NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF APPELLANT PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 and 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA691/2021
[2022] NZCA 217

BETWEEN	F (CA691/2021) Appellant
AND	THE QUEEN Respondent

Hearing:	24 March 2022
Court:	Goddard, Simon France and Hinton JJ
Counsel:	E J Forster for Appellant M R L Davie for Respondent
Judgment:	31 May 2022 at 11.00 am

JUDGMENT OF THE COURT

A Leave to adduce further evidence is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Hinton J)

[1] F faced nine charges of sexual offending before the Napier District Court.

[2] On 22 July 2021, he was found guilty by a jury of the following: charge 2, sexual violation by unlawful sexual connection;[1] charge 3, sexual conduct with a young person under 16 (representative)[2] and charges 4 and 5, sexual conduct with a dependent family member under 18 (both representative).[3]

[3] He was found not guilty of charge 1, sexual conduct with a young person under 16;[4] charge 6, sexual violation by rape;[5] charge 7, sexual conduct with a young person under 16 (representative);[6] and charges 8 and 9, sexual conduct with a dependent family member under 18 (both representative).[7]

[4] F was sentenced to five years and six months' imprisonment.

Appeals

[5] F appeals against conviction on the basis the jury verdicts are factually inconsistent.

[6] He also appeals against sentence on the basis the starting point was too high, leading to a manifestly excessive sentence.

Conviction appeal — inconsistent verdicts

Application to adduce fresh evidence

[7] F sought leave to admit fresh evidence in support of his appeal against conviction, being an affidavit from his junior counsel that contained information about

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1 Crimes Act 1961, ss 128(1)(b) and 128B; maximum penalty 20 years' imprisonment.
2 Section 134(1); maximum penalty 10 years' imprisonment.
3 Section 131(1); maximum penalty seven years' imprisonment.
4 Section 134(3); maximum penalty seven years' imprisonment.
5 Sections 128(1)(a) and 128B; maximum penalty 20 years' imprisonment.
6 Section 134(1); maximum penalty 10 years' imprisonment
7 Section 131(1); maximum penalty seven years' imprisonment.

the timing of a jury question and of the jury advice that it had a verdict. The affidavit also contained material concerning what had been heard by junior counsel from within the jury room. The application to admit the latter material was, correctly, not pursued at the hearing before us.[8] The timing information is material that forms part of the Court record so is potentially admissible. However in our view it is not relevant to any matter properly in issue, so we decline leave to admit it.

Background

[8] F was 69 years old at the time of sentencing. The offending took place against one complainant, his stepdaughter, between 2012 and 2019 when the complainant was 12 to 18 years old.

[9] F was aware the complainant has a mild to moderate intellectual disability and a physical disability.

Guilty verdicts

[10] The charges on which F was found guilty (charges 2–5 inclusive) all relate to incidents where he inserted his finger into the complainant's vagina. The charge 2 offending occurred around September 2012. Charge 3 spanned the period the complainant was under 16; charges 4 and 5 covered the time when the complainant was over 16 but under 18.

[11] The offences were usually carried out while F and the complainant were in bed together watching a movie. The representative charges relate to incidents which occurred on a weekly or fortnightly basis.

Not guilty verdicts

[12] Charge 1 relates to the first alleged incident of sexual connection in 2012. The Crown alleged F touched the complainant's genitalia. On this occasion F, the complainant, and the complainant's mother were lying in bed watching a movie.

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8 See s 76(1) of the Evidence Act 2006.

[13] Charge 6 relates to an incident between about November 2013 and November 2015 where the complainant alleged that F inserted his penis into her from behind and was "thrusting" her.

[14] Charges 7, 8 and 9 are representative charges where it was alleged F had sexual intercourse with the complainant.

Evidence at trial

[15] The jury watched two interviews of the complainant, conducted on 5 November 2012 and 16 April 2019, and she gave evidence at trial. The jury also heard from a psychologist as to the extent of the complainant's intellectual disability. The psychologist told them the complainant was suggestible and prone to acquiesce to people in roles of authority, but to assess her credibility like any other person. They heard evidence that the complainant's intellectual disability causes her to have a high libido.

[16] The complainant's mother gave evidence that when she confronted F, he admitted to touching the complainant's genitals but denied having sex with her.

[17] F in his interview stated that the complainant would sometimes grab his hand and try to get him to touch her genitals and sometimes he did not pull his hand away quickly enough. He said in respect of charge 1 that he may have touched the complainant's genitalia accidentally while he was asleep and he must have thought it was her mother. He denied all the other allegations.

Trial directions

[18] In summing up Judge Mackintosh emphasised that proof beyond reasonable doubt is a very high standard of proof and that it was not enough for the jury to think F probably or likely was guilty. The Judge stated that the jury needed to consider each charge separately and come to a separate decision about each, isolating the evidence and issues relating to the particular charge. She noted that charge 1 had been put before them by the defence on a "different platform" from the remaining charges. The Judge also said that the jury needed to be unanimous.

[19] The Judge further stated:

> [69] So to be clear, in relation to the sexual acts alleged in charges 2 to 9, they allege digital penetration of her genitals and sexual intercourse essentially. The grabbing by [the complainant] of F's hand and putting it on her vagina does not amount to either of those things. So on his version, if you accepted it or found it reasonably possible, you find him not guilty. So we are not talking about those actions as described by him of her as being the subject matter of these charges.
>
> [70] So basically the effect of the statements that he made to the police are these, that if you accept his version on the key issues, then you would acquit him. If you considered there was a reasonable possibility on F's version of events that he was telling the truth or that they might be true, they might be true, you would acquit him because you would have a reasonable doubt.
>
> [71] If you did not believe his version of events on the key issues, you should not automatically conclude he is guilty. What you would then do is you examine all the evidence that you do accept and then you decide whether it establishes his guilt beyond reasonable doubt.

[20] During deliberations the jury asked:

> Can you give us clarification on what it means when you say 'if you find that it is reasonably possible they did not happen you will find the defendant not guilty', is this possibly related to a lack of evidence, if we cannot find the evidence to prove a charge does that lead to it being reasonably possible that they did not happen?

[21] In response the Judge gave the jury fresh directions on the burden and standard of proof. She then reiterated her direction on F's statements to the police set out at [19] above. In specific answer to the jury's question the Judge said:

> To phrase that another way, you could ask the question or pose it like this, if you are not sure as to whether they happened you would find the defendant not guilty. The next bit was 'is this possibly related to a lack of evidence?' and the answer to that is yes. And then you ask, 'if we cannot find evidence to prove a charge does that lead to it being reasonably possible they did not happen?' and the answer to that is yes.

Submissions

[22] The thrust of the appellant's case is that the jury had to accept either all of F's evidence or all the complainant's evidence. Mr Forster for F submits that the narrative in F's statement, that the complainant had instigated the contact, was inconsistent with the complainant's and could not logically support her narrative. He contends that if the jury accepted F's version of events it would not be possible for them to convict

him on charges 2–5 because the intentional bases of the charges would not be made out. Particularly on charge 2, he says it is inconsistent with F's statement for the jury to find that there was no consent or no reasonable belief in consent.

[23] Additionally, Mr Forster submits that the nature of the jury deliberations casts doubt on the rationality of the inconsistent verdicts. The jury questions suggest that the jury was assessing whether or not the complainant's evidence was credible and reliable as a whole. Mr Forster says there is no suggestion the jury were dealing with charges differently, but they then returned with different verdicts between charges, which he says was not rational. Mr Forster says there was a quick change from the jury being deadlocked to unanimously returning the verdicts. This is consistent with the jury members making a compromise decision at the close of the day, which is not consistent with rational decision-making.

[24] Mr Davie for the Crown says that the jury returned a mixed verdict reflecting different evidence on each charge. Inconsistency does not arise simply because the jury accepted some of the complainant's evidence but not all of it.[9] The jury could have accepted that the conduct relating to charge 1 was accidental as it was the first charged incident, and the complainant's mother was in the bed. Charges 6 to 9 related to sexual intercourse, and the jury may have found the complainant's evidence unclear as to whether intercourse occurred, casting a reasonable doubt. In contrast, the jury may have convicted F on the charges relating to digital touching or penetration because the evidence was more detailed.

[25] Further, Mr Davie submits, although F's evidence (that the complainant would sometimes grab his hand and put it on her genitals and he left it there) was not the subject of a charge, the jury was entitled to consider this shows an interest in touching the complainant's genital area or that F was willing to touch it. The comments made by F are therefore more probative of charges 2–5 than charges 6–9.

