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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA480/2022
[2024] NZCA 50

BETWEEN	MELOTA METUALA Appellant
AND	THE KING Respondent

Hearing:	6 November 2023
Court:	Collins, Brewer and Muir JJ
Counsel:	E Huda and S C Kim for Appellant J E Mildenhall for Respondent
Judgment:	11 March 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed. The sentence of eight years and 10 months' imprisonment is quashed. A sentence of eight years and three months' imprisonment is substituted.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Metuala was tried before a jury on one charge of strangulation[1] and one charge of rape.[2] He was found not guilty on the former charge and guilty on the latter. Mr Metuala was sentenced to eight years and 10 months' imprisonment.[3] He now appeals his conviction and his sentence.

[2] Mr Metuala's appeal against his conviction is on the ground that the cumulative effect of comments made by the trial Judge during the cross-examination of the complainant, evidence-in-chief of the defendant, closing address of defence counsel and in his summing-up to the jury resulted in an unfair trial.

[3] The appeal against sentence is on the ground that the sentence is manifestly excessive because the starting point was too high and the credit given for the time spent by Mr Metuala on electronically monitored (EM) bail was too little.

Background

[4] At about 4 am on Saturday, 14 September 2019, Mr Metuala and the complainant encountered each other outside a bar in Blenheim. They had not previously met. Mr Metuala was a 22-year-old from Western Samoa working under a seasonal workers scheme. The complainant was 51 years old.

[5] The evidence was that the complainant was with a group of other patrons of the bar conversing. Mr Metuala spoke with the complainant for a short time. The group dispersed and Mr Metuala walked with the complainant towards Main Street, Blenheim. Mr Metuala put his arm around the complainant and began leading her towards an area with a BP service station. However, the Blenheim Police Station was also in that area and the complainant pulled away from Mr Metuala and went to the Police Station. Unfortunately, the Police Station was closed for the night.

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1 Crimes Act 1961, s 189A(b); maximum penalty, seven years' imprisonment.
2 Sections 128(1)(a) and 128B; maximum penalty, 20 years' imprisonment.
3 *R v Melota* [2022] NZDC 1681 [Sentencing notes].

[6] When the complainant approached the Police Station, Mr Metuala ran away. He went through the BP service station forecourt. The complainant, having realised that the Police Station was shut and that Mr Metuala had gone, then walked towards the BP service station intending to buy food and cigarettes. Unfortunately, the BP service station was also closed.

[7] Mr Metuala, who had been waiting nearby and who saw that the complainant was alone, returned to the BP service station and started talking with the complainant. He grabbed her, pushed her to the ground, straddled her and placed his hands across the front of her neck. He forcefully pulled her lower clothing off, ripping her body suit and the crotch of her underwear before raping her on the concrete floor of the forecourt of the service station.

[8] The complainant, during this attack, managed to call 111 on her mobile phone. The recording was played to the jury. At the start of the recording the complainant can be heard screaming loudly for help. She is then heard saying, "I will. I'll do it, I'll do it, I want you to do it with me". In her evidence the complainant said she was scared Mr Metuala would kill her and said those words to stop him from hurting her any further.

[9] After Mr Metuala ejaculated, he got up and walked away. The complainant put her trousers back on and ran back to the Police Station where she called 111 again. Police arrived a short time afterwards. The complainant underwent a medical examination and gave a recorded interview later that morning.

[10] A few days later, Mr Metuala gave a statement to the police. He said that the sexual intercourse was consensual. He said the complainant had asked him to have sex with her and paid him $40 to do so. He said that when she initially went towards the Police Station he thought she was trying to "put him in trouble". When she made the 111 call during the sexual intercourse and started screaming he thought she was "doing something bad" to him "to make him look bad" so he took her phone from her.

[11] Mr Metuala gave evidence at his trial. He described the complainant's screams as "moaning like normal sex with your wife thinking that she was coming at the time".

[12] Counsel agree, and we concur, that the Crown's case against Mr Metuala was very strong, if not overwhelming.

Conviction appeal

[13] To give context to Mr Metuala's ground for his conviction appeal we will set out the applicable legal principles.

[14] First, we must allow the appeal if there has been a miscarriage of justice.[4] That is to say, if any error, irregularity, or occurrence in or in relation to or affecting the trial has resulted in an unfair trial or has created a real risk that the outcome of the trial was affected.[5]

[15] Second, if the trial was unfair, it does not matter that the evidence against Mr Metuala was overwhelming. In *Wiley v R,* this Court confirmed "a conviction resulting from an unfair trial cannot be sustained even if a different outcome was unlikely or a conviction was inevitable".[6] There is likely to be a real risk of an unfair trial where a defendant has been deprived of an adequate closing address.[7]

[16] Third, if a judge intervenes in a trial to an extent raising a reasonable perception of bias on the part of the judge then that can make a trial unfair.[8] Improper judicial intervention undermines "the judge's role as a neutral and impartial arbiter with principal responsibility for ensuring that a defendant has a fair trial as required by s 25(a) of the New Zealand Bill of Rights Act 1990".[9] The number of interventions matters "less than their impact on the parties' cases" and any impression of bias on the part of the judge.[10] The different types of improper judicial intervention have been

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4 Criminal Procedure Act 2011, s 232(2)(c).
5 Section 232(4).
6 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [37].
7 *Kaka v R* [2015] NZCA 532 at [41].
8 *Tahere v R* [2013] NZCA 86; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA); *R v Loumoli* [1995] 2 NZLR 656 (CA); and *R v Fotu* [1995] 3 NZLR 129 (CA).
9 *M (CA508/14) v R* [2015] NZCA 183 at [25].
10 *Tahere v R*, above n 8, at [31].

encapsulated by the Court of Criminal Appeal of the Supreme Court of South Australia in *R v T, WA*:[11]

> (i) the questioning unfairly undermines the proper presentation of a party's case (the disruption ground);
>
> (ii) the questioning gives an appearance of bias (the bias ground); and
>
> (iii) the questioning is such an egregious departure from the role of a Judge presiding over an adversarial trial that it unduly compromises the Judge's advantage in objectively evaluating the evidence from a detached distance (the dust of conflict ground).

[17] The Supreme Court in *R v Condon* noted:[12]

> A verdict will not be set aside merely because there has been an irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair, as Lord Bingham made clear in a passage in *Randall*, which was referred to with approval in *Howse*. He said that it is at the point when the departure from good practice is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate Court will have no choice but to condemn a trial as unfair and quash the conviction as unsafe. In *Howse* it was said that this approach is one of general application.

[18] Judicial intervention during the addresses of counsel should be limited to exceptional circumstances.[13] The risk of miscarriage of justice is heightened where a trial judge has taken an interventionist or managerial approach in a trial coupled with an improper or unbalanced summing-up.[14] This Court, in *M (CA508/14) v R*, provided the following guidance:[15]

> (a) a judge may act in the interests of justice although the intervention incidentally helps or hinders a party's case;[16]
>
> (b) where the intervention involves asking questions of a witness, counsel must be permitted to ask any questions arising (s 100(2));[17]

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11 *R v T, WA* [2014] SASCFC 3, (2013) 118 SASR 382 at [38].
12 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78] (footnotes omitted).
13 *Panchal v R* [2011] NZCA 483 at [31].
14 *B (CA182/18) v R* [2019] NZCA 18 at [32].
15 *M (CA508/14) v R*, above n 9, at [37], citing *Tahere v R*, above n 8.
16 *Tahere v R*, above n 8, at [30]; and *R v H (CA421/01)* (2002) 19 CRNZ 518 (CA) at [33].
17 *Tahere v R*, above n 8, at [30].

(c) how far a judge may go varies with the nature of the case;[18]

(d) a direction that the jury decides the facts and a balanced summing-up cannot always cure an appearance of unfairness;[19] and

(e) the ultimate question is whether judicial intervention made the trial unfair in the particular circumstances of the case.[20] When answering that question an appellate court will examine the judge's handling of the trial as a whole.

[19] Under the Evidence Act 2006, a judge has wide powers to make rulings on the admissibility of evidence and to regulate the nature and scope of the examination, cross-examination and re-examination of witnesses.[21] A judge may also ask a witness questions.[22] As explained by this Court in *M (CA508/14) v R*, "all of the judge's powers in relation to the questioning of a witness must be exercised in the interests of justice for fair trial purposes."[23] Justice may require a judge to clarify evidence so a jury understands it.[24] Asking a witness questions can, of course, help clarify the witness's evidence.

[20] If a judge asks questions during a criminal trial, the judge should take into account:[25]

(a) the defendant's right to a fair trial;

(b) the separate roles of the judge and jury, with the judge having responsibility for questions of evidence, procedure and the law and the jury having sole responsibility for determining the facts;

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18 At [32]. See, for example, *R v H (CA446/08)* [2009] NZCA 72 at [8].

19 *Tahere v R*, above n 8, at [32] and *R v Perren* [2009] EWCA Crim 348 at [36].

20 *Tahere v R*, above n 8, at [32] and *R v H (CA421/01)*, above n 16, at [36].

21 Evidence Act, ss 85 (unacceptable questions), 89 (leading questions in examination in chief and re-examination), 92 (cross-examination duties), 93 (limits on cross-examination), 94 (cross-examination by party of own witness), 95 (restrictions on cross-examination by parties in person), 97 (re-examination), 98 (further evidence after closure of case), 99 (witness recalled by Judge) and 100 (questioning of witness by Judge).

22 Section 100.

23 *M (CA508/14) v R,* above n 9, at [30].

24 *Tahere v R*, above n 8, at [29], citing *Jones v National Coal Board* [1957] 2 QB 55 (CA) at 62, *E H Cochrane Ltd v Minister of Transport*, above n 8, at 150, *R v Fotu*, above n 8, at 135, *R v Loumoli*, above n 8, at 667, and *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008 at [178].

25 *M (CA508/14) v R,* above n 9, at [33].

(c) the need to let counsel pursue their examination and cross-examination of witnesses in accordance with their professional responsibilities and their obligations under the Evidence Act; and

(d) the possibility that judicial questioning could cut across a defence which a defendant wishes to rely on but which may not be apparent to the judge.

[21] Fourth, if a judge fails to deliver a fair and accurate summing-up, then that may lead to a real risk that the outcome of the trial was affected, or result in an unfair trial, thereby creating a miscarriage of justice.[26] A trial judge has a duty to summarise the Crown and defence case for the jury in a balanced and clear way.[27] This Court in *R v Keremete* set out the general requirements of summing-up:[28]

> [18] … A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not for the judge. Rival contentions with respect to the factual issues will normally be summarised … but there is a wide discretion as to the level of detail to which the judge descends in carrying out that task. Treatment of matters affecting the cogency of evidence is not required as a matter of law …
>
> [19] The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other … A judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact … Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms … Inevitably these are ultimately matters of degree and judgment.

[22] However, a conviction is rarely overturned as a result of an unbalanced summing-up because:[29]

(a) juries are expected and instructed to form their own view on factual matters;

(b) any alleged judicial preference will generally be cured by explicit and unequivocal direction for juries to reach their own views; and

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26 *Singh v R* [2017] NZCA 136, (2017) 28 CRNZ 435 at [23] and [84]–[87].

27 *Waters v R* [2018] NZCA 84 at [9]. This duty has been described by the Supreme Court of Canada as one to craft instructions that are both "comprehensive and comprehensible", per *R v Rodgerson* 2015 SCC 38, [2015] 2 SCR 760 at [50].

28 *R v Keremete* CA247/03, 23 October 2003 at [18]–[19] (citations omitted).

29 *Giles v R* [2010] NZCA 254 at [47].

(c) judges are permitted to express their own view on the merits of a case or issue that the jury must address.

Argument on conviction appeal

Appellant's submissions

[23] Mr Huda, for Mr Metuala, submits that the trial was unfair because of the Judge's interventions during the trial which created an unavoidable impression of bias against Mr Metuala. He refers to four instances which he submits amount to improper judicial intervention or action.

(a) Questioning witnesses

[24] The first intervention complained of occurred during the cross-examination of the complainant:

> **CROSS-EXAMINATION CONTINUES: MR SASEVE**
>
> Q. Because what appears to be on CCTV footage of the incident doesn't show much in the way of you pushing away or using your knees or your legs to fight him off[?]
> A. Really?
>
> Q. Yes, really.
> A. Well, that's not the case for me. I was trying with all my might to get away from that situation.
>
> Q. I'm suggesting to you that the reason why it doesn't appear at all to be, there appears to be no fighting at all on the CCTV footage is that you had agreed to have sex with the defendant for the money that you paid him and that's what was happening as we see the footage?
> A. I did not give him money for sex. Fucker [sic] cunt.
>
> **THE COURT**:
>
> Q. Just hypothetically, [complainant], if you had given him money for sex, do you think you would've been happy to have it on the forecourt of the BP petrol station?
> A. Exactly.
>
> Q. No?
> A. No.

[25] Mr Huda accepts that the questioning of the witness may have assisted to make a point clear about the plausibility of the defence case. However, this was not a point raised by the experienced Crown counsel during evidence-in-chief. Mr Huda submits

both the Crown in its closing and the Judge in his summing-up seized on this passage of evidence, with the Judge stating:

> [78] In terms of the suggestion of paying for sex, Mr O'Donoghue says, well, when you look at everything to do with this case, why on earth would she do that? And if she did do it, why would she want to engage in such a sexual encounter on the forecourt of a BP petrol station? It just does not make sense, he says to you.

[26] The second intervention occurred during the re-examination of Mr Metuala:

> **QUESTIONS FROM THE COURT:**
>
> Q. Are you a registered seasonal employee?
> A. At the time I was, but now I've got another job in Auckland.
>
> Q. Yes. But at the time this happened [were you] a registered seasonal employee?
> A. Yes I was.
>
> Q. What is your contract say about whether you can have alcohol or not?
> A. The requirement is that we shouldn't have but they also give us a lenience by our boss to give us time to have a drink.
>
> Q. Where?
> A. Where we are staying.
>
> Q. Yes. Not in town at a bar though?
> A. That's correct.
>
> Q. So you shouldn't have been drinking at all on this night should you?
> A. I'm not sure but – because we were drinking with the other (inaudible 11:16:31) workers as well so that was why I ended up in town. I just wanted to come to town and walk around town.
>
> Q. But he said he drank in town didn't he?
> A. Yes at the club.
>
> Q. All right.

[27] Mr Huda submits the Judge's purpose with these questions was to undermine Mr Metuala's defence and attack his character.

(b) Interrupting defence closing

[28] The third intervention occurred during defence counsel's closing address:

> So in terms of the strangulation part, the doctor has said that the examination of her neck showed a linear or scratch abrasion and tenderness. This may be related to the alleged strangulation. However, other causes are possible,

including viral infection, and the presence or absence of physical examination findings does not allow any condition – any conclusions in regard to the severity of any alleged strangulation and event – strangulation event.

THE COURT:

Yes, Mr Saseve, but would you please also refer the jury to the passage that the doctor then gave when I asked her about what the fact of her having to speak in a whisper might tell her about the force used in the strangulation. You might want to read that to the jury as well, please.

MR SASEVE:

What page is that, please, Sir?

THE COURT:

That is page 52, line 25.

MR SASEVE:

Thank you.

THE COURT:

I'm sorry, it's page 58, line 16. I apologise. Lines 15 down to about 22.

MR SASEVE CONTINUES CLOSING:

So the Court has asked the question: "How does…" So if I can just start from the beginning. So the question by the Court was: "There were two questions, Dr Moore, however I don't want to interfere with what the lawyers are doing, there was just two things that I think the jury might be interested in knowing. Firstly, you said that if there was damage to the windpipe area as a result of strangulation or the application of some force, then it's difficult to know with any precision how much force was applied, have I got that right?" Answer: "That's right, yes." "How does that or is that impacted by the fact that we saw her on a DVD interview that you may not have seen where she's seen to be reduced to speaking in a whisper and she explained that that was because of the injury she had to her neck, does that inform your opinion as to amount of force if that was, in effect, of what happened to her?" "Yes, it does. It suggests it was significant force or that it was for a prolonged period of time that it was applied." "When you were being asked questions by Mr Saseve, he properly took you to a number of the discrete individual injuries that you've commented on, but given what [the complainant] told you happened, were your findings consistent with or inconsistent with what she said happened?" "My findings were consistent with her report."

So that completes what His Honour has referred to, members of the jury.

In regards to the hoarse voice, certainly the doctor has – because the complainant was speaking to her in a low hoarse voice, and she's given the explanation that that must be due to the strangulation or the force that had been applied to her throat area to impede her breathing, you also, members of the jury, the defence suggests, need to take into account the fact that the complainant … was smoking a lot. She had a scarf around her neck most of the time.

THE COURT:

When did she say that?

MR SASEVE:

I'm not saying she's saying it. I'm saying that she was smoking on CCTV footage, Sir, you'll see a lot of that happening with her, and these are things that they can take from the CCTV footage.

THE COURT:

No, you should have put that to the doctor if you were going to suggest that the hoarseness or the whispering that she had to engage in was because of smoking. You had to put that to her.

MR SASEVE:

Well, Sir, I didn't think I needed to because that was just part of the footage that we see on the TV, on…

THE COURT:

And while we're at it, where you've spoken to this jury about the possibility that the marks on the neck may have been caused in the throes of passion, if I can put it that way, when he was cross-examined by Mr O'Donoghue about the injury to the neck he said he didn't recall his hand on her neck, so you can't have it both ways. It's either accidental or it didn't happen. That's his view. I'm just not happy about matters being put to this jury that really are this sort of speculation and in some ways contrary to the evidence the jury has before it. But I don't want to interrupt you, I'm sorry for having done so, but I thought these matters were of some importance.

MR SASEVE:

Thank you, Sir.

THE COURT:

Yes, go on, please.

[29] Mr Huda submits these interventions offended against the fundamental right of a defendant to have a closing address. The interruptions were unwarranted, and no legitimate reason can now be advanced to justify it. The closing did not commit any grave errors that required immediate correction or clarification. In the process of intervening during closing, the Judge lost the appearance of being a neutral arbiter and, instead, would have appeared biased to the jury. The approach was unnecessarily managerial and for no good reason.

(c) Improper summing-up

[30] The fourth submitted example of improper judicial action was part of the Judge's summing-up. Mr Huda points to the following extracts of the summing-up:

> [53] But can I just commend to you that along with all of the other pages that are important for you to read in the transcript which you will have of the defendant's DVD interview, you look at page 27 because he says a number of things himself, and I am not talking about through the translator or the interpreter. I am talking about what he said in English. And he said this: "I heard her, she was, like, 'Help', like 'help.'" "So why would she say that, why would she call out for help?" "I thought she was trying to do something, like, bad, setting me up." Did not say that today, of course. "Okay, when did the screaming start?" "At the time I was fucking her." "Okay, okay, so if she's calling for help, why did you take the phone off her? Did you take the phone when the lady called for help?" "Yeah." "Why did you take it from her?" "I just remove it from her." "Why?" "Cos I think she's doing something bad to me."
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> [54] Now today that becomes: "Ah, because I wanted her to concentrate on this fun sexual activity that we were both enjoying." So, you need to ask yourself why there seems to be the discrepancy today between what he said to the police officer and what he says today and measure that against what Mr O'Donoghue suggests to you about what credibility you can ascribe to Mr Metuala's evidence. They are again matters entirely for you. I am simply pointing parts of the evidence to you that might assist you in making those determinations.
>
> …
>
> [85] [Mr Saseve] suggests that the video on a proper view shows the complainant lowering herself down to the ground with Mr Metuala then lying on top of her. He says there is no CCTV footage of any struggle. Well, that may be so, although you have to look at all of the evidence and ask how does that accord with the damage to the throat and the other injuries that Dr Moore spoke of? Mr Saseve says that there was evidence on the CCTV footage of movement in a thrusting way from Mr Metuala with [the complainant] with her knees up. Again they are matters for your interpretation. I recall [the complainant] saying she had had a replacement knee. I am not sure how that fits into all that, but Mr Saseve's point is tha[t] there was nothing non-consensual that is disclosed in the CCTV. Again, you have to look at all of the evidence to make what you will of that submission.

[31] Mr Huda submits that the closing remarks unfairly undermined a critical element of Mr Metuala's defence, namely the possibility that the CCTV footage did not indicate non-consensual sexual activity.

Discussion

[32] We will assess the interventions complained of individually and then consider their collective effect.

[33] The first intervention[30] was unexceptionable. As Mr Huda accepts, it was an "obvious point" and it was made at the relevant stage of the complainant's evidence. The asking of the question does not show bias; the Judge appears to have been trying to achieve balance after a particularly unpleasant allegation had caused the complainant obvious distress. This Court has recognised that trial judges should be afforded a greater latitude to intervene in the cross-examination of complainants in sexual offending trials because "complainants are usually vulnerable witnesses who may experience heightened emotion that makes it difficult to respond to questions".[31]

[34] The references to the passage of evidence in the Crown's closing and the Judge's summing-up do not raise any issue of unfair prejudice. The passage was in the evidence, it was an obvious point, and it was for the jury to assess it for relevance to the issues in the trial.

[35] The second intervention[32] should not have occurred. Whether or not Mr Metuala "shouldn't have been drinking at all on this night" was irrelevant. The topic could have been prejudicial. However, it was not emphasised, the answers made it innocuous, and we do not accept it amounted to an attack on Mr Metuala's character by the Judge. The consumption of alcohol by both Mr Metuala and the complainant was already part of the background narrative.

[36] The third intervention[33] occurred during defence counsel's closing address. We accept Mr Huda's submission that defence counsel's speculation on the possible causes of the complainant's neck injuries, and how the injuries might be relevant to the alleged strangulation, was not a grave error requiring immediate correction or clarification.

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30 Above at [24].
31 *Haumate v R* [2021] NZCA 400 at [51].
32 Above at [26].
33 Above at [28].

[37] As we have said, judicial intervention during the closing address of counsel is limited to exceptional circumstances. A closing address is counsel's opportunity to persuade the jury to accept that the evidence favours counsel's case. It is an opportunity for advocacy. If a judge disrupts that opportunity unnecessarily then the opportunity, at least potentially, is undermined. If an intervening judge does so in a way that could reasonably be regarded as biased, or adding to a course of conduct going to bias, then an unfair trial can result.

[38] In our view, the Judge should not have intervened. In doing so he risked creating an unfair trial. He should have clarified or addressed counsel's comments during the summing-up. But, for these reasons, we do not consider that the intervention goes to trial fairness through disruption or to appearance of bias:

(a) Defence counsel was in error. He was inviting the jury to speculate on theories which had not been put in cross-examination to the applicable witnesses.[34]

(b) Further, defence counsel's comments were misleading because they were contrary to the evidence, as the Judge demonstrated by the passage he asked counsel to read to the jury.

(c) The Judge was measured in his intervention in his language and demeanour. He did not directly criticise counsel or upbraid him. The most critical remarks were finished with an apology:[35]

> But I don't want to interrupt you, I'm sorry for having done so, but I thought these matters were of some importance.

[39] The fourth criticism[36] is that the Judge's summing-up unfairly undermined the defence case that the sexual activity was consensual and that the CCTV footage did not necessarily contradict that case.

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34 Evidence Act, s 92.
35 Above at [28].
36 Above at [30].

[40] The Crown's submissions provide the full context for the passages complained of. The complete section of the summing-up is:

> [50] And you might want to ask yourself a number of questions in order to come to a view about the credibility of the particular witness. When they made their observations, where were they? Were they directly involved in the incident or were they bystanders? Well here, of course, the two central characters were there and involved at all points. Is there any bias or prejudice exhibited by the witness perhaps because of a relationship with another person involved? I do not know that that really arises here. Did any witness embellish or minimise or exaggerate their role or the role of someone else in this case? Were they prepared to make realistic and appropriate concessions? Now, in this case there is some conflict in this area. Mr O'Donoghue says that in terms of Mr Metuala first of all he told the police officer that on legal advice, and he was perfectly entitled to do this, that he did not want to make a statement. The next day, having been told he did not have to make a statement at all, he comes back nonetheless and provides the police with a videoed statement. And Mr O'Donoghue says that you are entitled to the view that what he has done is to give himself some time to think about what he wants to say.
>
> [51] More importantly, Mr O'Donoghue says, well yesterday he has had the opportunity overnight having now had all the evidence laid out in front of him of concocting a story to fit the evidence that he has to confront. One of the aspects about that, that he now puts, for example, in that regard is this question of what the screaming meant. Now, when he was spoken to by the police officer, he did not mention at any stage that the screaming was other than what you and I would, I think understand screaming to mean. Today, however, the screaming has transformed into groans of desire or sexual pleasure. Now, that was never suggested to [the complainant]. It had to be if it was to have any sort of validity at all and so it is a matter entirely for you, these facts are not for me, they are for you, but they are the sorts of features that you can take into account when you are deciding what sort of weight you put on what you have been told.
>
> [52] Mr Metuala, when taxed about this, says: "Oh, well, I hadn't been in this position before, so, um, I wasn't, I was concerned about my family." His family, it appears would be his parents in Samoa, from what he said.
>
> [53] But can I just commend to you that along with all of the other pages that are important for you to read in the transcript which you will have of the defendant's DVD interview, you look at page 27 because he says a number of things himself, and I am not talking about through the translator or the interpreter, I am talking about what he said in English. And he said this: "I heard her, she was, like, 'Help,' like: 'help.'" "So why would she say that, why would she call out for help?" "I thought she was trying to do something, like, bad, setting me up." Did not say that today, of course. "Okay, when did the screaming start?" "At the time I was fucking her." "Okay, okay, so if she's calling for help, why did you take the phone off her? Did you take the phone when the lady called for help?" "Yeah." "Why did you take it from her?" "I just remove it from her." "Why?" "'Cos I think she's doing something bad to me."
>
> [54] Now today that becomes: "Ah, because I wanted her to concentrate on this fun sexual activity that we were both enjoying." So, you need to ask

> yourselves why there seems to be the discrepancy today between what he said to the police officer and what he says today and measure that against what Mr O'Donoghue suggests to you about what credibility you can ascribe to Mr Metuala's evidence. They again are matters entirely for you. I am simply pointing parts of the evidence to you that might assist you in making those determinations.
>
> [55] And the next question, is the evidence of the witness consistent or different with what other witnesses say? You might think that the two sets of evidence from the complainant and Mr Metuala could hardly be more different, but also look at whether the evidence is consistent in itself. Is the evidence consistent with things they have already said? With Mr Metuala, you will have to look at that pretty closely. Is there any evidence that independently supports what one person or the other says? And again, Mr O'Donoghue has pointed to the CCTV footage, the 111 calls, the obvious injuries, the voice being reduced to a whisper a short time after the incident and the ripping of the clothing, so Mr O'Donoghue puts that, and I think there were some more incidents he pointed to, as being supportive of what the complainant says.
>
> [56] At the end of the day it is up to you what you accept or reject and you are entitled to have regard to the way they gave their evidence…

[41] In our view, when the criticised passages are read in the context of the related passages, there is no indication of bias and no unfairness. The Judge had to sum up both the Crown's case and the defence case. He had to identify the fundamental differences between the two cases, including the factual issues. That is what the Judge did.

[42] The Judge's language was appropriately neutral. He reminded the jury on more than a dozen occasions that it was the jury's role to make conclusions on the evidence.

[43] We accept that the Judge's summation identified discrepancies or differences in Mr Metuala's accounts of what happened and not in the complainant's. The Judge also identified more pieces of evidence going against Mr Metuala's defence. But, on the facts of the case that was inevitable. The Crown's case was overwhelming. As this Court said in *R v Keremete*:[37]

> The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other.

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[37] *R v Keremete*, above n 28, at [19], citing *R v Hall* [2987] 1 NZLR 616 (CA).

Cumulative effect

[44] Mr Huda's main point is that the cumulative effect of the Judge's interventions and directions lead to a reasonable perception of bias and hence to an unfair trial. We disagree.

[45] It is not every error by a trial judge, or even a series of errors, which will lead to a finding of perception of bias and a conclusion of unfairness. This has been made clear by the Supreme Court in *R v Condon* in the passage quoted at [17].

[46] In this case, the Judge erred in asking Mr Metuala about the propriety of drinking alcohol that night, and he departed from good practice in interrupting defence counsel's closing address. But these aspects of the Judge's conduct of the trial were, for the reasons we have given, not individually threatening to the interests of justice. The cumulative effect of all of the criticised actions does not reach the point enunciated by the Supreme Court in *R v Condon*. In the particular circumstances of the case, and looking at the trial as a whole, the Judge's interventions and comments did not make the trial unfair to Mr Metuala.

[47] We conclude by noting that the jury in this case was clearly aware that conclusions on the evidence were for it to make. The Judge reminded the jury of that frequently. The jury demonstrated its independence by acquitting Mr Metuala on the charge of strangulation, the very charge that was the subject of the Judge's intervention during defence counsel's closing address.

[48] The appeal against conviction does not succeed.

Sentence appeal

[49] We must allow Mr Metuala's appeal against sentence if it was imposed in error such that a different sentence should be imposed.[38] A manifestly excessive sentence is one premised on an error that the appellate court should correct.[39]

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38 Criminal Procedure Act, s 250(2).
39 *Tutakangahau v R* [2014] NZCA 279 at [32]–[35].

[50] On 30 August 2022, Judge Ruth sentenced Mr Metuala to eight years and 10 months' imprisonment.[40] The Judge concluded the offending fell within the middle of Band Two of *R v AM* and adopted a starting point of 10 years' imprisonment.[41] The aggravating factors that placed Mr Metuala's offending within Band Two included violence beyond that inherent in the charge (pushing her on the ground and strangling her); victim vulnerability (intoxicated and alone in the early hours of the morning); harm to the victim (significant emotional trauma); and premeditation.[42] The Judge allowed discounts of 10 per cent for youth and lack of previous convictions and two months for time spent on electronically monitored (EM) bail.[43]

Appellant's submissions

[51] Mr Huda submits that the sentence was manifestly excessive because the Judge erred in setting the starting point and gave an inadequate discount for time spent on EM bail.

[52] As to the starting point, Mr Huda submits that the Judge erred in treating the rape as being aggravated by strangulation because that was inconsistent with the jury's verdict of not guilty on the strangulation charge. The Judge said:

> [6] The evidence was overwhelming that you did place your hands around this woman's neck to quell her resistance. It may be that the jury was unable to be satisfied to the required standard about each of the elements of the charge that had to be proved. That does not mean the actual act did not happen. It did happen. There was clear bruising around the victim's neck and her voice was reduced to a whisper, only hours later when she was giving her evidential interview. So while you were not convicted of strangulation as a stand-alone charge I am satisfied that you did quell her resistance in a choking motion with your hands around her neck which although will not be treated as a separate sentencing, is however in my view a significant aggravating factor given that strangulation is often used in these circumstances as you did, to gain control and to stop resistance to what you were about to do.

[53] Mr Huda submits that the appropriate starting point is seven-and-a-half years to eight years' imprisonment. He refers to two comparator cases, *Liai v R* and *Taylor v R*.[44] In *Liai v R,* this Court upheld a nine-and-a-half year starting point. The

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40 *R v Metuala* [2022] NZDC 16815 [Sentencing notes].
41 At [24], citing *R v AM (CA27/29)* [2010] NZCA 114, [2010] 2 NZLR 750.
42 At [12]–[15].
43 At [24].
44 *Liai v R* [2020] NZCA 167 and *Taylor v R* [2012] NZCA 348.

appellant, with an associate, picked up a sex worker and took her to a secluded place. The associate kept lookout while the appellant raped the victim after she refused to have sex with him and asked to be taken back. The ordeal lasted 40 to 45 minutes and involved forced oral sex followed by rape. In *Taylor v R*, the appellant and victim knew each other from high school. The two bumped into each other at a bar and began socialising. They left and went to a nearby alleyway where they kissed consensually for a short time. The appellant got on top of the victim and held her down. She resisted but he proceeded to rape her. The appellant bit the victim on her face, neck and chest and pulled her hair. A starting point of seven years' imprisonment was adopted. Mr Huda submits that Mr Metuala's offending is less sinister and serious than in *Liai* and of comparable seriousness to *Taylor*.

[54] In respect of the EM bail discount, Mr Huda contends that the two-month reduction was inadequate for the two years and six months Mr Metuala spent on EM bail. Mr Huda submits a 30 per cent credit, being nine months, is appropriate.[45]

Crown's submissions

[55] The Crown submits that the starting point adopted by the Judge was correct. The appropriate band is Band Two. The Crown refers to two comparator cases.

[56] The first is *Pakau v R*, in which this Court amended a 12-year starting point to 10 years on appeal.[46] The appellant had followed the victim, who was intoxicated, while she was walking to a supermarket at around 9 pm. The victim's memory was patchy, but she recalled a hand being put over her mouth and waking up later. When she awoke, she found her underwear and leggings removed and a sticky substance on her thighs. She had grazes to her legs and lower back and a bump on her head. The aggravating features were violence beyond that inherent in the offence, victim vulnerability, harm caused to the victim and a degree of premeditation.

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45 Counsel citing *Shramka v R* [2022] NZCA 299, [2022] 3 NZLR 348 at [62], where this Court said discounts "commonly range between 30 and 50 per cent".

46 *Pakau v R* [2012] NZCA 522.

[57] The second is *Dempsey v R*, in which this Court upheld a starting point of 10 years' imprisonment.[47] The appellant had approached an intoxicated victim and offered her a ride home in his car. She declined, and the appellant drove up to her and pulled her into his car. He drove a short distance to a secluded spot, threatening her with a spanner. He demanded that she remove her clothing and he proceeded to have sex with her. The appellant insisted later that the victim propositioned him for sex. The aggravating factors were moderate victim vulnerability, a moderate degree of harm caused to the victim, a moderate to high degree of premeditation, as well as an element of abduction.

[58] The Crown submits that the discount allowed for time spent on EM bail was adequate. There is no rule or formula to calculate the appropriate deduction and it is ultimately the discretion of the sentencing judge to make a reasonable reduction. The Crown points to the relaxation of bail conditions. From December 2020 these were varied to a night-time curfew only, enabling Mr Metuala to work. He remained on those conditions until June 2022. So, of the two-and-a-half years spent on bail, only 12 months were subject to restrictive conditions. The Crown refers to *Malolo v R* in which this Court accepted that an appellant who had spent two years on bail, most of which was on bail simpliciter (which gave him the opportunity to work normal hours but with an evening curfew), was not entitled to a discount.[48]

Discussion

[59] The first issue is whether the Judge erred in treating the rape as being aggravated by force applied to the victim's neck.

[60] We accept that a sentencing judge cannot reach a conclusion on the facts that is inconsistent with a verdict of the jury.

[61] Here, the Judge was clear that the jury had rejected the charge of strangulation. Instead, the Judge relied on evidence that force had been applied to the neck, with reference to the marks on the complainant's neck and her voice being reduced to a

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47 *Dempsey v R* [2013] NZCA 297.
48 *Malolo v R* [2022] NZCA 399 at [27].

whisper. We agree with the Judge that the jury's verdict on the strangulation charge could have been on a number of grounds and it does not mean that there was no force applied to the complainant's neck. For example, the jury might have found that the necessary intention was not proved, or that restriction of breath was not proved.

[62] We are satisfied that the Judge was able to find, beyond reasonable doubt, that the evidence established that Mr Metuala placed his hands on the complainant's neck in a choking fashion for the purpose of "quell[ing] her resistance".[49]

[63] The Judge was entitled to find that the rape was aggravated by the following factors: violence beyond that inherent in the charge (hands forcefully placed on neck to quell resistance); victim vulnerability (intoxicated and alone in the early hours of the morning); harm to the victim (significant emotional trauma); and premeditation.

[64] The rape is within Band Two of *R v AM*. The range in Band Two is seven to 13 years' imprisonment.[50] 10 years is the mid-point. Starting points within a band are not calculated on a mathematical or formulaic basis. The Court must appraise and give considered weight to the relevant factors, and in the end stand back and decide whether the starting point is applicable to the offending itself. In this case, we are satisfied that it is. The aggravating factors call for a starting point significantly above the lowest end of Band Two. Comparator cases are often of limited value given the inevitable differences in the fact situations. But, the cases identified by the Crown are more consistent with this case than those identified by counsel for Mr Metuala.

[65] We conclude that the Judge did not err in setting the starting point at 10 years' imprisonment.

[66] However, we do find that the Judge erred in giving a discount of only two months for the time Mr Metuala spent on EM bail.

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49 Sentencing notes, above n 40, at [6].
50 *R v AM (CA27/29),* above n 41, at [41].

[67] Unlike ordinary bail, the Sentencing Act 2002 requires time spent on EM bail to be considered as a mitigating factor when determining a sentence.[51] In *Shramka v R*, this Court said:[52]

> [61] As for the time Mr Shramka spent on EM bail, the extent to which the sentence is discounted taking account of this factor requires an evaluative assessment of all the circumstances in s 9(3A) of the Sentencing Act, namely: (1) the period of time spent on EM bail; (2) the restrictiveness of the EM-bail conditions; (3) the extent to which the EM-bail conditions were complied with; and (4) any other relevant matter.
>
> [62] Unlike the Parole Act 2002, which provides a 100 per cent credit for time spent on custodial remand, time spent on EM bail is not "custodial". Discounts allowed for time spent on EM bail commonly range between 30 and 50 per cent, and discounts of up to 50 per cent are not uncommon. In *Paora v R* particularly restrictive, supervised EM bail attracted a 70 per cent discount.

[68] Mr Shramka spent a year on EM bail on restrictive terms before his conditions were further varied to allow him to be absent from the bail address so that he could work. The Court held that a 30 per cent discount was appropriate.[53]

[69] Here, Mr Metuala was on EM bail subject to a full curfew for a year. In December 2020 his bail conditions were varied to a nightly curfew (8 pm to 6 am) to enable him to work. He spent a further 18 months on EM bail subject to that curfew.

[70] For the first 12 months, Mr Metuala was effectively confined as though he was serving a sentence of home detention. A 50 per cent discount for this period would not be exceptional. For the 18 months on nightly curfew, we would allow a more modest discount. Overall, a discount of 30 per cent, nine months, is appropriate.

Result

[71] The appeal against conviction is dismissed.

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51 Sentencing Act, s 9(2)(h).
52 *Shramka v R*, above n 45 (footnotes omitted).
53 At [65].

[72] The appeal against sentence is allowed. The sentence of eight years and 10 months' imprisonment is quashed. A sentence of eight years and three months' imprisonment is substituted.

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