond reasonable doubt. The specific question whether Mr Skantha was guilty of the offence of indecent assault was not before the jury, a charge relating to that having been withdrawn, as we explained at [36] above.

[82] Mr Eaton also submitted that at one point in his summing-up the Judge reversed the onus of proof, asking the question whether "[Mr Skantha] would have thought that the way he conducted himself with these people was of no consequence?"

[83] We do not agree that the Judge reversed the onus. He made that remark when summarising the competing cases. He was addressing Mr Eaton's suggestion that the propensity evidence would mean nothing if the jury did not believe he was thinking about the incidents comprising the propensity evidence when Ms Rush threatened to go to the Police. At the beginning of his summing-up he had explained the presumption of innocence, directing the jury that Mr Skantha bore no burden of proving innocence, that the burden of proof lay on the Crown and that the charges must be proved beyond reasonable doubt. Taken as a whole the directions were sufficiently clear about the burden and standard of proof.

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35 See above at [75].

36 See the discussion in *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [17].

Failure to direct the jury on the "main" issue: whether the claims of the propensity witnesses were true

[84] Mr Eaton submitted that the Judge failed to identify and emphasise for the jury that the first and primary question was what, if anything, the propensity evidence established in each alleged instance of misconduct. Specifically, the question to be decided was whether or not the evidence established that any of the prior alleged acts occurred at all, and if they did whether those acts were indecent assaults. He submitted that the Judge proceeded rather on the assumption that the allegations were true, or at least failed to emphasise repeatedly that the claims were mere allegations. We have touched on this at [75] and [81] above, and we here deal with the specific complaints about each of the instances.

(i) The alleged indecent assault of Ms Rush

[85] Mr Eaton submitted that the first and highly important inquiry for the jury was whether Ms Rush was indeed indecently assaulted. If she was not, the relevance of the motive evidence fell away, in his submission.

[86] We accept Mr Eaton's submission that the defence had focused on this issue, advancing a detailed case that there was no such assault. We have referred to this issue at [48] above. The defence case was that Ms Rush stayed at Duxford Crescent on the evening of 3 January 2018 and that is when the alleged indecent assault must have occurred. M, who slept on the couch with Ms Rush and Mr Skantha, did not witness an indecent assault and believed he would have known had it occurred. Ms Rush continued to associate with Mr Skantha, returning to his house on 7 January. It was then that she took offence at his offer of money for sex.

[87] Although Mr Eaton did not develop this point in his submissions before us, he had reminded the jury, without labouring the point, that Ms Rush may have had a reason to accuse Mr Skantha of something he had not done. As noted earlier, the exchange of messages began with Mr Skantha asking her if she had used his credit card. She had told a friend, M, that she had done so, and in evidence he had admitted that, as part of that conversation, he told Ms Rush to be sure to tell everyone that Mr Skantha had offered to pay her for sex and had supplied minors with alcohol.

[88] We have already dealt with the relevance of the evidence of the alleged indecent assault.[37] Whether it happened was a question for the jury. The Judge correctly identified the issue for them and summarised the defence case about it. He did not assume that the allegations were true. He had earlier reminded the jury that they had Mr Skantha's statements in his police interview to the effect that he had no reason to be afraid of her threats.

(ii) The alleged indecent assaults of other women

[89] We have referred at [37] above to the evidence of alleged indecent assaults of two other women. Mr Eaton submitted that the Judge repeatedly addressed this evidence without warning the jury that the allegations were not proved.

[90] We make two points about this. First, the Judge did remind the jury that they were dealing with allegations, and he did direct them that it was for them to decide whether Mr Skantha had sexual contact with minors or young people without their consent. He referred to this evidence (and that of offering money for sex) and said:

> [172] You need to be mindful of the submissions which Mr Eaton made to you as to why you should disregard that evidence. The defence say, first of all, you cannot regard the Crown witnesses as both honest and reliable as to the complaints which they say Amber Rush made. The defence say, even if you accept the evidence of these witnesses as to how they say Dr Skantha behaved, you cannot and should not infer from that evidence that Dr Skantha would have been mindful of what he had done with these people when Amber Rush told him that she was going to the Police, or that he would have been so threatened by what she was telling him that he would have decided to kill her.

[91] Secondly, we accept Mr Bates's submission that the defence had not squarely confronted the evidence of other indecent assaults (or offers to pay for sex). Rather, the defence sought to minimise Mr Skantha's behaviour, characterising it as showing off or making a nuisance of himself. That stance was presumably taken for the good reason that there was cogent evidence of the behaviour from a number of witnesses. By way of illustration, we refer to the evidence about a woman, L, who had passed out on Mr Skantha's couch after drinking to excess. (We referred to this evidence at [37] above.) The defence challenge to the evidence of eyewitnesses at trial focused on the

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[37] See above at [75] and [81].

fact that her body and Mr Skantha's hands were covered by a blanket, so that it was possible the witnesses misinterpreted what they saw. Their response was that the position of his hands indicated that he was touching her vagina and she evidenced signs of sexual arousal. Following that, Mr Eaton did not contend that the incident had not happened at all or that it had been consensual; instead, he invited the jury to find that Mr Skantha had not touched L under the blankets and had simply been winding up his friends and showing off; and further that there was no reason to think L would complain about it.

Undue emphasis given to propensity evidence in summing-up

[92] Mr Eaton submitted that the Judge's discussion of and references to the propensity evidence consumed a significant proportion of the summing-up. He contrasted that to what he said were very brief references to the evidence in the closing address of Mr Bates. At the end of the summing-up, Mr Eaton complained about the emphasis that had been given to the evidence. The Judge drew the jury's attention to Mr Eaton's suggestion that the propensity evidence was ultimately of little consequence in the Crown's case and invited them to consider that suggestion. Counsel described that before us as an unusual and troubling end to a summing-up. The Judge ought to have emphasised more than he did the limitations of the evidence and the risk of unfair prejudice.

[93] To the extent that this was an argument that the propensity evidence had become unimportant by the end of the trial, we do not accept it. Motive was an important issue and most of the evidence went to that issue. The Judge could not have directed the jury that the Crown ultimately placed little reliance on the propensity evidence; that would have been factually incorrect. The evidence had been led and the Crown relied on it. The Judge had to deal with it carefully and at some length.

[94] To some extent the argument is a criticism of the summing-up for being discursive. Counsel submitted that key points that ought to have been emphasised were buried at different points in the summing-up. It seems to us, however, that the Judge was responding to the way in which the respective cases had been presented. What matters is that the jury could not have been confused about the use that could be

made of the evidence and the risk of unfair prejudice. The Judge took care, when concluding his discussion of the propensity evidence about sexual matters, to remind the jury of its relevance and caution against unfair prejudice:

> [181] Independently of the submissions that have been made by the Crown, I direct you that, when considering what inferences you can draw from this evidence, you must be careful that it does not cause you to be unfairly prejudiced against Dr Skantha. Mr Eaton said that it is asking a lot of a jury to be able to do that but, I am confident with the care you have shown in this case, that you will be able to do that. If you decide he has participated in the conduct which you have heard of from these witnesses, you may think he has behaved in a way unbecoming of a 30 year old doctor.
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> [182] The evidence is however relevant and probative only in terms of the issue as to motive. The killing of Amber Rush is an act very different from anything that Dr Skantha did with these young people. Because of that, the evidence as to how he conducted himself with these young people does not make it more likely that he killed Amber Rush, except insofar as the evidence might establish to you that it was Dr Skantha who had a motive to kill Amber Rush.
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> [183] You must therefore not infer that, simply by reason of Dr Skantha behaving in the way it is alleged, he is more likely to have been Amber Rush's killer.
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> [184] The evidence is also just one part of the Crown case against Dr Skantha. The crucial issue in this case is whether, from all the evidence that you can accept has been established as to Dr Skantha's conduct on the night of 2 February 2018 and the days afterwards, whether or not, with that evidence, the Crown has proved he was Amber Rush's killer.