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9 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [83].

Analysis

[26] The general principle is well established: a conviction is unsafe if no reasonable jury, properly instructed, could have arrived at the conclusion which was in fact reached.[10] Where the allegation is of inconsistent verdicts, an appellant must demonstrate that the only possible explanation for the inconsistency was that the jury was confused or adopted the wrong approach, and as a result the verdict was unsafe.[11] An appellate court will not usurp the jury's function by substituting its view of the facts for that of the jury if there is some evidence that, properly used, could support the jury's verdict.[12]

[27] It is legitimate for a jury to accept some of a witness' evidence but not all of it. As noted by the Supreme Court, this point is important in "she said, he said" cases where the Crown's case rests on the complainant's evidence.[13] This Court's explanation of the point in *R v Shipton* is as follows:[14]

> Time after time in appeals to this Court it is argued, as counsel argued here, that because the jury must have "disbelieved" a witness to acquit on one count, it was inconsistent to rely on her to convict on another count. The argument is utterly fallacious; there may be all sorts of valid reasons why the jury may be convinced by a witness on one count but not on another. To put this another way, there is no reason why credibility must be static … It is not necessarily illogical for a jury to be convinced as to the credibility of some aspects of one person's story, but not as to others, a fortiori where it is convinced, but not beyond reasonable doubt.

[28] In this case it was open to the jury to accept the complainant's evidence that F intentionally touched and digitally penetrated her (and to reject F's evidence in this regard) but be left with a reasonable doubt regarding the allegations of sexual intercourse. This does not amount to the jury accepting evidence in relation to one charge but rejecting that same evidence in relation to another charge,[15] because the evidence was different.

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10 *R v Shipton* [2007] 2 NZLR 218 (CA) at [75].
11 At [75].
12 *B v R,* above n 9, at [68(d)].
13 At [80].
14 *R v Shipton,* above n 10, at [77], affirmed in *B v R*, above n 9, at [80].
15 See *Senior v R* [2016] NZCA 389 at [60].

[29] The jury may have considered there to be some ambiguity in the complainant's evidence over whether vaginal penetration occurred, or only contact. For example, one passage of her evidence reads:

> A. … he slowly like started to put it in my, I won't say butt hole but you know like where my vagina area was like that area, he started to like go in slowly, slowly and it hurted but then started to feel good I guess and I just let that happen.
>
> …
>
> Q. I'm a little bit confused about what part of your body his penis is going into.
>
> …
>
> A. … and you have intercourse with someone and they do it from behind, it's like not the butt hole but its like the vagina area…

[30] Additionally, the complainant's evidence as to digital penetration was more detailed than her evidence as to sexual intercourse. For example, she could recall which movie they were watching and the series of actions that led up to an incident of the digital penetration offending. In contrast, her evidence relating to the circumstances surrounding the sexual intercourse was that it was dark and a movie was on. There is no description of the events leading up to the alleged sexual intercourse.

[31] It follows that there is no basis for Mr Forster's submission that if the jury acquitted F on charges 6–9, they must have rejected all of the complainant's evidence and illegitimately used his evidence of her grabbing his hand and moving it towards her crotch to convict him on the digital penetration charges. It was available to the jury to accept all of the complainant's evidence but consider the burden of proof for the sexual intercourse charges was not met, or alternatively to accept the complainant's evidence only in relation to the digital penetration and find her evidence in relation to the sexual intercourse not reliable. Further, the mixed verdict was consistent with the complainant's mother's evidence that F admitted to touching the complainant's genitals but denied having sex with her. It was also in line with the directions given by the Judge in the summing up that "it is important that you do consider each charge separately and come to a separate decision about each" and to "isolate the evidence and the issues that relate to each charge and then make a decision about it".

[32] The different outcome in relation to the digital penetration allegation in charge 1 could have reasonably resulted from the different evidence in relation to that charge. It was the first alleged offending, and F's evidence was that he was asleep and must have thought he was touching the complainant's mother. The trial Judge noted that F's defence of charge 1 was different from the other charges. F accepted the touching may have occurred but denied criminal intent. As it was the first alleged offence and the mother was in the bed, the jury may have given this some credence and accepted that the conduct was accidental (or at least that a reasonable doubt was cast).

[33] We see no reason why the mixed verdicts are factually inconsistent. The decision to return mixed verdicts was reasonable. The conviction appeal is dismissed.

Sentence appeal — starting point

Sentencing decision

[34] The Judge referred to the tariff decision of *R v AM* and placed the offending in unlawful sexual connection (USC) band two (four to 10 years' imprisonment).[16] She assessed the aggravating factors as the complainant's vulnerability due both to age and her condition, the ongoing nature of the offending, and the breach of trust (both because F was her stepfather and because he knew she had an intellectual disability). The Judge considered that the case of *T v R* was broadly similar but said that in the present case the complainant was very vulnerable.[17] The Judge set a starting point of six years' imprisonment.[18] She allowed a discount of six months, or 8.33 per cent, due to F's age and health, bringing the total sentence to five and a half years' imprisonment.[19]

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16 *R v [F]* [2021] NZDC 23287 [Sentencing notes] at [12], citing *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750.
17 At [14], citing *T (CA131/2018) v R* [2018] NZCA 481.
18 At [14].
19 At [15]–[16].

Submissions

[35] The submissions advanced for F on the sentence appeal were brief.

[36] Mr Forster accepts the offending fell within band two of *R v AM*.[20]

[37] He accepts that *T v R*, where this Court considered a starting point of six to six and a half years' imprisonment was appropriate,[21] was a broadly comparable case, but says it was more serious because the offender had taken the extra step of exposing his genitals. Mr Forster says that a five and a half year starting point is all that was reasonably available in this case. If this starting point were adopted, and the same discount were applied, then the difference in sentence would be five and a half months' imprisonment — more than mere tinkering.

[38] Mr Davie submits that the starting point was appropriate taking into account the characteristics of USC band two offending set out in *R v AM*. He says this case has similarities to *R v Harris* and *T v R*.[22] *R v Harris* was said in *R v AM* to fall into the "higher end" of USC band two.[23] It involved sexual offending over 18 months of a 47 year old man against a 12 year old boy. The aggravating factors warranting a higher placement in the band were the large age disparity and the duration of the offending,[24] both of which are present here. In *T v R,* the offender was found guilty of three charges of sexual violation by unlawful sexual connection (digital penetration) and one charge of committing an indecent act on a young person. The complainant was the offender's stepdaughter, and the offending occurred when she was around 10–14. As noted above, this Court held in *T v R* that a starting point of six years to six and a half years' imprisonment was appropriate.[25]

[39] Mr Davie says that although the charges were more serious in *R v Harris* and *T v R*, involving several charges of sexual violence, the offending in those cases was

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20 *R v AM*, above n 16.
21 *T (CA131/2018) v R*, above n 17, at [19].
22 Referring to *T (CA131/2018) v R*, above n 17; and *R v Harris* CA320/93, 15 November 1993.
23 *R v AM*, above n 16, at [118].
24 At [119].
25 *T (CA131/2018) v R*, above n 17, at [19].

not as repetitive and was similar overall to the present case. On that basis the starting point of six years' imprisonment was appropriate.

Analysis

[40] The sentencing Judge adopted the correct band based on the aggravating factors.

[41] We also agree with the Judge, and counsel, that this case has similarities to *T v R*. The aggravating factors are broadly similar. Although *T v R* involved premeditation which was not identified by the sentencing Judge here, the repeated offending captured by the representative charges may suggest some level of premeditation was in fact present. Otherwise, the aggravating factors were similar: a complainant vulnerable due to age, repeated offending, and breach of trust due to offending against a stepdaughter. The fact that in *T v R* the offender exposed his genitals was not referred to by this Court when considering the starting point. Additionally, the complainant's intellectual disability in the present case contributed to her vulnerability and doubled the breach of trust. While the charges in *T v R* were more serious, the offending was not as repetitive, and was similar overall to the present case.

[42] Additionally, the presence in this case of the two aggravating factors noted in *R v AM* that place *R v Harris* at the "higher end" of band two reinforces the conclusion that a lower starting point would not have been appropriate.

[43] The starting point fixed by the Judge of six years' imprisonment was appropriate.

[44] It was not contended, nor do we consider, that there was any error in the deduction of 8.33 per cent for personal mitigating circumstances.

[45] The sentence imposed was within range and not manifestly excessive.

Result

[46] Leave to adduce further evidence is declined.

[47] The appeal against conviction is dismissed.

[48] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent