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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS B AND C PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA704/2021
[2022] NZCA 369

BETWEEN	KARAKAPI ADAM KEPA Appellant
AND	THE QUEEN Respondent

Hearing:	7 June 2022
Court:	Katz, Thomas and Woolford JJ
Counsel:	W D McKean for Appellant Z R Johnston and T C Didsbury for Respondent
Judgment:	10 August 2022 at 10:30 am

JUDGMENT OF THE COURT

A The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

[1] On 20 April 2021, Karakapi Adam Kepa was found guilty by a jury of various sexual offences against three different complainants between 2005 and 2017.

On 15 October 2021, he was sentenced by Judge DJ McDonald to 11 years and four months' imprisonment.[1] He now appeals against conviction[2] and sentence.[3]

Factual background

[2] The first complainant, A, was the daughter of a friend of Mr Kepa and his partner, Ms S. A was sent by her mother to stay with Mr Kepa and Ms S when she was aged 17.

[3] A alleged offending by Mr Kepa against her in 2005 and 2006. After investigation, he was charged with two specific charges and one representative charge of rape, three specific charges of unlawful sexual connection and two representative charges of indecent assault. At trial, Mr Kepa was found guilty of one specific and one representative charge of rape, and of the two representative charges of indecent assault against A. He was acquitted of the remainder of the charges.

[4] As to the first specific charge of rape, Mr Kepa went to A's bedroom, stood in front of the door and started to feel her bottom and grope her breasts. She tried to push him away, but he turned her around, pushed her onto the bed, ripped off her t-shirt, took her bra off, and undid her jeans, taking them right off her and throwing them on the floor. A tried to kick and punch him away, but he was too strong. He pinned her down with his hands, pulled down his pants, spread her legs and raped her. He told her to be quiet.

[5] Mr Kepa was also found guilty of a representative charge of rape. At sentencing, the Judge found the representative charge included three rapes.[4] As to the two representative charges of indecent assault, A estimated that Mr Kepa would regularly touch her bottom (five to six times a day) and on occasion would touch her vagina on top of her clothes.

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1 *R v Kepa* [2021] NZDC 20423 [Sentencing notes].
2 Criminal Procedure Act 2011, s 229(1).
3 Section 244(1). Mr Kepa's appeal was filed 14 working days out of time. An extension of time to appeal was granted by Clifford J in a minute dated 2 March 2022.
4 Sentencing notes, above n 1, at [5].

[6] While staying with Mr Kepa and Ms S, A was also regularly beaten by Ms S. Ms S was subsequently convicted of charges of common assault, assault with intent to injure and assault with a weapon against A.

[7] The second complainant, B, was a relative of Ms S. She lived with Mr Kepa and Ms S when she was aged between four and six years. She alleged offending against her between 2006 and 2008. At trial, Mr Kepa was found guilty of a specific charge of unlawful sexual connection and a representative charge of indecent assault on a child under 12 in relation to B. He was acquitted of one charge of doing an indecent act on a child under 12.

[8] As to the specific charge of unlawful sexual connection, B was asleep in her bed in a sleepout. She heard Mr Kepa talking to her uncle and then saw his shadow as he entered the room. Mr Kepa started rubbing her leg and ran his hands up her thigh. B started to cry so Mr Kepa went to leave, but he returned and forced his fingers in her mouth. He put his fingers in her mouth a couple of times and moved them around in her mouth, touching the side of her cheeks. He left but returned again. This time he touched her leg and rubbed her face, then opened her mouth and put his penis in it.

[9] The representative charge of indecent assault involved Mr Kepa getting under B's blanket in bed and slowly moving his hands up her legs, over her boxer shorts, and trying to put his fingers up her pants. B would move away, and this would make him leave.

[10] The third complainant, C, was B's sister, and another relative of Ms S. She was 13 when she stayed overnight, on the evening of 17 September 2017, with Mr Kepa and Ms S. The next day, C complained to whānau about what had happened to her the previous evening. C died prior to trial and her evidential video interview (EVI) was admitted as evidence.

[11] At trial, Mr Kepa was found guilty of one charge of assault with intent to cause sexual violation and one charge of doing an indecent act on a young person under 16 in relation to C. Those arose out of the same incident. After a night drinking, Mr Kepa

entered the bedroom in which C was sleeping, with her young niece, multiple times. On the first occasion, Mr Kepa sat on the bed and put his hand on C's thigh. C moved and Mr Kepa left. On the second occasion, Mr Kepa rubbed C's hand. C moved and Mr Kepa said he was moving C's hands off her niece's face. He left. On the third occasion, Mr Kepa felt the top of her bottom. C moved again and Mr Kepa said he was checking her forehead because she was coughing a lot.

[12] Mr Kepa returned to the bedroom later. While C was lying on her back, Mr Kepa whispered to her to turn on her side and open her legs. He touched C's vagina area and her bottom over the top of her jeans. He then tried to put his hands inside her jeans. C moved and Mr Kepa pulled his hand out. C, who had been pretending to be asleep, pretended to wake up and told him to go to bed.

Appeal jurisdiction

[13] Mr Kepa respectively appeals his conviction and sentence under ss 229 and 244 of the Criminal Procedure Act 2011.

[14] As to the conviction appeal, this Court must allow the appeal if satisfied that the jury's verdict was unreasonable, or that a miscarriage of justice has occurred.[5] A miscarriage of justice is defined as an error, irregularity or occurrence in relation to or affecting the trial that has created a real risk the trial outcome was affected, or that has resulted in an unfair trial.[6]

[15] As to the sentence appeal, this Court must allow the appeal if satisfied that there was an error in the sentence and a different sentence should be imposed.[7]

Appeal against conviction

[16] Three grounds of appeal are advanced:

(a) As to the first complainant, A, the jury verdicts are inconsistent. The verdicts of not guilty on one specific charge of rape and three specific

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5 Criminal Procedure Act, s 232(2)(a) and (c).
6 Section 232(4).
7 Section 250(2).

charges of unlawful sexual connection are inconsistent with the verdict of guilty on the representative charge of rape when the evidence was, simply, that he did it three or four more times.

(b) As to the second complainant, B, the identification by her of the offender as Mr Kepa was so unreliable it should not have been admitted. If it was admissible, careful judicial directions were required on how to treat this evidence and the direction given was inadequate in terms of s 126 of the Evidence Act 2006 (the Act).

(c) In relation to third complainant, C, her EVI was inadmissible hearsay. Even if it was admissible, Mr Kepa's inability to test her evidence meant there was a real risk of prejudice that impinged his fair trial rights. A careful direction was required and the one given was inadequate in terms of s 122 of the Act.

Inconsistencies in verdicts relating to A

[17] Mr Kepa faced eight charges in relation to A. Charges 1, 2 and 3 were said to have occurred on the same day. Charge 1 was a specific charge of sexual violation by rape. Charges 2 and 3 were specific charges of sexual violation by unlawful sexual connection, respectively by introduction of Mr Kepa's penis into A's anus and connection between A's mouth and Mr Kepa's penis.

[18] There were two further charges of sexual violation by rape — charge 5, a specific charge of rape in Mr Kepa's daughter's bedroom, and charge 6, a representative charge of rape on "[o]ccasion(s) other than in charges 1 and 5". Charge 4 was a further specific charge of sexual violation by unlawful sexual connection in the lounge, while charges 7 and 8 were representative charges of indecent assault by touching A's bottom and A's genitals.

[19] Mr Kepa was found guilty of charges 1, 6, 7 and 8 and not guilty of charges 2, 3, 4 and 5.

[20] No issue is taken with the guilty verdicts on the representative charges of indecent assault (charges 7 and 8). Issue is, however, taken with the guilty verdicts on the specific charge of rape (charge 1) and the representative charge of rape (charge 6).

[21] Charges 1, 2 and 3 were said to have occurred on the same day. A was the only witness. She said she was raped in her bedroom during which her shirt was ripped. An hour or so later Mr Kepa told her to go to the toilet "for a poo". When she came out of the toilet he grabbed her by the arm, pushed her back to her bedroom and put his penis in her bottom (charge 2). After that he forced her to give him a blow job (charge 3). Mr Kepa says there was nothing to distinguish the incident in terms of her reliability or truthfulness, in that there was no explanation why the jury would accept one part of the incident over another and find him guilty of charge 1, but not guilty of charges 2 and 3.

[22] A said her shirt was ripped during the rape and that Mr Kepa's partner, Ms S, came home and saw the ripped shirt and her pants out of place and commented on it. The defence called Ms S to give evidence. She said this never happened and she would have remembered it if it did. Ms S therefore presented the only additional evidence and, if believed, cast doubt on charge 1.

[23] Mr Kepa submits that the jury's verdicts are illogical and make no sense. He submits this was an indication that something went awry with their deliberations.

[24] The complainant was asked in her EVI to talk about the last incident that happened. This is said to be significant because it resulted in A fleeing to a neighbour's house and then to a women's refuge. A gave detailed evidence of a rape which occurred in Mr Kepa's daughter's bedroom when she was folding clothes. This was charge 5, on which the jury also returned a not guilty verdict.

[25] Charge 6 was a representative charge of rape on "[o]ccasion(s) other than in charges 1 and 5". Mr Kepa says that the only evidence in support of this charge was an answer to a question: "We've talked about [Mr Kepa] putting his penis into your vagina. … How many times did that happen in that … period?" The answer A gave was: "I'd say at least three to four times".

[26] Mr Kepa submits that it did not make sense the jury would reject detailed evidence of specific incidents and then accept a representative charge based on brief evidence that lacked any specificity, was very broad and was difficult to describe as evidence which a jury could reasonably conclude amounted to proof beyond reasonable doubt. He submits that the verdicts on the rape charges were not logically reconcilable, were not supported by the evidence and were unreasonable.

[27] We agree with the Crown, however, that the verdicts of guilty on charge 1 and not guilty on charges 2 and 3 are explicable. First, they were separated in time. Charge 1 ended when Mr Kepa heard the front door open. Ms S arrived home and left again a little over an hour later. A described the events that were the subject of charges 2 and 3 as occurring after Ms S left the house.

[28] Secondly, there were differences in A's descriptions of charges 2 and 3 in her EVI and in her evidence at trial that may have led the jury to have a reasonable doubt in relation to those specific allegations. In her EVI she said the events giving rise to charges 2 and 3 happened in her room. However, in her evidence-in-chief at trial she said the event happened in another room (Mr Kepa's daughters' bedroom). She was closely questioned about this inconsistency. In his closing address, counsel for the defence referred to this inconsistency as an example of her evidence being "all over the place". That same inconsistency did not apply to events surrounding charge 1 — in our view constituting a reasonable basis for the differing verdicts.

[29] Likewise, the jury's decision to find Mr Kepa guilty on representative charges where similar specific charges resulted in findings of not guilty does not indicate something went wrong with its reasoning.

[30] Mr Kepa relies on *R v Maddox*, where this Court held that there was no rational explanation for the jury returning not guilty verdicts on two specific charges and one representative charge, but finding the defendant guilty on two other representative charges.[8] We agree with the Crown that the present case can be distinguished from *Maddox.* Unlike the defendant in that case, Mr Kepa was convicted of one specific rape (charge 1). The jury therefore accepted evidence from which they could establish

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8 *R v Maddox* CA424/00, 1 March 2001.

a continuance. The jury's acceptance of one specific rape, together with A's evidence that the offending occurred at least three or four times, gives a rational basis for the conviction on the representative charge.

[31] A's evidence that the rapes happened at least three or four times was also not her only evidence on the topic. In evidence-in-chief she referred to rapes on multiple occasions. She said:

> Q. So I'm going to talk to you about the actual incidents, or some questions about some of the actual incidents we've heard. And you talked about, or you were asked about on that first occasion, the defendant ejaculated onto the floor?
>
> A. Yeah.
>
> Q. Is that something he did on just that occasion?
>
> A. He did it on multiple occasions, every time I was home alone to do the housework, he would find an excuse to tell [Ms S] that he was staying home to make sure that I'm cleaning the house properly before she gets home. And when she's gone then he'll come to wherever I am and start raping me then and there.
>
> Q. And so when he'd do that, he would ejaculate on the floor on those occasions too?
>
> A. Yeah.

[32] Then, in response to a question in cross-examination, A also referred to "… the beatings, the rapes, day in, day out … [t]hat's something you can never forget, the rapes, the beatings …".

[33] The verdicts of the jury are not, in our view, inconsistent. The fact that they could not be satisfied of Mr Kepa's guilt to the required standard on some charges in no way impugns the findings of guilty on the remainder. On each occasion, the jury's verdict is readily explicable having regard to the evidence adduced at trial and the verdicts of not guilty have no consequent impact upon the integrity of the verdicts of guilty.

[34] The representative rape charge was logically separable from the charges on which the jury found Mr Kepa not guilty. It was not unreasonable for the jury to have accepted A's evidence on some charges and not others. The Judge directed them that

they were to look at the charges separately and come to a separate decision on each. This they did.

[35] The first ground of appeal fails.

Identification evidence by B

[36] Mr Kepa was found guilty at trial of a representative charge of doing an indecent act on a child under 12 years (charge 10) and a specific charge of sexual violation by unlawful sexual connection between his penis and B's mouth (charge 11).

[37] Mr Kepa submits that both charges depended wholly or substantially on the correctness of the identification of him by B.

[38] Prior to trial, Mr Kepa challenged B's identification of him. He accepted that s 45(1) of the Act applied in that there was good reason not to follow a formal identification procedure because B had lived with Mr Kepa and Ms S for some time. In those circumstances, s 45(1) provided that B's evidence was admissible unless Mr Kepa proved on the balance of probabilities it was unreliable.

[39] In a pre-trial ruling, Judge KB de Ridder found that Mr Kepa had not done so.[9] He stated:

> [67] [B] clearly knew the defendant as she was living in the same household with him at the time she says he offended against her. Although she refers to pretending to be asleep that does not mean to say that she did not have the chance to observe the defendant albeit briefly. There was no suggestion that there was anybody else in the house at the time who [B] could have mistakenly taken for being the defendant. Standing back and looking at [B's] evidential interview overall it is clear that she is talking about the defendant, and it is equally clear that she observed the defendant when he was offending against her.

[40] On appeal, Mr Kepa disputes the findings of Judge de Ridder. He submits the evidence identifying him as the offender against B is so unreliable that his convictions on charges 10 and 11 are unsafe.

