NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA598/2016
[2017] NZCA 587

BETWEEN	JOHN WILLIAM ROSS Appellant
AND	THE QUEEN Respondent

Hearing:	2 October 2017
Court:	Winkelmann, Wylie and Whata JJ
Counsel:	M J Phelps for Appellant Z R Johnston for Respondent
Judgment:	12 December 2017 at 3 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] In September 2016 the appellant, Mr Ross, was found guilty of seven charges of historic sexual offending following a trial before Judge Rea and a jury in the

District Court at Napier.[1] He was subsequently sentenced to four years and six months' imprisonment.[2]

[2] Mr Ross now appeals his convictions alleging both trial counsel error and inadequacies in the Judge's summing-up.

Background facts

[3] When she was five, following her parents separation, complainant M went to live with her father, T; his new partner, B; and B's two children from an earlier relationship — complainant R, and RE.

[4] M and R, both girls, were of a similar age. RE, a boy, was two years older.

[5] In 1980, as a result of complications with B's pregnancy, the three children were sent by T and B to live with others for short periods of time. They first spent time with relatives near Wellington, but later they were sent to a state forest settlement in Northland to stay with M's mother, H, and her then partner — Mr Ross.

[6] M and R were eight years old at the time. RE was 10.

[7] B recalled that the children were sent to stay with H and Mr Ross at the state forest settlement and each of the children had memories of this. One described the forest as being a "cool place to play in" — a novelty for children from the city. H also recalled the children staying with her and Mr Ross.

[8] As a result of being moved around, the three children attended a number of different schools over this period. At trial each remembered, to a greater or lesser degree, attending the local school while staying in the state forest settlement. M remembered "the longest bus ride on gravel roads". She also remembered her achievements at the school. R had vague memories of the school corridor, although she was not sure, given the number of schools she had attended. RE remembered the

---

1 One charge of attempted rape, five charges of indecent assault and one charge of inducing an indecent act.

2 *R v Ross* [2016] NZDC 22105.

bus trips to the school and he said that all three children had gone to the school. H recalled the children attending the local school and the names of the children were on the roll of the school at the relevant time — September–October 1980. The enrolment details recorded that the children had been enrolled by Mr Ross.

[9] Both M and R described sexual offending against them individually by Mr Ross during their stay at the state forest settlement:

(a) M said that on a number of occasions Mr Ross would pull her on top of his body while he was in bed and hold her there, rubbing his body and his erect penis against her until he ejaculated. She also said that he indecently assaulted her while bathing her, touching her genitalia with his fingers.

(b) R described Mr Ross touching her nipples and vagina and placing her hand on his penis. She also described being pulled on top of Mr Ross when he was in bed in the master bedroom.

[10] Some weeks after B had given birth to the new baby, the three children returned to live with T and B in South Auckland. R gave evidence of an incident when she was living in this household. She said that Mr Ross came to visit and that he stayed the night. She said that she awoke to find somebody smoking in her room. She said that it was Mr Ross and that he got into her bunk bed and attempted to put his penis into her vagina. Both B and RE remembered that Mr Ross came to stay in the house in South Auckland. B said that she worked on night duty and that she came home one night to find him in the house.

[11] M and R gave statements to the police in 1996–1997. The police made initial enquiries but the investigation was not further actioned at that time. Rather, an error in the police's administration system resulted in the file being closed. It was only reopened following an audit in 2010; Mr Ross was not spoken to by the police until 2012.

[12] Mr Ross was initially charged in May 2012 with sexual violation by rape of R and six charges of indecency against M and R. He was tried in September 2013 and found guilty of all charges. This Court quashed those convictions in August 2015 on the basis that errors by then trial counsel had caused a miscarriage of justice.[3] A new trial was ordered.

[13] Mr Ross was retried in September 2016 before Judge Rea and a jury.

[14] Mr Ross denied all of the alleged offending. His primary defence at trial was that the recollections of the two complainants and RE were unreliable. He gave evidence. He denied that the three children had ever lived with him at the settlement in the state forest. He denied enrolling the children at the local school. He said that his efforts to prove that the children had not lived with him had been hampered by the passage of time, and he asserted that if the police had properly investigated the allegations earlier, there would have been witnesses available who would have confirmed his version of events. He further said that he had never visited T and B's house in South Auckland except in the company of H, and that he had never stayed overnight at the house.

[15] In the course of the trial:

(a) the charge of rape was amended to a charge of attempted rape;[4]

(b) the prosecutor was permitted to rely on cross-propensity evidence — namely the accounts of the two complainants;[5] and

(c) the dates in two of the charges were amended, without objection.[6]

[16] As noted, Mr Ross was convicted on all charges and later sentenced to four years and six months' imprisonment.

---

3 *Ross v R* [2015] NZCA 387.
4 *R v Ross* [2016] NZDC 18000 [Ruling 1].
5 *R v Ross* [2016] NZDC 18138 [Ruling 3].
6 *R v Ross* [2016] NZDC 18139 [Ruling 4].

Evidence on the appeal

[17] Mr Ross alleges error by his trial counsel, Mr Fairbrother QC. He asserts that Mr Fairbrother failed to call possible defence witnesses and that his closing address to the jury was inadequate. Evidence was called before us in relation to these matters and also in relation to the delay in bringing the charges, which Mr Ross says prejudiced his defence and which he says the Judge did not adequately deal with in his summing-up.

[18] Mr Ross filed an affidavit. He said that he wanted to be actively involved in the retrial strategy and preparation. He asserted that if the matter had been properly investigated at the outset, information would have been available from:

(a) T, who had died in about 2011;

(b) residents at the state forest settlement including a Ms Mason, who was the storekeeper at the relevant time. Ms Mason had died before Mr Ross was charged;

(c) documentary records including his employment records and school records from each of the schools the evidence suggested the children were enrolled at; and

(d) photographs of the state forest settlement.

[19] Mr Ross said he wanted to give evidence and that he anticipated his evidence would be bolstered by other defence evidence. In particular, he says he anticipated that evidence would be called from:

(a) Ms Whittaker, a school principal;

(b) Mr Tolliday, a former resident at the state forest settlement;

(c) Ms Honore, also a former resident; and

(d) Mr Bills, a private investigator who had been retained by the defence.

[20] Mr Ross deposed that Mr Fairbrother told him at Court, immediately before closing the defence case, that no further defence witnesses would be called. He said that he did not sign any written instructions that the witnesses should not be called and that it was a unilateral decision by Mr Fairbrother not to call them.

[21] Mr Ross asserted that he provided a detailed analysis of the Crown case for Mr Fairbrother. He said that, in closing, Mr Fairbrother did not adequately put his defence to the jury and, in particular, that Mr Fairbrother failed to identify various contradictions in the Crown case; failed to adequately identify why it was unlikely that the complainants had stayed with Mr Ross and H; failed to adequately identify why it was unlikely that Mr Ross had stayed at T and B's house in South Auckland overnight without his wife; and failed to adequately identify the failure by the police to investigate the case earlier including the ways in which Mr Ross' defence had been prejudiced as a result.

[22] Mr Fairbrother also filed an affidavit and he was cross-examined before us. He accepted that Mr Ross was involved in every decision about the trial and asserted that he took Mr Ross' instructions on every point that arose. Mr Fairbrother said that he met with Mr Ross on 6 September 2016 shortly before the trial was due to commence, and that he handed to him a summary agenda setting out his proposed trial strategy. Mr Fairbrother also gave Mr Ross on 6 September written advice that summarised the key Crown evidence and noted Mr Ross' instructions to subpoena various prospective defence witnesses, including Ms Whittaker, Mr Tolliday and Ms Honore. Mr Fairbrother noted that the purpose of calling these witnesses was to prove a negative — namely that M and R did not live with Mr Ross in the state forest settlement. He recorded his view that there was limited assistance in the anticipated evidence, unless Mr Ross could challenge the accuracy of the local school's enrolment records. Mr Fairbrother expressed the opinion that calling the proposed witnesses might only serve to highlight to the jury that the children had stayed with Mr Ross for a period of time. He considered that the jury would be likely to accept the school record. He noted that Ms Whittaker could provide evidence that RE was enrolled at another school at the same time, but Mr Fairbrother observed that the records from the

local school clearly showed that the children were enrolled there for a short period of time. Mr Fairbrother expressed the view that, rather than highlight this to the jury, it would be better to have the local school record produced as an agreed fact. He expressed the view that there was a risk that the defence could become overly complicated and that this might only highlight various issues in the jurors' minds, which could be adverse to Mr Ross. Mr Fairbrother expressed the view that there was no real benefit in calling the proposed witnesses.

[23] Mr Fairbrother said that at the meeting, Mr Ross agreed with his advice.

[24] Although there is no signed record of Mr Ross' agreement, Mr Fairbrother's recollection is consistent with an email Mr Fairbrother sent to Mr Bills on 7 September 2016. In that email, Mr Fairbrother recorded that Mr Ross had met with him the previous day and that there was to be a change in trial strategy. Rather than calling the people that Mr Bills had spoken to about giving evidence, the plan was to get Mr Bills to give evidence about the enquiries he had made.

[25] On 14 September 2016 Mr Bills flew to Napier, in anticipation of giving evidence. By this stage the Crown case had concluded and Mr Ross had already given his evidence. Mr Fairbrother met Mr Bills. Mr Fairbrother said that this meeting simply confirmed his view that Mr Ross would be ill-advised to call Mr Bills as a witness. He sent an email to Mr Ross at 10.14 pm that evening, setting out his advice that it would be unwise to call Mr Bills and his reasons for taking that view. Mr Fairbrother also recorded that Ms Whittaker was on standby to give evidence by audio-visual link if required. He recorded his opinion that, if the proposed defence witnesses were not called, the jury would be "happily left with the uncertainties and contradictions of the evidence of [the complainants]". Mr Fairbrother took the view that if the witnesses were called, there was a risk that they might add certainty to some of the uncertainties the jurors would otherwise face.

[26] Mr Ross replied at approximately 3 am on the morning of 15 September 2016. He acknowledged Mr Fairbrother's advice and implicitly accepted the same. He also gave Mr Fairbrother instructions about what he should say in closing. In summary, he

wanted Mr Fairbrother to highlight the contradictions in the Crown case, in an endeavour to persuade the jury that they could not rely on the complainants' evidence.

[27] The emails are contemporary documents and they are persuasive. To the extent that there is a conflict between the evidence of Mr Ross and Mr Fairbrother, we prefer Mr Fairbrother's evidence. It is borne out by the emails.

[28] Mr Fairbrother's evidence is also supported by an affidavit which was filed by Mr Bills. He confirmed that he spoke to each of the witnesses that Mr Ross thought might be of assistance, and said his view was that the information they were able to provide was likely to be more damaging than helpful to Mr Ross' defence. He also expressed the view that there was little he could add to Mr Ross' defence. Nevertheless, he confirmed Mr Fairbrother's evidence that he flew to Napier on 14 September 2016 and that he met with Mr Fairbrother that evening. He commented that any helpful evidence he might be able to give was limited, and that there was a risk that he might have to give evidence damaging to Mr Ross' defence under cross-examination. Mr Fairbrother told him that he (Mr Fairbrother) needed to take instructions from Mr Ross before releasing him. Mr Bills said that he agreed to be available to meet with Mr Ross the following morning if Mr Ross wished to speak directly to him. He says he did not hear anything further, and that he subsequently left Napier. He recorded that his investigations were extensive, but that he was unable to find any evidence that he thought would assist Mr Ross' defence, and that it was clear to him that the only persons who were willing, albeit reluctantly, to help — Mr Tolliday and Ms Honore — could potentially have jeopardised Mr Ross' defence.

Analysis

[29] As noted, Mr Ross was first charged in May 2012, before the commencement of the second stage of the Criminal Procedure Act 2011. As a result, the appeal falls to be dealt with under the law as it stood prior to 1 July 2013.[7] Accordingly, pt 13 of the Crimes Act 1961 applies. Under those provisions an appellate court is obliged to allow an appeal if of the opinion that, inter alia, a miscarriage of justice has occurred.[8]

---

7 Criminal Procedure Act 2011, s 397.
8 Crimes Act 1961, s 385.

A miscarriage of justice in terms of pt 13 is something more than an inconsequential or immaterial mistake or irregularity.[9] There are generally two ingredients which have to be shown. This was noted by Tipping J in *R v Sungsuwan*:[10]

> First, something must have gone wrong with the trial or in some other relevant way. Second, what has gone wrong must have led to a real risk of an unsafe verdict. That real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong. It is, of course, trite law that an appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe. The presence of a real risk that this is so will suffice.

[30] Against this background, we consider Mr Ross' two alleged errors — first, trial counsel error and, secondly, deficiencies in Judge Rea's summing-up.

Trial counsel error

[31] Trial counsel error is not itself a ground of appeal.[11] The enquiry called for, when such an assertion is made, is not into the competence of counsel but rather whether the resulting verdict is unsafe through any deficiency in the trial, however it was caused. Gault J, in *R v Sungsuwan*, summarised the position as follows:[12]

> [W]hile the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[32] Reasonable tactical decisions, even if they could possibly have affected the outcome of the trial, will not necessarily establish a miscarriage of justice. This Court has noted as follows:[13]

> [74] There are trial decisions on which there is some discretion for trial counsel. As this Court has said previously, an appeal is not the time for "a minute dissection of whether some aspects could have been dealt with

---

9 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30].
10 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110] (footnote omitted).
11 At [7].
12 At [70]. See also *R v Scurrah* CA159/06, 12 September 2006 at [17].
13 *Hall v R* [2015] NZCA 403 (footnotes omitted). See also *R v Scurrah*, above n 12, at [18]; and *Hamdi v R* [2017] NZCA 242 at [48].

> differently or better". The context of the instruction will also be relevant. This position reflects both the practicalities of running a trial and the nature of counsel's obligations.
>
> [75] As this Court said in *R v Pointon*, "[t]he effective conduct of a client's case would be impossible if he had to be consulted at every turn during preparation and at the trial itself". And, the authorities are clear, counsel have to exercise some judgment on matters such as the approach to cross-examination. Both of the cases on appeal illustrate this point. Mr Hall, for example, on one aspect submits trial counsel's cross-examination could have been "stronger" although there is no suggestion the defence was not put. That is not a proper basis for challenging counsel conduct.

[33] As noted, Mr Ross denied the offending. Mr Bills was engaged in an attempt to confirm that the complainants had not resided with Mr Ross at the state forest settlement. He reported to Mr Fairbrother on 26 April 2016. His report detailed the various persons he had spoken to and summarised the evidence that might be available, including from Mr Tolliday and Ms Honore. Mr Bills expressed reservations about how helpful they might be.

Calling witnesses

[34] In the summary agenda prepared for the meeting of 6 September 2016 — see [22] above — Mr Fairbrother summarised the anticipated evidence and set out his trial strategy. He suggested that the proposed witnesses would be of little or no assistance. Mr Fairbrother has given evidence, which we accept, that Mr Ross agreed with his strategy. The possibility was, however, left open that Mr Bills might give evidence — see [24] above — to detail the enquiries he had made, but Mr Bills and Mr Fairbrother agreed that this could be potentially damaging to Mr Ross' defence. Mr Bills would not be able to say in evidence that he had found nothing to suggest that any of the complainants had ever resided with Mr Ross at the state forest. As noted above at [25], Mr Fairbrother emailed Mr Ross on 14 September 2016 setting out his views, and the reasons for them. He suggested that it would be unhelpful and potentially damaging if Mr Bills were to give evidence. While Mr Fairbrother did not formally seek instructions in the email, he offered to make himself and Mr Bills available to discuss the position with Mr Ross the following morning. It is clear that Mr Ross accepted this advice. As noted above at [26], he responded by email in the early hours of the morning, expressing the view that it was a "pity" that Mr Bills could not give evidence but nevertheless indicating acceptance of the advice he had been given,

"providing [Mr Fairbrother] can highlight the contradictions with sufficient emphasis to convince the jury they cannot rely on [the] Crown evidence". He did not ask to see Mr Fairbrother and Mr Bills later that morning.

[35] We have rejected Mr Ross' assertion that he was surprised when, on 15 September 2016, Mr Fairbrother advised the Court that no further defence evidence would be called — see above at [20]. It is clear from the contemporaneous documents that Mr Ross was in agreement with Mr Fairbrother's trial strategy, and that he had made a fully informed decision in that regard. In any event, a decision whether to call witnesses, other than the defendant, is not generally a fundamental trial decision but rather one left for counsel.

[36] We accept the submission made by Mr Phelps for Mr Ross that Mr Fairbrother did not follow best practice. He did not prepare briefs for the prospective witnesses.[14] Nor did he obtain signed instructions from Mr Ross.[15] However, he had comprehensive outlines prepared by Mr Bills of what each witness would likely say and he did obtain confirmation of his view that the witnesses should not be called. Further, a failure to prepare briefs and to obtain signed instructions, even if proved, do not of themselves establish a miscarriage of justice.

[37] Regardless, we have considered the proposed evidence each of the available witnesses might have been able to give and we do not consider that their evidence would have materially advanced Mr Ross' defence:

(a) Mr Tolliday's memory was unclear. He did recall children living with Mr Ross for a period of time, possibly a few months. He recalled two children — possibly three. While he remembered girls, he told Mr Bills that there could have been a boy. His description of the children was not inconsistent with the complainants and RE. He was shown a photo and he agreed that the children in that photo could have been the children he remembered. It seems, however, that the children he identified were Mr Ross' daughters who, on occasion, came to live with

---

14 *Ede v R* [2010] NZCA 358, [2010] 3 NZLR 557 at [57].
15 See *R v Chambers* [2011] NZCA 218 at [1].

him. There was a risk that this evidence would not necessarily have been accepted by the jury. Mr Ross was only allowed limited access to his children and not for a period of months. This risk was understood and acknowledged by Mr Ross. In his email to Mr Fairbrother sent at 3 am on 15 September 2016, he acknowledged that "taken at face value [Mr Tolliday's] comments seem to support the Crown".

(b) Ms Honore could not recall any children living with Mr Ross. Her memory, however, was limited. She did not recall Mr Ross' name, although she remembered that she disliked him. Nothing else that she told Mr Bills would have assisted Mr Ross' defence. Ms Honore did identify one photograph shown to her of children, saying that it had definitely been taken at the state forest settlement.

(c) Ms Whittaker's evidence would have been to the effect that RE was enrolled at another school during the period of the alleged offending. This was not necessarily inconsistent with the Crown case. The names of all three children were on the roll at the local school in the state forest settlement at the relevant times. Any advantage to the defence through being able to show that RE was on the roll at another school at the time would have been undermined by Ms Whittaker's anticipated acknowledgement that it was possible for children to be on the rolls of more than one school, and that being on a roll does not equate with attendance.

[38] In our view, the proposed witnesses could not have materially advanced Mr Ross' defence and there were distinct risks in calling them. There was a risk that both Mr Tolliday and Ms Honore would have given evidence adverse to Mr Ross. While that evidence would have been irrelevant and inadmissible, there was nevertheless the possibility that adverse matters may have been inadvertently mentioned in the course of the trial. That risk was a factor which was properly taken into account by Mr Fairbrother. The proposed witnesses would not have materially advanced Mr Ross' defence, and the fact that they were not called does not establish a miscarriage of justice.

Defence closing

[39] It was also asserted for Mr Ross that Mr Fairbrother failed to adequately put the defence in closing. Mr Phelps referred to the early morning email Mr Ross sent to Mr Fairbrother in advance of his closing address, outlining the matters that he wanted Mr Fairbrother to cover. Mr Phelps said that Mr Fairbrother did not adequately address all matters and that his failure to do so resulted in a miscarriage of justice.

[40] Appellate courts rarely question the advocacy style of trial counsel when errors in closing are alleged.[16] This Court has, however, acknowledged that there are some factors that trial counsel must cover to provide an adequate closing:[17]

> [C]ounsel must always tailor their address to the jury to the circumstances of the case and the evidential issues which arise in it. Therefore, trial counsel in closing is required to highlight the weaknesses and inadequacies of the Crown case and/or to indicate the factors in the defence case which should have precluded the jury from being satisfied of essential ingredients to the requisite standard.

[41] In the present case, Mr Ross wanted Mr Fairbrother to emphasise the contradictions and inconsistencies in the Crown case, and to identify certain matters said to be implausible in the Crown's evidence. Specifically, that it was unlikely the complainants came to stay with him in the state forest settlement and that it was unlikely he had stayed at their South Auckland home overnight without his wife being present.

[42] Mr Fairbrother, in closing, emphasised the defence — namely, that Mr Ross could not have committed the offences as the complainants never stayed with him, nor he at their home in South Auckland. He expressly did not go through all the inconsistencies alleged in the Crown evidence. Rather he said as follows:

> I spent a lot of last night reading through the notes of evidence. They're about 150 odd pages. You'll have them there and I've highlighted lots of passages where there's contradictions, uncertainties and suggestions of collusion between the three … children … and I've considered whether I should pick up my notes and read these passages to you but it would bore you to death, with the greatest respect.

---

16 *E (CA113/2009) v R (No 2)* [2010] NZCA 280 at [28].
17 At [27] (footnotes omitted).

[43] Mr Fairbrother did specifically mention some inconsistencies in the Crown case. By way of example, he referred to inconsistencies in the Crown's evidence as to where the complainants were living before coming to the state forest settlement, and as to whether M had a birthday while staying at the state forest settlement. Further, Mr Fairbrother highlighted that there were inconsistencies in the various accounts of family dynamics and of the location of the forest. He highlighted further inconsistencies between the evidence of both M and R and other Crown witnesses. He argued that the complainants' evidence generally was unreliable, suggesting that the passage of time had affected their memories:

> You know, I could spend hours picking holes in the evidence and I'm not trying to just belittle [R, M or RE] but you ask any person outside of your jury what were you doing as an eight year old? … Ask them some 30 years later and would you act on what they tell you and make a decision of the enormity of this? I suggest not.

And:

> 36 years later we need more than just fragile memory to convict a man such as Mr Ross on charges such as these.

[44] In relation to the South Auckland offending, Mr Fairbrother emphasised that H had stated in evidence that Mr Ross had only gone to the South Auckland address with her, and that B had indicated in an earlier statement that she did not recall Mr Ross ever staying overnight at the South Auckland address. Again, this was a direct challenge to the offending alleged to have occurred at that location.

[45] Mr Fairbrother identified evidence that was missing, and highlighted aspects of the Crown evidence that favoured the defence. For example, he referred to a photograph of R and RE allegedly taken outside Mr Ross' house in the state forest settlement in 1981, which was produced by the Crown in the course of the trial. He noted Mr Ross' evidence that his house did not have steel railings like those shown in the photograph. Mr Fairbrother emphasised that Mr Ross' evidence in this regard was essentially undisputed.

[46] In our judgment, Mr Fairbrother's closing clearly presented the defence case, and clearly highlighted weaknesses in the Crown's case. Mr Fairbrother was not required to close the case with any particular emphasis, or to canvass every detail

Mr Ross wanted him to cover. Nor was Mr Fairbrother required to slavishly follow Mr Ross' instructions on matters of style.[18] Providing the fundamentals were covered, the details of the closing and its style were counsel's prerogative.[19]

[47] We are satisfied that Mr Fairbrother's closing put the appropriate challenge to the Crown's evidence and that Mr Ross' defence was made clear to the jury. Mr Fairbrother's decision not to labour every individual inconsistency was a tactical decision that was reasonable in the context of this trial. It is not otherwise appropriate for us to engage in a minute dissection of the style of Mr Fairbrother's closing.

[48] We reject the ground of appeal alleging trial counsel error and consequent manifest injustice.

Inadequacies in the summing-up

[49] Mr Phelps submitted that there were three inadequacies in the Judge's directions in his summing-up — first, in relation to the warning given under s 122 of the Evidence Act 2006 as to the reliability of Crown witnesses; secondly, in relation to the cross-propensity evidence; and, thirdly, in relation to various changes in dates in the indictment. We deal with each in turn.

Reliability warning

[50] A core concern for Mr Ross was that the passage of time made the trial more difficult for him. In his evidence he explained that he had attempted to find archived records from the New Zealand Forest Service, and from the various schools which the complainants said they had attended, which might have assisted him. He criticised the police for not conducting a thorough investigation following the 1996–1997 complaints, and suggested that some of the locals who could have assisted him have since died. That theme was taken up by Mr Fairbrother. In closing, he emphasised the efforts Mr Ross had gone to to try and prove that the complainants never lived with him, and he noted that the complainants could not produce any school reports or drawings that they brought home from the local school at the state forest settlement.

---

18 *R v Boyd* [2007] NZCA 507 at [16]–[17].

19 *Duncan v R* [2011] NZCA 307 at [27]; and *R v Jeakings* CA231/98, 30 November 1998.

He emphasised that given the passage of time, their evidence was "inherently unreliable". He referred to the complainants' "fragile" memories, and he suggested that more was required to convict Mr Ross of the charges he faced.

[51] The alleged offending occurred some 36 years prior to the trial. Clearly, Judge Rea was required to consider warning the jury of the need for caution in deciding whether to accept the evidence of the complainants and the weight to be given to their evidence.[20] In this regard, the essential question the Judge was required to consider was whether the jury was likely to be materially assisted in its consideration of the evidence by a reminder from him that caution was required in dealing with the evidence.[21] In the circumstances of this case, Judge Rea also needed to consider whether he should make it clear to the jury that it should bear in mind the prejudice to the defence arising from the passage of time.

[52] The premise of s 122, as explained by the Supreme Court in *CT v R*, is that it is "not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence".[22] Instead, in certain circumstances the required warning should have the "imprimatur of the judge".[23] In *CT* the Court was critical of the s 122 warning given there. It observed as follows:

> [55] The direction did not mention at all the effect of time on memory; this despite the deviation between the complainant's evidence on the one hand and her earlier statements on the other. There was no indication of a need for particular concern about the new count of rape despite it (a) having been added to the indictment only at the end of the prosecution case, and (b) being based on an allegation never previously made prior to the complainant's evidence in chief. There was no acknowledgement that the appellant's own memory, and thus his ability to mount an effective defence, may have been compromised by the effluxion of time. And, as well, the Judge did not point out to the jury the other respects in which there may have been prejudice to the defendant relating to changed physical characteristics and dead witnesses. That those risks were seen as insufficiently specific and cogent to warrant a stay did not mean that they were entirely negligible. Depending on the tone of the Judge's voice, the references to being "bound" and obliged by the Evidence Act to give a warning may have conveyed to the jury an impression that the Judge was distancing himself from the substance of the warning. Judges should take personal responsibility for the warning and should thus be careful to avoid giving such an impression.

---

20 Evidence Act 2006, s 122.
21 *B (CA58/2016) v R* [2016] NZCA 432 at [59].
22 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [50].
23 At [50].

[53] If a judge considers a warning is needed, what is required is a warning of the need for caution, an explanation as to why such caution is necessary and identification of the risks.[24] There can, however, be a concern that in certain cases (for example where reliability issues are already very obvious to the jury) the judicial imprimatur can artificially tip the scales against witnesses.[25] That concern was real in this case.

[54] Judge Rea determined that it was appropriate to give a warning to the jury. He did so on two occasions:

(a) In his opening address to the jury, Judge Rea said as follows:

> You have to decide what you believe and how much you believe and it won't have escaped your attention that the allegations here go back a considerable time, to 1980. You will have to bear in mind as you are listening to the evidence that people are dredging up in their memories, things that have gone on a very long time ago as they allege. That you are being asked to focus in September of 2016 on events that have occurred in 1980 or thereabouts. You will have to factor in peoples' memory, whether their memory has played tricks on them over the years. Whether they have become more sure of their positions or less sure of their position as time has gone on. You will have to make all these sort of assessment. I will have more to say about that at the end but it probably appeals to you, just as a matter of common sense, that you are going to have to scrutinise the evidence that you hear from any witness, very closely indeed bearing in mind the length of time ago these allegations arose.

(b) In his summing-up to the jury, Judge Rea said:

> [10] Now I want to say something to you about the length of time that it has taken for this case to come to Court. We do not have in this country what is known as a statute of limitations. In other words, there is not a particular time after which cases cannot come before the Court. So there cannot be any criticism that this has taken as long as it has to come just on a strictly legal point of view. And also criticising authorities or anybody else involved in it for the delays that are inherent in this case, do not actually achieve a great deal from your point of view. *You have to make your decision in relation to these charges based on the evidence that you have heard and that has been given. Please do not guess or speculate or wonder about what might have happened if other evidence had been called; if other people had come forward, if there were other circumstances. You are confronted with making your decision based on the evidence you have here.* However, this evidence is very, very old and there really is a need for caution when you are considering whether you accept the evidence

---

24 At [54].

25 *B (CA58/2016) v R*, above n 21, at [61].

against the defendant in relation to the allegations that are made, simply because of the age of it. And also you need to give caution as to what weight you give the evidence because that is based on the age of the allegations.

[11] You have to determine the case before you, as I said, not based on guesswork or speculation but we simply cannot overlook the fact that this has taken as long as it has to come to fruition. The fact that it is 36 years old does not amount to a defence to Mr Ross if the Crown are able to prove to you that these one or more charges have been established to a level where you are sure. But when you are considering this case, please remember that peoples' memories do let them down. We know that simply from our own experience and that is a common sense thing that you as the jury will be able to bring to your deliberations.

[12] There can be situations as Mr Fairbrother submitted to you, where people for the best will in the world, align themselves with a particular viewpoint because they think they can remember and remembering it in that way is the best way for everyone around them. You need to subject what each of these witnesses has said to a good deal of scrutiny before you are prepared to act on it to the detriment of Mr Ross. Having said that, if, after you consider the evidence you are sure that the charges are proved, you cannot shy away from it on the basis of this is ridiculous, it has taken 36 years. That is not a basis in law or in fact why you would not come to a verdict if there was sufficient evidence for you to do so.

[13] Obviously in situations such as this, it is difficult when people are looking back as they have to here for this length of time, to determine what the position was. It is your job to decide whether the Crown has proved these charges and you have to do it to the level which I am going to explain to you now.

(Emphasis added.)

He also said:

[52] Now as far as Mr Fairbrother is concerned. He has made it very clear to you that Mr Ross has never accepted that these children were there. He says that 36 years on it has made it extraordinary difficult to try and find information to support his position but that right from the outset, when he was first confronted with these allegations, his position has been consistent. That they were not there and he never, ever stayed at [South Auckland] on his own. Mr Fairbrother says to you that no matter how you dress it up, the circumstances around the children and those who had the immediate care of them, was unstable and he extended that to H, who at the time of course was living with Mr Ross. He submitted to you that no matter how you look at it, this was not a normal situation. These children were from pillar to post a good deal of the time and that there is no certainty at all that they were in that area at [the state forest settlement] nor that Mr Ross was at [South Auckland] in the way that the witnesses have said.

> [53] Essentially Mr Fairbrother says to you amongst other things that time can play tricks on the memory. That over the years all participants on the opposite side of this to Mr Ross, may well have convinced themselves that this was what the situation was but in reality it wasn't.
>
> [54] Mr Fairbrother put it neatly to you, in terms of his submission when he said to you, we need more than fragile memory to convict a defendant in this case. …

[55] In the present case, we agree that a s 122 warning was necessary. The complainants and other witnesses had given evidence about Mr Ross' conduct said to have occurred some 36 years prior to trial. Issues of reliability and prejudice were a central plank in the defence case. The issue is whether the warnings given were adequate.

[56] Mr Phelps contended that the warnings were inadequate and asserted that they were not tailored to Mr Ross' case. First, he noted that the Judge did not refer to the fact that potential witnesses for the defence had passed away or to the fact that, if Mr Ross had been prosecuted in 1998 or thereabouts, it would have been easier for witnesses to remember the events in question. Moreover, records, photographs and the like would more likely have been available. Secondly, Mr Phelps argued that the Judge's failure to identify the specific prejudice occasioned by the delay was exacerbated by the italicised part of the summing-up, set out above at [54]. The Judge told the jury to "overlook matters of specific prejudice".

[57] As to the first argument, we consider that the Judge's s 122 warning was deficient. He failed to identify the specific prejudices caused by the delays in this case. The matters noted by Mr Phelps should have been identified. While the Judge summarised the defence case in regard to the frailties of memory of events long past, he did not specifically acknowledge the difficulties and prejudice caused for the defence by the passage of time. In *CT* the majority held that a s 122 direction should extend to identifying prejudice to the defence's ability to challenge Crown evidence, caused by the passage of time.

[58] However, it is not every deficiency in the trial process that will occasion a miscarriage of justice. The Judge's directions should not be seen in isolation. It would have been obvious to the jury that the defence case was prejudiced by the delays,

including the fact that witnesses were no longer available and records had been lost. The jury had heard evidence in this regard from Mr Ross. It had also heard Mr Fairbrother's opening and his closing. Mr Fairbrother emphasised in both that Mr Ross had been disadvantaged in his attempts to gather evidence in support of his case by the passage of time. The Judge, in turn, appropriately emphasised the need for caution and the effect time can have on memory on a number of occasions. He also summarised the defence's case that their ability to challenge the evidence was prejudiced. While he should have gone further to add his own caution that the jury should take into account the specific claimed impact on the defence's ability to challenge the evidence, in the context of a trial where so much of the focus was upon this issue, we are satisfied the jury had it clearly in mind.

[59] As to the second argument, the impact of the portion of the summing-up we have italicised, this was a conventional direction. In the course of his closing address Mr Fairbrother also acknowledged that "you cannot reach a verdict on evidence that isn't here". We do not consider the direction can be read as a direction to ignore the difficulty for the defence in challenging the accuracy of events recounted 36 years on. To speculate on the evidence that others might have given if they had been available or had been called would have been improper, and in context the Judge was saying no more than that.

[60] Accordingly, viewed in the context of the trial, the deficiency in Judge Rea's s 122 direction did not create any risk of a miscarriage of justice; the jury would have well understood the need for and reasons for caution when approaching the evidence of Crown witnesses.

[61] In case we are wrong in this conclusion, we record our view that this is an appropriate case to apply the proviso found in s 385(1) of the Crimes Act. The proviso enables this Court to dismiss Mr Ross' appeal against conviction if we are sure of his guilt, even if a point raised has been determined in his favour. We note the following.

[62] All of the complainants' accounts of the offending were unshaken on cross-examination. Mr Ross' defence was not that the complainants had made up the offending. Rather, his defence was that they were mistaken that he was the offender,

and in particular that they had stayed with him in the forest settlement. As to that we record:

(a) Both of the complainants and RE identified Mr Ross.

(b) The complainants and RE had memories of living in the state forest settlement with H and Mr Ross.

(c) H recalled the complainants and RE staying with her and Mr Ross when they were children.

(d) Both complainants and RE remembered, to a greater or lesser degree, attending a local school while staying at the state forest settlement.

(e) The prosecution produced records showing that the complainants and RE were enrolled at the school near the state forest settlement by a Mr Ross. The jury had before it evidence that enrolment did not necessarily equate with attendance, and that was a matter for them to weigh.

(f) The prosecution produced a photo of a house which each of the complainants and RE identified as being Mr Ross' house in the state forest settlement. The complainants were in the photo.

(g) In relation to the incident at South Auckland, R gave evidence of Mr Ross' visit.

(h) B (R's mother) remembered Mr Ross coming to stay in the house. She said that she had worked on night duty and that she had come home to find Mr Ross in the house.

(i) RE also remembered Mr Ross visiting the house.

(j) M and R complained to the police in 1996–1997, when the events were rather more recent than they were when the matter proceeded to trial, for a second time, in 2016.

[63] In our judgment it was a strong Crown case, notwithstanding the passage of time. It is, as the Judge identified, speculative what other witnesses who may have been available but for the passage of time might have said, and it is noteworthy that those potential witnesses whom the private investigator was able to track down did not unequivocally support Mr Ross' denials that the children stayed with him. Indeed, as noted above, the defence made the tactical decision not to call those persons as witnesses.

Propensity directions

[64] The prosecutor at trial invited the jury to use the evidence of each of the complainants to support the allegations made by the other, putting it to the jury that there were similarities in the circumstances of the sexual offending alleged by each and that the evidence of both showed a pattern of conduct by Mr Ross. The defence on the other hand contended that there was no pattern of conduct, and that the two complainants had discussed the matter with each other and colluded in making their representative allegations.

[65] Mr Phelps submitted that Judge Rea's directions as to propensity were deficient because they did not adequately put to the jury the defence contentions regarding the alleged pattern of behaviour.

[66] The leading discussion on propensity evidence directions is the minority judgment of McGrath and William Young JJ in *Mahomed v R*.[26] William Young J, writing for both, held that when giving a propensity evidence direction, the judge should:[27]

(a) *Identify the evidence in question and explain why it has been led and the legitimate respects in which it might be taken into account by the jury.* We see no need for the judge to define "propensity" … . In cases in

[26] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
[27] At [95].

> which a demonstrated propensity could legitimately be a stepping stone in the reasoning process of the jury, that should be identified using concrete language addressed not to "propensity" as an abstract concept, but rather specifically to the particular pattern of behaviour or thinking which is in issue. In most cases, the legitimate reasoning available to the jury will be based around coincidence or probability. That should be explained to the jury in simple and direct language addressed to the particular facts and what is said to be the implausible coincidence or how the evidence otherwise bears on the probability of the defendant being guilty. This is likely to require a discussion of the similarities involved in the conduct alleged. Where there are factors which may explain the postulated coincidence (for example, suggested collusion between the witnesses) that too should be addressed. We see no need for the judge to otherwise go through the s 43(3) criteria ... . These criteria are addressed to the admissibility decision the judge must make and not the factual assessment which is for the jury.
>
> (b) *Put the competing contentions of the parties.*
>
> (c) *Caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence.* This should usually be along the lines that the fact that the defendant has or may have offended on other occasions does not establish guilt and that the only legitimate reasoning process available to the jury is the one which has been outlined.

The minority emphasised there is no single template that will fit every trial.[28] Each direction must be tailored to meet the needs of the case.

[67] In the present case, Judge Rea gave the following directions as to the propensity evidence:

> [38] Now in this case Mr Ross faces allegations from two separate complainants and each of them has given you an account of what they say happened to them. Now as I have said to you, each of these charges has to be looked at separately and you are required to give a separate verdict in relation to each of the charges. However in this case the Crown submits to you that there are similarities or patterns of conduct between the allegations made by each of the complainants and as such you are entitled to take into account the evidence of what one of them says to support what the other says, and vice versa. To say to yourselves that they mutually support one another and therefore we can take that into account in deciding whether in face these allegations are true.
>
> [39] The Crown submits that because of this it makes it more likely that the defendant has committed any one of these offences that he is charged with. The Crown says to you that the evidence of each of the complainants shows that the defendant has a tendency to act in a particular way and in this case, Mrs Reilly has said to you that the particular way is to sexually abuse young

---

28 At [94].

> females who are in his temporary care in similar sorts of ways as you have heard alleged by each of the witnesses.
>
> [40] If you agree that there are similarities and that they show a pattern of conduct by Mr Ross, then you are entitled to use the evidence of one complainant to support the evidence of the other. You may take the evidence relating to any charges fitting within the pattern, into account, in relation to all of the other charges that come within the pattern. If you find that these similarities or this pattern of conduct are present, then you are entitled to give it such weight as you consider is appropriate in the circumstances. If on examining the evidence, you do not find the similarities or pattern of conduct that the Crown alleges, then there is no linkage between the charges and you must then go about looking at each charge separately without using the evidence of any other charge or any other complainant to support that charge. It is the Crown's case here that based on the defendant's proven pattern of conduct, he is either guilty of these charges or he is the victim of an implausible coincidence, namely that he has been falsely accused in such a similar way by two different complainants. Putting it another way, the Crown says to you that the defence case here rests on the unlikely coincidence that of all the people a particular complainant chooses to make a false complaint about, she has chosen a person who someone else alleges acted in the same way towards her.
>
> [41] Now where the complainants are known to one another, as they are here, or have had contact with one another, Judges always warn juries to be careful about the possibility that they got their heads together to make up a false story against the defendant. Now that was not directly put in that way to either of the complainants, that they had got together and cooked up stories so that they could get Mr Ross into trouble but you have to look, not only at the length of time ago it was but the context in which they were living, to see whether you can rule out the possibility that that is what might have been what has happened here. And that would go right across all of the family members. Is it another situation where somebody has tried to dovetail their own experiences to support a family member against Mr Ross in these circumstances. Remember that in the end you do need to look at each charge separately. Do not reason that just because you find he may have done bad things, he must be guilty of the charge you are considering.

[68] In our judgment, the propensity direction given by Judge Rea was appropriate. The Judge explained in simple terms the concept that the evidence as to one set of charges could be used to support the evidence on the other charges, if it was found that there were similarities or a pattern between the representative sets of charges. He did not attempt to define propensity in the abstract or to go through the factors in s 43 of the Evidence Act. Rather, he explained what the jury were to do if they found that there was no linkage or pattern — they were to look separately at each charge without using the evidence on any other charge for support. He set out the Crown assertions of similarity and then warned against the possibility of collusion between witnesses,

which was the defence contention. Finally, the Judge warned against illegitimate reasoning processes involving propensity evidence.

[69] We do not consider that the Judge was required to go further, or that any miscarriage of justice arises from the Judge's propensity direction.

Indictment dates

[70] Finally, Mr Phelps contends that the Judge gave an unfair direction in respect of the various changes made to dates in the indictment.

[71] Mr Phelps pointed out that the indictment had been amended on various occasions. The Crown case at the first trial was that the offending at the state forest settlement occurred between 1 May 1980 and 30 September 1980. The offending in South Auckland was said to have occurred between 1 September 1980 and 30 June 1981. At the conclusion of the evidence in the first trial, the indictment was amended. The offending in South Auckland was alleged to have occurred from 11 September 1980 to 30 June 1981. Following the successful appeal against conviction, the Crown again sought to amend the dates in the indictment. In a pre-trial ruling, Judge Rea granted an amendment which saw the date range of the five counts said to have been committed at the state forest settlement amended to between 1 July 1980 and 8 October 1980, and the date range of the remaining counts alleging the offending in South Auckland, amended to between 8 October 1980 and 31 December 1980.[29] At the conclusion of the Crown case, the prosecutor sought a further amendment in respect of the South Auckland charges. Judge Rea initially reserved his position but, at the conclusion of the evidence, the indictment was amended in respect of the two South Auckland counts to between 8 October 1980 and 31 March 1981.

[72] The defence at trial contended that these changes reflected adversely on the Crown case. Mr Fairbrother in closing referred to the various changes and the shifting nature of the allegations against Mr Ross as a whole, including the fact that the initial charge of rape was amended to a charge of attempted rape.

---

[29] *R v Ross* [2016] NZDC 1323.

[73] In his summing-up, Judge Rea said as follows:

> [28] Now I just want to say something to you before I deal with that, about these dates. Mr Fairbrother said something about those and you will take on board what he had to say about the changes. I want to tell you this. That if you were sure that this activity occurred at the locations alleged, any of it. It would not matter what the dates were; it would not matter if they got the dates wrong. If you are sure it happened, the dates do not actually matter. It is not a defence, for example, to say yes well I did not do this on the 31 December which covers the charge but I did do it on 2 January. That would not be a defence. So do not get hung up about that.

[74] We do not consider this direction was inappropriate for the following reasons:

(a) Ordinarily, a date specified in an indictment will not be an essential element, and it will be open to a jury to convict in relation to a different date whether or not an amendment to the indictment has been sought. Dates are only essential if, for example, issues of limitation arise or there are changes in the law, which could result in a miscarriage of justice.[30] No such circumstances applied in this case.

(b) While it was open to the defence to rely on the changes of dates as evidencing uncertainties in the Crown case, we do not consider that the point can be taken further than that. The defence was that the complainants never lived with Mr Ross at the state forest settlement, and that Mr Ross was never alone with the complainant, R, at the address in South Auckland. The defence was that the offending could not have occurred at all, not that the offending could only have occurred on particular dates.

(c) The latest changes to the dates in the indictment were made by consent.[31] Mr Fairbrother accepted that there was no prejudice to Mr Ross in amending the dates.

---

30 Simon France (ed) *Adams on Criminal Law — Criminal Procedure Volume 1* (looseleaf ed, Thomson Reuters) at [CPA17.06]; and *K (CA665/2014) v R* [2015] NZCA 566.

31 Ruling 4, above n 6.

[75] In our judgment, the trial Judge's direction to the jury that the precise dates set out in the charges did not matter was orthodox and appropriate. The jury was not directed to ignore Mr Fairbrother's closing regarding the date changes. Rather, they were told to "take on board what he had to say". Judge Rea did not err by directing the jury that, if they were sure the offending occurred at the locations alleged, the dates did not matter.

Result

[76] We do not consider either of the grounds of appeal are made out. In our judgment there were no errors by trial counsel, nor any inadequacies in the trial Judge's summing-up, which could have resulted in a miscarriage of justice.

[77] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent