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

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA225/2022
[2023] NZCA 83

BETWEEN	H (CA225/2022) Appellant
AND	THE KING Respondent

Hearing:	22 February 2023
Court:	Gilbert, Ellis and Davison JJ
Counsel:	W C Pyke for Appellant Z R Hamill for Respondent
Judgment:	30 March 2023 at 9.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Davison J)

[1] Mr H, the appellant,[1] appeals his convictions on three charges of indecent assault on a young person under 16 years,[2] three charges of sexual violation by unlawful sexual connection,[3] and two charges of rape.[4]

[2] The appellant also appealed against his sentence of 13 years' imprisonment with a minimum non-parole period of 50 per cent.[5] However, at the commencement of the hearing of the appeal Mr Pyke, counsel for the appellant, advised that the sentence appeal is not pursued and is abandoned.

[3] The complainant in respect of all charges was the appellant's stepdaughter who was 12 years old at the time of the offending against her. The events upon which the charges were based all took place in 2018.

[4] The appellant was convicted on 6 May 2021 following a jury trial in the Manukau District Court at which he was found guilty of the eight charges. The principal prosecution witness was the complainant. The appellant's defence was founded on his denial that any of the conduct alleged by the complainant had taken place, and that she had retracted her complaints. The complainant's allegations against the appellant were not supported by her mother (Mrs H). The Crown case was that Mrs H had known about the offending against her daughter while it was occurring and subsequently, after the complaint had been made to the Police, that she had put pressure on her daughter to retract her complaint. The Crown case also included that Mrs H had fabricated documents in which it appeared that the complainant had retracted her complaint.

[5] The appellant's sole ground of appeal is that Judge Earwaker ought to have given the jury a direction pursuant to s 122 of the Evidence Act 2006 as to the reliability of the complainant's evidence regarding retraction of her complaint and

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1 The appellant's name has been anonymised throughout this judgment, despite it not being suppressed, because identifying the appellant by name would risk breaching the complainant's protections under ss 203 and 204 of the Criminal Procedure Act 2011 due to the nature of the offending and his relationship with the complainant. See *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58].

2 Crimes Act 1961, s 134(3).

3 Sections 128(1)(b) and 128B.

4 Sections 128(1)(a) and 128B.

5 *R v [H]* [2022] NZDC 651.

any motivations she may have had for making a false complaint against the appellant. He argues that the Judge's failure to give the jury a reliability warning has given rise to a miscarriage of justice, and that this Court should quash the convictions.

[6] In response, the Crown submits that a reliability warning under s 122 of the Evidence Act was not required in this case where the key issue was the complainant's credibility regarding both the alleged offending against her, and her denial of having retracted her complaints. The Crown submits that the giving of a reliability warning in the circumstances of this case would not have assisted the jury and may in fact have confused them.

The prosecution and defence cases

The prosecution case

[7] The appellant had been in a relationship with the complainant's mother since the complainant was five years old. They were then living in South Africa. The appellant emigrated to New Zealand in 2017, and the remaining members of the family followed in 2018. When the complainant, her brother, and mother arrived in Auckland they were collected from the airport by the appellant and taken to his address where they were to live with him.

[8] The eight charges on which appellant was found guilty are all based on the complainant's evidence which need only be briefly summarised for the purposes of this appeal. The complainant gave evidence that on the night the family arrived in New Zealand, the appellant insisted that they all sleep in the same bed with the complainant beside him. The complainant said that night the appellant touched her breasts and vagina under her clothing, and thereafter he touched her breasts on numerous occasions. The complainant gave evidence that the appellant also digitally penetrated her vagina on a number of occasions, and she described three specific occasions. She said that around Easter 2018 the appellant took an opportunity when he was alone with her to sexually offend against her. She said that he touched her breasts, inserted his fingers into her vagina and inserted his penis into her anus. On another occasion the complainant said that she was required to stay at home as a punishment for being naughty, while Mrs H and her brother went with family friends

to the movies. She said that while the other family members were away, the appellant raped her and ejaculated inside her. The complainant said that on another occasion, when she came home from school sick and went to bed, the appellant digitally penetrated her.

[9] In February 2018, about a month after their arrival in New Zealand, Mrs H took the complainant to a medical centre and requested that she be put on a contraceptive injection because she was concerned about random sexual assault and potential pregnancy. The request was declined because the reasons for the contraceptive were not considered appropriate for a girl of the complainant's age of 12. Nevertheless, Mrs H took her back to the medical centre in March 2018 and repeated her request for her daughter to be given a contraceptive injection.

[10] The complainant first disclosed the offending to a family friend (Ms DK), who had become concerned about the complainant. On one occasion Ms DK's daughter, who was nine years old, was left at the appellant's address in the company of the appellant, the complainant, and her brother while Ms DK took Mrs H shopping for groceries. When the two women returned from shopping some 45 minutes later, Ms DK observed the complainant exit the appellant's bedroom and go straight to the bathroom. She saw that the complainant was crying and her hair was messy. Ms DK's daughter was also upset, and upon seeing her mother arrive, she insisted on leaving the house immediately.

[11] On another occasion Ms DK took the complainant to visit the appellant in hospital where he was receiving treatment for appendicitis. Ms DK said that the appellant greeted the complainant saying: "Hello titties" and asked her how many nights she had stayed away from home at Ms DK's house, saying "[y]ou owe me big time". That evening Ms DK said she asked the complainant about what the appellant had said to her at the hospital, and what he had meant by his remark, "[y]ou owe me big time". The complainant then explained that the reason why Ms DK's daughter had insisted on being taken home immediately on the occasion when she and the complainant's mother had returned from the grocery shopping trip was because her daughter had walked in on the appellant having sex with her and that he had shouted at Ms DK's daughter to leave. The complainant also told Ms DK that

the appellant's abuse of her had begun when she was five or six years old and they were living in South Africa. She said that the abuse had started as digital penetration and had progressed to rape and anal penetration. She said that her mother knew about the abuse but had not taken any steps to protect her. And she explained that when the appellant had said at the hospital that she "owed [him] big time", he was referring to her being required by the appellant to give him "blow jobs" and sex if she ever stayed away from home overnight with friends.

[12] Following these disclosures, the complainant did not return to the appellant's house, and she stayed with Ms DK. On 11 July 2018, shortly after having made the disclosure, the complainant was taken by Ms DK to a medical centre. While they were at the medical centre Mrs H arrived. She was in an agitated state and she verbally abused the complainant, referring to her as a "slut" and a "whore". Mrs H also threatened the complainant that she would have to go back to South Africa to live with her biological father. The complainant was taken home from the medical centre by another mutual friend of the family (Ms UM), and during the drive home with Ms UM, the complainant told her about the appellant's abuse, and said that her mother knew about what he had been doing with her. In her evidence Ms UM said that she had asked the complainant whether she was telling the truth because of the serious consequences of the matters she was disclosing, and that the complainant responded saying what she had described "did happen". The complainant stayed at Ms DK's home until 23 July 2018, when she was admitted to hospital for stomach pains. When she was discharged from hospital on 30 July 2018, she was placed under the care of Oranga Tamariki.

[13] The complainant underwent a first evidential interview with the Police on 7 August 2018. The Police arrested and charged the appellant on 17 August 2018. The arrest was made by Sergeant Stephen Wright who was a member of the Police Child Protection Team at Counties Manukau. The appellant made his first appearance in the Manukau District Court on Saturday 18 August 2018 and was remanded on bail without entering pleas. On 19 August 2018, Mrs H departed New Zealand and returned to South Africa, taking the complainant and her brother. She had previously arranged for Oranga Tamariki to deliver the complainant to the airport so that she could board a flight to South Africa.

The defence evidence and alleged retractions

[14] At the trial the defence called evidence from several witnesses about what they said had happened in South Africa after Mrs H, the complainant and her younger brother had returned there. Mrs H gave evidence that upon arrival in South Africa and while they were being driven to her mother's house by the appellant's brother and his wife, the complainant said that she was sorry that she had lied and had messed everything up. She said that a few days later the complainant had repeated this to Mrs H and her grandmother, and said, "Mummy, I swear to God [the appellant] never touched me". Mrs H said that as a result of these comments it was agreed that they would go to the local police station for the complainant to make a statement confirming what she had said about having lied about the appellant's sexual abuse of her. Mrs H said that she then arranged for the appellant's brother to take her and the complainant to the local police station where they spoke to the police captain on duty, and he had taken a statement from the complainant. She said that the police officer had hand written the statement which the complainant then signed. Mrs H said that the process of making the statement involved the police officer first speaking to the complainant and asking her questions, and then handwriting the statement. She said that she had never met this police officer before, did not know anything about him, and did not know him personally.

[15] The statement is dated 25 August 2018 and it was produced as a defence exhibit. It is handwritten on a printed "South African Police Force" form headed: "Affidavit". It has the complainant's name and address, and her age (12 years) written in the relevant sections of the document. It reads:

> I am the [step] daughter of [the appellant]. On the 17th [of] August I pressed charge[s] [of] assault and molestation at Counties Manakau [sic] Police in New Zealand. I dont [sic] want to proceed any further with this case as it is not financially possible to go abroad everytime [sic]. With this statement I am withdrawing all charges against [the appellant], my stepfather. That is all I can say.

[16] The 25 August 2018 statement is signed by the complainant by writing her first name above the words "Deponent Signature", and it is signed by the South African police officer, Petrus J van Rensburg, thereby certifying that he had taken the statement and that the deponent "knows and understands the contents of

the statement". Mrs H also signed the statement as a witness to the complainant's signature.

[17] The following day Mrs H said she took the complainant back to the police station to make a second written statement. Mrs H said that during the drive home after making the first statement, that the complainant had read over her statement and said, "Mummy this is not the whole statement". She said that as a result she arranged to take the complainant back to the police station the following day when she made a second statement. The second statement is dated 26 August 2018. It is also headed with the complainant's name, address and states her age as being 12 years. It reads:

> I am the step daughter of [the appellant]. On 17/07/2018 I laid charges of molestation and assault against my stepfather. This statement is to say that I lied when opening that case because I was angry because my phone was taken away from me and I was not allowed to visit. The incident I mentioned never happened. This is the truth and nothing but the truth. I know the difference between the truth and a lie. That is all I can declare.

[18] The second statement also bears a signature of the complainant in the form of the complainant's first name which is handwritten in the space designated for the "Deponent Signature".

[19] On 26 August 2018 Mrs H sent an email to Sergeant Wright of the New Zealand Police attaching the statement dated 25 August 2018. The email had no accompanying message. Later that day, Sergeant Wright received a second email from the Mrs H attaching the statement dated 26 August 2018. The email included the following message: "The affidavit sent now is of [the complainant] insisting to confess that she lied about the allegations".

[20] On 11 November 2018 Mrs H left South Africa and returned with her son to New Zealand. The complainant was left behind in South Africa with her grandmother. Mrs H said that when unpacking her luggage following her arrival back in New Zealand, she found some letters hidden among her clothing which she said had been written by the complainant. She said that until she came across them in her luggage, she did not know they were there.

[21] One of these handwritten letters is in Afrikaans and dated 10 November 2018. It was produced as a defence exhibit at the trial. An English translation reads:

> Dear Mom, Dad, and Brother
>
> I am really sorry about everything. I wish I could have fix[ed] this earlier. I hope you find it somewhere in your heart to forgive me. I feel all alone and heartbroken. I wish we had more time together. I love all of you very much and I mean it. Mom and brother, I hope you had a nice flight and I prayed that you get to dad safely. Thank you for all your support that you always gave me. And thank you dad for all your love, support, food, clothes and every cent. I feel so bad about everything. I miss you a lot.
>
> From: [the complainant]
>
> To: Mum, Dad and Brother.
>
> Date: 11/10/2018[6]

[22] Another letter Mrs H said she found in her luggage was also handwritten in Afrikaans. An English translation reads:

> Dearest Dad
>
> I am really sorry about everything. I hope that dad can find it somewhere in your heart to forgive me. I miss you dad. It's hard for me without all of you. I realise now that I've messed everything up. But no one will break our family apart. Thank you for everything, the love, support, clothes, food and every last cent and a wonderful brother and dad. Thank you dad for supporting me and not hating me. Dad, you are my hero and will always be. Dad, the last thing I want to ask you now is to forgive me please. I am really sorry about everything. Thank you for every years support from my awesome dad.
>
> From: [the complainant]
>
> To: Dad
>
> Date 11/10/2018.

[23] Mrs H gave evidence that in December 2018, she also received a number of WhatsApp messages from the complainant using her grandmother's phone. The defence produced screenshots of these messages as exhibits. These WhatsApp messages were written in Afrikaans and the defence exhibits include an English translation. The messages contain some of the same comments as made in

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[6] The complainant's mother explained in her evidence that the "11/10/2018" format of the date on the document was in the South African date format and referred to the 10th of November 2018.

the handwritten letters, including statements that the complainant was sorry for having "messed up everything".

[24] The defence also called two further witnesses to give evidence regarding the complainant's alleged retraction of her allegations. One of the witnesses was the appellant's brother (Mr JF) who had collected the complainant with her mother and brother from the airport when they arrived from New Zealand in late August 2018. Mr JF said that upon arrival and while driving to the complainant's grandmother's house where they were going to stay, the complainant was crying and upset and said that she had made a mistake, she was sorry, and wanted to make everything right again. He said that the complainant said that she had been under a bad influence, and that she wanted to rectify the mistake at the police station. He said that as a result of what the complainant said that same day he took her and her mother to the police station where the complainant "made up a[n] affidavit to say she was sorry". He explained that he had first taken the complainant and Mrs H to the police station from the airport, but that they had to go back to the house because the officer who was "supposed to be on duty couldn't do [the] paperwork, so they had to go back the next day". He said that the reason they had to return to the police station the following day was because, "the correct police officer that has to take down the statement, he was not available, and they had to go back the next day".

[25] We note here that the Crown says that Mr JF's evidence was inconsistent with Mrs H's evidence in several respects. Mrs H said that: the first visit to the police station occurred some five days after their arrival in South Africa; the reason they returned a second time to the police station was because the complainant said that her first statement did not cover the whole story and she wanted to make another statement; and that although Mrs H said in evidence that she wanted to speak to whoever the duty officer was, Mr JF's evidence about having to go back to see the "correct" police officer supported the complainant's evidence that her mother knew the police officer who took her first statement.

[26] The second witness called by the defence in support of the defence allegation that the complainant had retracted her complaint was Mrs H's sister (Ms R). Ms R said that on an occasion when she had taken the complainant with her while she went

to a hair salon, she had asked her about the legal proceeding in New Zealand and the complainant told her "in a crying voice" that she had lied, and the appellant had not raped her. Ms R said that the complainant told her that she had lied in order to be sent back to South Africa because her mother's rules were too strict, she was not allowed to have a boyfriend and she wanted to stay with her biological father where there were no rules.

[27] The Crown says that Ms R's evidence as to what she said the complainant told her was inconsistent with Mrs H's evidence in which she said that no one in the family wanted to be associated with the complainant's biological father because of his violence towards her and the complainant.

The complainant denies the retractions

[28] In her evidence the complainant denied that she had ever retracted the allegations she had made against the appellant. She said that upon arrival back in South Africa, and following pressure from Mrs H and the appellant, she agreed to withdraw her allegations, and to that end had signed the first statement prepared at the police station on 25 August 2018. She said that when they were at Auckland Airport waiting to depart for South Africa, the appellant had spoken to her by telephone and asked her to withdraw the charges when they arrived in South Africa, and her mother also asked her to do so. The complainant said that her mother had requested that Mr JF drive them to the police station, and that her mother had told the police officer what to write on the statement and had then told her to sign it. The complainant said that the police officer who took her statement on 25 August 2018, was someone that her mother had known since she was young.

[29] The complainant said that prior to the first day of the trial she had never seen the second police statement (dated 26 August 2018) and that she did not sign it. She said that she did not go back to the police station in South Africa on a second occasion to make a second signed statement. She said that she first saw the 26 August 2018 statement on the first day of the appellant's trial, when it was shown to her as one of several documents to be produced as exhibits. She said that although the appellant had broken her phone on one occasion, that occurrence was unconnected

to her complaint against him. The complainant said that prior to the trial she had never seen the letters that her mother said she had found in her luggage upon arrival in New Zealand, and she denied sending the WhatsApp messages produced by the defence. She also denied speaking to Ms R about wanting to retract her complaint, or that she had said that she had made the allegations in order to be sent back to South Africa to live with her biological father.

[30] The complainant said that she had not stayed in South Africa by choice when her mother and brother had returned to New Zealand in November 2018. She said that she had been told by Mrs H that she had to stay because she was not allowed to go back to New Zealand. She said that she had stayed in South Africa with her grandmother who had died the following year in August 2019, and that she then went to live with an uncle and aunt for several months, before being sent to live in an orphanage, which had been arranged by her mother.

[31] Sergeant Wright gave evidence that following his receipt of the complainant's two statements which Mrs H emailed to him on 26 August 2018, through police liaison channels, he requested the South African Police to visit the complainant and obtain a statement from her explaining why she had made the statements. In her evidence the complainant said that in 2019, while she was living at the orphanage, she was spoken to by a South African police officer and asked whether she wished to continue with her complaint against the appellant. She said that she did wish to proceed with her complaint and made a written statement to confirm her position. The statement was produced as an exhibit. It reads:

> [The complainant] state in Eng[lish].
>
> I am a 13 year old with birth date 2006/01/10 and residing at [name of children's home in South Africa] and in grade 7.
>
> I would like to go on with the case that was opened in New Zealand. The reason that I didn't want to go on with the case in the past was that my mother told me to withdraw the case.
>
> [A]s a child when I was sexually abuse[d] by my father my mother knew about the sexual abuse and she did nothing about it[.]
>
> I would be able to take part in the upcoming court appearances and would like to travel to New Zealand for court if [no] video link from South Africa would be possible.

> Everything that I said in this statement is the truth.
>
> [Signature of the complainant]
>
> I certify that the statement was taken by me at [place of residence in South Africa].
>
> [signed]
>
> KPJ Geldenhuys

The defence case at trial

[32] The defence case at trial was based on the appellant's total denial of any impropriety and of all of the complainant's allegations. The defence claimed that the complainant had fabricated her allegations against the appellant and supported that with an allegation that the complainant had subsequently retracted all of her allegations. The defence contended that Ms DK had lied about what she said she had seen and heard in her dealings with the appellant, the complainant, and Mrs H.

[33] The appellant gave evidence in his own defence. He denied engaging in any sexual impropriety with the complainant, which he said had "never happened". He maintained that because of the long hours he spent at work there was never any time when the alleged offending could have been committed. The appellant also denied saying to the complainant, "Hello titties", and "You owe me big time", when she visited in hospital when receiving treatment for appendicitis.

[34] Mrs H was also called to give evidence for the defence. She said that the complainant's description of the sleeping arrangements on the first night following her arrival did not happen. She also denied that any of the events described by the complainant could have happened. She said that the evidence Ms DK gave of seeing the complainant distressed and dishevelled when coming out of the appellant's bedroom on an occasion when she and Mrs H returned from grocery shopping never happened. She said that her friend Ms DK never left her daughter at their house on the occasions when she went shopping with her. Mrs H also denied that she knew that the appellant was sexually abusing the complainant and said that she had no knowledge of sexual abuse of the complainant having occurred in South Africa when she was around five years old. She also denied having taken any steps to cover for the

appellant in order to conceal his abuse of the complainant. Mrs H said that the reasons she took the complainant to the medical centre to request that she be given a contraceptive was because of menstrual problems the complainant was having and was not because she knew that the appellant was sexually violating her, as that did not happen. Mrs H said that there was an occasion when the appellant was in hospital, that her friend Ms DK took the complainant to the hospital to visit him, and although she accepted that she was not present on that occasion, she said that so far as she was aware the appellant had never used language when speaking to the complainant by saying "Hello titties".

[35] Mrs H said that she first learned about the complainant's allegations, that the appellant had been abusing her, when she spoke to a nurse at the medical centre after the complainant had made disclosures to Ms DK which was shortly before the police contacted her and asked her to get the appellant to arrange to see a detective at the Manukau Police station. She said that when the appellant was charged and appeared in court, the complainant who had been staying with Ms DK was then in the care of Oranga Tamariki. She said that she was advised by Oranga Tamariki that she and her two children had to get out of New Zealand within 28 days or they would be deported. She said that was the reason she had made arrangements to leave New Zealand on 19 August 2018 and travel back to South Africa with the two children. She said that she had arranged with Oranga Tamariki for the complainant to be brought to the airport shortly prior to their departure. She denied that the appellant had spoken by telephone to the complainant shortly before her departure and suggested to her that she should withdraw her allegations. Mrs H said there was no such telephone conversation.

[36] Mrs H said that upon arrival in South Africa they were picked up at the airport by Mr JF and his wife. She said when they got out of the airport and went to the car, the complainant was crying. She said that during the drive to the grandmother's house the complainant said that she had lied and that she had messed everything up. Mrs H said that a few days later when speaking with the complainant and her mother, the complainant said, "Mummy I swear to God [the appellant] never touch me". She said that statement led to a conversation about the allegations made against the appellant and the complainant saying she wanted to withdraw the charges. She said

she arranged for Mr JF to drive them to the police station and upon arrival she had asked to see the police captain who was on duty that day. She said that having explained the situation to the police officer, he started asking the complainant questions and wrote down what she said. She denied that it was her who told the police officer what to write down. She said that she did not know the police officer personally and had never met him before. She said that after they arrived back home at her mother's house, the complainant said that the police officer had not put in her whole statement, and she insisted on going back in order to make a second statement. She said that as a result they returned to the police station the next day and the complainant made a second statement. She said that the complainant's claim that she only saw the second statement for the first time at the commencement of the appellant's trial is simply not true, because it was the complainant who had insisted on having the second statement made. She denied having fabricated the second statement in an attempt to make a better retraction by the complainant, and to help her husband who was back in New Zealand facing serious charges. She said that she used her phone to email copies of the two statements to Sergeant Wright, and she retained the original statements herself.

[37] Mrs H denied putting any pressure on the complainant to retract her complaint and said that because of the criminal proceedings in New Zealand she was not permitted to discuss the case with the complainant. She said that when she was told that because she was a witness in the case she should not have left New Zealand, she decided to return. She said that she was not sure if she was allowed to bring the complainant back to New Zealand because prior to returning to South Africa she had been in the care of Oranga Tamariki. So she arranged for the complainant to stay in South Africa with her grandmother. She said that upon her arrival in New Zealand she found several letters in her luggage "hidden between [her] clothes". She said that she emailed copies of the letters to defence counsel, but was not sure where she had placed the originals. She agreed that the documents produced as the defence exhibits are "a representation" of the letters she discovered in her luggage. She said the WhatsApp messages produced as defence exhibits were screenshots she had made of communications received from the complainant using her grandmother's phone to send the messages to her. She denied that she had "manufactured" the WhatsApp messages produced as defence exhibits. She said that because the screenshots

themselves did not have the date of the messages on them, she had gone back into her phone to "indicate the date on [which] this conversation took place."

[38] The Crown put to Mrs H in cross-examination that the wording of the complainant's 25 August 2018 statement, in which she states: "I don't want to proceed any further with this case as it not financially possible to go abroad every time", is not the language of a 12-year-old. The Crown also challenged Mrs H's evidence regarding the making of the complainant's second statement (dated 26 August 2018) and the implausibility of the complainant being seen by the same police officer on the occasion of the second visit to the police station and her claim not to have known the police officer personally. The Crown also asked Mrs H why the complainant's signatures on the two statements were different. Mrs H agreed that the signatures were dissimilar but said that she had not signed the complainant's name on the second statement. And she agreed that she had sent photographed copies of the statements to the New Zealand Police and had not asked the South African Police to do so. It was also suggested to her by the Crown that as she was in contact with the Police in New Zealand, it would have been a simple matter for her to have advised them that the complainant wished to talk to them about the case, and she could have facilitated that. The Crown also asked Mrs H for an explanation of why the handwriting, said to be the complainant's, on the documents she said she found in her luggage was entirely different one from the other. Further, why the complainant's signature on each was different to her signature on the first police statement which the complainant confirmed was hers. Discrepancies relating to the WhatsApp screenshots were also raised by the Crown in their cross-examination of Mrs H, including the absence of a number appearing in the screenshots verifying the number of the phone they were sent from.

[39] The Crown also put to Mrs H that she had not been told by Oranga Tamariki that she and her children would be deported from New Zealand if they failed to leave the country promptly in August 2018. The family's visas were valid until November 2019 and Oranga Tamariki were not responsible for immigration matters. While Mrs H maintained that her explanation for departing New Zealand in August 2018 was correct, she accepted that she had not been contacted by Immigration New Zealand about the matter. She was also challenged as to the accuracy of her claim

that she ought not to have left New Zealand because she was a witness in the case, when she had not made a witness statement.

The Judge's direction to the jury

[40] In his summing up to the jury the Judge said:

> [63] Because credibility and reliability have been such a focus in trial and also in counsel's addresses, I want to talk a little bit more about that before I consider the evidence and counsel's submissions. As I have already said to you, it is entirely for you to assess whether you find a witness credible, that is whether you believe what they have told you by assessing the inherent likelihood that they are correct and how they have responded to questions from counsel. It is also helpful to ask whether you find the witness reliable in the sense that what the witness says is consistent with other evidence that you have heard in the case. Obviously assessing evidence for its credibility and reliability are slightly different things. Credibility relates to truthfulness, reliability relates to accuracy. You can accept all of what a witness says, part of what a witness says, or none of it at all, but you are all used to assessing credibility and reliability subconsciously in your daily lives. You filter everything out that is told to you as I say as you go about your normal lives. All I do is urge you to apply those ways of measuring the evidence in the same structured and careful way.

Law

[41] The appellant appeals his convictions pursuant to s 229 of the Criminal Procedure Act 2011. This Court must allow the appeal only if satisfied that the jury's verdict was unreasonable, or a miscarriage of justice occurred that created a real risk that: the outcome of the trial was affected; has resulted in an unfair trial; or a trial that was a nullity.[7]

[42] Section 122 of the Evidence Act 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.

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7 Criminal Procedure Act, s 232.

(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:

(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.

(3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

(5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.

(6) This section does not affect any other power of the Judge to warn or inform the jury.

[43] In *B (CA58/2016) v R* this Court considered the circumstances in which a trial judge ought to give the jury a reliability warning under s 122.[8] The Court explained:

> [58] In the Privy Council's advice in *Benedetto v R*, Lord Hope emphasised that when reliability questions arise in relation to evidence at trial, the judge must examine the material for him or herself in order to assess that question:
>
> > Counsel may well have suggested to the jury that the evidence is unreliable, but it is the responsibility of the judge to add his own authority to these submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence.

8 *B (CA58/2016) v R* [2016] NZCA 432 (footnotes omitted).

[59] The judicial imprimatur can be important in the dynamic of a jury trial. But it is not the case in New Zealand that every reliability issue arising at trial necessitates a judicial warning. Section 122 provides that the decision to give such a warning is discretionary. The essential question must be whether the jury is likely to be materially assisted in its consideration of the evidence by a reminder from the judge that caution will be required in this respect. This point was well made by Richardson J in *R v Harawira*:

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

[60] In some trials, witness reliability will be a collateral issue or one of many issues. In others, the context giving rise to a reliability question may be outside the knowledge or general understanding of ordinary people. A reliability warning is likely to assist the jury in such cases. Judge Fraser's warning in this case about the effect of delayed complaint on the defence case is explicable in these terms. But often, as here, where it was such a feature of the trial, the need for particular caution in respect of witness reliability will be so obvious to the jury that a warning cannot be said to provide them with material assistance. In such cases, it will be enough for the Judge to reiterate to the jury, in his or her own words, that witness credibility and reliability is a central issue in the case and it will be for them to resolve that question. That is exactly what the Judge did here.

[61] Ironically, the issue for Judges to consider in cases such as the present one is that the judicial imprimatur can sometimes artificially tip the scales against the witness. That is, a reliability warning may, because the issue is so obvious, be taken by the jury as a subtle signal that the judge thinks the witness is lying. Such a signal will of course not be of material assistance to the jury. Quite the contrary. It will be for the trial judge, immersed as he or she is in the dynamics of the trial, to make the appropriate call.

Discussion

[44] As our summary of the prosecution and defence cases makes very clear, the key issue in the trial was centred on the complainant's credibility and whether, based on her evidence, the jury were satisfied beyond reasonable doubt that she was telling the truth and had given an accurate account of what she said the appellant had done in sexually assaulting and violating her by raping her on the occasions relevant to

the charges. This was a quintessential jury issue which the trial Judge appropriately respected.[9]

[45] The jury's assessment of the complainant's credibility also required consideration of: her denial of having retracted her complaint by signing the second statement dated 26 August 2018; her denial of being the author of the letters which Mrs H claimed to have found concealed in her luggage; and her denial of having said to several people that she had lied in making her complaint and allegations against the appellant. Only if the jury were satisfied beyond reasonable doubt that the complainant was a credible, honest and reliable witness in respect of those matters could it have found the charges proved. Moreover, in order to be satisfied that the complainant's evidence was credible and reliable, the jury would necessarily have to reject: the appellant's evidence in which he denied engaging in any sexual impropriety with the complainant at any time; Mrs H's evidence regarding the second statement made by the complainant at her local police station in South Africa; the authenticity of the second statement, hand written letters, and WhatsApp messages, as being genuinely written by the complainant; and the evidence of the other defence witnesses who said the complainant had told them she had lied in making her allegations against the appellant.

[46] We note also that the complainant's evidence derives support from the evidence of the prosecution witnesses Ms DK and Ms UM.

[47] This is not a case where any aspect of the complainant's evidence required the Judge to give the jury a reliability warning regarding the possible or potential unreliability of her evidence detailing the offending against her or as regards the alleged retraction of her complaint. There is nothing in the evidence to suggest that the complainant had a motive to give false evidence prejudicial to the appellant. And neither are any of the other circumstances referred to in s 122(2) of the Evidence Act present which would require the trial Judge to consider giving the jury a warning about evidence which may be unreliable. Moreover, there is no aspect of the evidence that would require the Judge to explain the reasons for some potential

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9 *Taylor v R* [2010] NZCA 69 at [64]; and *Witika v R* [2011] NZCA 137 at [14]–[15].

unreliability of the complainant's evidence that would not necessarily be obvious to the jury to see for themselves.

[48] In our view it is clear that the Judge correctly described the trial as being focused on the credibility and reliability of the complainant and witnesses. In his direction which we have set out above at [40], he referred to the distinction between witness credibility and reliability and explained: "Credibility relates to truthfulness, reliability relates to accuracy." And he directed the jury to assess the credibility and reliability in a "structured and careful way". We consider that the Judge's directions were appropriate in the circumstances of this case where the jury was required to determine whether they would accept the complainant's account of the offending against her as satisfying the standard of proof beyond reasonable doubt of the appellant having committed the offending alleged in respect of each charge. In our view, had the Judge given the jury a reliability warning, and directed the jury to the effect that although the evidence they had heard was admissible it may nevertheless be unreliable and there was a need for caution on their part when deciding whether to accept the complainant's evidence and when deciding what weight to give it, such a direction would be likely to confuse them and be of no assistance.

[49] In the circumstances of this case, a direction pursuant to s 122 of the Evidence Act may have conveyed to the jury that the Judge himself had concerns about the accuracy of the complainant's evidence regarding what she alleged the appellant had done. Sending such a signal to the jury would of course not be the Judge's intention, but in a case such as the present where credibility and reliability of the complainant's evidence was the central issue, a direction that may have had the unintended effect of indicating to the jury what the Judge's own view of the complainant's evidence was, could distract them from their task of assessing the evidence themselves. The direction would not be of any material assistance.

[50] We do not accept the appellant's submission that because of the central importance of the retraction evidence, a reliability warning was required directing the jury that they needed to be sure that the retraction evidence was false, and the complainant's evidence regarding the offending against her was true, before they could find the appellant guilty of the charges. As we have said, the credibility and

reliability of the complainant's evidence as to the appellant's offending against her and the credibility and reliability of her evidence in which she denied retracting her complaints were the central issues to be determined by the jury. We are satisfied that the Judge's direction appropriately instructed the jury as to how they should approach the issues of credibility and reliability of evidence, and to proceed to do so in a structured and careful way.

[51] We find that the trial Judge did not err by not giving the jury a warning pursuant to s 122 of the Evidence Act as to the need for caution when deciding to accept the evidence of the complainant, and we are not satisfied that a miscarriage of justice occurred that created a real risk that the trial was affected or resulted in an unfair trial.

Result

[52] The appeal against conviction is dismissed.

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