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9 *R v Kepa* [2019] NZDC 9036.

[41] Charge 10 was a representative charge of indecent assault on a child under 12 years, relating to occasions when Mr Kepa touched B's person while she was in bed. In her EVI, B said:

> Q. Mhm, so tell me all about [Mr Kepa].
>
> A. He's gross … and yuck.
>
> Q. Mhm, so tell me more about [Mr Kepa] being gross and yuck.
>
> A. He touches me when I don't like being touched. ... When I'm asleep. … And I'd wake up and he would be in my, ah, under my blanket … trying to touch me.
>
> …
>
> Q. Mhm. So how many times altogether did it happen, [B]?
>
> A. Like, five times a week or mainly, mostly every night, but sometimes he wouldn't.
>
> …
>
> Q. Right, so how old were you the first time it happened?
>
> A. I think I was like, four or five.
>
> Q. Mhm, and what about the last time?
>
> A. I think I was like, six …

[42] B described Mr Kepa entering from the bottom of her bed, underneath her blanket and trying to put his fingers down her pants. She would try to move away. His fingers also went into her mouth and on her legs. B said she could see him underneath her blanket and could feel his hands on her legs. She kept on moving and the touching stopped, but she never saw him leaving the room.

[43] Charge 11 was a specific charge of sexual violation by unlawful sexual connection between Mr Kepa's penis and B's mouth. In her EVI, B said:

> Um, this one night, I was sleeping in the sleepout … and my uncle and him were out in the shed and he would come into my room and put his fingers in my mouth and then he would go out and then he would come back in and then he'd start touching me, and then he would go out and then come back in and then put his penis in my mouth.

[44] B went on to describe the incident over nine pages of transcript. She referred to hearing Mr Kepa's voice outside talking to her uncle and then seeing Mr Kepa's shadow and knowing he was in her room. She said she never really looked at him and kept her eyes shut. She did, however, see his penis hanging out of his pants and him holding it before he inserted it in her mouth. She felt scared.

[45] In cross-examination at trial, B said she did not know whether there were other people in the area and could not remember if Mr Kepa said anything.

[46] We consider that, in all the circumstances, B's identification evidence was not unreliable on the balance of probabilities and the trial Court did not err by admitting it. B's mother confirmed that B lived with Ms S and her partner, Mr Kepa, from when she was four to seven years old. B was clearly able to, and did, identify Mr Kepa as the man who offended against her. The weight to be given to the reliability of her identification was a jury matter.

[47] Mr Kepa also contends that the warning given to the jury by the Judge in his summing up of B's identification evidence was inadequate. He says the Judge put voice identification in issue but did not direct the jury on the need for caution before accepting said voice identification.

[48] Section 126 of the Act sets out the mandatory jury direction when the case against the defendant depends wholly or substantially on the correctness of one or more visual or voice identifications. Section 126 provides:

> **126 Judicial warnings about identification evidence**
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> (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
>
> (2) The warning need not be in any particular words but must—
>
> (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
>
> (b) alert the jury to the possibility that a mistaken witness may be convincing; and

(c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

(3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

[49] In summing up the Judge dealt with identification as follows:

> [61] I want to talk to you now about identification as I said I would. And this is in relation to [B] for charges 10 and 11 only, not charge 9. So that is important, it is 10 and 11 only, not 9. You'll recall Mr McKean submitting to you in his final address that if you find that someone, a male, put their penis into [B's] mouth it was not Mr Kepa, that she has got the identification of the perpetrator wrong and Mr McKean said, well it was night time, she only saw a shadow, she saw a person holding a penis but never looked at him, never spoke to the perpetrator and he was in the room and she never looked at him when he left. So you'll need to consider all of that.
>
> [62] The Crown say, well this was a man she knew well, she had been around him frequently, she lived at the same property at the [same] time as him but in a sleep-out, she knew his voice and heard it next door along with another male voice she could differentiate between. Ms Needham says there is ample evidence from which you could conclude that she has got the identification of the perpetrator correct.
>
> [63] If you accept the physical acts occurred to [B] in relation to charges 10 and 11 you will have to consider whether she has got the correctness of her visual identification of the defendant right. I am required to, and do warn you that there is a need for special caution before finding the defendant guilty on the basis of the **(unclear)** identification where the Crown's case, as it does here, depends substantially on the correctness of that identification. The reason for this warning is that experience has shown that it is quite possible for a perfectly honest witness to be mistaken about identification. If such a mistake is acted on miscarriages of justice can and have occurred. Remember that a mistaken witness may be convincing.

[50] Mr Kepa says the Judge made these three errors:

(a) First, the Judge (incorrectly) stated the Crown relied on voice identification but did not direct the jury on the need for caution before accepting voice identification. Mr Kepa submits that in the Crown closing address, counsel did not address the issue of identification of Mr Kepa by B at all and incorrectly said there was really only one issue in the trial: whether the acts occurred. On the other hand, in its opening statement of issues, the defence stated, "If someone did that to her, it

was not Mr Kepa." Having put voice identification in issue, the Judge only directed on visual identification. There was no mention on the correctness of her voice identification.

(b) Second, when directing the jury on identification, the Judge mumbled the direction so that a crucial part of compliance with s 126(1) could not be heard or understood. The transcript of what was said in the summing up is recorded as (**unclear)**. This was the vital part of the warning of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification. This error is said to be fatal given the importance of the direction and could not be described as a clear warning within the spirit of s 126.

(c) Third, the Judge did not say that mistaken identification can result in a *serious* miscarriage of justice. Although this Court found that a similar failure in *Pritchard v R* did not lead to a miscarriage of justice,[10] the Court should now assess the case more strictly given the Supreme Court's finding in *Fukofuka v R* that the direction under s 126 must be given.[11] Further, the failure to use the word "serious", even if excusable on its own, aggravates the other failures above.

[51] Section 126 applies to both voice and visual identification. It also applies to recognition evidence, that is, cases where the identification witness already knew the defendant and as such "recognised" them.[12] Here, B lived with Mr Kepa and Ms S for a period of years and obviously knew Mr Kepa well.

[52] As to the first alleged error, the only evidence of voice identification is in relation to charge 11, when B says she heard Mr Kepa talking with her uncle outside the sleepout prior to Mr Kepa entering the sleepout a number of times, initially touching her and inserting his fingers in her mouth before finally coming back and sexually violating her by inserting his penis into her mouth. The voice identification

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10 *Pritchard v R* [2010] NZCA 403 at [24].
11 *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [29] and [31]–[32].
12 *Ponga v R* [2014] NZCA 496 at [38].

was mixed with B's visual identification of Mr Kepa as the offender with his penis hanging out of his pants and him holding it.

[53] B's reference to having heard Mr Kepa's voice was one factor which led her to identify him as the offender for the sleepout incident. It would therefore have been best practice for the Judge to expressly refer to both aspects of B's identification evidence (voice and visual) in the course of his warning. That said, we do not believe there is a real risk that the trial outcome was affected by this oversight. Although only visual identification was expressly referred to in the Judge's introductory comments, the warning itself referred to "identification" more generally. Specifically, the Judge warned the jury that experience has shown that "it is quite possible for a perfectly honest witness to be mistaken about identification" and that "if such a mistake is acted on miscarriages of justice can and have occurred". The Judge also warned the jury that "a mistaken witness may be convincing". The jury would have clearly understood this warning to relate to the overall correctness of B's identification of Mr Kepa, not just the correctness of her visual identification. The key message was the same, regardless of whether it was voice or visual identification evidence, or a combination of both.

[54] As to the second alleged error, because of Mr Kepa's submission that the Judge mumbled a vital part of the direction on identification and that this error was fatal, we have taken the opportunity to listen to the audio recording of the summing up. The word said to be unclear is the word "visual", which we found quite clear. In any event, we again agree with the Crown that the possibility that the jury might not have heard one word in the sentence would not fatally alter their understanding of the direction as the surrounding context is clear.

[55] As to the third and final alleged error, s 126 also does not mandate a particular form of words.[13] The direction must, however, warn the jury that a mistaken identification can result in a serious miscarriage of justice and alert the jury to the possibility that a mistaken witness may be convincing.[14] The second requirement was complied with. The question is whether the first requirement — that the jury must be

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13 Evidence Act 2006, s 126(2).
14 Section 126(2)(a) and 126(2)(b).

warned that a mistaken identification can result in a serious miscarriage of justice — was complied with. Specifically, does the omission of the word "serious" make a difference? In the circumstances of this case, the answer must be no. Remembering that no particular words are required, the Judge advised the jury not only that miscarriages of justice can occur, but have actually occurred because mistakes made by perfectly honest witnesses about identification have been acted upon. This direction certainly conveys a message of seriousness and made clear to the jury that they needed to approach the identification evidence with special caution.

[56] As Mr Kepa acknowledges, this Court in *Pritchard v R* rejected the argument that the direction in that case, which also omitted the word "serious", did not strictly comply with the terms of s 126.[15] The Supreme Court's decision in *Fukofuka v R* does not require a different result. There the trial Judge had failed "to inject into his summing up the appropriate and statutorily required level of scepticism as to identification evidence".[16] Here, the Judge did emphasise the need for special caution.

[57] The second ground of appeal fails.

Admissibility of C's EVI

[58] Mr Kepa was found guilty at trial of one charge of assault with intent to commit sexual violation and one charge of doing an indecent act on a young person under 16 in relation to C.

[59] C died in a motor vehicle accident in January 2021, three months before the start of the trial. The Crown therefore applied to have her EVI admitted as hearsay evidence at trial. The trial Judge granted the application in terms of s 18 of the Act. Section 18 allows a hearsay statement to be admitted in any proceeding if the circumstances relating to the statement provide a reasonable assurance that the statement is reliable,[17] and the maker of the statement is unavailable as a witness.[18]

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15 *Pritchard v R*, above n 10, at [24].
16 *Fukofuka v R*, above n 11, at [38].
17 Evidence Act, s 18(1)(a).
18 Section 18(1)(b)(i).

[60] Mr Kepa submits that the Judge was wrong to admit the EVI. He says C's evidence was not reliable. Mr Kepa did not deny entering the room where C was sleeping with her young niece on multiple occasions. When confronted the next morning, Mr Kepa maintained that he had only touched C in order to move her because she had been suffocating her young niece, with whom she was sleeping. He said C had misinterpreted his actions. Further, C acknowledged her niece had been sleeping with her head on C's arm and that at one stage Mr Kepa had told C he was just moving her hand off her niece's face.

[61] Mr Kepa submits that the interviewer in the EVI did not sufficiently enquire of C where her niece was and explore whether there was justification for a belief that C may have been sleeping on top of her niece.

[62] We see this case as similar to *K (CA332/2014) v R*.[19] In that case, the complainant was interviewed (and a video recording was made) 18 months after the alleged sexual offending. The complainant then died, and the Crown applied to adduce the video-taped interview under s 18 of the Act.[20] This Court held that the circumstances relating to the statement provided reasonable assurance as to its reliability based on several factors, including that the interview was conducted by a trained and experienced interviewer; that the complainant was encouraged to explain in her own words and in as much detail as possible the events; and that, after free recall, the interviewer asked clarificatory questions on the information already provided.[21] The Court said:[22]

> [t]he interviewing method assumes significance when assessing whether the complainant's statement is reliable, because it shows that the complainant was initially able to recount the entire incident herself without any input from or prompting by the interviewer.

[63] The same can be said for C's EVI.

[64] Additionally, the complainant in *K (CA332/2014) v R* on the day of the alleged incident told her mother what happened. The consistency between what she said to

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19 *K (CA332/2014) v R* [2014] NZCA 393.
20 At [6], [9] and [10].
21 At [21].
22 At [21].

her mother that day and what she said in her recorded statement 18 months later was another factor going to reliability.[23] We agree with the Crown that similar circumstances arise here. C disclosed to her aunt and cousin the next morning that Mr Kepa had touched her bottom. C's mother also gave evidence that in the days after the incident, C told her "[Mr Kepa] touched the front, then touched the bum".

[65] In all the circumstances, C's hearsay statement met the requirements of s 18 of the Act and the trial Court did not err by admitting it.

[66] Mr Kepa submits that even if the EVI was admissible, a direction under s 122 of the Act tailored to the circumstances of the case was required. He says the warning given by the Judge was inadequate. He says further that inappropriate sympathy had been built up for C by the Judge's comment in his opening remarks that C "was tragically killed in January this year", his brief questions of the officer in charge about the circumstances of her death in a motor vehicle accident and his comment in his summing up that "she sadly passed away prior to this trial".

[67] Unlike s 126 which requires a judicial warning about identification evidence, s 122 only requires a Judge to consider a warning in the case of hearsay evidence. It relevantly provides:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> (a) hearsay evidence:
>
> (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
>
> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:

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[23] At [22].

(d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:

(e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.

[68] The Judge addressed the jury as follows:

> [71] I will now briefly discuss [C] with you. I need to warn you to be cautious when you are looking at her evidence. She sadly passed away prior to this trial. I ruled that her evidence could be played to you but you will need to take into account that Mr McKean has not been able to challenge her about these essential issues in cross-examination. He has not been able to cross-examine her as to what Mr Kepa said he was doing when he went into her room a number of times, he has not been able to put to her, ask her, "Well maybe you made a big mistake, maybe this was all just a misunderstanding, that in his drunken, stumbling state he was only trying to save four year old [C's niece] from being suffocated by you." You can of course accept her evidence. That is entirely a matter for you but you must take into account and be cautious because of the inability of Mr McKean to cross-examine her.

[69] The Judge obviously considered that some sort of direction should be given to the jury about how to approach C's evidence. He made it clear that Mr Kepa was disadvantaged because his counsel was unable to cross-examine C and put the defence case to her. The Judge clearly identified the defence case — that it was all a mistake because Mr Kepa was only trying to ensure that C's four-year-old niece, with whom she was sleeping, did not suffocate.

[70] Though the Judge's comments urged caution because of counsel's inability to cross-examine C, he did not separate the warning into the two issues specified in s 122(1)(a) and 122(1)(b) — whether to accept the evidence and the weight to be given to the evidence. It would have been preferable for the Judge to have referred separately to the two issues; but the failure to do so does not lead to any miscarriage of justice. The law does not require any particular form of words to be used.[24] What is important is the substance of what the judge says. That, of course, must reflect the circumstances of the case at hand. In this case we consider it did.

[71] Finally, as to the suggestion the Judge had built up inappropriate sympathy for C, both the prosecutor in her closing address and the Judge in his summing up made

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[24] Evidence Act, s 122(4).

general comments about putting any feelings of sympathy or prejudice to one side. Defence counsel specifically referred to C in his closing address as follows:

> You might feel sympathy for [C] because she died. I don't need to tell you that it would be grossly unjust to Mr Kepa if you used that sympathy for [C's] death to in some way bolster her evidence, her untested evidence, because she died in a car accident. The fact she died has no impact on her evidence; that still remains untested.

[72] We are of the view that a specific direction by the Judge was not required as there was clearly no causal nexus between the alleged offending and C's death. A general direction to the jury to put any feelings of sympathy or prejudice to one side was sufficient to meet any concerns.

[73] The third ground of appeal fails.

Appeal against sentence

[74] Mr Kepa was sentenced to 11 years and four months' imprisonment. He now appeals against sentence on the basis that the starting point of 14 years' imprisonment adopted by the Judge was too high.

[75] The Judge adopted an initial starting point of nine years' imprisonment for the offending against A to which,[25] taking into account the principle of totality, he added three years' imprisonment for the offending against B[26] and a further two years' imprisonment for the offending against C.[27]

[76] In adopting the starting point for the lead offences of rape of A, the sexual violation by unlawful sexual connection of B, and the assault with intent to commit sexual violation in respect of C, the Judge identified the aggravating factors of the

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25 Sentencing notes, above n 1, at [17].
26 At [18].
27 At [19].

offending by reference to the guideline judgment of *R v AM (CA27/2009)*.[28] The Judge identified the following aggravating factors:[29]

(a) There was some limited planning and premeditation, although the Judge acknowledged any premeditation was relatively opportunistic. For instance, Mr Kepa had offended when he thought he could get away with it, when no one else was around or when others were drunk.[30]

(b) There were three complainants, two of whom were related to Mr Kepa's partner.[31]

(c) The complainants were vulnerable. Specifically, A was isolated, either pregnant or with a new baby and subject to violence from Ms S. B was four to six years old, alone in her bedroom and extremely vulnerable. C was somewhat vulnerable but had a lot of people around her.[32]

(d) Mr Kepa was much older than the complainants.[33]

(e) The scale of the offending, although the Judge provided no further details aside from referring to his outline of the facts.[34]

(f) There was a low-level of breach of trust.[35]

(g) There was some "over and above" violence in relation to the offending against A.[36]

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28 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750. The charge of assault with intent to commit sexual violation was brought under s 129(2) of the Crimes Act 1961. Although there is no guideline judgment for offending under s 129, the culpability assessment factors and sentencing bands from *R v AM* are relevant: see *Harawira v R* [2019] NZCA 562 at [54] and *Bowman v R* [2014] NZCA 92 at [17].

29 Sentencing notes, above n 1, at [15(a)]–[15(h)].

30 At [15(a)].

31 At [15(b)].

32 At [15(c)].

33 At [15(d)].

34 At [15(e)].

35 At [15(f)].

36 At [15(g)].

(h) There was harm to the victims, including serious psychological harm.[37]

[77] The Judge considered there were no mitigating factors in relation to the offending.[38]

[78] The Judge did not consider any matters called for an uplift.[39] He allowed a 20 per cent discount based on personal mitigating factors.[40] The most prominent was Mr Kepa's health — he suffered a brain injury some time ago and in 2019 underwent surgery for a brain tumour.[41] Less significant was a cultural report that was "not anywhere near as bad as the majority" the Judge had seen. He considered the nexus between the cultural report and the offending was slight, but still took it into account.[42] The end sentence was 11 years and four months' imprisonment.[43]

[79] Mr Kepa submits that the rape of A was low-level for offending of its type and should fall at the upper end of rape band one — six to eight years' imprisonment — in *R v AM*.[44] Mr Kepa also notes that despite the Judge's finding that he raped A three further times, no detail was given. Further, all these incidents would have been at the lower end of seriousness for offending of this type.

[80] Mr Kepa submits that the offending against B was also low-level for offending of its type. Regarding the sexual violation by unlawful sexual connection, he did not use force or threats, did not move his penis while in B's mouth and never ejaculated.

[81] Similarly, Mr Kepa submits that the offending against C was low-level for offending of its type.

[82] Mr Kepa submits that in terms of *R v AM*, the relevant culpability assessment factors are:

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37 At [15(h)].
38 At [15(h)].
39 At [20].
40 At [23].
41 At [21].
42 At [22].
43 At [33].
44 *R v AM*, above n 28, at [90] and [93]–[97].

(a) Planning and premeditation were limited. The offending was opportunistic.

(b) A was only vulnerable to the extent that she did not have a large support network in the location where Mr Kepa lived. Otherwise, she was 18 and an adult. B was vulnerable due to her age and Mr Kepa's age, but C was not overly vulnerable.

(c) The complainants did not suffer extraordinary harm.

(d) There was some scale to the offending, but not to the extent of other cases. There were three victims. The offending against A occurred for a period of just over one year and was low-level. The offending against B involved a one-off sexual violation incident. The rest was low-level indecent assault that occurred over a couple of years. The offending against C was one-off and impulsive.

(e) The breach of trust was only to a small degree.

(f) The violence used against A was limited and not unusual.

[83] Overall, and with the *R v AM* culpability assessment factors in mind, Mr Kepa submits a starting point of 12 years' imprisonment was more appropriate. He submits that rightly placed the offending at the top end of rape band two, or at the lower end of rape band three. He submits that this case was more serious than *R v W*,[45] but not as serious as other cases where the court has imposed starting points of 14 years' imprisonment. He cites, in particular, *R v T*[46] and *R v F*.[47]

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45 *R v W* CA87/93, 4 June 1993.
46 *R v T (CA674/07)* [2008] NZCA 157.
47 *R v F (CA206/05)* CA206/05, 22 November 2005.

[84] The case of *R v W* is cited in *R v AM* as an example of a case with a starting point at the lower end of rape band two (seven to 13 years' imprisonment). The Court described the offending as follows:[48]

> O [offender], male, offended against several boys, aged 11 to 16, over a ten year period. O was a boxing trainer/coach and invited boys he was training to stay overnight, taking the opportunity to offend against them. The majority of the offending involved masturbation of the Vs [victims], followed by simulated intercourse to ejaculation. A single sexual violation charge consisted of mutual oral contact.

[85] The Court did, however, sound a note of warning about the use of such cases:[49]

> The examples [provided in relation to each sentencing band] are a convenient way of providing illustrations of factual scenarios. The use of earlier cases is not a commentary on the appropriate sentencing outcome in those cases. It will generally not be helpful to revert back to the actual outcome in those cases which may well involve a different sentencing regime or a different approach to starting points.

[86] *R v T* and *R v F* are not cited as examples in *R v AM*, but both cases were decided before it. In *R v T*, the appellant pleaded guilty to two representative charges of sexual violation, alleging respectively rape and digital penetration, and one representative charge of indecent assault in relation to his partner's daughter. The offending started when she was nine years old. The appellant admitted attempting to insert his penis into her vagina four to five times. In addition, the appellant pleaded guilty to four further specific charges of indecent assault of his partner's daughter and three of her friends at a YMCA camp.[50]

[87] In *R v F,* the appellant pleaded guilty to seven charges of sexual offending against two young girls. The younger complainant was aged between seven and nine years and was the appellant's wife's niece. While staying with them, the appellant "sexually violated her by rape and oral connection on multiple occasions and sodomised her once". He also induced her to masturbate him. The second complainant stayed with the appellant when she was aged 12 and 13. He digitally

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48 *R v AM*, above n 28, at [98].
49 At [91].
50 *R v T*, above n 46, at [1]–[10].

penetrated her and indecently assaulted her, and on several occasions the appellant attempted to rape her.[51]

[88] Overall, we agree with the Judge's evaluation of the culpability assessment factors,[52] but the breach of trust is arguably worse than low-level. A had been sent to live with Mr Kepa and his partner to ensure her safety and Mr Kepa knew of the beatings inflicted on A by Ms S. B and C were relatives of Ms S, with B being especially young (four to six years old) when the offending occurred. The breach of trust can therefore be characterised as moderate.

[89] A starting point of 14 years' imprisonment for Mr Kepa places his offending towards the lower end of rape band three in *R v AM.* We note the court in *R v AM* described band three as including offending accompanied by more than three aggravating factors to a moderate degree.[53] In that light, we do not consider a starting point of 14 years' imprisonment manifestly excessive.

[90] We do not agree that the offending in *R v T* and *R v F* is much (if at all) more serious than Mr Kepa's. We see both cases as broadly comparable to Mr Kepa's. The range of offending and number of offences are similar. The victims were similarly young and vulnerable. In all cases there was at least a moderate breach of trust, including in a familial setting. It appears all victims suffered serious psychological harm. The offending in *R v T* was arguably more pre-meditated than Mr Kepa's, but it was arguably less violent and involved only one "primary" victim. The offending in *R v F* seems the most violent but involved two victims rather than three. In Mr Kepa's case the offending period was the longest.

[91] Overall, considering *R v AM,* the culpability assessment factors and the comparison to similar cases cited by counsel, we find that the starting point of 14 years' imprisonment adopted by the Judge was within the permissible range. The discounts the Judge applied for personal factors are not contested. Accordingly,

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51 *R v F*, above n 47, at [2]–[5].
52 As set out at [15(a)]–[15(h)] of the Sentencing notes.
53 *R v AM*, above n 28, at [105].

neither the starting point nor the effective end sentence of 11 years and four months' imprisonment is manifestly excessive.

[92] The appeal against sentence also fails.

Result

[93] The appeal against conviction and sentence is dismissed.

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