NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA330/2020
[2021] NZCA 535

	BETWEEN	TE KIRI GEOFFREY WILLIAMS Appellant
	AND	THE QUEEN Respondent

Hearing:	22 July 2021
Court:	Miller, Thomas and Wylie JJ
Counsel:	H G de Groot and TWR Lynskey for Appellant M J Lillico and S E Trounson for Respondent
Judgment:	13 October 2021 at 2.00 pm

JUDGMENT OF THE COURT

A An extension of time for filing the appeal is granted.

B The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] Te Kiri Williams was convicted following a jury trial and sentenced to nine years and two months' imprisonment on six charges of offending against the complainant: three charges of male assaults female, one of injuring with intent to injure, one of assault with intent to injure and one of sexual violation by rape. All of these charges involved Mr Williams' abuse of his former partner with whom he had been in an on-again off-again relationship for ten years. Although only one of the charges was representative, the complainant's evidence at trial was wide-ranging, painting a picture of a relationship in which Mr Williams was highly controlling and seriously violent towards her over a sustained period.

[2] Mr Williams appeals his convictions on the following grounds:

(a) that during her evidence-in-chief, the complainant introduced a range of inadmissible and prejudicial evidence and took the trial into her own hands and as a result, the trial was unfair and there was a miscarriage of justice;[1]

(b) the evidence of a previous statement made by a defence witness was not substantially helpful in assessing her veracity and was otherwise inadmissible under s 8 of the Evidence Act 2006;

(c) there was no proper basis for the Crown to have excluded that witness and others from its witness list, irrespective of whether they hindered the prosecution case; and

(d) the counter-intuitive evidence directions given by the trial Judge were impermissible.

[3] Mr Williams appeals his sentence on the grounds that the starting point was too high and an inadequate discount was given for his personal and cultural circumstances.

[4] Mr Williams's appeal was filed six days out of time. The delay was short and the Crown accepts there is no prejudice. An extension of time is granted.

CONVICTION APPEAL

The facts as found at trial

[5] The following description of the offending comes from the trial Judge's assessment of the evidence as set out in his sentencing notes.[2]

[6] On 19 May 2018, Mr Williams and the complainant were staying in a motel unit with two of Mr Williams' adult children and their partners. At some stage that night, Mr Williams and the complainant argued and he punched her to the head

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1 Criminal Procedure Act 2011, s 232(2)(c) and (4)(b).
2 *R v Williams* [2020] NZDC 8781 [Sentencing notes].

repeatedly. The force of the blows was enough to knock her off her feet. This was the basis of the first male assaults female conviction.

[7] When Mr Williams stepped outside, the complainant attempted to crawl away and leave. When Mr Williams saw her, he grabbed her by her left leg and twisted or wrenched it. This caused her left knee to become swollen and painful, leaving her unable to walk properly. According to one of the medical expert witnesses, it was more likely than not that the twisting caused the complainant's kneecap to become dislocated. This was the basis of the injuring with intent to injure conviction.

[8] On 12 July 2018, the police stopped the car Mr Williams was driving. The complainant talked to police and told them that she was being held by Mr Williams against her will. Mr Williams then started to complain of chest pains, causing the police to call an ambulance. The complainant was taken by the police to another location for her safety. The following day, she suffered a seizure and was admitted to hospital. There, she was spoken to by a police detective and made a statement alleging abuse.

[9] The complainant said she and Mr Williams had argued in the car and Mr Williams assaulted her by choking, grabbing and punching her, and striking her head with a full can of alcohol. She said Mr Williams had thrown her into the boot of the car and only allowed her out a short time before being stopped by police. The police detective noted bruising to the complainant's neck, arms, upper body and forehead. This was the basis of the second male assaults female conviction.

[10] After being discharged from hospital, the complainant was taken by police to a safe house. She was later relocated to a women's refuge in Kaitaia. After learning of her whereabouts, one of Mr Williams' children visited the complainant and pleaded for her to return. The complainant eventually agreed to do so.

[11] On 23 July 2018, the complainant was driven back to Mr Williams' address in Auckland. Upon re-entering the house, Mr Williams began abusing her almost immediately, accusing her of cheating on him. When the complainant denied this, he

punched her repeatedly about the head and body. This was the basis of the third male assaults female conviction.

[12] The physical assaults continued over the next two days, increasing in severity. They culminated in what the complainant described as the "worst hiding" she had suffered at Mr Williams' hands. The assaults included punching, stomping on her throat, kicking her injured knee and pulling her hair. Mr Williams wrapped a phone charging cord around the complainant's neck, restricting her breathing to the point she lost consciousness. This was the basis of the conviction on the representative charge of assault with intent to injure.

[13] When she regained consciousness, the complainant discovered she was naked and Mr Williams was lying on top of her having penetrative sex without her consent. This was the basis of the rape conviction.

Was the trial unfair?

The standard for an unfair trial

[14] This Court considered what amounts to an unfair trial in *Wiley v R*.[3] It observed that not every error, irregularity or occurrence will result in an unfair trial.[4] The assessment is to be made in relation to the trial overall. Referring to Lord Bingham's observation in *Randall v R*,[5] the Court noted that there will come a point when a departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable, an appellate court will have no choice but to condemn the trial as unfair and quash the conviction as unsafe.[6]

[15] The Court provided a non-exhaustive list of categories where the issue of an unfair trial may arise (including counsel error and lack of legal representation) but also stressed that the range of matters may be "extensive".[7]

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3 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1.
4 At [35], referring to *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].
5 *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].
6 At [35].
7 At [40].

Submissions

[16] The complainant had given three separate statements before the trial, including an electronically recorded interview.[8] In pre-trial call-overs, the Crown had indicated it would lead evidence of other assaults alleged to have occurred during the charged incidents and evidence of drug use, but undertook not to lead evidence of unrelated criminal offending referred to by the complainant, or Mr Williams' family's gang connections.

[17] Despite this, in Mr de Groot's submission for Mr Williams, the complainant's evidence went significantly beyond those statements, introducing an array of allegations that formed no part of the Crown case. These allegations fell into three separate categories:

(a) Category one: allegations that Mr Williams was violent during the charged incidents. These included allegations of detention, strangulation, suffocation, assaults with objects (stones and a television), property damage, poisoning, general violence, threats from Mr Williams' family and additional sexual assaults in the course of the rape.

(b) Category two: allegations of Mr Williams' violence unrelated to the charged incidents. These included habitual assault, strangulation, police call-outs, burning the complainant for refusing to smoke methamphetamine, selling methamphetamine with his mother, breaking the complainant's fingers, drugging his son and then having sex with his son's partner and forcing the complainant to watch, forcing objects under her fingernails and additional sexual assault. Mr de Groot maintained that most of these allegations had not been referred to in the complainant's statements or had been deleted from them.

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[8] We have been provided with two written statements but not the transcript of the electronically recorded interview.

(c) Category three: allegations of unrelated offending, "bad character" or other prejudicial evidence. These included Mr Williams' family intimidating medical staff in gang regalia, Mr Williams' detaining the complainant, efforts to evade police, manipulating and isolating the complainant from others, supplying methamphetamine to Mr Williams' children and to prostitutes, starving the complainant, restricting access to her medication, taking and selling her medication, threats to kill her, threats to kill her children, kidnapping her daughter, threats by his family and reference to his having been in prison. Mr de Groot maintained that almost none of these allegations were in the complainant's statements, or had been deleted from them.

[18] Mr de Groot characterised the category one evidence as propensity evidence which, he accepted, arguably went to proving a pattern of violence and cycle of toxicity in the relationship.[9]

[19] However, referring to the case of *Edmonds* (discussed below),[10] Mr de Groot submitted that the complainant unfairly took the trial into her own hands and this resulted in unfairness because:

(a) she was warned prior to the trial to avoid referring to inadmissible material;

(b) she was spoken to after she referred to gang affiliations and prison but referred to both again;

(c) large amounts of propensity and other prejudicial evidence were introduced by the complainant which was then referred to by other witnesses;

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9 Mr de Groot abandoned the ground of appeal criticising the propensity directions.

10 *Edmonds v R* [2015] NZCA 152 at [24], where the Court noted it would be more likely to find a miscarriage of justice had occurred if "a witness had unilaterally, or at the invitation of the Crown, taken matters into his or her own hands and introduced damaging and irrelevant material that affected the fairness the trial".

(d) that evidence was almost entirely unsignalled in the formal written statements or had been deleted, indicating that the Crown did not intend to lead it;

(e) only two aspects of the evidence were remediated by the Judge's directions (gang affiliations and time in prison); and

(f) much of the evidence was given in the complainant's evidence-in-chief and was given gratuitously.

[20] In Ms Trounson's submission for the Crown, evidence of conduct arising from the same incident was admissible under ss 7 and 8 of the Evidence Act. The uncharged allegations formed part of the overall events that were the subject of the charges. That evidence was therefore probative and material to proving each assault.

[21] Ms Trounson's position in relation to categories two and three was that evidence of violence and other extrinsic matters relating to the relationship between the complainant and Mr Williams fell squarely within the scope of relationship evidence admissible under s 43 of the Evidence Act as relationship propensity evidence. Referring to *P(CA354/2017) v R*, and *Campbell-Joyce v R*, Ms Trounson contended that this was propensity evidence which demonstrated the way in which Mr Williams and the complainant behaved towards one another, reflecting a highly dysfunctional relationship.[11]

[22] While Ms Trounson conceded that certain aspects of the category three evidence fell outside the scope of relationship propensity evidence (relating to gang connections, previous offences and time in prison), they were ruled on by the trial Judge, who decided not to comment at the time to avoid giving them undue attention. Furthermore, some of the complainant's evidence did not amount to her taking the case into her own hands but rather, as the Judge observed to the jury, were inextricably part of the narrative.

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[11] *P(CA354/2017) v R* [2018] NZCA 361 [*P v R*]; and *Campbell-Joyce v R* [2016] NZCA 192.

[23] Ms Trounson noted that the defence had been warned in at least two pre-trial memoranda there was a risk the complainant would exceed her brief. She then submitted that the majority of the responses complained of were made in cross-examination and in reaction to being challenged by trial counsel. Ms Trounson gave three examples. First, a category two incident, where the complainant said the neighbours would often call the police on Mr Williams for beating her. Ms Trounson pointed out that this answer was given in response to the complainant being pressed by defence counsel as to whether she willingly returned to Mr Williams.

[24] Secondly, also in category two, the complainant said she had burn marks all over her body from when she refused to smoke methamphetamine. That evidence, said Ms Trounson, was given in response to questions in cross-examination alleging that she was the aggressor in the relationship and that she was a methamphetamine user. Her answers were essentially to say that she had no choice.

[25] Thirdly, from category three, that the complainant said Mr Williams "fed" methamphetamine to his children. Ms Trounson pointed out that there was no dispute that the family were all methamphetamine users and that the youngest child was 19 years old.

[26] So, in Ms Trounson's submission, the complainant's evidence was in response to a confrontational cross-examination and any prejudice was adequately covered by the Judge's direction on prejudice and sympathy.

Relationship evidence and this case

[27] In *Taniwha v R* and *P v R*, the Supreme Court and this Court respectively endorsed the minority's view in *Mahomed v R*,[12] where McGrath and William Young JJ noted that propensity evidence relating to interactions between a defendant and a victim may have an important explanatory value in terms of the background or relationship between those involved.[13] This includes situations where the events are

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12 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

13 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [63]; and *P v R*, above n 11, at [32]–[33].

so interconnected with the alleged offending that the jury will not be able to understand properly what happened without hearing evidence about them.[14]

[28] Furthermore, in *P v R*, this Court explained:[15]

> [32] It is recognised that in cases of domestic abuse, which can involve wide-ranging allegations, it can be helpful, and even necessary, for the jury to have access to evidence that places the allegations in the context of the family dynamic. Evidence tendered to show the defendant's previous conduct towards the victim, to establish the context in which the offending occurred and to explain the nature of the relationship between the defendant and victim, is sometimes called relationship evidence.

[29] The Court went on to say:[16]

> [33] Relationship evidence is not propensity evidence in the traditional sense, despite falling within the scope of s 40 of the Evidence Act because it does not primarily depend on ideas of linkage and coincidence. It is led for the purpose of informing the jury of the nature of the relationship. In *Perkins v R* this Court explained that such evidence is:
>
> > … allowed in not because of the similarity between what is alleged by way of background and the actual offending (although there are similarities) but rather because otherwise the complainant's evidence as to the alleged offending which is the subject of charges will be necessarily incomplete and perhaps not comprehensible from the point of view of the jury.
>
> [34] The factors set out in s 43(3) will generally be of less significance in determining the probative value of the evidence than it would be in cases where ideas about linkage and coincidence are relied on. It is generally accepted that there is little room for unfair prejudice in respect of relationship evidence, as against evidence led for the purpose of coincidence reasoning, because "the wrongfulness of the defendant's conduct will usually be closely connected to the core elements of the case against [him or her]".

[30] But this appeal does not really challenge the admissibility of relationship evidence. Mr de Groot accepted that, in cases alleging family violence, relationship evidence can legitimately be used as part of the background narrative of the relationship between the parties. In his submission, however, what happened in this case was unorthodox and unfair. It could not have been anticipated, he said, that in a case involving six charges, only one of them representative, that the complainant's evidence would in fact make in excess of 50 allegations in addition to those covered

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14 *Perkins v R* [2011] NZCA 665 at [20].
15 *P v R*, above n 11 (footnote omitted).
16 Footnotes omitted.

by the charges. This was not a case, in his submission, of there being simply some evidence given of background incidents.

[31] These criticisms, on their face, suggest there was a real problem at the trial and that the evidence exceeded by a large margin the case Mr Williams expected to face. However, we note that Mr de Groot was not trial counsel. This is not a criticism but it is important to examine the background to the trial and what Mr Williams knew about the Crown case.

What did the defence know prior to trial?

(a) Crown call-over memoranda

[32] In the trial call-over memoranda dated 3 April and 18 October 2019, the Crown prosecutor discussed the complainant's evidence. Relevantly, in the 3 April 2019 memorandum, the Crown said:

> Charges
>
> For a number of reasons, the Crown has elected only to lay charges where there is corroborating evidence in support of the complainant's allegations (in particular observed injuries). In her statements the complainant refers to a number of other assaults which occurred during the same incidents. The Crown intends to lead these matters from the complainant, on the basis that it would be artificial to exclude them from her evidence.
>
> Drug references
>
> On a number of occasions the complainant refers to both herself and the defendant consuming illegal drugs. The Crown anticipates that this will be a relevant issue at trial, and therefore at this stage intends to lead this evidence.
>
> The complainant also refers to unrelated criminal offending by the defendant, and her belief that the defendant's family have gang connections. The Crown does not intend to lead this evidence.

[33] In the second trial call-over memorandum dated 18 October 2019, the Crown repeated those comments and said:

> 4.2 The Crown does not intend to play the complainant's evidential interview at trial, due to its discursive nature. The Crown **attaches** a brief of evidence indicating the matters that the Crown intends to lead from the complainant.
>
> (Emphasis in original.)

[34] There is nothing before us to suggest there was any pre-trial challenge to the Crown's approach.

(b) The complainant's brief of evidence

[35] The complainant's brief of evidence incorporated her two written statements, dated 19 June and 9 August 2018.

[36] The complainant's 19 June written statement gave an account of the night of 19 May 2018, involving the incident when Mr Williams dislocated the complainant's knee and assaulted her, giving rise to the first two charges (male assaults female and injuring with intent to injure).

[37] The complainant said she woke Mr Williams at about 11.00 pm and "he just started smashing me around". He punched her to the right side of her jaw and then got on top of her on the bed, punching her in the head. He grabbed her ponytail and flicked it round her head like a whiplash, hit her in the mouth and broke her dental plate.

[38] While Mr Williams was still on top of the complainant, he strangled her by pressing down on her voice box with his thumbs, threatening to kill her. She noted at that point in the statement that she "got hidings every day". When she was on the ground, he put her left leg in a position similar to a headlock and twisted it until it made a noise. The pain caused her to scream. He then picked her up by her shoulders and threw her on the bed. He began to strangle her again, as well as punching her. He told her she was going to die. He then carried her out of the motel and threw her under a bush. She was taken back to the motel room. When she tried to call the police using her phone, Mr Williams grabbed it and squeezed her hand so hard he sprained her right thumb. When she tried to escape the following morning, Mr Williams threw stones at her good leg, trying to stop her moving.

[39] Some matters were deleted from that statement. For example, reference to Mr Williams being in prison, him not allowing her to talk to anyone, making her urinate into a container, never leaving her alone and references to drug use.

[40] The complainant's second statement dated 9 August concerned the same incident but with some additional information, for example that Mr Williams made her sit on a chair in the shower while he punched her in the head continuously, that he locked her in the toilet and that he threatened to break her other leg. Aspects of the statement which were deleted were that:

(a) Mr Williams' mother made her plead guilty to charges involving offending by Mr Williams to avoid him going to jail;

(b) Mr Williams' parents had arrived at the hospital in Black Power T-shirts;

(c) Mr Williams had broken her ribs in the past;

(d) Mr Williams hit her with her crutches;

(e) Mr Williams' use of pornography;

(f) Mr Williams put her uninjured leg into a lock and threatened to break it (although as noted above, a more general threat to break the complainant's uninjured leg was retained in the statement);

(g) Mr Williams choked her;

(h) Mr Williams hit her with a can of alcohol; and

(i) Mr Williams shoplifted.

[41] In respect of charge three and the events of 12 July 2018, the complainant's brief relevantly recorded that, when she and Mr Williams were in the car, she was crying and he was "punching my head in". He would not let her eat but made her drink something which "tasted like shit" and made her feel sick. Mr Williams kept looking at the drink and laughing, "saying something about Toilet Duck or Janola". He told her he was going to end her life that night and that he was in love with his son's partner. Mr Williams then "forearmed" the complainant in the mouth and began

to strangle her. He suffocated her and then she was "out". She woke up in the boot of his car and he dragged her out and threw her into the passenger side. When stopped by the police, he faked a heart attack.

[42] In respect of charges 4, 5 and 6, the complainant's brief recorded that on 23 July, Mr Williams punched the complainant in the back of the head, slammed her onto a chair, trampled on her toes and kicked her in the knee.

[43] On 24 July, the complainant got "the worst as hiding" and the choking incident was "the worst one ever". She said she was "strangled and strangled" and it felt like he was trying to kill her. He wrapped the charging cord around her neck and said he was going to make it look like she hung herself. Mr Williams put her into a headlock and suffocated her with pillow. He trampled on her neck. The "hiding" went on for about nine hours and she thought she was going to die.

[44] On 25 July, Mr Williams threw the complainant onto the bed, smashed her into the wall and strangled her again. At one stage she was knocked out. He put her in a choke hold and caused her to lose consciousness. She woke up naked and heard talk about glass. As he raped her, Mr Williams was looking at photographs of his son's partner. After the rape, Mr Williams continued to assault the complainant, punching her in the stomach and putting her in a headlock.

(c) Charge list

[45] The amended charge list dated 26 November 2019 recorded the following:[17]

(a) Charge 1, 19 May 2018: Male assaults female. Particulars: punch(es) to her head.

(b) Charge 2, 19 May 2018: Injuring with intent to injure. Particulars: injury to her left knee.

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[17] We note that charge 3 was originally a representative charge but this was amended following a legal discussion between counsel and the trial Judge on 26 November 2020.

(c) Charge 3, 12 July 2018: Male assaults female. Particulars: bruises to head observed by Detective Hearn on 13 July 2018.

(d) Charge 4, 23 July 2018: Male assaults female. Particulars: punching her.

(e) Charge 5, between 24 and 26 July 2018: Assault with intent to injure (representative). Particulars: choking her.

(f) Charge 6, 26 July 2018: Sexual violation by rape.

(d) Summary of facts

[46] The Crown produced a summary of facts described as the "TCM version" which we interpret as being the latest summary of facts provided to the Court for the purposes of the trial call-over. In relation to the charges, the allegations (in summary) were:

(a) Male assaults female – punches to the head: during the course of the evening of 19 May 2018, Mr Williams punched the complainant repeatedly to the head.

(b) Injuring with intent to injure: at some stage during that evening Mr Williams twisted the complainant's leg with such force that it made a loud clicking noise. She woke early the next morning and left the motel room. Mr Williams caught up with her and they travelled together to the accident and emergency unit. After being seen by staff, she was taken to Middlemore Hospital under a false name to avoid Mr Williams being able to contact her. Doctors noted the following injuries:

(i) likely dislocation and relocation of left knee;

(ii) multiple contusions to her face, including a split and swollen left lower lip; and

(iii) multiple areas of tenderness and bruising over the rest of her body.

Social workers placed the complainant into a motel following her discharge. Mr Williams located the complainant and they left the motel together.

On 17 June 2018, the police stopped Mr Williams' vehicle. He was arrested and she was taken to Women's Refuge in Kaitaia. She subsequently returned to Auckland and stayed with Mr Williams.

(c) Male assaults female: on 12 July Mr Williams assaulted the complainant, causing various bruises and abrasions. Their car was stopped by police that same day and Mr Williams was arrested in relation to outstanding warrants. The complainant was taken to hospital on 13 July 2018 and her injuries were noted by the police officer present as:

(i) bruising to the right side of her forehead above the brow;

(ii) bruising to her left and mid-forehead;

(iii) welt marks to her left collar bone;

(iv) slight bruising to the right upper side of her neck; and

(v) bruises to both upper forearms.

The complainant returned to Women's Refuge in Kaitaia but later agreed to return to Auckland with Mr Williams' son.

(d) Male assaults female: on 23 July 2018, Mr Williams became angry when he heard the complainant had been speaking to another man. He punched her in the back of her head, slammed her onto a chair and trampled on her toes.

(e) Assault with intent to injure (representative) (choking incidents on 24 and 25 July 2018).

On 24 July 2018, Mr Williams told the complainant, "I'm gonna make it look like you hung yourself" and wrapped a charging cord around her neck to strangle her. Over the next few hours, he placed her into a headlock on a number of occasions, causing her to vomit and froth at the mouth.

On the evening of 25 July 2018, Mr Williams told the complainant to go to bed. When she refused, he threw her onto the bed, "upper cut" her mouth, causing her to bleed, got on top of her and strangled her, saying, "fuck, go to sleep cunt" and, "I'll fucking kill you, I'll fucking kill you". He put the complainant into a carotid hold. She tapped his arm to try and get him to stop. He did not. She lost consciousness.

(f) Sexual violation by rape: when the complainant regained consciousness, she found she was naked on the bed. Mr Williams moved on top of her and raped her. She scratched his neck and told him to get off her but he continued.

The police arrived at the address and arrested Mr Williams. A doctor examined the complainant and noted she had:

(i) a bruised cervix;

(ii) fresh blood in her upper vagina;

(iii) abrasions and linear marks on her neck; and

(iv) multiple tender bruises on her face, arms and legs.

Mr Williams was observed to have scratches on his neck when he was arrested.

(e) Observations on pre-trial approach

[47] It is clear, therefore, that the complainant's brief of evidence and her two written statements included a wide range of allegations. The defence knew well in advance of the trial that a number of the allegations in all three categories would be led in the complainant's evidence-in-chief. In respect of charge 1, all of the uncharged allegations were specifically mentioned in the complainant's two written statements. This included Mr Williams locking the complainant in the shower while smoking methamphetamine, suffocating and strangling the complainant, yanking her ponytail and whiplashing her neck, giving her a "hiding" each night, and throwing stones at her while she was trying to leave the motel. The same applies to the uncharged category one allegations relating to the five other charges, with certain limited exceptions which we discuss at [59] below.

[48] We also observe that the representative charge of assault with intent to injure related to Mr Williams choking the complainant between 24 and 26 July 2018. References to choking and strangulation over this period were properly admissible as evidence of the representative charge alleging choking.

[49] Therefore, we do not agree with Mr de Groot that much of the complainant's evidence in relation to these uncharged allegations was "almost entirely unsignalled in the Crown's statements". In fact, in his table that helpfully set out all of the uncharged allegations in categories one, two and three, Mr de Groot identified where in the written statements almost every uncharged allegation was made.

During the trial

[50] During the complainant's evidence-in-chief, trial counsel raised a concern with the Judge about her reference to two aspects of prejudicial bad character evidence. The complainant had described her ten-year relationship with Mr Williams as continuous apart from the time he spent in jail. Then, in her narrative of what happened when she was in hospital for her injured knee, she said that Mr Williams' mother and father attended hospital wearing clothing which identified them as being connected to Black Power. The complainant said it was their intimidating behaviour which led to accident and emergency staff contacting police.

[51] The Judge's bench note recorded that the Crown prosecutor told him that the complainant had been spoken to before the trial about the need to avoid prejudicial material, saying her utterances were "completely spontaneous". The Judge recorded that he had considered whether to say anything to the jury at that stage. He decided not to, in order to avoid highlighting the evidence.

[52] He made this decision because the references were fleeting and the jury already knew Mr Williams had been dealt with by the police a number of times over the charged period. This was relevant to setting the timeline as to when various police officers had noted the complainant's injuries and the defence had made it known that it intended to cross-examine the complainant about the occasions Mr Williams had been arrested between May and July 2018.

[53] The Judge noted that the defence case was that Mr Williams and the complainant had been charged with dishonesty offending and his arrest was simply because he was in breach of a bail condition. He held that any resulting prejudice would also adversely affect the complainant. And finally, he observed that reference to Mr Williams' parents being associated with Black Power did not mean that he himself was a member of the same gang. The Judge recorded:

> [8] Mr Winter is content for me to address the jury about the defendant's jail time and his parents being dressed in gang regalia during my summing up. I am prepared to do this.
>
> [9] Mr Rhodes has undertaken to speak to the complainant again and reinforce to her the importance of not making any further references to the defendant spending time in jail or being connected in any way to a gang.

[54] So, while trial counsel did raise a concern during the complainant's evidence, it was in respect of these two issues only and it was in respect of these issues that the Crown prosecutor had spoken to her.

Discussion

[55] Trial counsel did not apply for a mistrial. We expect this was because much of the evidence now in dispute had been heralded pre-trial or was given by the complainant in her answers to cross-examination. Much of the evidence was

consistent with the way in which both the Crown and the defence anticipated the trial would be run.

[56] That is not, however, the end of the matter. The issue is whether the complainant's evidence exceeded, by an unfairly prejudicial extent, what could properly be characterised as relationship evidence or evidence the complainant could reasonably have been expected to give in response to a robust cross-examination. Did she "go rogue" or was she needled into giving the responses which, given the wide-ranging nature of the allegations in her pre-trial statements, should have been anticipated by defence counsel?

[57] Most of the allegations under categories one and two were in our view either related to the context of the charges, relationship evidence (such as evidence of manipulation and past abuse), allegations the defence was aware of before the trial or justified responses by the complainant to a confrontational cross-examination. The cross-examination focused on the extent of the complainant's methamphetamine use and whether she was acting on threats to have Mr Williams "locked up for the rest of his life", as the defence suggested she had achieved in relation to a former partner. The complainant was challenged as to whether *she* was in fact the aggressor, particularly when "coming down" from methamphetamine use.

[58] However, the following allegations in all three categories were unheralded in the complainant's brief and arguably outside the scope of the questions put to her.

[59] The unheralded evidence that fell into category one (additional violence during the charged incidents) was:

(a) In evidence-in-chief when discussing charge 4 (male assaults female), the complainant said Mr Williams tried to rip her hair out, whiplashed her head,[18] hit her with a phone charger and hit her with a six/four-way plug.

[18] She had made a similar allegation in respect of the events which resulted in charges 1 and 2.

(b) In evidence-in-chief when discussing charge 5 (assault with intent to injure), the complainant said that Mr Williams sprayed silicon spray in a small bedroom and locked her inside, saying, "by the time I come back out you should be blind". She also said Mr Williams smashed a small television over her head.

(c) In evidence-in-chief when discussing charge 6 (sexual violation by rape), the complainant could be taken, obscurely, to say she was violated with a lightbulb and, even more obscurely, to say in cross-examination that she was anally violated.

[60] Except where specified, all the allegations next discussed in categories two and three were made during the complainant's cross-examination.

[61] In relation to category two allegations (violence unrelated to the charged incidents), the complainant said:

(a) Mr Williams' mother dealt methamphetamine and forced her and Mr Williams to steal to pay for it. If she refused, Mr Williams and his mother would beat her.

(b) She had burn marks all over her body from when she refused to smoke methamphetamine.

(c) Mr Williams had previously broken all of her fingers.

(d) Mr Williams drugged his son with sleeping tablets so that he could have sex with his son's partner, forcing the complainant to watch and hitting her in the process.

(e) In evidence-in-chief, that Mr Williams forced something under her fingernail.

[62] In relation to category three allegations (unrelated offending/bad character evidence), the complainant said:

(a) Mr Williams locked her in a room at her uncle's house for several days;

(b) Mr Williams' family had gathered to "smash" her because she had informed the police of Mr Williams' whereabouts;

(c) Mr Williams fed methamphetamine to his children;

(d) Mr Williams gave methamphetamine to prostitutes;

(e) Mr Williams and his mother stole her bank card and fraudulently collected her benefit for ten years;

(f) Mr Williams took her medication from her and sold some of her prescription Tramadol to his mother;

(g) Mr Williams threatened her life and attempted to kill her and her children, who were in a CYF facility; and

(h) Mr Williams and his family had kidnapped her daughter in the past.

[63] In our view, although the complainant's evidence did go beyond the scope of her brief of evidence, we do not consider that the evidence she gave was so prejudicial that we would have no option but to condemn the trial as unfair. We now explain.

[64] As discussed above, in cases involving an abusive relationship which has lasted over a lengthy period, evidence of the underlying dynamics is relevant to explain the context in which the alleged incidents occurred, and the effect of them.[19] In *H (CA227/2018) v R*, this Court cautioned against the imposition of "artificial restrictions" unfairly limiting what a complainant could or could not refer to, stressing that a jury must be entitled to know the "dynamics of the household", or otherwise the case would have an "air of unreality".[20]

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19 *Perkins v R*, above n 14, at [21].
20 *H (CA227/2018) v R* [2018] NZCA 266 at [19].

[65] That is not to say that all relationship evidence should or could be admissible. Ultimately the assessment still comes down to a balance between probative value and prejudicial effect. However, in these circumstances, we consider that the categories one and two allegations reflected the context of the relationship, particularly Mr Williams' controlling nature and the sustained nature of the abuse. As this Court has very recently noted in a case also involving physical and sexual violence against a former partner, complainants may often be vulnerable witnesses who may experience heightened emotion that makes it difficult to respond to questions and may lead to questions being answered incompletely or not at all.[21]

[66] It is clear that the complainant in this case was a particularly damaged individual, suffering the effects of prolonged methamphetamine use and family violence. Although the Crown did not spell this out in its pre-trial memoranda, we take it this was the reason the Crown decided to lay charges only where there was corroborating evidence in support of the complainant's allegations, in particular observed injuries. Put simply, it is clear from reading the transcript that the prospects of controlling or limiting the complainant's evidence were slim. That was obvious too from her three pre-trial statements. It would be naive to think that it would be possible to control her narrative and in many ways this played into the defence hands and enabled it to defend the allegations in the way it did, as we discuss at [81].

[67] It is also true that a number of the allegations complained of were very fleeting comments only, and indeed we had to read the transcript carefully to pick up some of the references. This is important in two ways. First, it may explain why there was no complaint about the references at the time or request to direct the jury on them and thereby draw further attention to them. Secondly, it reinforces the somewhat rambling and chaotic way in which the complainant gave evidence.

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[21] See *H (CA715/2020) v R* [2021] NZCA 400 at [51]. See also Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (University of Canterbury, Christchurch, 2020) at 71 and 328. See also the discussion of sexual violence complainants' experience with the justice system in New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.3] and [1.23]–[1.30].

[68] At this point, it is worth discussing in more depth the case of *Edmonds*.[22] Mr Edmonds had been convicted at trial of offences relating to the physical and sexual abuse of his victim. He appealed his conviction on the basis that two pieces of irrelevant and inadmissible evidence were put before the jury, resulting in a miscarriage of justice. During cross-examination, the victim inadvertently indicated that Mr Edwards had previously been in prison and inferred that he was a patched gang member.

[69] This Court dismissed the appeal, holding that there was no unfair prejudice to Mr Edmonds as a result of the disclosure. It considered the victim's evidence to be a "spontaneous and natural response to a line of questioning", rather than a deliberate disclosure made by her in an attempt to tarnish Mr Edmonds' reputation.[23] The Court also observed that it would be more likely to find that a miscarriage of justice had occurred if a witness had unilaterally, or at the invitation of the Crown, taken matters into his or her own hands and introduced damaging and irrelevant material that affected the fairness of the trial.[24] In making that observation, the Court cited *Thompson v R*, where the complainant in a sexual and physical family violence case had alluded to the defendant's time in prison, gang association and drug use.[25] In that case, the Court observed:[26]

> [19] This is not a case in which a prosecution witness has for her own purposes gratuitously introduced significant illegitimately prejudicial material. It is readily distinguishable from those cited by Mr King, *R v McLean (Colin)* and *Arthurton v R*, in which highly prejudicial and irrelevant evidence was unexpectedly introduced by a prosecution witness, seemingly for the purpose of damaging an accused who was entitled to rely upon his good character. In *McLean* reference was made by the complainant to a complaint of rape against the accused by his former wife of which he had actually been acquitted. In *Arthurton* a police sergeant had been asked to confirm, as was a fact, that the accused had no previous convictions and had, quite improperly, chosen to say that she could not really say and that she knew he had been arrested and charged for a similar offence. In the present case there was no misconduct of that kind by the complainant. Her answers were directly relevant to questions asked of her as part of the defence case which challenged her credibility, and obviously enough Mr Thompson was not relying upon his own good character. It was not a situation in which the

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22 *Edmonds v R*, above n 10.
23 At [25].
24 At [24].
25 *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577.
26 Footnotes omitted. See also *R v McLean* [2001] 3 NZLR 794 (CA); and *Arthurton v R* [2005] 1 WLR 949 (PC).

> witness has taken matters into her own hands by introducing damaging and irrelevant material and has thereby affected the fairness of the trial so that the guilty verdict cannot be allowed to stand.

[70] Although the complainant's allegations in the present case were significantly more prejudicial than those in *Edmonds*, we consider that this is also not a case where a witness has gratuitously introduced significant illegitimately prejudicial material for her own purposes. Critically, the relatively significant breadth of the complainant's evidence was signalled to the defence in advance at trial call-over and again in the prosecution's opening submissions. The complainant did expand her allegations but this must be considered in the context of our earlier observations about the complainant. Many of her statements were made in response to being needled or challenged robustly in cross-examination. That was a risk the defence chose to take and it was a risk of which the defence was effectively forewarned, both by the information provided pre-trial and by the way the complainant gave her evidence-in-chief.

[71] This brings us to our next point — that the Judge's direction on prejudice and sympathy and his summing-up generally sufficiently dealt with the prejudicial evidence that was given by the complainant.

[72] The Judge gave a prejudice and sympathy direction which covered references to Mr Williams and his family belonging to a gang, methamphetamine use and Mr Williams' time in prison. In particular, the Judge said:

> [9] Some of the other evidence was led because it was inextricably woven into the narrative which suited the Crown and the defence cases put before you. For example, you have heard some evidence of the defendant and the complainant both using methamphetamine around the relevant period. Some other aspects of evidence were placed before you inadvertently. For example, when [the complainant] gave evidence that the defendant's parents visited her at the A&E on 20 May wearing Black Power t-shirts visible to all in the A&E waiting room. Whether the evidence which I have referred to was placed before you intentionally or because a witness simply misspoke, it is important that you put aside any ill feelings or prejudice arising from references to jail, gangs, being charged by police, methamphetamine use and the like. Ignore them. It is important though that you focus on the task in hand.
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> [10] This is not a case about whether the defendant is a nice guy. He is not guilty because he has done some bad things in the past or, like the complainant, used methamphetamine occasionally. He is not guilty because he has family members who wore clothing associating them to a gang or perhaps lives in a

> way that meets with your disapproval. Therefore, you cannot use any of these matters as a source of prejudice and permit prejudice to be the basis for any decision you make. That would be both inappropriate and wrong.
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> [11] Recall that I said to you at the outset. When you are considering your verdicts, you are judges, and judges can never allow their decisions to be influenced by feelings of prejudice against or sympathy for any defendant, complainant or anyone else who might be connected with the case. You must not decide he is guilty because you think he is the type of person who might commit these offences. What you are required to do is to assess whether the evidence proves the defendant's guilt to the required standard.

[73] We must say that, given the wide-ranging scope of the complainant's evidence, the Judge could have given a more detailed direction regarding the additional unheralded allegations in order to remedy any prejudice against Mr Williams arising from that evidence. On the other hand, as Ms Trounson said, the Judge may have wanted to avoid giving those allegations undue attention. As we have noted above, many of the complainant's additional allegations were made fleetingly or were relatively unintelligible. The Supreme Court has acknowledged that where potentially prejudicial evidence is inadvertently brought up by a witness, a decision must be made whether to instruct the jury to disregard it (which draws the jury's attention to the material) or simply to ignore it, on the basis that, from the jury's perspective, it is likely to be lost in the "noise" of the trial.[27]

[74] Ultimately, in his summing-up the Judge directed the jury to focus on the task at hand, saying that the background evidence had been admitted for a limited purpose. In *K (CA445/2018) v R* (which concerned an appeal relating to the admission of relationship evidence where the appellant had sexually abused his partner's child), this Court held that the Judge should have given a specific direction on the relationship evidence,[28] but that his failure to do so did not result in an unfair trial.[29] The summing-up was structured in a way that focused the jury's attention on the complainant's evidence regarding the appellant's alleged sexual conduct and not any of his other alleged conduct.[30] Furthermore, the summing-up centred on a question

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27 *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [49].

28 This evidence was given by the complainant, her mother, her older sister and her step-sister about the family dynamics of the household, and included descriptions of the appellant as a dominating and controlling figure prone to angry outbursts, abusive language and, on occasion, violence.

29 *K (CA445/2018) v R* [2019] NZCA 264 at [29]–[32].

30 At [31].

trail which the Judge had tailored to the specific facts and which he went through question by question, referring to the relevant evidence from the complainant.[31]

[75] We consider that the circumstances are similar here. A specific direction on the uncharged allegations of violence would have been desirable but, after warning the jury to focus on the task at hand, the Judge restricted his summing-up to the six charges Mr Williams faced, and went step-by-step through the question trail relating to those charges. He fairly put the defence case in respect of each of the allegations and made some important observations as he took the jury through the charges as set out in the question trail. For example, in respect of charge three, male assaults female, he said:

> [73] Now, you might recall the fact that when the complainant alleged the defendant assaulted her in several different ways leading up to his arrest on 12 July and leaving her with a constellation of injuries noted by Detective Hearn the following day at the North Shore Hospital, she recorded several alleged assaults. [The complainant's] evidence as to how she came by her injuries noted on 12 July was that the defendant strangled her, grabbed her by the arms and forcibly placed her inside the boot of his car, punched her to the head, and then struck her in the head with a full can of Dark Horse pre-mixed bourbon and cola. Now, be that as it may, the Crown has asked you to focus on one singular aspect of the alleged assault, which is the defendant's strike to the complainant's head which left her with bruising around or under her hairline. Now, whether she was struck by a can held in the defendant's hand or his hand alone in the form of a closed-fisted punch, it is the strike which is the alleged assault here. That is the assault which has been put forward, hence why the question has been framed in the way that it has, and you will need to be sure that this assault did occur.

[76] The final section of the Judge's summing-up involved his summarising the respective Crown and defence cases. In respect of the complainant, the Judge summarised the Crown's case as follows:

> [103] Focusing on the peripheral issues will not be helpful. Instead, focus on what really matters, the elements of the charge defending, and use your collective common sense and worldly experience when doing so. The Crown told you that [the complainant] is a credible and reliable witness. She was genuine, sometimes brutally honest, reasonable and constantly accessing real, even if sometimes imperfect, memories. No one has a perfect memory. Neither was the complainant herself perfect, but she never pretended to be. She accepted using drugs in the past, carrying out acts of theft and dishonesty and leading a life many, if not all, of you would disapprove of. She told you all of this. That should tell you something about her veracity.

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[31] At [31].

[77] The defence case was summarised as follows:

> [111] Mr Winter for the defence submitted to you that the central issue in the trial is the complainant's credibility. The defence case is that she is not a credible witness. Her behaviour, perceptions and ultimately allegations need to be assessed in the context of her own addiction issues. The relationship between the defendant and the complainant was an unhealthy one. Much of this related to the shared drug habit that they had. Both living on the edge of society and both of them giving as good as they got. The complainant's use of methamphetamine, alcohol, tramadol, other prescription medication and cannabis means that you must treat her evidence with real caution because the use of any one of these substances can make a witness extremely unreliable, the combination of them even more so. It can give them a warped sense of perception.
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> [112] The complainant only ever cried abuse when it suited her and more often than not when dealing with police to avoid being arrested. [The complainant] was an angry, violent and jealous person who had an unhealth[y] obsession with the notion that the defendant had or wanted a sexual relationship with [his son's partner]. There is no evidence of this fact apart from her own word and her belief can only be described as irrational and deluded. It is this jealousy which is at the heart of the complainant's lies about the defendant. This jealously which led her to get the defendant arrested, charged with rape and dealt with like her former domestic partner. As for the allegations of being a victim of domestic violence, she simply hinted at this to police to escape being arrested during random vehicle stops.
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> [113] The charges are separate, Mr Winter told you, and need to be considered separately, but the complainant's credibility or lack thereof is what ties everything together or unties everything. That is the real problem with the Crown case because much turns solely on her uncorroborated account.

[78] The Judge repeated the defence submission that the claims of abuse and rape were outlandish, imagined and far-fetched.

[79] Relatedly, some deference should be given to the trial Judge. As this Court observed in *Pulemoana v R*, an appellate court will not lightly interfere with a trial judge's discretion when dealing with a jury which has received in evidence illegitimate prejudicial material. The exercise of that discretion depends on the nature of what was admitted into evidence, the circumstances in which it was admitted and what, in the light of the circumstances viewed as a whole, is the correct course.[32]

[80] Here, the Judge exercised his discretion by giving a direction to the jury to stay focused on the task at hand and discussing the allegations as part of the contextual

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[32] *Pulemoana v R* [2019] NZCA 293, (2019) 29 CRNZ 235 at [50], citing *Thompson v R*, above n 25, at [16].

background narrative. As this Court and the Supreme Court have observed on many occasions, appellate courts need to take a contextual approach to considering how trial judges exercise their discretion in dealing with unexpected prejudicial evidence — that is, the approach discussed in the preceding paragraph.[33]

[81] Finally, there is nothing to suggest trial counsel took issue with the evidence. If anything, he appeared to be quite willing to incorporate the complainant's wide ranging allegations into his closing address to the jury, specifically referring to a number of the "new" allegations and describing the complainant's allegations of abuse sounding like a "Japanese Prisoner of War camp" or a "dungeon torture movie" in an attempt to undermine her credibility.

[82] As this Court has noted, failure of counsel to object during the trial can be dispositive on appeal, where it indicates that a ground of appeal was less problematic at trial than the appellate record might suggest.[34] Here, we are satisfied that the absence of any protest from trial counsel, coupled with the Judge's direction and his exercise of discretion during the trial, confirms our view that this was not an unfair trial.

[83] For these reasons, we dismiss this ground of appeal.

Other matters

Veracity of defence witness

[84] The partner of Mr Williams' adult son was called by the defence and gave evidence favourable to Mr Williams. However, during her evidence the police discovered that, following her having previously made two contradictory statements to the police about a family violence incident, she had been charged with making a false statement, although the charge was later withdrawn.

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33 *Pulemoana v R*, above n 32, at [50]; *Thompson v R*, above n 25, at [16]; *Edmonds v R*, above n 10, at [23]–[24]. See also *R v McLean*, above n 26, at [14], and Robin Palmer "Case Note: Counter-Intuitive Sexual Abuse Evidence, Emotive Language and Inadvertently-Elicited Potentially Prejudicial Evidence: *Kohai v R* [2015] NZSC 36 and *DH v R* [2015] NZSC 35" [2016] NZCLR 48 at 56–57.

34 See *T (CA561/14) v R* [2016] NZCA 235, (2016) 28 CRNZ 17 at [59].

[85] According to Mr de Groot, that evidence was inadmissible as it was not substantially helpful to the jury in assessing the witness' veracity. Furthermore, the evidence had an unfairly prejudicial effect on the proceeding, undermining Mr Williams' right to run an effective defence, and should have been ruled inadmissible under s 8.

[86] Mr de Groot also submitted that the evidence was adduced in breach of the Criminal Disclosure Act 2008, as the veracity evidence was not properly disclosed.

[87] In response, Ms Trounson submitted that the evidence of the witness' previous statements was substantially helpful because it directly called into question her truthfulness in a serious criminal prosecution in a family violence context, as this case was.

[88] A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.[35] The evidence that the witness had previously given two different statements to the police in relation to a family violence incident was substantially helpful and properly admissible. It did not have an unfairly prejudicial effect on the proceeding. She was a defence witness and, like all witnesses, susceptible to a challenge to her veracity if there were grounds to do so. The Crown made the Court aware of the evidence once the police advised them about the earlier charge following their enquiries when she was called as a defence witness.

[89] There is no merit in this ground of appeal.

Failure to call relevant witnesses

[90] Neither of the Crown's two trial call-over memoranda indicated that the Crown would call any of the three witnesses Mr Williams says the Crown should have called. The defence could have applied for an order under s 113 of the Criminal Procedure Act that the Crown call the witnesses or called them as defence witnesses.

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35 Evidence Act 2006, s 37(1).

[91] There is no merit in this ground of appeal.

Trial Judge's directions

[92] In Mr de Groot's submission, the Judge went too far in giving what was effectively counter-intuitive evidence about how a victim of family violence might behave when there was neither a statutory nor evidential basis to do so. The Judge told the jury they should not assume that a victim of family violence would promptly complain to the police or leave the relationship, and there was no typical or normal pattern of behaviour which is to be expected in response to family violence.

[93] Ms Trounson's answer was that the directions responded to the defence case and addressed a live issue at trial, as Mr Williams had leveraged misapprehensions about the behaviour of victims of family violence in his defence. Furthermore, the Judge explained why he was making the directions. The jury was told that common sense, while normally an underpinning of the jury's deliberations, had some limitations in respect of the behaviour of complainants in family violence cases.

[94] In our view, the Judge's directions were fair and fell within the parameters discussed in *Satini v R*.[36] In that case, the Court considered a prosecutor's comment that it was not unknown for victims of violence to suffer in silence or return to a violent relationship. There had been no expert evidence to that effect at the trial. This Court considered there was no issue: the comment reflected common sense and was probably not news to the jury.[37]

[95] We consider the directions were sufficiently generic, accurate and important. They were not linked to the complainant's circumstances and did not suggest that the absence of complaint was evidence of abuse. The Judge directed the jury that the complainant's behaviour in not leaving Mr Williams and not complaining were matters for them to assess.

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36 *Satini v R* [2014] NZCA 413.
37 At [11]–[13].

SENTENCE APPEAL

The sentencing decision

[96] After setting out the relevant facts of the offending, the Judge acknowledged the effect of the offending on the complainant. She described her life with Mr Williams as one made up largely of drug abuse, violence and crippling fear, both emotionally and physically. Her knee injury meant that she was likely to walk with a limp for the remainder of her life and she struggles daily with anxiety, ADHD and post-traumatic stress disorder. She feels isolated from many of her former friends and family.[38]

[97] The Judge took the rape as the lead charge. He identified the aggravating factors as the harm caused to the complainant, her vulnerability, actual physical violence, and humiliation.[39] He considered the offending fell just below the midpoint of band two in *R v AM* (seven to 13 years).[40] Accordingly, the Judge adopted a starting point of nine years.[41] The starting point included the offending covered by charge 5, the representative charge of assault with intent to injure by choking. The Judge considered that this violent offending was approximate or directly linked to the sexual offending and therefore took it into account when setting the starting point for rape.[42]

[98] The Judge then turned to analyse the violent offending covered by charges one to four (three charges of male assaults female and one of injuring with intent to injure between 19 May and 23 July 2018).

[99] In respect of the charge of injuring the complainant's knee, the Judge placed the offending in band two of *Nuku v R*, given the aggravating factors of attacking the head of a vulnerable victim and inflicting a serious injury on her knee.[43] The Judge considered that charge alone merited a starting point of 18 months. To reflect the other violence charges and totality, he uplifted the starting point by two years.

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38 Sentencing notes, above n 2, at [12].
39 At [20].
40 At [24], citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
41 At [24].
42 At [25].
43 At [27], referring to *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.

He considered that reflected the overall culpability of the additional violence charges.[44]

[100] Turning to mitigating factors, the Judge took into account the evidence of Mr Williams' genuine and sincere remorse. For that, a discount of six months was made.[45] A further discount of four months was granted for rehabilitative efforts while in custody.[46] A discount of 12 months was granted for personal circumstances identified in the s 27 cultural report. The Judge said:

> [30] The issue which I have wrestled with is what further discounting should be applied for your personal circumstances as they are set out in the pre-sentence report and s 27 cultural report. It is clear that you had a difficult upbringing. It was an early childhood punctuated with violence, drugs, inadequate care and supervision which in turn led to your own affiliation with organised crime. But the same could be said for many other people who do not go on to offend in a similar way to you. Your brother, who you refer to in the pre-sentence report, is a case in point. Nonetheless, I accept the submissions made by your counsel that there is a causal connection between your upbringing and abuse which in turn led to the present offending by you. Accordingly, there should be some discount to take into account these personal circumstances. …

[101] The result was a sentence of nine years and two months' imprisonment for rape, with one year's imprisonment concurrent imprisonment on the other charges.[47]

Mr Williams' appeal

[102] Mr Williams appeals his sentence on two grounds: that the starting point was too high and that an inadequate discount was given for the s 27 report.

[103] On the starting point, Mr de Groot accepted that the offending fell into band two of *R v AM* but submitted it ought to have been placed lower within the band rather than "just below the midpoint" as the Judge found.[48] On the inadequate discount, he submitted that, given the causal nexus between Mr Williams' upbringing and his offending, the adjustment ought to have been 20 per cent. In his submission, the

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44 At [27].
45 At [28].
46 At [29].
47 At [31].
48 At [24].

sentence should be substituted by an end sentence of six years and eleven months' imprisonment.

[104] In response, the Crown contended the nine-year starting point for the rape was available to the sentencing Judge as the offending was appropriately characterised as falling into band two offending for which starting points of seven to 13 years are available.

[105] On the matter of the s 27 cultural report, the Crown submission was that, given the very serious nature of Mr Williams' offending, denunciation and protection of the public should be emphasised as purposes of sentencing. The Crown referred to *Arona v R*, where the Court of Appeal observed discounts for deprivation will be reduced or even eliminated in cases of serious sexual violence where these purposes are to the fore.[49]

What was the appropriate starting point?

[106] Band two offending under *R v AM* was characterised by this Court as follows:[50]

> [98] By comparison with rape band one, this band is appropriate for a scale of offending and levels of violence and premeditation which are, in relative terms, moderate. This band covers offending involving a vulnerable victim, or an offender acting in concert with others or some additional violence. It is appropriate for cases which involve two or three of the factors increasing culpability to a moderate degree.

[107] Cases which were at the lower end of band two variously involved violence, victim vulnerability, abuse of trust and an element of degradation.[51] The cases that fell at the higher end of band two had those same aggravating features but often involved a greater level of physical and sexual violence, and degradation and/or humiliation.[52]

[108] The Judge acknowledged that the nine-year starting point was relatively stern in the circumstances.[53] The offending is arguably less serious in comparison to some

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49 *Arona v R* [2018] NZCA 427 at [61].
50 *R v AM (CA27/2009)*, above n 40.
51 At [98].
52 At [102].
53 Sentencing notes, above n 2, at [24].

other cases, such as *Archer v R*, where this Court found on appeal that a nine year starting point (in the middle of band two) was more appropriate for offending that was arguably more serious than the present.[54] That case involved the appellant offending against his partner on one night resulting in convictions on two charges of sexual violation by unlawful sexual connection (including the insertion of an object) and one of rape.

[109] The offending in this case is also arguably less serious than that in *R v Dunick*, where a starting point of eight years was upheld on appeal,[55] and was identified as being at the lower end of band two in *R v AM*.[56] The case was described by the Court in *R v AM* as follows:[57]

> *R v Dunick:* O, male, and V, female, had been friends for about six weeks. V invited O to her house. The visit was preceded by text messages with some sexual content. On O's arrival, V rejected his advances. O removed V's clothing before he digitally penetrated her, causing her pain, and then penetrated her with his penis. He made her kneel on the bed and again penetrated her while slapping her buttocks. O made a number of derogatory sexual references to V. V eventually escaped.

[110] The compelling difference in the present case is the extent of violence which preceded the rape and which was included in the nine-year starting point. The representative charge of assault with intent to injure, which carries a maximum penalty of three years' imprisonment,[58] related to some of that violence, being the choking incidents which occurred over a period of three days. The complainant's evidence was that she was subject to repeated bouts of choking or strangulation, and that Mr Williams was "really trying" to stop her breathing. Immediately prior to the rape, Mr Williams had wrapped a telephone charging cord around the complainant's neck, restricting her breathing to the point she lost consciousness. He then raped her, saying, "fight me I'll fuckin' break your neck". The complainant was unconscious at times during the rape. She suffered genital bruising and bleeding as a result, as confirmed by the expert evidence. There is no doubt this was extremely serious offending over a prolonged period. A starting point of nine years' imprisonment

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54 *Archer v R* [2018] NZCA 331.
55 *R v Dunick* [2008] NZCA 482.
56 *R v AM*, above n 40, at [98].
57 At [98] (footnote omitted).
58 Crimes Act 1961, s 193. The offending pre-dated the introduction of the offence of strangulation or suffocation which carries a maximum penalty of seven years' imprisonment.

cannot, in our view, be legitimately criticised, except to say it was generous in all the circumstances.

[111] Furthermore, we do not accept Mr de Groot's submission that an 18-month uplift was sufficient to represent the violence that occurred in respect of the first four charges. If anything, the Judge was generous in imposing a two-year uplift only for those four charges. We note the offending included a range of aggravating factors, such as extreme violence, serious injury, use of weapons, attacking the head and vulnerability of the victim.

Were the discounts inadequate?

[112] The s 27 report prepared for Mr Williams detailed his Māori and Cook Islands whakapapa, and a number of risk factors which the report-writer identified as relevant to his offending, including:

(a) Family/whānau disconnection – Mr Williams grew up with little connection to his biological father. His mother was in and out of prison and gang affiliated.

(b) Child Youth and Family Intervention – Mr Williams and his siblings were taken into state care at an early age.

(c) Exposure to drugs and alcohol at a young age – while Mr Williams was living with his mother and stepfather, he recalled a home environment which included regular parties and exposure to drugs and alcohol.

(d) Family violence (physical, verbal and psychological abuse by his mother) – Mr Williams recalled "countless beatings" he received as a child by his mother and stepfather, including with items such as a jug, cords and belts.

(e) Absence of role models – Mr Williams had little connection to his biological father, was abused by his mother and stepfather, who

introduced him to gang life and methamphetamine use, and was removed from his whānau at a young age.

(f) Poverty – Mr Williams recalled his whānau having no money for clothes and food, and their struggles in finding regular employment.

(g) Urbanisation and lack of cultural connection – the report-writer discussed the intergenerational effect of colonisation resulting in systemic Māori deprivation. Mr Williams' impoverished childhood, disenfranchisement and disconnection from his whenua, hapū and iwi reflected these impacts.

(h) Exposure to gangs – Mr Williams' difficult early years, his early exit from the education system, as well as his disconnection between his whānau and whakapapa led him to join a gang (ultimately becoming the president of a Black Power chapter).

(i) Sexual abuse – Mr Williams said he had been abused by older children also in state care, which he believed had affected his ability to engage and act appropriately in his relationships.

[113] In the context of Mr Williams' difficult background, including the traumatic events he appeared to have suffered as a child, his removal away from his whānau into state care, and the intergenerational effects of colonisation and deprivation, we would consider the 12-month discount (just over 10 per cent) was low, and bordering on inadequate. We do not endorse the Judge's reasoning that Mr Williams should not receive a discount, or receive a relatively small discount only, because many other people in similar situations (such as Mr Williams' brother) do not go on to offend in the same way as he did.[59] This Court has repeatedly endorsed the reasoning of the Full Court in *Zhang v R*, and as an extension to that, the reasoning of Williams and Whata JJ in *R v Rakuraku* and *Solicitor-General v Heta* respectively, which illustrate the importance of an overall assessment, taking into account social and cultural dislocation resulting from colonisation (which can result in poverty, alcohol and drug

[59] Sentencing notes, above n 2, at [30].

abuse, unemployment, educational underachievement and violence) as part of the sentencing analysis.[60]

[114] We note the Crown's observation that this Court has also suggested that, in cases of serious sexual violence, cultural discounts may be reduced because of the need for a greater emphasis on denunciation and accountability.[61] However, the seriousness of the offence should not preclude a s 27 discount. The size of that discount will ultimately be highly contextual, taking into account an overall assessment of the offender's cultural background, their offending, and the principles of sentencing. As Mr de Groot noted, relatively large discounts have been given by the senior courts in cases of serious offending.[62]

[115] Here, a discount of 15 per cent would have been more appropriate. We acknowledge, however, that the Judge gave discrete discounts of six months for Mr Williams' remorse and four months for his efforts to rehabilitate by attending some courses while in custody. The Judge accepted Mr Williams was remorseful notwithstanding the comment in the pre-sentence report that, while Mr Williams expressed some remorse, he also tried to minimise his behaviour and shifted blame. And, of course, he put the complainant through the ordeal of the trial.

[116] The question for us is whether there was an error in the sentence and a different sentence should be imposed.[63] While we have concluded that a greater discount should have been given for s 27 factors, when the discount for personal mitigating factors is considered in the round, any deficiency is marginal at best. We have already observed that the starting point for the offending was generous. In those circumstances, we are not satisfied that a different sentence should be imposed and the sentence appeal is dismissed.

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60 See *Carr v R* [2020] NZCA 357 at [66]; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [159]–[162]; *R v Rakuraku* [2014] NZHC 3270 at [58]; and *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50].

61 *Arona v R*, above n 49, at [61].

62 See for example *R v Beattie* [2019] NZHC 3108 at [66]; *R v Tauroa* [2020] NZHC 376; and *R v Archer* [2019] NZHC 3146.

63 Criminal Procedure Act 2011, s 250.

RESULT

[117] The appeals against conviction and sentence are dismissed.

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