



## REASONS OF THE COURT

(Given by Whata J)

[1] Mr Misa was convicted on 20 charges of acts of physical and sexual abuse against two complainants, AB and BC. Mr Misa now appeals against conviction on two key bases:

- (a) There is strong, credible and cogent evidence, not put before the jury, supporting Mr Misa's claims of fabrication and collusion.
- (b) Defence counsel was not sufficiently prepared for trial and, as a result, Mr Misa was not able to present an effective defence.

[2] Mr Misa claims that, as a result of these two factors, his trial miscarried.

### **Background**

[3] AB was Mr Misa's partner from 2004 to early 2006. BC was Mr Misa's partner from early 2006 to 2009. Their respective accounts of their time with Mr Misa share some common features, including a litany of abuse. They were young when they first met Mr Misa. AB was 19 and BC was 16. They were infatuated with him, changed their lives to be with him and became pregnant to him. He was possessive and controlling. They were isolated from friends and family. He was frequently violent. He bullied them and physically abused them for trivial matters. Sometimes Mr Misa expressed regret. Sometimes they had to appease him to calm him down. The violence included acts of sexual abuse, including rape. Both AB and BC acknowledged they should have left Mr Misa at an earlier stage in their relationships, but felt unable to do so.

### *"Mt Wellington"*

[4] One overlapping feature of their respective complaints stands out for special mention because the proposed new evidence is said to contradict BC's account of alleged offending at a Mt Wellington location and, more generally, undermine her credibility. AB resided with Mr Misa at a third-floor apartment in Glen Innes in early

2006. It is common ground she leapt from this apartment to the roof of an adjacent building on 3 January 2006. Mr Misa was subsequently charged with and convicted of an assault which immediately preceded this leap. BC claims that later the same year, she leapt from a third-floor apartment located in Mt Wellington to escape from Mr Misa. She said she jumped to the ground below. Mr Misa disputed, among other things, the existence of a Mt Wellington apartment. The jury was plainly troubled by this. Mid-trial it queried whether the Mt Wellington apartment in fact existed. The Judge responded by telling the jury that the exact location is not an essential element of the charges, and the Crown amended the relevant charges by adding quotation marks around “Mt Wellington”. The Crown then claimed in closing that the offending may have, in fact, occurred at the Glen Innes apartment. Part of the new evidence is said to show that BC never lived with Mr Misa at the Glen Innes apartment building.

### **The charges**

[5] The charges were based on detailed accounts given by AB and BC in evidential interviews. The following summary broadly reflects the evidence given by the complainants at trial on those charges.

[6] Mr Misa faced 10 charges in relation to AB. The first two charges relate to alleged assaults. Mr Misa is said to have literally picked AB up and threatened to drop her on a TV. He is also said to have punched her on an almost daily basis, for such things as poor cooking or if he had a difficult day busking. The next four charges allege various assaults, one with a weapon, and a rape at a different address. These included more punching, a knife to the throat, and booting AB across the room. The rape allegedly occurred when she did not want sexual intercourse, he put his hand over her mouth and nose, and forced his penis into her vagina. These incidents were followed by similar offending at another address. AB was assaulted less frequently here because the address was closer to her family. Nevertheless, AB claimed he hit her there and separately raped her again. She tried to push him off but he just carried on.

[7] The final two charges of offending against AB are said to have occurred while they were living at the Glen Innes apartments. It is claimed they moved into the third-floor apartment where there were “heaps of incidents of physical abuse”. The assaults arose from various circumstances, for example, because AB had burnt his steak and eggs. AB also claimed Mr Misa put his fingers into her genitalia without consent while they were out driving. Mr Misa was, however, acquitted on this charge.

[8] Mr Misa also faced 15 charges at trial in relation to BC, though one of them was discharged prior to verdicts. The first two charges involve claims of assault. BC says that early in their relationship, BC and Mr Misa were arguing and he punched her straight in the face. She started crying and Mr Misa dared her to go to the police. On the second occasion, Mr Misa became angry on discovering BC had been smoking. He threw her to the ground and whipped her with a PlayStation cord.

[9] The next two charges involve claims of digital penetration, the latter a representative charge. It is claimed that sometime in 2006 or 2007, Mr Misa put his fingers inside BC’s vagina without her consent. BC was pregnant at the time and Mr Misa arrived home drunk. Mr Misa had told her, among other things, that he had cum all over his fingers and said it smelt like someone had been in there. It is also claimed this incident was immediately followed by a rape at a “Mt Wellington” location. It is said Mr Misa pulled down her pants and forced his penis inside her vagina. She asked him to stop. He did not. The last of the “Mt Wellington” charges involved a claim of assault. BC says Mr Misa put his hand over her face and mouth to stop her from screaming. Mr Misa was pushing her by the window in the bedroom of their “Mt Wellington” apartment. She thought Mr Misa was going to kill her. She ran for the window and, despite being pregnant at the time, jumped out the window, landing on the ground.

[10] The “Mt Wellington” charges are followed by eight charges involving claims of sexual violation by rape on two occasions, two of sexual violation by unlawful connection and four charges of assault. The first alleged sexual violation occurred on BC’s birthday. BC did not want to have sexual intercourse as she had given birth just four days previously, and Mr Misa forced her to perform oral sex. Mr Misa was acquitted on this charge. This is followed by the four assaults, involving shoving,

punches to the head while out driving, covering BC's mouth and nose making it difficult to breathe, and shoving to the ground because Mr Misa thought BC was having a relationship with a work colleague.

[11] The last of the charges allege sexual violation. BC claims Mr Misa forced her to have sexual intercourse. Mr Misa was acquitted on this charge. There is also an allegation of anal sex. BC asked him to stop. He kept going despite the fact that she was crying. Mr Misa claimed that it was consensual. Finally, BC claimed she was sexually violated by Mr Misa while they were watching pornography. Mr Misa was also acquitted on this charge.

### **The trial**

[12] The Crown case included a statement of agreed facts, including:

(a) Mr Misa pleaded guilty to the following summary of facts:

At about 8.30 am on Tuesday the 3<sup>rd</sup> of January, 2006, the Defendant Misa was at an address ...

Also present was [AB], the Victim in this matter.

The Defendant and Victim have been in a relationship for two years and live together[.] At the time of the incident she was eleven weeks pregnant with his child.

The Defendant became verbally abusive and aggressive towards the Victim in the bedroom of the address, accusing her of having an affair.

He has then punched the Victim twice in the left side of her face with full force.

She has feared for her life and struggled to break free from him.

The door bell of the Defendant's address has rung, and the Defendant has then left the bedroom to answer the door. At this time the Victim was able to escape.

The Victim has jumped from a three storey window onto the neighbouring building, fearing for her life.

She has suffered bite marks to her face and thighs, severe bruising to her face, and small lacerations. Due to suspected facial fractures the Victim was required to stay in hospital.

(b) Mr Misa has a previous conviction for male assaults female:

The defendant has a previous conviction for Male Assaults Female in relation to the complainant [BC] after a guilty plea. The summary of facts to which he pleaded is no longer available.

The assault charge relates to an incident on 15 May 2008 that occurred outside the defendant's parents address ...

[13] Both complainants gave detailed accounts of the alleged offending at trial. Those accounts largely mirror the statements made in their evidential interviews. Unsurprisingly, their credibility was in focus at trial. They were cross-examined on a range of issues, including their failure to complain at the time, lack of detail, the implausibility of their accounts, poor recall, their jealousy, their instability and their collusion. In addition, BC was cross-examined specifically about the existence of an apartment at a Mt Wellington location. She maintained there was such an apartment.

[14] Mr Misa also gave evidence. He strongly denied all the allegations as made up. He was adamant that the Mt Wellington address never existed. He was specifically cross-examined on whether it might in fact be the Glen Innes apartment. He rejected this, noting that BC's claim mirrored AB's claim.

[15] The Crown closed to the jury summarising the complainants' evidence on each charge as detailed above. The location of the "Mt Wellington" offending was specifically mentioned. The prosecutor noted:

... [BC's] description of the apartment complex that she lived with the defendant namely it had been a three storey complex, but being two storeys inside the individual apartment with a ladder that led to the bedroom upstairs is entirely consistent in my submission with the description given by [AB] and the defendant of the apartment complex at [Glen Innes]. She said she was pregnant when she was living with the defendant in the apartment and we know that she was pregnant in the second half of 2006. I submit this fits with the evidence that after a separation with [AB] which was around January 2006, there was a period of time when [AB] later was living at [Glen Innes] in a separate apartment to the one that the defendant was living in, and again when [AB] was living in the separate apartment that fits in with the 2006 timing.

[16] In closing for the defence, Mr Le'au'anae emphasised several points, including:

(a) The complainants were not vulnerable, stupid young women.

- (b) They were infatuated by Mr Misa because he was a well-known musician.
- (c) They were obsessive about Mr Misa, noting incidents of such obsession.

[17] Mr Le'au'anae then identified seven reasons why the complainants should be disbelieved, namely:

- (a) The complainants colluded, referring to, among other things, the remarkable similarity of some of the claims, especially the claim by BC that she leapt from a third-storey apartment in "Mt Wellington". Mr Le'au'anae put it this way:

I was thinking to myself, "Where have I seen that before?" ... in the agreed summary of facts, Ladies and Gentlemen of the jury, you will see that on the very first page, and you'll get it, that about 8.30 on Tuesday the 3<sup>rd</sup> of January 2006 Mr Misa was at an address ... and then it goes through the rest of the summary, and then the second to last paragraph you read, "The victim has jumped from a three storied window onto the neighbouring building fearing for her life". That's really similar to what the Crown, [BC], has said that happened to her.

Now it's also, won't be lost on you ... that [BC] when she was pushed, "Tell me the address of this Mt Wellington property? She couldn't. You know why she can't tell you ... She was never there. So how did she find out about this, and why was she able to say about being pushed out of a three storied building? ... she said three storey then she said two storey. The reason being that they had talked to each other ... and isn't interesting that you might recall that [AB] said she lived at the ... property, and then in January 2006 when this incident of assault took place, do you remember what she said, that was the end of the relationship. No longer lived there. What did she do? She actually came back and lived in a flat across from where Mr Misa was. Why would you do that in the first place? And secondly, she said, "Well I just came back to check on him." Well, check on him, and [BC] lived at that address, never heard any evidence about from [AB] say that [BC] lived at that address ...

- (b) The eight-year delay in making a complaint (in 2014) was not adequately explained and further supports a finding of collusion.

- (c) The allegations from AB lacked detail, in particular, counts 4 and 8. He emphasises there is no information about what happened beforehand, or what AB was wearing; just her allegation that Mr Misa: “Put [his] penis in my vagina, he raped me”.
- (d) There was no corroborating or independent information supporting the allegations. For example, there is no evidence from her parents or from Mr Misa’s parents, or from AB’s brother who lived upstairs at one stage, that the rapes were mentioned previously. Similarly, the only evidence of this kind in respect of BC’s allegations came from a cousin who mentioned seeing bruising, emotional and physical abuse, but no mention of sexual abuse.
- (e) The complainants had clear opportunities to tell authorities about what was happening and they never did, noting for example that the Police had got involved in relation to assaults against AB in 2006. Yet there was no mention of the sexual offending at that time.
- (f) The claims lacked credibility and defied commonsense. He noted the example of indecent touching while driving.
- (g) BC got a Samoan “malu” — an excruciating ordeal, after their relationship ended, even though she is Maori not Samoan. This was said to show she still had a deep connection to Mr Misa which was not consistent with the abusive relationship now claimed.

[18] The Judge also provided a fulsome summary of the defence case, repeating almost verbatim the seven reasons stated by Mr Le’au’anae as to why the Crown failed to prove the charges. On the issue of collusion, similarities between the nature of the charges and some of the facts alleged by the complainants are highlighted, including the “Mt Wellington” leap.

### **Grounds of appeal**

[19] Ms Sellars submits that:

- (a) strong, cogent and credible evidence is now available that is directly relevant to Mr Misa's defence that the allegations of both complainants resulted from collusion and were fabricated; and
- (b) the case was not sufficiently prepared for trial and, as a result, Mr Misa was not able to present an effective defence.

[20] We will address each ground separately before addressing whether Mr Misa's trial miscarried overall.

### **New evidence**

[21] The new evidence is:

- (a) evidence obtained from the Ministry of Social Development (MSD) about Mr Misa's residential addresses during the periods of alleged offending;
- (b) the evidence of John Albert, manager of the Glenn Innes apartments;
- (c) a transcript of a conversation between Mr Misa's mother and his former wife where the charges were discussed; and
- (d) a social media message posted after trial from Mr Misa's former wife to BC.

