IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CRI-2017-425-000016
[2017] NZHC 2628

BETWEEN	PATRICK MAURICE O'SULLIVAN Appellant
AND	THE QUEEN Respondent

Hearing:	14 August 2017
	Additional Submissions Applicant: 22 August 2017 Crown: 6 September 2017 Applicant Reply: 19 September 2017
Appearances:	Appellant in person I R Murray for Respondent
Judgment:	26 October 2017

JUDGMENT OF DUNNINGHAM J

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[1] On 23 February 2017, the appellant was convicted in the District Court on one charge of doing an indecent act on a child under 12 years and on one charge of doing an indecent act on a person under 16 years.[1] He was subsequently sentenced to 11 months imprisonment.[2] He now appeals both his conviction and sentence.

1 *R v O'Sullivan* [2016] NZDC 25428.
2 *R v O'Sullivan* [2017] NZDC 8184.

Background to the conviction

[2] The appellant and the victims lived in a small Southland community. The appellant was in his sixties. At the time of the offending, victim X was aged about 11 or 12, and victim Y was aged six. X's mother lived around the corner from the appellant. She was in a relationship with Y's father. The two girls, X and Y, and their respective sisters would often spend time at the appellant's house.

[3] The offence against X, the older victim, occurred when X was watching a movie with the appellant. He was wearing a robe with no underwear, so his genitals were at least partially exposed. He put his hand down X's pants and began rubbing her bottom. While doing this he began rubbing his penis and masturbating. This went on for about five minutes. X told the appellant she had to go home and he stopped.

[4] The offence against Y occurred sometime later. She was at the appellant's house playing cards with him. The appellant asked her to massage his shoulders and then to massage his leg and foot both before and after he had a shower. After the second massage, he told her to lift up her top. At this point she was uncomfortable and left. She arrived home upset, told her father what happened. Approximately a week later the police were involved and both girls disclosed the offending in interviews which were recorded on DVD.

[5] For completeness, although X says she told her mother what happened on the day of the offending, she later recanted her allegations, saying she might have been mistaken. She then confirmed in evidence that her recantation was false.

District Court decision

[6] The hearing in the District Court commenced in late 2016. The case was adjourned, part-heard, to 23 January 2017 when the appellant was recalled to give further evidence and the evidence of another witness for the defence was heard.

[7] The Judge then reserved her decision, which was produced after receiving written closing submissions. In it, she identified the issues in dispute and then carefully and fully laid out all of the evidence from the witnesses. This included the evidence given in video statements the victims made to the police, the appellant's video interview and the evidence given in Court by the victims, other family members and the appellant. After comparing the competing narratives as to what had occurred, the Judge found the victims' accounts of the alleged offending were credible and the appellant's was not.

[8] In relation to the allegations involving X, the Judge rejected the suggestion by the appellant that the witnesses had colluded and, while acknowledging that some aspects of X's evidence had varied over time (for example, how often she claimed to have seen the appellant's genitals), she considered these were matters of detail which were not relevant to the offence. In the end, and after hearing the appellant give evidence, the Judge said she found X's evidence "compelling". In contrast, although acknowledging there was no burden on him to prove anything, she found aspects of the appellant's evidence "less believable".

[9] In respect of the younger victim, Y, the Judge again rejected the suggestion that there had been collusion which had influenced her evidence. While she identified some inconsistencies between Y's earlier account and the account she gave in evidence (for example, as to what the appellant was wearing, and when the incident occurred in relation to her birthday), the Judge again considered these were peripheral details that were not important to establishing the elements of the charge. She also did not find the appellant's evidence in Court to be particularly compelling, saying he "seems to be trying to reconstruct what might have happened based on his habits".

[10] The Judge discussed the evidence relating to the allegation that Y was asked to lift her top, and whether she might have confused this with the appellant's suggestion that she should pick up the top that she had previously placed on the table while a game of cards was being played. However, the Judge held the appellant's version appeared to be "an attempt after the event to try and explain why Y may have said what she did". Instead she accepted the explanation given in the video interview that she had run home and told her dad because the appellant had "told me to lift my top

up". While the appellant contended that Y was upset because she had been caught cheating at cards, it seemed to the Judge inherently unlikely that this would have provoked Y's father to make up the allegations and use Y as a vehicle for them, or that Y would invent the allegation to cover her distress at being caught cheating at cards.

[11] In the end, the Judge was sure that the appellant had asked Y to massage his lower leg and foot because "of the clear and detailed way that Y described how the defendant was lying, the position of his body and his legs and feet while she was massaging him". She also concluded that, while the massaging alone was not indecent, a request was also made to Y to lift up her top, and it was this combination of events which made it an indecent act.

[12] The Judge therefore found both offences had been proved beyond reasonable doubt.

Principles on appeal

Appeal against conviction

[13] Section 232 Criminal Procedure Act 2011 provides that the Court may only allow this appeal if satisfied that "a miscarriage of justice has occurred". A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[3]

[14] Section 232 makes clear that not every error or irregularity causes a miscarriage of justice. Instead there must be a "real risk" that the outcome was affected. *R v Sungsuwan* defines a "real risk" as "a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong."[4]

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3 Section 232(4).

4 *R v Sungsuwan* [2006] 1 NZLR 730 (SC) at [110] per Tipping J.

[15] *R v Condon* held that a mere departure from good practice does not render a trial unfair.[5] Instead the errors or irregularities must depart from good practice in a manner "so gross, or so persistent, or so prejudicial, or so irremediable" that the court must quash the decision.[6]

[16] The appeal proceeds by way of rehearing, and the court on appeal must examine the Judge's reasoning carefully and come to its own decision on the facts.[7] However, it is generally only in exceptional circumstances that a court on appeal will interfere with the trial Judge's findings of fact.[8]

Appeal against sentence

[17] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011, and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence *and* that a different sentence should be imposed.[9] It is only appropriate for this court to intervene and substitute its own views if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[10]

Grounds of appeal

[18] The appeal was initially lodged by the appellant's solicitor. The grounds of appeal, in summary, were as follows:

(a) in relation to complainant Y;[11]

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5 *Condon v R* [2006] NZSC at [78].
6 *Randall v R* [2002] 1 WLR 2237 (PC) at [28] per Lord Bingham, cited with approval by the Supreme Court in *Condon v R* at [78].
7 *R v Slavich* [2009] NZCA 188.
8 *Rae v Police* HC Hamilton CRI-2006-419-162 at [38].
9 Criminal Procedure Act 2011, ss 250(2) and 250(3).
10 *Ripia v R* [2011] NZCA 101 at [15].
11 The appeal document reversed the references to "X" and "Y" but I am satisfied the grounds related to each complainant as set out in [18] above.

(i) that the Judge erred in finding a non-indecent massage, combined with a discrete request (not in itself an "act") sufficient to constitute an indecent act;

(ii) the Judge failed to deal adequately with the possibility of a misunderstanding as between defendant and complainant;

(b) in respect of complainant X;

(i) the Judge was incorrect on the timing issue and the prosecution did not prove that the offending occurred within the time specified in the charging document;

(ii) the Judge failed to deal correctly with the significance of the dinner agreed upon between the witnesses and linked to the birthday of the complainant;

(iii) the Judge's findings as to credibility were open to question; and

(iv) the Judge did not deal with the issue of the photographs of the defendant in a correct way.

[19] In respect of sentencing, the grounds of appeal are that:

(a) the sentence in relation to complainant X was manifestly excessive;

(b) the sentence in relation to complainant Y was unreasonable and manifestly excessive; and

(c) in totality, the combined sentence was manifestly excessive and unreasonable.

[20] After the appeal was lodged the appellant parted company with his solicitor and filed an application for leave to amend the grounds of appeal. A further ground of appeal was raised claiming counsel error. In a lengthy supporting memorandum the appellant explained that this was not a challenge to counsel's competence, but rather "a difference in the appellant's views of approach to the case". The appellant went on to say that this meant:

(a) counsel omitted to do certain things the appellant thought should have been done when running his case;

(b) the effect of the omissions was "significant", and

(c) consequently, there was a real risk that the outcome of the case could have been affected.

[21] The appellant's key complaints about the conduct of the case by counsel are that:

(a) he mishandled the argument about the exchange over Y's top, saying he did not question Y on the "phonetic misunderstanding" between the appellant pointing out that she had "left her top" rather than asking her to "lift her top";

(b) exhibits relating to the timing of X's complaint were not produced and should have been;

(c) the issue of collusion between the complainants, and with Y's father who was hostile to the appellant, which would have affected X's credibility, was not properly handled by counsel; and

(d) he failed to properly challenge X on whether the event actually occurred at all.

Further evidence and submissions

[22] Accompanying the appellant's memorandum and his submissions were 22 documents which he sought to introduce into evidence, many of which he said counsel was instructed to produce at the hearing but which his lawyer had relegated to a "not useful" pile. Thus, a preliminary issue I must consider in this appeal is whether it is appropriate to admit this further evidence on appeal. It seems to me inevitable that they should be admitted on appeal in order to consider the allegation of counsel error and whether that allegation can be dealt with without a waiver of privilege. Accordingly, those documents are admitted as evidence on appeal.

[23] Some further complications arose at the hearing of the appeal. The appellant had not received the Crown's submissions until the day of the hearing, so had not had time to digest them and the authorities provided in support. Consequently, I made directions which allowed for a further exchange of submissions from the parties.

Appellant's submissions

Preliminary observations

[24] The appellant's submissions were voluminous. The primary submissions comprised 67 pages. The memorandum seeking to enlarge his grounds of appeal also contained 17 pages of comprehensive submissions on the allegations of counsel error. The appellant then availed himself of the opportunity to file further submissions following the hearing. Although this was only intended to address points in rebuttal of the Crown submissions because he had not received them until the day of the hearing, a further 59 pages of submissions were filed, along with additional documents and authorities.

[25] I observe, at the outset, that the appellant's submissions were repetitive and verbose. This is not made as a criticism of the appellant, who clearly is an intelligent and perceptive man. However, it is relevant to the allegations of counsel error where the appellant's primary complaint is that his lawyer did not traverse all the background detail and produce all evidence that the appellant thought relevant to his defence.

[26] This complaint was summarised in the appellant's memorandum dated 10 July 2017 under the heading "Different Perspectives", where he said:

> [14] Counsel could reasonably contend that the Solicitor/Client relationship was damaged by the appellant's stream of analysis and commentary on the probative relevance of detail. Counsel is of the "find the significant points and hammer them" school. Given the antithetical position of the appellant to those of the complainants, the "he said – she said" nature of the contentions were unlikely to be resolved by an atomised search for substance in discrete events, the more so as both cases of X and Y were packaged in a respectively nebulous fabric of interconnectivity of circumstance and event.
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> [15] Both complainants presented densely pixelated narratives of co-dependent circumstance or event in a nexus rendered incoherent if decontextualized. The appellant did no [sic] so much resist the narrowness of front of counsel's resistance to the depth probe and the calibration of circumstantial linkages required to prevail on that front…
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> …
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> [17] …counsel did not really see or pursue the "probe in depth" philosophy requisite to the issues…

[27] Having read the appellant's submissions, they suffered from an inability to discriminate between materials that were of utility to his defence (or, in this case, his appeal), and those materials which tended to obscure, rather than emphasise, the key points he wished to make. It is evident from the further documents I have reviewed that his trial lawyer was faced with the same issues. He received a surfeit of detailed instructions from the appellant and was having to exercise judgment as to which parts of the material he was provided with would usefully advance the appellant's defence and which would not.

[28] Having seen a sample of the appellant's communications with his lawyer, I am satisfied that responsible counsel would have encouraged the appellant to be selective and focus on those matters which would genuinely advance his defence. Of course, whether those decisions were in fact appropriate, and did not risk a miscarriage of justice, are still to be considered in the discussion below.

Appeal against conviction – alleged offending against Y

[29] The appellant submits that the Judge incorrectly understood and applied the legal test for indecency. He submits that relying on the combination of the massage

and the subsequent request to lift Y's top, to establish an indecent act was inconsistent with the principles espoused in *R v Court*[12] on the application of the subjective indecency test, and with those in *Y v R*[13] on the application of the objective capability test.

[30] He also challenges the factual finding on the issue of whether he did in fact ask her to lift her top, saying that counsel failed to put the possible phonetic misunderstanding to Y between a statement that she "left" her top on the table and what she thought he said which was to "lift her top".

[31] The appellant also submits that the Judge was wrong to have found Y's evidence more convincing than the appellant's, given her equivocal statements and her changing narrative of events. The Court therefore could not simply dismiss his account which was, in essence, that she was caught cheating at cards and she was embarrassed by this so she left in a hurry and he had to remind her that she had left her jersey on the table. The subsequent explanation that she gave of why she was distressed was in fact motivated by her father's "animus" against the appellant and suggestibility from X.

Appeal against conviction – alleged offending against X

[32] The appellant submits that the alleged offences could not have occurred in the time frame alleged of 12 July 2010 to 11 July 2012. He supports this by X's references to the weather and to the date of her older sister's birthday as being more in keeping with the event occurring in November 2012 than in the middle of that year.

[33] The appellant also submits that X's evidence was not credible, given that she made claims that she later resiled from, such as the frequency of the appellant wearing a robe that exposed his genitals. He considers there were a number of "contextual details" where she was unreliable and this had probative value to the enquiry but was not fully put to her or explored in cross-examination. He further submits that X's

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12 *R v Court* [1988] 2 All ER 221.
13 *Y (SC 40/2013) v R* [2014] NZSC 34.

evidence about the appellant's penis and what occurred with it during the alleged offending is not consistent with him masturbating.

[34] The appellant's last key submission is that the Judge was wrong to devalue the claim of collusion between the complainants. There was "alignment" of their evidence on various matters, such as whether they always knocked before entering his house. Furthermore, he suggested the "animus" of Y's father was the "possible driver of her allegation", saying "some third party influence was palpable" and had affected both girls' evidence.

Appeal against sentence

[35] The appellant submits that his sentence was too high when compared to other cases given that his offending was at the lower end of the spectrum.[14] He submits that a more appropriate sentence would be one of eight months' imprisonment, given the totality of the offending.

Respondent's submissions

[36] The respondent submits that:

(a) There is no risk that the conduct of trial counsel that the appellant complains about could have led to a miscarriage of justice;

(b) The Judge's conclusion about the period of the offence against X was available on the evidence and, regardless, the date of the offence is not an element of the offence so the Crown was not required to prove it;

(c) Despite inconsistencies in, and other areas of criticism of X's evidence, none were fatal to her credibility and the Judge was entitled to accept her evidence and find the charge proven;

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[14] Referencing a number of cases including *R v Olliver* [2016] NZHC 2547; *R v Eraki* CA73/08, 1 April 2003 and *R v H* CA221/05, 17 October 2005.

(d) The Judge did not err in finding that the offending against Y was proven;

(e) The Judge was entitled to conclude that the actions described by Y were indecent and occurred on or with the appellant; and

(f) The cumulative sentence imposed for these charges was not manifestly excessive.

Counsel error

[37] The appellant spent considerable time in his submissions explaining why he considered there was counsel error which was sufficiently serious to pose a real risk that it could have affected the outcome of the trial. Both parties referred to the Supreme Court's discussion in *R v Sungsuwan,* as to when counsel error would warrant an appeal against conviction being allowed.[15] In that case it was said:

> [70] In summary, while 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 a 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.

[38] The appellant argues that the failure by counsel to produce certain documents in evidence, or to put certain matters to the witnesses which he says should have been put to them, meant the Crown's case of when and how these incidents occurred was not fully tested, nor was the credibility of the witnesses adequately challenged.

[39] The respondent, however, submits that the process in r 8.7 of the Criminal Procedure Rules 2012, which should ordinarily be followed when counsel error is alleged, has not been followed. This provides that where it is alleged that a miscarriage

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15 *R v Sungsuwan* [2005] NZSC 57 at [69]-[70].

of justice is alleged because of the conduct of the appellant's lawyer at trial, the appellant must:

(a) not later than 30 working days after filing the notice of appeal file and serve on the prosecutor any affidavits that relate to the ground of appeal;[16] and then

(b) if the appellant wishes to waive privilege between the appellant and the trial lawyer, the appellant must, not later than 30 working days after filing the notice of appeal, provide to the prosecutor a waiver of privilege in respect of all communications of that kind[17]

[40] No such waiver has been provided and the respondent's position is that, in the absence of evidence disclosing those communications, the Court cannot get to the bottom of the dispute between the appellant and his counsel. It must therefore assume that reasonable tactical decisions were done on instructions. It is only if the decisions made were objectively unreasonable that the Court could intervene. In any event, the Crown contends that the matter can be resolved on the evidence available as none of the matters raised could reasonably have affected the outcome so, on the face of the evidence as it stands, no miscarriage of justice arose.

[41] The appellant agreed that there was no need to defer the hearing and I should proceed on the basis of the materials before me.

[42] Having considered these submissions, I have decided not to defer the hearing to allow affidavit evidence from the appellant and provision of a waiver so that the appellant's trial lawyer could respond. The onus was on the appellant to provide probative evidence of counsel error and not simply to make submissions to this effect which could not be responded to by counsel.[18] I therefore deal with each allegation of trial lawyer error by considering whether, on the material before me, counsel's actions were objectively unreasonable and likely to have affected the outcome, leading to a miscarriage of justice.

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16 Rule 8.7(2).
17 Rule 8.7(6).
18 As the appellant himself notes "submission is not evidence".

"Lift" or "left"

[43] The first allegation is that counsel did not cross-examine Y on whether she misheard the appellant telling her that she had "left her top" (referring to a jersey she had taken off and placed on a table), and instead mistakenly thought that he had asked her to "lift her top". He is critical of counsel putting this to her as confusion between the alleged request to lift her top, and an instruction to "pick up her top" as she left. He said this did not address the potential phonetic confusion between the words "lift" and "left".

[44] The appellant said that in his evidential interview the word "pull" was used, rather than the word "lift", so he did not become aware of the actual words alleged until closer to trial. This presumably is to explain why he did not advance the phonetic misunderstanding explanation in his original interview. However, the transcript of his interview records that he was told that Y said he had asked her to "lift her top up". Indeed, that is the language he adopts in the interview, saying "they're wrong about the lifting the top".

[45] He is then critical of his lawyer for not following his instruction to explore the "lift/left" confusion in cross-examination, pointing to a Post-it note found in his lawyer's file which records the words "lift or left" and to a page of comments given to his lawyer where the appellant states that he would have said "you left your top", not "pick up" or "lift".

[46] However, it is not clear when the alleged instruction to explore the phonetic confusion between "lift" and "left" was given. From reviewing the documents provided, it appears likely to have been in the adjournment over the Christmas break after Y had given evidence and been cross-examined. I say this because the appellant picks up on the language used in cross-examination, saying he would have said "left", not "pick up" or "lift". Without evidence as to when the appellant raised this possible explanation, and without a waiver being given so his lawyer could comment on when it was raised and whether it was too late to put to Y, I am not prepared to conclude that this was a failure by his lawyer to follow an instruction.

[47] On the same issue, the appellant is also critical of his lawyer for not producing exhibit "G" which was an earlier email to X, saying that she had left her jacket at his place. The appellant considers this email to be probative evidence on the issue as to whether Y was asked to lift her top. It is not.

[48] The appellant appears to be suggesting it demonstrates a propensity by the girls to leave articles of clothing behind, and a propensity by him to as the word "left" in reference to such clothing. However, Y acknowledged that she had put her jersey on the table, so the fact she had left an item of clothing there was not in dispute. The issue was whether the alleged statement was a reference to the top she had taken off and left on the table, or the top that she was wearing. The fact he has referred to a jacket being "left" by another child, on another occasion, is not probative evidence as to what occurred on this occasion, as there is nothing surprising or distinctive in the appellant's use of the word "left" in that context. Counsel's decision not to produce exhibit 'G' was therefore entirely appropriate as it was simply not relevant. In any event, the possibility of a misunderstanding was clearly explored with X and her answers make it clear she understood the request to be a reference to the top she was wearing, not a separate garment that she was not wearing.

[49] In conclusion, I am not satisfied that the possibility of a phonetic misunderstanding was raised by the appellant until late in the hearing process, possibly even only before the filing of closing submissions, consistent with this being an example of what the Judge described as an "after the event" reconstruction.[19] In any event, the possibility of there being a misunderstanding between a reference to the jersey on the table or the top she was wearing, was clearly put to Y and repeatedly rejected by her because she believed he was talking about the top she was wearing. I therefore do not consider this could reasonably have led to a different verdict and there was no real risk of a miscarriage of justice.

Failure to test complainant X's credibility adequately

[50] The appellant's successive submissions develop a range of complaints about counsel's failure to do more to undermine the credibility of the complainants including

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19 At [130] and [132].

the risk of collusion between X and Y, or suggestibility by Y's father. By way of example, he is critical that a short section of the DVD interview was redacted to remove a comment by X that Y's father told her that the appellant had told Y to lift her top. Similarly, a document referred to by the appellant as exhibit Q, which was the record of an interview X had with social workers, was, according to him "documentary evidence of ongoing exchanges about the case between X and Y". In it X confirms that Y told her about being asked to pull her top up. He also considers that if exhibit Q had been produced in evidence it would have fortified the assertion there was collusion between the girls. It would also have discredited the allegation of "drunkenness" made about him because in it X described his drinking in benign terms, saying it was "a couple of times at dinner with friends, he talks a lot and laughs". He also considers some other light-hearted email communications with X, which occurred in 2013, should have been produced as they demonstrate "post incident engagement" with him which is inconsistent with her subsequent victim impact statement.

[51] However, I do not have evidence of exactly what instructions were given to counsel about production of these (and other) documents, when they were given, or what decisions were made in the end, having regard to issues of admissibility, relevance and probative value. Furthermore, I consider there are obvious reasons why the documents may not have been produced by counsel. For example, the admission of exhibit Q was likely excluded under the provisions of s 35(1) Evidence Act 2006, in that it is a statement where X reiterates the allegations that the appellant was touching her on the buttocks and masturbating. Similarly, the redaction from Y's DVD interview was, as the Crown submits, likely to have been removed as it was inadmissible hearsay.

[52] I am satisfied that where the appellant is critical of counsel for not producing these further documents as evidence in the hearing (or conceding to the redaction in the DVD interview), there is, even in the absence of an explanation from the trial lawyer, an objectively reasonable basis for the document not being produced, and I am not satisfied it indicates counsel error. Furthermore, I consider the appellant overstates the impact of these documents on the issue of collusion. The Judge was already aware of the allegations of collusion between X and Y and of suggestibility by Y's father,

and considered it closely. Given the family lived together the Judge accepted there was an opportunity for collusion, but concluded that it was not made out.[20]

[53] Nothing the appellant points to would have elevated the evidence beyond the possibility of collusion which was already acknowledged by the Judge. Unless there was evidence of actual collusion, it could not take the issue beyond speculation. Such speculation was rejected by the Judge on the basis of the inherent credibility of the accounts of the offending itself and the fact that, for example, Y did not give a version of events that was consistent with her father's, but rather her own evidence differed from his, both at her evidential interview and at Court.

[54] The appellant also submits that counsel did not adequately cross-examine X and failed to put to her various inconsistencies in her evidence. These included her "improbable assertions" about him wearing a robe during the day, whether he was drunk or not and around how she could see the alleged masturbation.

[55] However, as the Court of Appeal said in *R v Pointon*, "the effective conduct of a client's case would be impossible if he had to be consulted at every turn during preparation and the trial itself".[21] Counsel is entitled to exercise some judgment on matters such as the approval to cross-examine.

[56] In this case the complaint is more about the strength and detail of cross-examination rather than a fundamental failure to challenge X's credibility. It is clear from the transcript that counsel did cross-examine on a wide range of issues relating to her credibility, including the issues the appellant raised. The Judge was clearly aware of the inconsistencies in X's accounts. She was aware that X's narrative of the events differed between interviews and her evidence varied, or was vague, on a number of contextual matters such as the issue of when the event occurred which has already been discussed above. X's credibility formed a significant part of counsel's closing submissions and it is difficult to see that counsel could have done more to highlight these matters without venturing into repetition or irrelevancy. Indeed the issue of whether X's unreliability in recalling various matters dented her credibility on

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20 At [134]-[136].
21 *R v Pointon* [1985] 1 NZLR 109 (CA) at 112.

the key events which led to the charge, was clearly acknowledged by the Judge in her decision.[22]

[57] For all these reasons I do not consider there was a real risk that even if there had been counsel error on this count, that it would have been likely to lead to a different outcome. There was, therefore, no miscarriage of justice on this issue.

Period of offending against X

[58] The appellant was originally charged with doing an indecent act against a young person between the dates of 1 September 2011 and 29 February 2012. Those dates were amended, without opposition, to the offending taking place between 12 July 2010 and 11 July 2012 to encompass X's allegation that the offending occurred when she was 11 or 12. The appellant therefore argues that the date range is a "material element" of the offence and, if there is doubt as to whether it occurred between those two dates, then the charge is not proved.

[59] He says the reliable evidence places the events which gave rise to the charges in 2012 because X said in evidence:

> I definitely know it wasn't last year [2013] or the year before [2012] … it might have been 12 because two years ago when I was 12 [up to 11 July 2012] and I don't remember it happening the year before so I would have been 12 when it happened.

[60] The appellant says this puts the event in the year 2012. He also says X recalls that she was there with her older sister (C), and the two girls were there for dinner. He says the only occasion when C and X were together for dinner at his place was in November 2012 when he put on a birthday dinner for C. He says that given the significance of there being a birthday dinner for C at this time, the event must have occurred in November 2012. That would also be consistent with her recollection, in her videoed interview, that it was spring or summer. Furthermore, he says that if exhibit F, an email from X thanking him for dinner on 19 July 2013, which he says is her birthday dinner was produced in evidence, it would have reinforced the "birthday

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22 At [59]-[68].

protocol whereby there were birthday dinners for C and X, but Y, being much younger, simply got a gift".

[61] The concurrence of evidence, he says, fixes the timing of the alleged event at November 2012, he had briefed counsel on its significance, but that evidence was ignored and the Judge simply concluded that the event occurred in the two year period when X was either 11 or 12, instead of by reference the uncontroverted facts about birthdays and related protocols which he says proved that the event occurred outside the timeframe alleged. All this means that the finding at [76] in the judgment, that the offending occurred within the stated date range, was unreasonable.

Discussion

[62] Two issues are engaged here. First, whether the evidence pointed to the event being outside the date range in the charge or would have, if counsel had produced the further documents as exhibits. The second is whether, even if it did, that risked a miscarriage of justice.

[63] In this case, I do not accept that the totality of evidence, even taking into account the other documents referred to by the appellant, meant the offending against X must have occurred outside the stated date range.

[64] In her first video interview, X says it was when she was either 11 or 12 and she was at the appellant's house with C playing cards but then C went home. She could not remember the time of year when it happened, saying it was "in the middle of the year or something". Her attempts to pin it down to the year or the season are equivocal. For example, she thinks he had the fire going, but then she says he always had the fire going. The fact she had no clear idea as to exactly what time of year it might have happened was confirmed in cross-examination where she said "I honestly can't remember, its – 'cos it was too far back so …". She does confirm, though, that she and C were invited around there for dinner, but otherwise can only pin it down to when she was 11 or 12 years old.

[65] I do not consider that evidence demonstrates the event must have occurred in 2012, as contended for by the appellant, nor that it must have been on the date of a

birthday dinner for C. The evidence pointed to by the appellant does not go so far as to suggest there was never another occasion when X and C came to dinner. In any event, the appellant's view that it had to be November 2012 because the dinner referred to was C's birthday dinner was fully outlined in closing submissions for the defence. I am satisfied that the Judge considered the respective parties' evidence as to dates for the offending and she was entitled to accept the evidence of X that it occurred when X was 11 or 12.

[66] More importantly though, even if there was evidence which clearly placed the event as occurring in November 2012, around the agreed date of C's birthday, I accept the Crown's submission that there is no risk of a miscarriage of justice. This is a case where the ordinary principle applies that the date specified in the charging document is not an essential element of the charge and the Judge could convict on a different date, irrespective of whether an amendment was sought.[23] It is not a case where the date specified in the charge is essential because of, for example, issues of limitation or changes to the law. There is no issue of prejudice to the defendant if the date is in fact in November 2012, rather than in the two year period from July 2010 to July 2012. The charge in this case covered an offence which could have occurred in the period up to X's sixteenth birthday, and the date range given in the charge was already very wide, so the difference in date on or before July 2012 and a date in November 2012 was not significant, and there is no suggestion that the defence would have been different if the dates were broader.

[67] Of course, in a general sense, confusion as to dates could impact on the reliability or credibility of her evidence. However, X was cross-examined on the fact that she could purportedly remember the event but could not remember anything to pin down the timing, and her vagueness on this issue was clearly addressed in closing submissions. However, an inability to recollect the date of the offending is not, of itself, a barrier to conviction. An example of a similar case is found in *L (CA685/2015) v R*, where the complainant was unsure about the dates of the offending but was sure the offending had happened.[24] The Judge directed the jury, the Crown did not have to

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[23] J Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed Thomson Reuters) at [CPA17.06] citing *H v Police* (1994) 11 CRNZ 632 (HC) at 634.

[24] *L (CA685/2015) v R* [2016] NZCA 507.

prove the dates beyond reasonable doubt, the relevance of which went more to the assessment of reliability and credibility. The Court held that the inconsistency "did not go to the heart of the charges. It related to peripheral matters, particularly as to when the offending occurred".[25]

[68] I also accept that if further evidence had been adduced which did demonstrate that the event occurred in November 2012 (and I do not accept that the evidence relied on by the appellant as to birthday protocols and the like does that), the Crown would have sought to amend the dates of the charge and such an amendment could not reasonably have been opposed.

[69] In these circumstances, I consider that also disposes of any allegations of counsel error in not producing further evidence for the purpose of supposedly challenging the stated date range. It could not have made a material difference to the outcome of the trial. Accordingly, this ground of appeal is dismissed.

The reasonableness of the verdict

[70] The original grounds of appeal allege that the Judge did not deal adequately or correctly with certain aspects of the evidence and her findings as to credibility were open to question. In the appellant's substantive submissions, these factors evolved into a challenge to the "adequacy of enquiry" of the Judge. In his further submissions, these issues were addressed under the heading "unreasonable verdicts" and encompassed the following:

(a) the Judge's analysis of the evidence;

(b) her dismissal of collusion; and

(c) her assessments of credibility.

In the defendant's submission, had she assessed all the evidence correctly, she ought to have had reasonable doubt about his guilt.

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[25] At [25].

[71] The appellant considers that X's credibility was sufficiently undermined to make her evidence on the key issues questionable. In particular, he considers her description of him wearing a robe was contradicted by Y's evidence that he wore day clothes during daylight hours. He also rejects Y's "nonsensical claim" that he was inebriated at the time. He also points to the inconsistency in her claims as to how often she had seen his genital area. In the record of the CYF interview which was not produced, she said she has never seen the appellant's genital area, but in her first evidential interview she claimed to have seen it 10 or 20 times and then at trial, a couple of times. He also points to evidence that she continued to visit and interact with him after this alleged event as needing to be taken into account by the Judge.

[72] In relation to Y he also considers her credibility was so dented that the verdict was unreasonable. By way of example, he points to her retraction of evidence over whether he was wearing a jersey or robe, her varying evidence on whether she knocked at the door or sometimes sneaked in, and on her knowledge of massage and how she acquired it.

[73] In summary, a submission he returns to in a number of ways, the appellant claims that the Judge should not have reached the conclusion she did on the evidence before her.

Discussion

[74] The Court must allow an appeal if it finds that the verdict was unreasonable or cannot be supported having regard to the evidence.[26] The Supreme Court has endorsed the following considerations:[27]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

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[26] *Roest v R* [2014] 2 NZLR 296 at [55] (CA).

[27] *R v Owen* [2008] 2 NZLR 37 at [13], endorsing the Court of Appeal's decision in *R v Munro* [2008] 2 NZLR 87.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[75] On appeal, the verdict of a judge sitting alone is treated as the equivalent of a jury decision. While the provision of full reasons by a judge will put the appellate court in a better position to assess the justification for a judge's verdict, the basis of the appeal remains the same and the court does not retry the appellant on the facts.[28]

[76] The threshold for this Court to interfere is high.[29] The decision will only be overturned for unreasonableness if the Judge reached a conclusion not available to her on the evidence. Rather than simply showing that the Judge could have reached a different conclusion, the appellant must satisfy the court that the conclusion reached was not an available one.

[77] As I have already noted, the Judge carefully analysed all the evidence before her. She considered aspects of X and Y's evidence that spoke against its credibility, as well as factors against the appellant's evidence. In the end, on the basis of listening to the witnesses and assessing their previous statements, she found that X and Y were more reliable than the appellant. This was a finding that was open to her on the facts. It cannot be considered to be unreasonable. She set out reasons for preferring the victims' evidence over the appellant's, and, given the Judge's advantage of hearing the witnesses in person, I am not prepared to find that she was wrong to do so.

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28 *Roest v R*, above n 26, at [56].
29 *R v Kuka* [2009] NZCA 572 at [75].

[78] The Judge's findings of fact were available to her and were not unreasonable. Therefore there was no error in this aspect of the judgment which gives rise to a miscarriage of justice.

Did the Judge err in applying the legal test for an indecent act?

[79] The charge involving Y was brought under s 132 of the Crimes Act 1961 alleging an indecent act on a child. Section 2 of that Act defines what comprises an indecent act on another person as follows:

> (2)(1B) For the purposes of this Act, one person does an indecent act on another person whether he or she
>
> (a) does an indecent act with or on the other person; or
>
> (b) induces or permits the other person to do an indecent act with or on him or her.

[80] The elements for the offence of doing an indecent act on another person are that:

(a) there is an act performed on or with the victim;

(b) the act would be considered indecent by right thinking members of society; and[30]

(c) the defendant was aware of the aspects of the act making it indecent.

[81] In determining whether or not an act is indecent it is well established that the circumstances surrounding the act are also relevant to that determination.[31]

[82] These elements were considered by the Judge, although she did not expressly lay them out. She found that the alleged massages, on the neck and on his lower leg and feet, did occur, and were at the appellant's request.[32] She then found that the

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30 *R v Stamford* [1972] 2 QB 391, [1972] 2 All ER 427 (CA); *R v Court*, above n 12; and *R v Annas* [2008] NZCA 534.

31 *Milne v Police* (1990) 6 CRNZ 636 (HC); *Rowe v R* [2017] NZCA 316.

32 At [137].

appellant had asked Y to lift up her top.[33] It is clear that the Judge considered that the appellant did these things intentionally. The Judge then found that the combination of massages, particularly on the defendant's leg, and the request to lift up Y's top, did constitute an indecent act.

[83] While the appellant challenges the factual findings of the Judge, including that there was a massage of his lower leg and that he asked her to lift her top, he also challenges whether the legal test for an indecent act is made out on these facts. He accepts that the following methodology is endorsed by the relevant cases:

(a) identify the act alleged to be indecent;

(b) consider whether, from the perspective of an objective, a right thinking member of the community the act is either:

(i) inherently decent; or

(ii) an act capable of being indecent in certain circumstances; or

(iii) an act incapable of being indecent;

(c) If (ii), consider whether, from that same perspective, in the particular circumstances of the case, the act was indecent.

[84] In this case, the appellant relies on the Judge's finding at [138] that the act of soliciting a massage, in itself, was not indecent. Given that finding he says there is no mandate to go on to investigate surrounding circumstances to analyse whether they turned an act which was ambiguous as to its indecency, into an indecent act. Indicia of an indecent intention are irrelevant when the identified act is not considered indecent, and he criticises the Judge for putting "a retrospective intentional cart before the massage horse".

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[33] At [139].

Discussion

[85] In *R v Court*, the House of Lords held that where the act alone is not obviously indecent, an undisclosed indecent purpose may render it so. In that case the defendant smacked a girl's buttocks. The Court considered that act was not obviously indecent. However, the defendant's admission that he had a "buttock fetish", which is why he did it, was held to colour the act and make it indecent. A distinction was made between that situation and one where the act, in itself, is incapable of being seen as indecent. An example given of this was the removal of a girl's shoe by a person who had a shoe fetish,[34] because removal of a shoe is not an act which can under any circumstances be said to be indecent. An indecent design cannot render it so.

[86] In New Zealand, these distinctions have been developed in a line of cases which consider whether taking photographs of children can be an indecent act. Initially, in *R v S*, the Court of Appeal accepted the defence submission that the taking of a photograph cannot be an indecent act.[35] However, *R v Annas*, the Court of Appeal came to a different conclusion, saying: [36]

> [57] Whether the photographing of a naked child is objectively indecent will depend upon the circumstances. One extreme is a photograph taken in good faith in the course of a medical examination, or by loving parents of a child playing in a pool or at the beach. Neither will satisfy the objective test. The same photograph taken for obviously pornographic purposes could.

That approach was recently reaffirmed by the Court of Appeal in *Rowe v R*.[37]

[87] In this case, the only identifiable act was the procurement of a shoulder, lower leg and foot massage from a child. That act, in my view, falls into the category of acts which are capable of being indecent in certain circumstances but not in others. Massages can be procured for sexual gratification but often they are not. In terms of *Court*, it is more like a smack on the bottom than the removal of a shoe. As with the smack, the right thinking member of the community would want further information about the surrounding circumstances to inform the conclusion as to decency.

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34 As in *R v George* [1956] Crim LR 52.
35 *R v S* CA273/91, 20 December 1991.
36 *R v Annas* [2008] NZCA 534.
37 *Rowe v R* [2017] NZCA 316.

[88] Here, the Judge's conclusion that the act on its own would not have been indecent must logically be read as saying that, but for the request to lift up the top, she would not have inferred indecency. I do not consider the conclusion at [138] was to the effect that the act of procuring a massage from a young girl is in the class of acts that can never be indecent. Rather, the surrounding circumstances, and in particular, the ensuing request to lift the top up, colours the act, as it indicates an inappropriate motivation on behalf of the appellant. For this reason, I do not consider that the Judge erred in concluding that, when the events were viewed in combination, they comprised an indecent act. This ground of appeal also fails.

Appeal against sentence

[89] In the event that the convictions are not set aside, the appellant challenges the sentences imposed.[38]

[90] In sentencing on the two offences, the Judge accepted that the offending against victim X was more significant than the offending against victim Y, which was "at the lower end of the scale". After discussing various cases she considered that a starting point of 18 months was justified in relation to the offending against X, particularly taking into account his behaviour masturbating while he placed his hand down the clothing of that young woman. In respect of the offending against Y, she considered that four months' imprisonment would be justified, taking her to a provisional starting point for both offences of 22 months' imprisonment.

[91] She then considered how the totality principle should be reflected in the sentence imposed. If she was just sentencing on these two offences she would have reduced the sentence to 20 months. However, as the appellant was already serving a sentence of two years one imprisonment for historical sex offending against his stepdaughter in 1986, she decided to consider what might have happened if he had been sentenced on all matters at the same time. Having done that, she came to the view that a cumulative uplift of 11 months on his current sentence was justified. That meant the end sentence he would serve on all three offences was three years' imprisonment.

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38 *R v O'Sullivan*, above n 2.

The appellant's submissions

[92] The appellant makes a range of submissions on sentence.

[93] First, he covers what he describes as "mitigation", but in fact these submissions encompass a range of issues which relate to conviction and then to both setting, and adjusting, the starting point. These include:

(a) in respect of complainant Y, a challenge to the finding of indecency, saying there was no sexual connotation, the massage only occurred on the shoulder and involved no indecency, and there was absolutely no attempt to follow through with the subsequent request;

(b) in respect of X, he does not accept the level of emotional impact contended for, because it is not consistent with her retraction letter and other evidence which shows that she did not suffer any emotional or psychological damage at all; and

(c) an assertion that the presentation of sentencing submissions by counsel was inadequate saying, counsel "confuses dispassion with detachment and servility with concession to the peril of his client".

[94] He then challenges the starting points adopted by comparison with other cases. In respect of complainant X, he provides a detailed comparison of his sentence compared with sentences imposed in 12 other cases.[39] In comparing his offending with the other cases cited, he pointed out there was "no grooming or premeditation", no "mutuality" and a low degree of violation in his case. Other cases discussed had features of force or violence, or there were multiple victims, and the offenders had much higher risks of reoffending. What was alleged were single unpremeditated incidents of short duration. He considered the breach of trust was at a low end, particularly as the victims continued to have contact with him, and the relationship

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[39] *R v Olliver*, above n 14; *R v Fisher* [2014] NZHC 2189; *R v Morrison* HC Rotorua CRI-2010-063-715, 24 November 2010; *R v Eraki*, above n 14; *R v H*, above n 14; *R v Brown* CRI-2005-02-003954 HC Napier, 30 July 2008; *R v McCord* [2013] NZHC 3261; *R v Nuntoon* HC Auckland CRI-2007-090-008562 15 September 2009; *Police v Paki* [2017] NZHC 79; *Mayo v R* [2016] NZHC 34; *R v MWH* CA221/05, 17 October 2005; and *R v Berryman* A91/98, 28 August 1998.

they had with him was "globally benign and both academically and socially educative". This supported his submission that there was "no evidence of ongoing emotional psychological harm".

[95] In respect of complainant Y, he refers to the Judge adopting a 10 month starting point and argues that is disproportionate to the starting points adopted in the comparator cases. However, of course, that is not the starting point adopted by the Judge. She adopted four months in respect of the offending against complainant Y.

[96] He concludes that a starting point of seven months should be adopted in respect of X and one month in respect of Y, making a provisional starting point for both sets of offending of eight months.

[97] Finally, the appellant submits that taking into account the totality principle, the cumulative uplift on his current sentence should be four months or less.

[98] The Crown submission is simply that the starting points adopted by the Judge, and which were reduced to 20 months to reflect the totality principle, was within the range for sexual offending against two young complainants and was not out of line with broadly comparable cases such as *Olliver* and *Fisher* referred to by the appellant. In any event, the starting point was then almost halved to 11 months before being added cumulatively to the existing sentence being served and, if anything, was generous to the appellant. The combined sentence of three years' imprisonment for sexual offending against three young complainants was well within the available range.

Discussion

[99] An appeal against sentence will only be allowed if there has been an error in imposition of the sentence and the Court is satisfied that a different sentence should be imposed.[40] If the sentence under appeal may be properly justified having regard to the relevant sentencing principles, it is not the place of this Court to intervene and substitute its own views for those of the sentencing judge. It is only if the sentence is

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[40] Criminal Procedure Act 2011, s 250.

"manifestly excessive" that the Court should interfere with the exercise of the Judge's discretion. The focus, in most appeals, is thus on the end sentence.[41]

[100] *R v Olliver* is referred to by both the appellant and the respondent as a useful comparator, albeit there are some factual distinctions. That case involved a 39 year old man who was found guilty of three charges of doing an indecent act on a child under 12, with two victims, one aged eight and one aged nine. The offending involved touching the children in ways that made them feel uncomfortable including squeezing each child's buttocks, touching the vaginal area on the outside of the clothing, kissing the second child and trying to put a hand down the second child's pants on two occasions. Nation J described the offending as involving actions "which these young girls did not like and which made them feel uncomfortable, even though, at the time, they both regarded [the defendant] as a friend". The Judge noted that had the girls not rebuffed his attempts to put his hand down their pants, the touching could have been worse than it was. The overall sentence imposed for the offending was two years and five months, which included an uplift on account of previous criminal offending of four months.

[101] The appellant noted that this offending involved "vaginal touching, premeditation and an extended and proximate history of criminal offending". He therefore considered the starting point in respect of X at 18 months as inconsistent when the starting point for each of the more serious offences against the second victim in *Olliver* of 16 months' imprisonment.

[102] However, I do not consider the comparison is appropriate. The cases involved similar degrees of breach of trust and, while there was less touching of the victims in the appellant's case, there was, in relation to X, the aggravating act of masturbating in front of her. The starting point of 16 months on each of the charges with the nine year old victim in *Olliver* (although uplifted to 20 months for previous offending) suggests the starting point of 18 months for the offending against Y was within the available sentencing range.

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41 *Tutakngaahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.

[103] In terms of the offending against Y, I accept it is at the low end of the spectrum of indecent acts, and it is difficult to find a comparator case. However, it did involve a breach of trust and clearly was disturbing enough for the victim to immediately leave and tell her father. In my view, the starting point adopted of four months was stern but also within the available range.

[104] I also put little weight on the appellant's assertions that the offending had no real impact on the victims and they continued to communicate with him after the alleged events. However, the Judge clearly put little weight on Y's victim impact statement in any event and explained that what happened to her was only just starting to affect her at the time of preparing her victim impact statement. The Judge did not put undue weight on the victim impact statements.

[105] However, it is the end sentence which I must take into account and I consider that, with the adjustment for totality, taking into account the sentence the appellant was already serving, the end sentence of 11 months' imprisonment is entirely consistent with analogous cases where there are three sets of offending against three young victims. A sentence of less than 11 months would be insufficient to take into account the relevant sentencing principles for the appellant's present offending and the sentence imposed of 11 months in addition to his current sentence is in line with other cases and is not manifestly excessive.

[106] Accordingly, the appeal against sentence is dismissed.

Name suppression

[107] When sentencing the appellant, the Judge noted that he had applied for suppression of his name. It is not clear on what grounds interim name suppression was sought, or granted. Nevertheless, the Judge ordered that suppression "continue" until an appeal was filed, where the Court hearing the appeal had considered whether suppression should continue.

[108] Name suppression is only permitted in a limited range of circumstances as set out in s 200 of the Criminal Procedure Act 2011. These include where publication would be likely to cause extreme hardship to the person charged with, or convicted of,

or acquitted of the offence, or any person connected with that person, or where undue hardship would be caused to any victim of the offence.

[109] The victims, of course, have automatic suppression of their names and of any details that would lead to their identification, so I consider there is no real risk of undue hardship to the victims. There is also nothing in the material before the Court which would suggest that the consequences for the appellant of having name suppression lifted would be any more than those normally associated with the publication of a defendant's name. Accordingly, name suppression (if, in fact, it was ever granted) is lifted, and the identity of the appellant can be published.

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Copy to: Appellant