[95] We record, lest it be thought we have lost sight of it, that in his written submissions Mr Eaton referred to a large volume of prejudicial evidence, instancing the evidence we have discussed but also evidence about drug use. The evidence about drugs was not among the points developed in argument, perhaps because the defence accepted at trial, we think correctly, that it was inevitable some of the witnesses would mention drugs and the Crown took care not to emphasise it.

Refusal to admit hearsay evidence of Ms Rush's complaints about W

[96] As noted at [53] above, the defence wished to adduce hearsay evidence that Ms Rush had complained to two witnesses, one a former best friend and the other a former boyfriend, about W, saying that he had appeared unexpectedly in her bedroom late at night and stood by her bed, behaviour which she described as "weird" and "creepy".

[97] The Judge ruled the evidence inadmissible on the ground that circumstances attaching to the statements did not provide a sufficient assurance of their reliability.[38] He noted by way of context that he had already visited the question of hearsay statements by Ms Rush before trial, when the Crown wished to put in evidence her allegations to support a charge of indecent assault. The Judge ruled, having regard to the nature of the social context in which those statements had been made, that there was not sufficient assurance of reliability.[39] He took the same view of the evidence that the defence sought to adduce, stating that Ms Rush could not have been aware that her statements could be used as evidence in a criminal proceeding and the importance of being accurate would not have been brought home to her before she spoke. There was also a delay between these events and her speaking to the witnesses.[40] He noted that W could be cross-examined about whether he had behaved in that way. He could also be cross-examined about what Ms Rush had seen as his attempts to interfere with her ambition to move into Mr Skantha's house at Duxford Crescent.

[98] On appeal, Mr Eaton submitted the context of the hearsay statements did provide the required assurance of reliability. The two witnesses gave broadly consistent accounts. Indeed, W accepted that he had entered Ms Rush's home. This evidence can be distinguished from Ms Rush's hearsay allegations of indecent assault because that evidence raised a risk of unfair prejudice arising from an inability to cross-examine her. The question of reliability was ultimately one for the jury. The omission of this evidence resulted in a miscarriage of justice.

[99] Mr Bates submitted that there was no merit in this ground of appeal. The Judge's ruling was orthodox. In any event, Mr Skantha took the opportunity to put Ms Rush's assertions to W in cross-examination or to raise them in closing.

[100] In our view the circumstances of the statements did afford sufficient assurance of reliability for admissibility purposes. Two witnesses, to whom Ms Rush had spoken separately, said essentially the same thing. We further accept Mr Eaton's submission

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38 Evidence Act 2006, s 18(1)(a).
39 High Court decision, above n 6, at [70].
40 *R v Skantha*, HC Dunedin, CRI-2018-012-000310, 13 November 2019 (Ruling No 2), referring back to the High Court decision, above n 6, at [64]–[70].

that although Ms Rush's allegations of indecent assault were similarly made in a social context, they would have raised a significant issue of unfair prejudice for the defence if admitted.

[101] We are not, however, persuaded that there is a real possibility that the absence of this evidence affected the result. We say that for two reasons.

[102] First, there was other cogent evidence that W was obsessed with Ms Rush and had entered her house uninvited at night. She twice sent text messages to him stating that "[y]ou turn up to my house uninvited all the fucking time". He admitted that he had turned up "once or twice at night" and that he may have done so uninvited when she was asleep in bed. And there was the unchallenged evidence of a friend of hers, who deposed that W wanted to go out with her and sought his help in setting it up. Mr Eaton was able to make the following suggestion to the jury:

> He's got the hots for her. But she's not reciprocating. Not interested in him like that at all. We knew he was a regular visitor to Amber's house. Lisa [Mills] told you about that, and he told you about that. We know he went there by himself late at night. That was the occasion I said to him he creeped her out … He didn't deny it but sought to give an explanation as to why he'd gone there.

[103] There was also evidence, including text messages, to the effect that W wanted the room in Mr Skantha's house that Ms Rush planned to move into, and was jealous about her plans to do so. When dealing with that topic, counsel said to the jury:

> And Amber sends that message you might think is quite telling, on the late December where she says to [W], "You tum up at my house uninvited all the fucking time". He's the one who turns up uninvited, he's the one who's been there at night before. So, as at the beginning of 2018, what do you make of it? [W] a bit obsessed with Amber? Hurt by Amber? Aware that Amber and [C] are isolating him from Vinnie, negatively impacting on his Vinnie, wanting to make it up to Vinnie?

[104] The second reason why we think this evidence would not have made a difference is that the circumstantial case against Mr Skantha was exceptionally strong. It is not surprising that the jury deliberated for only four hours. On the view we take of this case we need not decide for ourselves whether the evidence proved

Mr Skantha's guilt beyond reasonable doubt,[41] but we record that we are in fact satisfied of it.

Summing-up: unfairness and lack of balance

[105] Mr Eaton grouped a number of topics under this heading. We have dealt with some of them — lies, demeanour and expert evidence — separately below as we consider that they are better characterised as distinct grounds of appeal. We do not overlook his submission that they contributed to an overall lack of balance and unfairness that was sufficient to cause a miscarriage of justice.

Defence case as to indecent assault

[106] It was, as Mr Eaton submitted, an important limb of the defence case that Mr Skantha had not indecently assaulted Ms Rush, and that being so, the alleged motive fell away since he was hardly motivated to commit murder to prevent a demonstrably false complaint. Counsel submitted that the Judge inexplicably failed to refer to the defence case as to whether there was an indecent assault at all.

[107] We do not accept this submission. The Judge directed the jury as follows:

> [163] Mr Eaton argued that this propensity evidence about Dr Skantha offering money for sex, or about him having sexual contact with others, would mean nothing if you can be satisfied that he had never indecently touched Amber Rush. He referred you to some of the evidence relating to that and said you can be satisfied that no indecent assault of Amber occurred, [M] never saw it. He said, on that basis, Dr Skantha would not have been concerned about that conduct ever becoming the subject of a complaint with the Police or the subject of investigation.

Propensity generally

[108] More generally, Mr Eaton submitted that the Judge dealt with the propensity evidence in a way which was prejudicial to the defence. He repeatedly assumed that the claims of the propensity witnesses were true. He referred to a "body" of evidence "from various witnesses" as to Mr Skantha's alleged sexual misconduct with three young women. He told the jury that the Crown case was that Mr Skantha had a motive

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41 *Haunui v R*, above n 20, at [67].

in that Ms Rush had told him she was serious about telling the police and the hospital about his "supplying minors with alcohol, offering them money for sex and touching up minors without consent". He implied that there might be yet more young women from whom the jury had not heard, saying that if the jury accepted the evidence of witnesses they could infer that he was very likely to have realised that her complaint would "open up a can of worms" for him and that there could be an enquiry as to his alleged offending which could have led the police to other potential victims or witnesses. He spoke of Mr Skantha having been involved in contact with "the likes of these women", which illegitimately conveyed the impression that there may have been other incidents in which Mr Skantha behaved inappropriately around women.

[109] Further, counsel submitted, the Judge sometimes offered a rejoinder to defence contentions that he had summarised. Specifically, he recorded Mr Eaton's suggestion that it was inconceivable that Mr Skantha would have been thinking about three named witnesses on the night Ms Rush was threatening to go to the police and said that:

> Well, it may be, as a 30 year old doctor, he would have had no thought at all as to how he had been apparently interested in having sex with girls much younger than himself and had demonstrated that with the likes of [P] or in what he said to [J] about having sex with a school friend of hers, or with [J] herself.

[110] We have already rejected a number of these points. So far as the others are concerned, it was correct that there was a body of evidence from a number of witnesses about the sexual misconduct. The Judge's summary of the Crown case was accurate. We do not accept that he conveyed the impression that there were in fact other complainants or witnesses; he was making the general point that the Crown need not show that Mr Skantha had specific complainants in mind when he responded to Ms Rush's threats. He was directing the jury that the question of motive rested on the Crown claim that Mr Skantha feared an investigation into his conduct with people to whom Ms Rush's complaints could lead the Police. Further, the summing-up must be considered as a whole. As noted at [94] above, the Judge did caution the jury against unfair prejudice and remind them of the purpose for which the evidence was led.

Treatment of inferences

[111] Mr Eaton submitted that the Judge's direction on inferences invited the jury to infer that Mr Skantha was guilty. He gave six examples of inferences that the Crown wanted the jury to draw, all of which were hotly contested. Mr Eaton submitted the Judge ought to have discussed inferences in relation to uncontested facts to avoid confusing the jury. We do not think this is a fair criticism of the Judge's direction. It was appropriate to give concrete examples drawn from the case at hand, and the Judge made it clear that these were inferences the Crown wanted the jury to draw. He immediately went on to summarise what the defence had to say about those inferences, namely that the underlying facts were too uncertain to justify drawing them.

References to key players

[112] Mr Eaton submitted that the Judge throughout referred to the appellant as "Dr Skantha", without ever using his first name, while every reference to either Ms Rush or W included their first names, so personalising them for the jury. The Judge also repeatedly referenced Mr Skantha's age, contrasting it with that of Ms Rush and other witnesses. Counsel drew our attention to the passage from the summing-up which we have quoted at [109] above. He pointed out that not all of the witnesses were as young as 16. Two of the alleged victims of indecent assault were aged 19, but the Judge did not draw the jury's attention to that fact.

[113] This Court has held that it is best to avoid using forenames when referring to complainants while referring to the defendant impersonally as "the defendant".[42] It is not the use of forenames that is problematic, but the contrast with the treatment accorded the defendant. Nation J did not speak impersonally of Mr Skantha as "the defendant". We were told that Mr Skantha prefers to be called "Mr" rather than "Dr", but it does not appear that the trial Judge was asked to refer to him in that way. And as Mr Bates submitted, the age of Ms Rush and the other witnesses, relative to that of Mr Skantha, was part of the Crown case. It reflected poorly on him, but not illegitimately so.

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[42] *Curel v R* [2020] NZCA 473 at [46].

Taking on prosecutor's role

[114] Mr Eaton submitted that in various ways the Judge took on the role of the prosecutor. The Judge made a number of references to passages from W's police interview which were consistent with W being fearful of Mr Skantha, but then directed the jury that it was not suggested to W that he had no reason to be fearful. Counsel submitted by directing the jury in this way the Judge was effectively telling them to place no relevance on W's failure to take any steps to report the alleged offending. No reference to this evidence had been made by the prosecutor in closing. The Judge also referred to W's evidence that Mr Skantha had told W in detail about how Ms Rush was killed and enquired rhetorically why Mr Skantha would have done that. The Crown had not invited the jury to speculate about that point, and the defence of course had denied it. The Judge also sought to excuse lies by W regarding the phone call between W and SC at 11.54 pm, when the prosecutor had not referred to those lies at all.

[115] We do not accept that the Judge took on the prosecutor's role when outlining the respective cases. The first observation likely reflected the basis on which the case had been tried, with the Crown refraining from leading other evidence about W's fear of Mr Skantha. The others were part of the evidence before the jury and the Crown's case, notwithstanding that the prosecutor had not focused on them in his closing address. The Judge did draw the jury's attention to inconsistencies in W's account about the phone call and the defence suggestion that W was creating an alibi for himself. He did not invite the jury to accept W's account.

The lies direction

[116] In a ruling delivered during the trial, on 19 November 2019, the Judge ruled inadmissible veracity evidence about lies Mr Skantha allegedly told to the Police on other occasions, unrelated to Ms Rush.[43] It concerned allegations that he had tried to get young females into his car and that he had unlawfully entered a complainant's bedroom and taken a laptop. The Crown had sought to adduce evidence that he lied

[43] See the subsequent reasons judgment: Reasons for Ruling 4 Judgment, above n 33.

when interviewed about these matters because the defence had attacked W's veracity by cross-examining him about unrelated incidents.

[117] The Crown was however permitted to challenge Mr Skantha's veracity by suggesting that he had lied in his police interview by claiming that Ms Rush was not even a friend, that he was not concerned about her allegations, that he had not been anywhere near her house on 2 February 2018, that he and W did nothing at Blackhead Quarry, and that all they did at Balclutha was have a barbecue. The Judge gave a lies direction accordingly. He also directed the jury that they might take into account his lie to his employer about the death of his mother, saying that it was relevant to motive.

[118] However, the Judge also gave the jury a direction about lies that W told the police when interviewed in December 2017 about sexual allegations he faced. The Judge stated that:

> [146] You have also heard submissions from the defence and the Crown as to the lie or lies which [W] told the Police when he was interviewed about sexual allegations he faced from December 2017. [W] accepted he had initially lied to the Police in that interview in the face of the allegations he then faced. Had he ever stood trial in relation to those allegations, a Judge would have had to warn the jury about how they might consider lies in just the same way as I have done in this trial and what you are asked to accept were lies Dr Skantha told to the Police in his interview. The fact someone being interviewed by the Police has lied does not necessarily mean they are guilty of the allegations they were being interviewed about.
>
> [147] The defence refer to the lies [W] then told as evidence that he was someone who was prepared to lie to get himself out of the predicament he faced. They suggest this will be of considerable weight to you when you have to assess whether he lied about what happened with Amber Rush to avoid his being identified as her killer.
>
> [148] It will be for you to decide what you make of the evidence in this regard. In doing so, it will be relevant that [W] did tell the Police, despite being told of his right to silence on being arrested, that he had consensual sex with the complainant in that case, and subsequently pleaded guilty to a charge of having sex with a 15 year old.
>
> [149] As I said to you, after you heard [W] being questioned about the lies, the defence are not suggesting that the conduct [W] was being interviewed about would be of any relevance to you in deciding whether or not he could have been Amber Rush's killer. That was a proper stance to take. There is nothing in the evidence you have seen and heard to suggest there was any sexual motive in the killing of Amber Rush.
>
> …

> [151] You are also entitled to consider the fact [W] lied to the Police in his interview in December 2017 in deciding whether he was an honest witness in the evidence you heard from him in this trial.

[119] Mr Eaton submitted that it was wrong and unfair to give a lies direction in respect of W, still less to discount his lies by pointing out that W did make admissions about his behaviour with the complainant in that case. And so far as the direction with respect to Mr Skantha's lies was concerned, the Judge ought to have emphasised that it was important not to give disproportionate weight to any alleged lie and he ought to have advanced any possible innocent explanation.

[120] We do not accept that there was anything wrong with the lies direction given for Mr Skantha. It was orthodox. Mr Skantha did not accept that he told any lies. The Judge emphasised that the jury must first be satisfied that he did lie and they should recognise that a lie is not necessarily probative of guilt. He warned the jury that they must exercise considerable caution when deciding what weight to give to any lies told in the interview. The Judge was also plainly conscious of the potentially prejudicial effect of evidence that Mr Skantha lied about his mother's death. He told the jury that they could not infer from that lie that he was more likely to have killed Ms Rush.

[121] Turning to the lies warning given about W, in *Khairati v R* this Court firmly discouraged the practice of giving a lies direction for a Crown witness, pointing out that a lies direction under s 124 of the Evidence Act is intended to give a specific warning to the jury where the Judge fears they may attach undue weight to a lie uttered by a defendant.[44] A Judge may allow a jury to consider a lie by a non-defendant witness when determining the credibility and reliability of that witness's evidence, but the Judge should refrain from offering innocent explanations for the lie.[45]

[122] However, the direction given in respect of W was not an orthodox lies direction and it was nowhere near as extensive or exculpatory of the witness as the direction condemned in *Khairati*. The Judge did caution the jury that a lie told to the Police does not necessarily signify guilt, but his evident purpose was to point out the extent

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44 *Khairati v R* [2017] NZCA 31 at [24] and [27], citing *Ngatai v R* [2016] NZCA 352 at [19].
45 *Khairati v R*, above n 44, at [27].

of W's lie and to caution them that (as the defence accepted) it was not evidence that W killed Ms Rush. He did tell the jury that they could consider the lie when assessing W's evidence. We do not think there is any risk that the Judge's direction affected the result. W was by his own admission an unreliable witness and there was ample evidence of that.

Demeanour

[123] The defence sought to make much of the demeanour of Mr Skantha and W in their respective police interviews, describing Mr Skantha as calm, polite and confident while W's demeanour was not at all what one would expect of a 16-year-old who had found himself associated with a friend's murder, nor was it consistent with W's alleged fear of Mr Skantha.

[124] The Judge recounted Mr Eaton's submissions on the point, then cautioned the jury about relying on demeanour:

> [128] I do warn you nevertheless that, simply observing witnesses and watching their demeanour, how they appear, as they give evidence is not, by itself, necessarily a good way to assess the truth or falsity of their evidence. A witness who is being questioned may not appear confident or may hesitate, fidget or look away when giving evidence. That does not necessarily mean that their evidence is untruthful. A witness may understandably be nervous giving evidence when responding to questions or giving evidence in an unfamiliar environment in front of unknown people. On the other hand, the person being questioned may appear confident, open and persuasive, but may nevertheless have told you something which is not true.

[125] The Judge then reminded the jury that the defence case was that W was a dishonest witness and told them that they were entitled to consider whether the way in which he gave his narrative events to the police, and in court, was consistent or inconsistent with him deliberately lying about all that he was describing. He emphasised that he was not telling them that demeanour must be totally disregarded; they could make of it what they would. But they should bear in mind that demeanour alone may not be a good indicator as to truthfulness.

[126] On appeal, Mr Eaton submitted that the direction was unfair and inconsistent with the Supreme Court decision in *Taniwha v R*, in which the Court observed that the key consideration for a trial judge when considering a direction will be whether there

is a "real risk that witness demeanour will feature illegitimately in the jury's assessment of witness veracity or unreliability".[46] In this case, Mr Eaton submitted, there was no risk that the jury's assessment of demeanour would bear illegitimately on the assessment of W's veracity or reliability. He submitted that the direction given effectively invited the jury to disregard his submissions about W's demeanour.

[127] We do not accept that the Judge was wrong to caution the jury against attaching too much weight to demeanour. It plainly was in issue, especially for the defence, and it was not unreasonable to think there was a risk the jury might attach too much weight to it. The Judge did not tell the jury to disregard Mr Eaton's suggestions or direct that they must not take demeanour into account.

Experts

[128] Mr Eaton submitted that the Judge's brief direction on expert evidence ignored defence criticisms of one expert witness, Mr Pelvin, who gave evidence regarding Google location data. Mr Eaton submitted that the witness was inexperienced and made bold claims without being able to substantiate them, and a fair and balanced direction would have addressed the primary question for the jury as to whether he was in fact an expert on whose opinion they might rely.

[129] It does not appear, however, that the admissibility of Mr Pelvin's evidence was contested at trial. It was not in dispute, in other words, that he was qualified to give expert evidence on a topic with which the jury were not familiar. They were told that the weight to be given to his evidence was a matter for them. The Judge drew attention to the defence criticisms of Mr Pelvin's opinions, the substance of which was that the jury could not conclude Mr Skantha had deliberately tried to hide location data.

Conclusion

[130] Mr Eaton mounted a wide-ranging and thorough challenge to the conduct of the trial and the summing-up, but we are not persuaded that there were any material errors. Those we have identified were not sufficiently serious, even in combination,

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[46] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [43].

to create a real risk of a different outcome. It is not necessary that we form our own view of Mr Skantha's guilt but we have done so; we are satisfied that the evidence proved his guilt beyond reasonable doubt.

Result

[131] The appeal is dismissed.

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