[22] We briefly describe the new evidence before assessing its significance.

### *MSD*

[23] The MSD records show:

- (a) In December 2005, Mr Albert confirmed that Mr Misa was a permanent tenant at the Glen Innes apartments.

- (b) On 5 January 2006, a person at Work and Income New Zealand (WINZ) spoke to Mr Albert. Mr Albert had been informed of a change in Mr Misa's circumstances.
- (c) On 6 January 2006, Mr Misa's supplementary benefit was declined as "client now out of the area".
- (d) In the period from January to 3 July 2006, WINZ continued to send correspondence to Mr Misa at the Glen Innes address.
- (e) The Work and Income database records the Glen Innes address as one of Mr Misa's residential addresses from 7 July 2005 to 26 July 2006.

[24] The Crown called Peter James Kruger of MSD to produce and speak to the MSD/WINZ records. He confirmed the accommodation supplement was suspended on 5 January 2006 but, on 3 February 2006, the supplement was resumed and back dated to 4 January 2006 with a slight increase. He accepted under cross-examination that there was no information on the system to show what address the payment was being sent to. He also confirmed that the recorded postal address is simply the address recorded at the time of the application for a grant. He also accepted that beneficiaries will usually be referred to a WINZ office nearest to their residence and that, on 23 June 2006, Mr Misa was referred to an Otara office. He confirmed the WINZ records refer to "returned mail" which shortly follows from letters having been sent to the Glen Innes address.

[25] Mr Kruger was questioned at length about the assumption Mr Misa continued to live at the Glen Innes address through to July 2006. He maintained that, in the absence of any request to change the address for the supplement, it is assumed the supplement is being received for that same address. He appeared to concede, however, that an alternative address was noted on the WINZ records for the relevant period.

*John Albert*

[26] Mr Albert was the manager of the Glen Innes apartments in 2005 to 2006. He continues to perform that role. He has a firm memory of Mr Misa's time at the

apartments. He was known to him from his singing background. He also recalled AB's time at the apartments both as a tenant on her own and as an occupant with Mr Misa. He could not recall whether she was in her own apartment first, but he said she was in her own apartment most of the time. He remembered AB because she caused problems when she went to Mr Misa's apartment. He referred to Mr Misa asking her to leave and AB refusing to do so. He recalled hearing a "lot of yelling and banging" but did not see any physical violence.

[27] Mr Albert confirmed AB jumped from Mr Misa's apartment to a neighbouring building. He vividly recalls seeing her running naked across the roof of the neighbouring building and was terrified she would go straight over the side of the building. He also said he was not 100 per cent sure Mr Misa moved out after this incident and does not have any records to confirm the position. He accepted it was possible he returned to live there. But he was adamant no one else was there with him for more than a week, because he and his staff were "keeping an eye" on things after what had happened.

[28] Mr Albert described the apartments and their surrounds. He noted they were two storey, but with three levels. At the time, the ground level outside Mr Misa's apartment was covered in old concrete with twisted steel and old pipe. He recalled it took six months to remove it. He was of the strong opinion that had BC jumped from the third-floor window to this surface she would have died or been seriously injured.

*The transcript and Facebook entry*

[29] Mr Misa's mother recorded a conversation with Mr Misa's former partner, CD, on 21 January 2016, just under five months prior to trial. This transcript includes references to Mr Misa's upcoming trial. It shows CD's awareness of the allegations against Mr Misa. CD refers to the seriousness of the allegations and the consequences of being found guilty. She notes she is "friends with [BC] and she's been going through a lot because she's sent to go to court". She also refers to allegations of sexual abuse by Mr Misa of their daughter and why they stay away from him. She

says she has had nothing to do with the investigation into Mr Misa's alleged offending. She also says, "I am doing the law because of him".<sup>1</sup>

[30] A subsequent Facebook entry also states the following:

Can you please email with the offences he was convicted of so I can commence my research – this is a fun task for me and am so looking forward to seeing the ex cry when sentenced ...

### *Argument*

[31] Ms Sellars contends the new evidence, while not fresh, goes directly to the credibility of both complainants and the issue of collusion. First, she says it shows that BC fabricated her account of the alleged "Mt Wellington" offending. The MSD records and Mr Albert's evidence show, she claims, BC never lived with Mr Misa at the Glenn Innes apartments, removing the apartments as a possible explanation for the location of the "Mt Wellington" offending. In addition, any leap from the third floor to the ground would have caused serious physical injury, if not death. Second, the transcript of the conversation, together with the social media post, supports an inference that the complainants colluded, in collaboration with Mr Misa's former partner, who plainly had ill feelings toward Mr Misa.

### *Threshold*

[32] The new evidence is not fresh. As stated by the Privy Council in *Lundy v R*:<sup>2</sup>

If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[33] In the present context, the risk of a miscarriage depends on whether, in light of the new evidence, there is scope for the jury to have been left in doubt about a key issue at trial.<sup>3</sup> We consider it desirable to admit this evidence for the purposes of addressing that issue.

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<sup>1</sup> CD had commenced a law degree following her relationship with Mr Misa.

<sup>2</sup> *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

<sup>3</sup> *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [37].

### *Assessment*

[34] We address the significance of the MSD records and Mr Albert's evidence first. Mr Albert's evidence is credible evidence about whether and, if so, how long Mr Misa and/or BC resided at the Glen Innes apartments in 2006. His evidence, together with the MSD records, places Mr Misa out of the Glen Innes apartments as early as January 2006 or, at the latest, by the end of July 2006. His evidence also suggests BC could not have been residing at the Glen Innes apartments in the alleged periods of the "Mt Wellington" offending. The new evidence also bears on the plausibility of the Mt Wellington leap, if it was in fact from the third level Glen Innes apartment. It would have been a very significant fall onto a hard and uneven surface, most likely resulting in significant injury. Finally, in combination, the implausibility of BC residing at the Glen Innes apartments, together with the implausibility of "Mt Wellington", adds force to the claim it was simply contrived to mirror AB's proven, similar (though not identical) claim.

[35] Nevertheless, we are satisfied that the potential impact of this evidence on the verdicts is small. First, the new evidence is directly relevant to a contextual issue only; that is, whether the offending occurred at the Glen Innes apartments and whether BC leapt from them. Second, the evidence at trial that the offending occurred at the Glen Innes apartments was and remains cogent. BC stated the offending occurred at an apartment in a Mt Wellington location based on her general understanding of the area. Most relevantly, she had distinct memories of it being located near Moyes Panmure, having driven past that well-known car dealer while living at the apartments. It is located on one of the main arterials linking Glen Innes to South Auckland, where her grandparents resided. She also provided a detailed description of the apartment and the apartment complex that was very similar to Mr Misa's apartment and the Glen Innes apartment complex. While parts of BC's evidence-in-chief would have placed her out of the "Mt Wellington" apartments, under cross-examination she confirmed that the "Mt Wellington" offending predated an August visit to a doctor.<sup>4</sup> This fits with the MSD records which suggest Mr Misa was

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<sup>4</sup> She initially said the offending occurred while she was three, four or five months' pregnant and she gave birth to their daughter in March 2007. This would have placed the offending well into the third quarter of 2006. There is no evidence to suggest Mr Misa resided at the Glen Innes apartments in that period.

receiving an accommodation supplement for the Glen Innes address up to the end of July.

[36] Third, Mr Albert's evidence is not of such strength or cogency as to raise a real doubt about a jury finding that the "Mt Wellington" offending occurred at the Glen Innes apartments. Mr Albert could not be categorical about whether Mr Misa returned to the Glen Innes apartments after January 2006 and his evidence that he did not observe BC living at the apartments is highly contestable. It relies on the absence of observation after an elapse of 10 years and he has no records as to who was resident in the apartments at the time.

[37] We accept the similarity of BC's description of the Mt Wellington apartment to the layout of the Glen Innes apartment, and the similarity of the two leaping episodes, supports an inference that BC's allegations are copy-cat. We also acknowledge a leap from the third floor is likely to result in injury. However, the similarity of their accounts would have been obvious to the jury. Indeed, while Mr Albert's evidence would have further highlighted that issue, all of the material facts were already before them.

[38] Notably also, the location and the leap were background matters in the context of 25 claims of abuse by two complainants in long-term relationships with Mr Misa. While Mr Misa has sought to make much of certain aspects of the "Mt Wellington" offending, they formed only discrete parts of finely-grained, plausible, mutually supportive narratives of domestic abuse spanning five years, including proven acts of assault on each of the complainants.<sup>5</sup> We very much doubt that Mr Albert's evidence would have materially affected the outcome, given the combined weight of these narratives.

[39] Finally, issues of implausibility and potential collusion were thoroughly explored before the jury, Mr Le'au'anae making much of the copy-cat nature of the "Mt Wellington" offending. Mr Misa also gave evidence at trial that BC would not have survived a leap from the third-floor window and the jury would have taken

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<sup>5</sup> See [12] for the charges which formed part of the agreed facts.

that into consideration. In reality, Mr Albert's evidence would have done little to enhance the case for implausibility and/or collusion.

[40] Accordingly, Mr Albert's evidence and the MSD evidence is not sufficiently strong or cogent to lead to a different verdict or raise real scope for the jury to be in doubt about a key issue or issues at trial.

[41] We also see nothing in the transcript and Facebook evidence. The transcript is not direct evidence of collusion between the complainants and only marginal evidence of collaboration between BC and CD. At best, it may have provided a hook upon which to cross-examine the complainants further about collusion, but the nature and quality of any potential evidential catch is speculative. In this regard, production of the transcript and, presumably, calling CD would present its own risks to Mr Misa, including evidence from CD as to her relationship with him. While we assume her allegations of child sexual abuse may have been excluded as unduly prejudicial, other allegations of abusive behaviour may, nevertheless, have been raised in evidence. Given these additional complications, the case for a new trial based on the transcript and/or the Facebook entry is inherently weak.

### **Pre-trial preparation**

[42] Mr Misa and Mr Le'au'anae gave evidence before us about pre-trial preparation. It is common ground Mr Le'au'anae was sparsely briefed by Mr Misa before trial. On the evidence available to us, Mr Le'au'anae and his juniors spent little more than an hour with Mr Misa in pre-trial briefings. In a case involving 25 charges, including ten charges of sexual violation, that was inadequate. Unsurprisingly, Mr Le'au'anae acknowledges that his instructions were insufficient. In fairness to Mr Le'au'anae, it was not for want of trying. The record shows multiple attempts by Mr Le'au'anae to meet with Mr Misa about his case, including travel by him to Mr Misa's parents' home. The lack of contact is partially explained by the fact Mr Misa was also living an itinerant lifestyle through this period due to financial constraints and was under considerable personal strain, his father having passed away in October 2015.

[43] In any event, Ms Sellars made the following key points:

- (a) Mr Le'au'anae should have sought an adjournment;
- (b) had Mr Le'au'anae been better briefed, he could have more effectively exposed evidential inconsistencies, the collusion, the fabrication and the implausibility of the complainants' evidence; and
- (c) Mr Misa was not advised about any aspect of jury selection.

[44] The claimed evidential inconsistencies are:

- (a) AB's evidence in relation to charge 1 is contradictory as to whether she was on the bed or had moved out of bed when she was picked up. Furthermore, the description of how she was picked up lacks credibility.
- (b) AB's narrative about charge 4 lacks credibility and is inconsistent. She says she was wearing clothes, but does not describe them being removed when raped. She also said in evidence that she tried to push him off. But she did not say that in her evidential interview.
- (c) AB's evidence about charge 8 is inconsistent with her interview statement. In evidence, she said she swore at Mr Misa stating: "Fuck, get the fuck off me". However, in her evidential interview she said "... I was trying to tell him no like, actually no I don't think I was trying to say no, I was trying to say get the fuck off me. But if I ever swore he'd just beat the crap out of me 'cause that's disrespecting him."
- (d) In evidence AB said, referring to a knife: "He knew it was under there and I had a reason". But in the evidential interview she said: "I don't think he knew it was there".
- (e) BC gave a detailed account of events leading to the alleged first assault in the car in her evidential interview but she could not remember these events when giving evidence.

### *Assessment*

[45] An adjournment should have been sought. Mr Le'au'anae knew his instructions were inadequate, but carried on regardless. In so doing, he took the risk that Mr Misa might not be able to present an effective defence. While an application for adjournment may have been declined, Mr Misa should have been afforded the opportunity to seek an adjournment and any decision to adjourn should have been left with the trial Judge.

[46] Even so, we are not satisfied the inadequacy of the pre-trial briefing had a material effect on the verdicts. First, Mr Le'au'anae was, overall, sufficiently prepared for trial. The best illustration of this is his conduct at trial. He competently tested the complainants' reliability and credibility in cross-examination by reference to a range of matters, identified several weaknesses in the complainants' evidence and closed to the jury by identifying all key defence grounds, including implausibility, fabrication and collusion.

[47] Second, more elaborate pre-trial briefings would not have added materially to Mr Misa's case on the matters now highlighted by him for the purpose of his appeal. More specifically:

- (a) The alleged inconsistencies in the evidence noted above at [44], were already identifiable from the written record available to counsel prior to trial and were not matters on which Mr Misa could provide any special insight.
- (b) Two of the alleged inconsistencies (the picking up of AB in charge 1 and the removal of clothing in charge 4) were specifically addressed by Mr Le'au'anae.
- (c) None of the inconsistencies individually or collectively stand out as material to the verdicts.
- (d) Mr Misa's strongest point is that the "Mt Wellington" offending was fabricated. But this issue was signalled in the pre-trial briefing notes

and was dealt with robustly at trial; so much so the Crown had to amend the charges.

[48] Third, in our view, Mr Misa's suggested weaknesses in trial performance reflect post-trial remorse rather than inadequate pre-trial preparation. In reality, the potential for additional "Mt Wellington" evidence only assumed any significance during the trial when the Crown linked BC's allegations to the Glen Innes address. We very much doubt additional briefing time with Mr Misa would have better enabled Mr Le'au'anae to anticipate and respond to this change of direction in the Crown case with the evidence now proposed. In addition, for the reasons already stated, we do not consider that there is a real risk this evidence would have had a material effect on the outcome.

[49] Finally, we see nothing in the jury selection point. Mr Le'au'anae gave evidence about this. He confirmed that his usual practice was to give clients standard instructions about jury selection. We prefer his evidence on this. Mr Misa seemed to suffer loss of memory on key pre-trial matters when convenient to do so. By contrast, Mr Le'au'anae's evidence was balanced.

### **Miscarriage?**

[50] We have also considered whether the new evidence, in combination with the inadequacy of pre-trial briefings, raises miscarriage concerns on unfairness grounds. This arises as a separate issue because it might be said that the inadequacy of pre-trial briefings meant that Mr Misa never had the opportunity to present a fully effective defence, supported by the best evidence available to him. In this regard, it might also be said matters were compounded by the Crown amending the charge, after evidence-in-chief, to specify "Mt Wellington" and then cross-examining Mr Misa to place BC at the Glen Innes apartments. Putting the case as highly as we can, given the inadequacy of preparation, Mr Misa was arguably disabled from properly addressing the Crown's case on the "Mt Wellington" offending, whether in terms of cross-examining BC, presenting evidence-in-chief or responding to cross-examination on the "Mt Wellington" issue.

[51] But this contention belies what in fact transpired at trial and, even adopting a generous approach to the new evidence, we have no concern about unfairness. At trial, Mr Misa was confronted by two complainants with similar evidence about physical and sexual abuse spanning several years, both as to context and the nature and type of offending. His defence was simply it did not happen; that they were lying and colluding because they were out for revenge. Assuming for present purposes that there were weaknesses in BC's evidence about the Mt Wellington location and a potential for collusion, Mr Misa was aware of the overlapping complainant narratives about leaping from apartments well before trial. He said this in his interview statements:

It's the same comment that ah [AB] said to me ah accused me of. These stories link up with identical with each other. I never did that. Why didn't she specify which address? If she can clearly state what actually happened or where ... I don't know whether why she can't state the address or the location of this so this address that we so-called stayed at.

[52] BC also stated clearly in her interview statements that she thought it was the same apartment previously occupied by AB. Mr Le'au'anae had these interview statements pre-trial, and his file notes shows he was briefed about the "Mt Wellington" location issue.

[53] We are therefore satisfied that nothing in the pre-trial preparation, the conduct of trial counsel and the new evidence (individually or in combination) raises real scope for concern about the safety of the verdicts.

## **Result**

[54] The application for leave to adduce further evidence is granted.

[55] The appeal is dismissed.

[56] To avoid the risk of identifying the complainants, we make an order prohibiting publication of the name, address, occupation or identifying particulars of connected person CD pursuant to s 202 of the Criminal Procedure Act 2011.