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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 60/2018
[2019] NZSC 55

BETWEEN	YUSUKE (DAVID) SENA Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	13 February 2019
Court:	William Young, Glazebrook, O'Regan, Ellen France and Winkelmann JJ
Counsel:	D P H Jones QC and H T Drury for Appellant M J Lillico and J E L Carruthers for Respondent
Judgment:	24 May 2019

JUDGMENT OF THE COURT

A The appeal is allowed.

B The convictions of the appellant are quashed.

C We direct a new trial.

REASONS
(Given by William Young J)

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The appeal

[1] Following a judge-alone trial, Judge Henwood found the appellant guilty on five charges of assaulting his children, S and K.[1] His appeal to the High Court against conviction and sentence was dismissed by Downs J,[2] as was a later application to the Court of Appeal for leave to appeal against conviction.[3]

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1 *R v Sena* [2017] NZDC 3564. The charges were laid under s 194(a) of the Crimes Act 1961.
2 *Sena v Police* [2017] NZHC 2319 [*Sena* (HC)].
3 *Sena v New Zealand Police* [2018] NZCA 203 (Miller, Ellis and Woolford JJ) [*Sena* (CA)].

[2] The appeal to Downs J was brought under s 232(2)(b) of the Criminal Procedure Act 2011. This provides for a first appellate court dealing with a challenge to a finding of fact made in judge-alone proceedings to allow the appeal if satisfied that:

> … the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; … .

In *Gotty v R*, the Court of Appeal held that the factual findings of a judge sitting alone are to be treated on appeal as the equivalent of a jury verdict with the result that the principles applicable to factual challenges to jury verdicts also apply to s 232(2)(b).[4] This approach was adopted by both Downs J in dismissing the appeal to the High Court and by the Court of Appeal in refusing the appellant's application for leave to appeal against the judgment of Downs J.[5]

[3] There being room for debate whether the *Gotty* approach is correct,[6] this Court granted the appellant leave to appeal direct from the judgment of Downs J.[7]

The correct appellate approach

[4] Section 232 of the Criminal Procedure Act provides:

> **232 First appeal court to determine appeal**
>
> (1) A first appeal court must determine a first appeal under this subpart in accordance with this section.
>
> (2) The first appeal court must allow a first appeal under this subpart if satisfied that,—

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4 *Gotty v R* [2017] NZCA 528 at [14]. Those principles as they applied to s 385(1)(a) of the Crimes Act are reviewed in *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13].

5 *Sena* (HC), above n 2, at [48], [55], [67]–[68] and [71]; and *Sena* (CA), above n 3, at [9].

6 There has been divergence in the High Court as to the approach a first appellate court should adopt when applying s 232(2)(b): see *Yang v R* [2016] NZHC 1165 at [4]; *R v Police* [2016] NZHC 523 at [11]; *Flemming v Police* [2016] NZHC 2734 at [13]; *Marino v New Zealand Police* [2017] NZHC 1348 at [11]; *Cummings v New Zealand Police* [2018] NZHC 338 at [14]; *Sullivan v New Zealand Police* [2018] NZHC 397 at [18]; *Malone v R* [2018] NZHC 1059 at [18]; *de la Harpe v New Zealand Police* [2018] NZHC 1080 at [16]; and *Murdoch v New Zealand Police* [2018] NZHC 2849 at [11], but compare: *Parfoot v R* [2018] NZHC 2702 at [19]; *Nishant v New Zealand Police* [2019] NZHC 18 at [16]; *Waite v New Zealand Police* [2019] NZHC 213 at [21]–[22]; and *Aramoana v New Zealand Police* [2019] NZHC 225 at [16]–[17].

7 *Sena v New Zealand Police* [2018] NZSC 92. Although we would not normally hear an appeal from a High Court judgment where the Court of Appeal has refused leave, the effect of *Gotty* and *Sena* (CA) on the way appeals to the High Court are dealt with is that the issue might not otherwise be presented for determination in this Court.

(a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or

(b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or

(c) in any case, a miscarriage of justice has occurred for any reason.

(3) The first appeal court must dismiss a first appeal under this subpart in any other case.

(4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

…

[5] Primarily relevant to this appeal is s 232(2)(b). But so too is s 232(2)(c). And material to both is the definition of "miscarriage of justice" in s 232(4).

[6] Section 232 replaced appeal provisions in: (a) the Summary Proceedings Act 1957 governing appeals to the High Court against conviction in the District Court in respect of offences tried summarily; and (b) s 385 of the Crimes Act 1961 which provided for appeals to the Court of Appeal from convictions following trial on indictment. In assessing the legislative purposes which s 232 implements, it is necessary to understand the operation of those appeal provisions.

The Summary Proceedings Act 1957

[7] This Act provided for the summary trial of offences with such trials typically (but not always) heard by professional judges, initially, stipendiary magistrates and, since 1980, District Court judges. Section 115 gave defendants a general right of appeal to the High Court against conviction. The procedure for such appeals was provided for by s 119 which, immediately before the Criminal Procedure Act came into effect, was in these terms:

119 Procedure on appeal

(1) All general appeals shall be by way of rehearing.

(2) Where any question of fact is involved in any appeal, the evidence taken in the District Court bearing on the question shall, unless the High Court otherwise directs, be brought before the High Court as follows:

(a) as to any evidence given orally, by the production of a copy of any note made by the District Court Judge or Justice or Justices or such other materials as the High Court may deem expedient:

(b) as to any evidence taken by affidavit and as to any exhibits, by the production of the affidavits and of such of the exhibits as may have been forwarded by the Registrar of the court appealed from and by the production by the parties to the appeal of such exhibits as are in their custody:

(c) as to any evidence taken under section 31 (which relates to taking the evidence of a defence witness at a distance) or under section 32 (which relates to taking the evidence of a person about to leave the country), or any statement admitted under section 33 (which relates to the admissibility of a statement made by a person who is seriously ill), by the production of a copy of that evidence or statement:

provided that the High Court may in its discretion rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if the court has reason to believe that any note of the evidence of that witness made by the District Court Judge or Justice or Justices is or may be incomplete in any material particular.

(3) The High Court shall have the same jurisdiction and authority as the District Court, including powers as to amendment, and shall have full discretionary power to hear and receive further evidence, if that further evidence could not in the circumstances have reasonably been adduced at the hearing, and for that purpose shall have the same jurisdiction and authority to make any order under section 31 or section 32 as the court from whose decision the appeal is made, or a District Court Judge, had.

[8] The language of s 119 was largely borrowed from s 76 of the Magistrates' Courts Act 1947 which provided for appeals by way of rehearing in civil cases. In turn, s 76 broadly reflected the Judicature Act 1908 provision in respect of civil appeals from the Supreme Court to the Court of Appeal.

[9] The nature of the appeal "by way of rehearing" provided for by s 119(1) was addressed in many judgments. The cases soon established that a de novo hearing on

the merits was not required,[8] with the approach adopted in respect of civil appeals being treated as applicable to s 119.[9] This meant that the appellate court was required to form, and act on, its own assessment of the evidence, albeit that:[10]

(a) the onus was on the appellant to establish an error on the part of the trial judge; and

(b) this would be difficult to do in cases where the complaint was directed at the facts as found by the trial judge (as distinct from the inferences to be drawn from, or an evaluative assessment of, them) and especially so in cases where those findings of fact were based on credibility assessments.

[10] In a number of s 119 appeals, appellants complained as to the absence, or inadequacy, of the reasons given by the judge (or occasionally justice of the peace) when finding them guilty.[11] In *R v Awatere* – a case decided in 1982 – the Court of Appeal stopped short of imposing an absolute obligation to provide reasons.[12] But the reality, even then, was that an unreasoned decision was highly likely to be set aside on appeal[13] and, by the end of the last century, a requirement to give reasons not only applied to professional judges but had also been extended to lay justices of the peace dealing with minor summary offences.[14] What this meant in practice was that the

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8 *Toomey v Police* [1963] NZLR 699 (SC); *Page v Police* [1964] NZLR 974 (SC); and *Reilly v Police* [1967] NZLR 842 (SC). Prior to the Summary Proceedings Act 1957 coming into effect, conviction appeals were dealt with by the Supreme Court by way of de novo hearing, that is by retrial: see DW McMullin "Appeals from Magistrates: Principles Applicable" (1958) 34 NZLJ 183.

9 *Toomey*, above n 8, at 701, relying on *Gillard v Cleaver Motors Ltd* [1953] NZLR 885 (SC) at 886.

10 *Toomey,* above n 8, at 700–701. See also DW McMullin "Appeals From Magistrates – Principles Applicable" [1964] NZLJ 54 [McMullin (1964)] at 56.

11 See, for example, *Connell v Auckland City Council* [1977] 1 NZLR 630 (SC); *Beard v Police* HC Christchurch M40/80, 4 September 1980; *Anderson v Police* HC Wellington M599/80, 6 March 1981; and *Mead v Police* HC Auckland M899/81, 13 October 1981.

12 *R v Awatere* [1982] 1 NZLR 644 (CA). The Court observed that while it would be "undesirable and impractical" to impose an absolute obligation to provide reasons, judges "should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion": at 649. The approach in *Awatere* was affirmed by a majority of the Court of Appeal in the next case in the Law Reports: see *R v MacPherson* [1982] 1 NZLR 650 (CA) at 653.

13 See, for example, *R v Atkinson* [1984] 2 NZLR 381 (CA).

14 *Jefferies v Police* HC Timaru AP18/98, 5 March 1999 [*Jefferies* (HC)]; aff'd *R v Jefferies* [1999] 3 NZLR 211 (CA).

requirement to show an error on the part of the judge could be discharged by reference to the particular reasons given for the decision. As Fisher J in *Herewini v Ministry of Transport* observed, a recognised ground for an appeal under s 119 was "a factual error in the assessment of the evidence upon which the conviction was based".[15]

Section 385 of the Crimes Act 1961

[11] This section provided for appeals following trial on indictment:

> **385 Determination of appeals in ordinary cases**
>
> …
>
> (1) On any appeal … , the Court of Appeal … must allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal … may, notwithstanding that it is of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

We note in passing that in s 385(1)(a), the words "cannot be supported having regard to the evidence" were otiose, as this Court pointed out in *R v Owen*.[16]

[12] Section 389 provided for the Court of Appeal (and later the Supreme Court)[17] to hear further evidence, a power which corresponded to that in s 119 of the Summary Proceedings Act, albeit that the two sections were differently expressed.

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15 *Herewini v Ministry of Transport* [1992] 3 NZLR 482 (HC) at 490.
16 *Owen*, above n 4, at [12].
17 See Supreme Court Act 2003, s 48(1) and sch 1.

[13] New Zealand courts never saw the application of s 385(1)(a) as requiring a "rehearing" of the case in the sense s 119 of the Summary Proceedings Act provided for. This point was made very starkly in *R v Hand*:[18]

> It has not been the law in New Zealand that if the Court of Appeal considers there exists a reasonable doubt, then so too must the jury.
>
> In our view *R v Ramage* encapsulates the view expressed in other authorities to the effect that the Court on appeal "... does not proceed on such lines as these – look at the evidence, see what conclusion the Court would have come to and set aside the verdict if it does not correspond with such conclusion".[19]

As that passage indicates, the leading New Zealand case was *R v Ramage* where the test was put this way by Somers J:[20]

> A verdict will be of such a character if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. It is not enough that this Court might simply disagree with the verdict of the jury: see *R v Mareo (No 3)* [1946] NZLR 660; *R v Ross* [1948] NZLR 167; *R v Kira* [1950] NZLR 420; *Chamberlain v R* (1984) 51 ALR 225.

[14] There are some New Zealand cases where judges used the expression "lurking doubt",[21] an expression drawn from English cases and suggestive of a de novo or fresh consideration of the evidence.[22] The lurking doubt approach was not discussed in either *Ramage* or *Hand* and was firmly rejected in the decisions of the Court of Appeal in *R v Munro*[23] and the Supreme Court in *Owen*.[24] On the approach adopted in those cases, the ultimate issue for the appellate court was whether the jury could not reasonably have been satisfied of guilt beyond reasonable doubt.

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18 *R v Hand* CA200/98, 28 October 1998 at 11.

19 *R v Hancox* (1913) 8 Cr App R 193 (Crim App) at 197.

20 *R v Ramage* [1985] 1 NZLR 392 (CA) at 393.

21 See, for instance, *R v Lui* [1989] 1 NZLR 496 (CA) at 501; and *Herewini*, above n 15, at 491. *Herewini* concerned an appeal from summary conviction and was in the slightly different context of determining what should happen where there had been a procedural irregularity.

22 See *R v Cooper* [1969] 1 QB 267 (CA) at 271. At least formally, the "lurking doubt" approach has been abandoned in England and Wales: see *R v F* [1999] Crim LR 306 (CA); and LH Leigh "Lurking Doubt and the Safety of Convictions" [2006] Crim LR 809. In *R v Fanning* [2016] EWCA Crim 550, [2016] 1 WLR 4175 at [58], Lord Thomas CJ, speaking for the Court of Appeal, went as far as to say: "We deprecate the use of the phrase 'lurking doubt' as it represents an invitation to this court to substitute its view for that of the jury." But a similar approach, albeit without the use of the expression "lurking doubt", has continued to be adopted on occasion: see *R v Graham* [1997] 1 Cr App R 302 (CA) at 308; and *Dookran v The State (Trinidad and Tobago)* [2007] UKPC 15 at [36].

23 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [45] and [88].

24 *Owen*, above n 4, at [17].

Appeals following trial on indictment before a judge alone

[15] Amendments made to the Crimes Act in 1979 provided for trials on indictment to be dealt with, in some instances, by a judge alone.[25] A defendant convicted at such a trial had the usual rights of appeal under s 385 but this section was not amended to deal specifically with convictions following a judge-alone trial. In particular, there was no amendment to s 385(1)(a) which continued to refer only to "the verdict of the jury". In *R v Connell*, the Court of Appeal was required to decide how, in such cases, challenges to the factual findings of a judge should be dealt with.[26] This was addressed by Cooke J, for the Court, in this way:[27]

> A number of the grounds of appeal allege that the Judge was in error in factual conclusions or in failing to give sufficient weight to certain factors or in failing "to address" certain factors.
>
> It may have been overlooked when the notice of appeal and the argument on appeal were prepared that the grounds for allowing an appeal against a conviction on indictment are limited by s 385(1) of the Crimes Act 1961 … .
>
> …
>
> It will be seen that the only two grounds capable of covering challenges to factual findings or reasoning are (a) and (c).
>
> The available grounds were not altered when the 1979 Amendment Act introduced provisions whereby the accused may apply for trial by a Judge alone. Reading the principal Act and the Amendment Act together, there is no difficulty in accepting that the verdict of a Judge sitting alone is to be treated as the equivalent of the verdict of a jury and may be challenged on the ground that it is unreasonable or cannot be supported having regard to the evidence. But no new or more extensive ground of appeal has been given. In particular this Court is not authorised to retry the case on the facts.

[16] This approach, which remained current until the Criminal Procedure Act came into effect, meant that a challenge to the factual findings of a judge was required to be dealt with as if the judge's decision was a jury verdict.[28] The corollary was that the approach to appeals under s 385(1)(a) in respect of jury verdicts was applied to

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25 Crimes Amendment Act (No 2) 1979, s 2.

26 *R v Connell* [1985] 2 NZLR 233 (CA).

27 At 237.

28 See *Roest v R* [2013] NZCA 547, [2014] 2 NZLR 296 at [56] in which the Court said, in relation to an appeal under s 385(1)(a), "the verdict of a judge sitting alone in a criminal trial is to be treated for appeal purposes as the equivalent of the verdict of a jury".

decisions by a judge sitting alone and para (a) was applied as if the words "the verdict" were not followed by "of the jury".[29]

[17] Unlike juries, judges customarily give reasons for their conclusions. The extent to which such reasons were required was also addressed by Cooke J in *Connell*:[30]

> To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicate the criminal process to a degree which Parliament cannot have contemplated. There are cases where a point or argument is of such importance that a Judge's failure to deal expressly with it in his reasons will lead this Court to hold that there has been a miscarriage of justice. A demonstrably faulty chain of reasoning may be put in the same category. But it is important that the decision to convict or acquit should be made without much delay. Careful consideration is an elementary need, but not long exposition.
>
> In practice, if the reasons are of some length it has sometimes been found fairest to announce the verdict at the outset. There can be no invariable rule; the Judge will wish to take into account the implications case by case. If necessary the reasons can be delivered later in writing, although preferably they should be given with the verdict.
>
> Only in most exceptional cases, if ever, is it likely to be consistent with the judicial role in trying an indictment to give no reasons for the verdict. If the verdict is not guilty, however, occasionally a very brief statement of reasons is best. In other cases, whether the verdict is guilty or not guilty, it is obviously impossible to work out a formula covering all circumstances. But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

[18] In *R v Eide*, the Court of Appeal added a codicil to those remarks:[31]

> Underpinning the approach then taken were two interrelated considerations: first, a Judge's decision in such a case is technically a verdict; and, secondly, the rights of appeal in relation to such a decision are the same as those which apply to jury verdicts. It may be that these considerations do not justify

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29 *Jeffries v R* [2013] NZCA 188 at [93].
30 *Connell*, above n 26, at 237–238.
31 *R v Eide* [2005] 2 NZLR 504 (CA) at [20]–[21].

> current practice and this Court may have to consider whether the *Connell* approach continues to be appropriate.
>
> The problems with short-form judgments are particularly acute in fraud prosecutions. The parties (that is, the prosecutor and accused) are obviously entitled to know the key elements of the Judge's reasoning. In a case of any complexity, this will not be possible unless the Judge provides an adequate survey of the facts. As well, in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form. Similar considerations apply if the verdict is not guilty. Further, some regard should be had to how the case will be addressed on appeal. A judgment which is so concise that some of the key facts in the case are required to be reconstructed by this Court on appeal is too concise. We will indicate shortly a particular aspect of the present case that illustrates the problem. All of this points to the need for a judgment to be able to be read as a stand-alone document.

[19] Where the reasons provided by the trial judge did not show a rational and complete basis for the verdict, the Court of Appeal would allow the resulting appeal.[32] As well, the corollary of judges providing reasons for their decisions was that s 385(1)(a) had to be applied in a context in which the court could assess the reasonableness of the particular steps in the judge's actual reasoning. In a practical sense, this gave appellants convicted by a judge scope for challenging factual findings which was rather greater than that afforded to those found guilty by a jury.[33]

Was there a significant difference in approach to appeals from judge-alone trials depending on whether s 119 of the Summary Proceedings Act or s 385 of the Crimes Act applied?

[20] Conceptually, there was a sharp distinction between appeals by way of rehearing under s 119 of the Summary Proceedings Act and those provided for by s 385 of the Crimes Act. Section 119 required the appellate court to form its own view of the facts and determine the appeal accordingly. Under s 385(1)(a), the issue for the appellate court was whether the verdict arrived at was reasonably open to the trier of fact (that is, the jury in a jury trial, or the judge in a judge-alone trial). On the former

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32 See *Wenzel v R* [2010] NZCA 501.

33 See the discussion in *R v Slavich* [2009] NZCA 188 at [33] where, although it did not need to decide the point, the Court said that an appellant "[p]robably" gets "the advantage of a 'fuller' appeal if his or her trial has been before a judge alone who has delivered full reasons". In *Roest*, above n 28, at [56] the Court also acknowledged that "where full reasons are given, an appellate court is in a better position to assess the justification for, and correctness of, the judge's verdicts than in a jury case".

approach, an appeal against conviction would necessarily be allowed if the appeal court was left with a reasonable doubt as to guilt. As we have said, this was not the case in respect of s 385(1)(a).

[21] This conceptual distinction was of practical significance in certain types of case. By way of example, determinations which largely came down to inferences to be drawn from, or the evaluation of, undisputed facts were as susceptible to appeal on factual grounds in criminal proceedings under the Summary Proceedings Act as in civil cases.[34] Likewise, in appeals under s 119, an appellate court concerned about some objective implausibility in the prosecution case would be entitled to substitute its own opinion for that of the trial judge, just as might happen in a civil appeal. In these respects s 119 provided greater scope for factual challenge than s 385(1)(a). As well, there were differences as to what should happen when some error or other mishap may have influenced the finding of guilt. Under s 385(1), the appellate court was required to allow the appeal unless the proviso could be invoked. In contradistinction, under s 119 it was open to the appeal court to address the case in terms of its own appreciation of the evidence,[35] albeit that with the approach adopted in *R v Matenga* to the proviso to s 385(1), the practical significance of this distinction was much diminished.[36]

[22] All of that said, the conceptual difference of approach was of limited moment in respect of findings of fact based simply on conflicting oral evidence. In appeals under s 119, it was for the appellant to establish that there had been an error. In circumstances where the trial judge's finding was reasonably open on the evidence given at trial, it would be difficult, if possible at all, to establish such an error.[37] That the two approaches were similar is well illustrated by *R v Puru*.[38] A District Court Judge had conducted a trial in respect of two offences, one of which was prosecuted indictably and the other summarily. Appeals from the convictions were heard by the same three Judges sitting, in one case, as the Court of Appeal and, in the other, as a

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34 See *Toomey*, above n 8, at 701; and McMullin (1964), above n 10, at 56.
35 This occurred in *Jefferies* (HC), above n 14.
36 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.
37 McMullin (1964), above n 10, at 56. See also *Sullivan v New Zealand Police* HC Auckland CRI-2008-404-152, 2 October 2008.
38 *R v Puru* (2001) 19 CRNZ 290 (CA).

Full Court of the High Court. Although the Judges were meticulous in applying s 385 in the first appeal and s 119 in the latter, the standards of review applied were practically similar.

The legislative history of s 232(2)(b)

[23] As introduced, cl 236 of the Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) set out the statutory grounds on which a first appeal court could allow an appeal against conviction. It included sub-cl (2) which provided that appeals against conviction from judge-alone trials "must proceed by way of rehearing". The explanatory note to the Bill, however, also observed that the threshold for allowing an appeal would be whether there had been a substantial miscarriage of justice:[39]

> A modified Crimes Act 1961 model is adopted for both Judge-alone trials and jury trials and the Bill sets out the grounds on which the appeal court may determine an appeal. The same principles will apply to all appeals against conviction and the appeal court will determine an appeal by applying an error correction approach. However, in an appeal against a conviction entered in a Judge-alone trial, the rehearing procedure is retained (as in section 119(1) of the Summary Proceedings Act 1957).
>
> …
>
> The policy implemented in this subpart is to make substantial miscarriage of justice the ultimate test for determining an appeal against conviction. This approach follows section 276 of the Criminal Procedure Act 2009 (Vict.) and addresses aspects of section 385 of the Crimes Act 1961 (such as the proviso to subsection (1)) discussed in the reported decisions *Owen v R* [2007] NZSC 102 and *Matenga v R* [2009] NZSC 18 and elsewhere.

[24] The provision for appeals against conviction in judge-alone trials under cl 236, which eventually became s 232 of the Act, to be by way of rehearing was, however, removed from the Bill when it was reported back by the Select Committee. The alteration was explained in this way:[40]

> We recommend that clause 236(2) be deleted as it implies that appeals against conviction from jury trials do not proceed by way of rehearing. This is not an accurate reflection of the law, as section 24 of the Supreme Court Act 2003 states that all appeals to that court are by way of rehearing.

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[39] Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) [Explanatory note] at 65–66.

[40] Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) [Select Committee report] at 9–10.

[25] As will be apparent from what we have said – and contrary to the understanding of the Select Committee – appeals to the Court of Appeal from jury verdicts under s 385 of the Crimes Act were not by way of rehearing. And although it is true that s 24 of the Supreme Court Act 2003 did provide that all appeals to this Court were to proceed "by way of rehearing", this was primarily addressed to appeals from the Court of Appeal to the Supreme Court (in respect of which the Supreme Court conducts a "rehearing" of what happened in the Court of Appeal).[41] In the case of appeals direct from jury verdicts to the Supreme Court (a right provided for in s 385, but never invoked) or from the Court of Appeal to the Supreme Court, the jurisdiction to entertain the appeal was controlled by s 385, as s 10 of the Supreme Court Act made clear.

Is an appeal under s 232(2)(b) by way of rehearing?

[26] Although the legislative history is untidy, we think it reasonably clear that the underlying legislative purpose in respect of what became s 232(2)(b) was that appeals invoking that ground were to be dealt with in the same manner as appeals under s 119 of the Summary Proceedings Act. There are a number of reasons why we say this.

[27] First, if the parliamentary purpose had been a continuance of the *Connell* approach, s 232(2)(a) would have been expressed in terms which encompassed both jury and judge-alone verdicts. It would thus have read something like this:

> … the verdict of the jury or judge (as the case may be) was unreasonable.

[28] Secondly, and relatedly, the language of s 232(2)(b) requires a focus on the judge's assessment of the evidence, a focus which presupposes the existence of reasons from which the substance of that assessment can be discerned. This presupposition is reinforced by s 106(2) of the Criminal Procedure Act which explicitly requires the giving of reasons in judge-alone trials. It is perhaps no coincidence that the language of s 232(2)(b) – and in particular the reference to an

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41 Section 24 of the Supreme Court Act was the subject of the discussion in *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124. At [16], the Court noted that an appeal by way of rehearing "does not contemplate a right to a new hearing of the evidence", rather the Court is limited to determining the "issues which had to be determined in the proceeding of the Court appealed from on the basis of the evidence appearing in the lower Court's record".

error in the "assessment of the evidence" – appears to have been borrowed from the passage in the judgment of Fisher J in *Herewini* outlining the grounds of appeal under s 119, which we have set out earlier.[42]

[29] Thirdly, the legislature assumed that an appeal under s 232(2)(b) was to be heard by way of rehearing as had been the case with appeals under s 119 of the Summary Proceedings Act. This is apparent from the legislative history to which we have referred. Although cl 236(2) was removed, this was on the mistaken basis that appeals under s 385 were by way of rehearing.[43] The underlying parliamentary purpose remains clear despite this mistake.

[30] Fourthly, there is no sensible policy reason why the approach to appellate review of decisions made by a judge should be less intensive in criminal cases than in civil cases. In this respect we do not accept the suggestion made in the respondent's submissions that this would have an appreciable effect on the workload of the High Court. It represents a return to the approach adopted under the Summary Proceedings Act, is one which a number of High Court judges have been taking under s 232(2)(b)[44] and, in practice, should not be significantly more time-consuming to administer than the approach adopted in *Gotty*.

[31] Finally, the appeal by way of rehearing procedure provides a mechanism far more suitable for determining appeals from judge-alone trials than the old s 385(1)(a) approach.

[32] It follows from what we have just said that the approach adopted in *Austin, Nichols & Co Inc v Stichting Lodestar* in respect of civil appeals conducted by way of rehearing is applicable to appeals under s 232(2)(b).[45]

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42 See above at [10]. The explanatory note to the Bill, in discussing appeals against conviction from judge-alone trials, quotes this passage of *Herewini*: see Explanatory note, above n 39, at 65.

43 It follows that the legislature assumed that appeals under s 232(2)(a) should also be by way of rehearing. In this respect, however, we would place rather more emphasis on the legislature's more significant assumption that appeals under s 232(2)(a) would be dealt with on substantially the same basis as appeals under s 385(1)(a): see Explanatory note, above n 39, at 65–66; and Select Committee report, above n 40, at 9.

44 See the cases referred to in n 6 above.

45 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

The appellant's arguments as to what is required under s 232(2)(b)

[33] For the appellant, Mr Jones QC relied on two lines of argument, which in his submissions were closely intertwined.

[34] The first was the contention that the function of an appellate court under s 232(2)(b) extends to full reconsideration of the case. In developing this submission, and in reliance on *Austin, Nichols*, Mr Jones contended that we should re-evaluate the evidence afresh and that the "review function of whether a finding was open to the trial Judge has no application". He claimed that:

> An appellant is entitled to the appeal court's determination of whether the first instance Judge was right or wrong substantively on the outcome.

On this approach, if:

> … the appellate court comes to a different view on the evidence, the trial Judge necessarily will have erred in their assessment.

[35] In his second line of argument, Mr Jones emphasised the need for trial judges to give reasons:

> Put simply, a Judge has to justify their findings. How a decision is reached and what was taken into account (and what was not) is of importance. A global credibility finding (explicit or implicit) is not enough. Reasons are the justification for decisions. If the analysis or reasons are deficient, the conclusion is flawed and unsubstantiated.

Our approach to s 232(2)(b)

[36] As will be apparent, we broadly accept the second line of argument just referred to. We see s 232(2)(b) as premised on the assumption that the s 106(2) (and common law) requirement for reasons has been satisfied. *Connell* and *Eide* indicate the kind of reasons which judges should provide. They should show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached. Reasoning which consists of a conclusory credibility preference is unlikely to suffice. The language of s 232(2)(b) reflects an assumption that the reasons given by a judge will reflect that judge's assessment of the evidence and why that assessment resulted in a conviction. A failure to provide such an assessment frustrates the

operation of s 232(2)(b) and may well engage s 232(2)(c); this on the basis that a reasoned judgment is essential to a fair trial. A failure to provide a reasoned resolution of a significant evidential dispute may, alternatively, suggest a misapprehension of the effect of the evidence, for instance a misapprehension of the significance of the dispute. As we explain later in these reasons, this case involves such a misapprehension.

[37] In saying all of this, we accept that imperfection of expression is practically unavoidable, particularly in oral judgments. Accordingly, appellate courts should assess reasons contextually, in light of the evidence given and allowing for the burden for judges of balancing the need for prompt determination of criminal cases with other workload requirements. The adequacy (or not) of reasons must be assessed in light of the type of case (including seriousness) and the issues involved. What is required are reasons which address the substance of the case advanced by the losing party. Depending on the circumstances, this can be achieved without necessarily referring in detail (or sometimes at all) to every issue or argument which that party has advanced.

[38] To the extent that Mr Jones' first line of argument is based on the premise that the approach in *Austin, Nicholls* applies to appeals from judge-alone trials, as indicated above, we agree. If an appellate court comes to a different view on the evidence, the trial judge necessarily will have erred and the appeal must be allowed. But, to the extent that Mr Jones was suggesting that the role of an appellate court is to consider the issues de novo as if there had been no hearing at first instance, then we do not agree. Since it is an appeal, it is for the appellant to show that an error has been made. Further, in assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had. Because of this, where the challenge is to credibility findings based on contested oral evidence, an appellate court will exercise "'customary' caution".[46] There are two main, overlapping, reasons for this.

[39] The first is that a slow-paced trial, at which the evidence emerges gradually, provides a good opportunity for evaluating the strengths and weaknesses of a case. In

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[46] *Austin, Nichols*, above n 45, at [13] (footnote omitted).

assessing the plausibility of what is said by the witnesses, the judge has the advantage of being also able to form a view as to what sort of people they are. This is an appreciable consideration despite the now well-recognised difficulties with demeanour-based credibility assessments.[47]

[40] The second consideration, in effect the other side of the coin to the first, is that appellate judges dealing with a case on the basis of a written record of what happened at trial and the submissions of counsel are unlikely to be as well-placed as a trial judge to determine contested questions of fact based on contested oral evidence. For instance, what a witness means may be conveyed, at least in part, by gesture or intonation, something which will not be apparent on the written record.[48] More generally, the appellate process in which appellate judges are taken, sometimes rather selectively, to the aspects of the evidence on which counsel rely does not replicate the advantages of a trial judge which we have just described.

The challenge to the factual findings of the Judge

The general factual background

[41] The appellant and Ms H married in either late 2004 or early 2005. S was born on 15 June 2004; K on 8 March 2008. The appellant and Ms H separated in 2011 and their marriage was dissolved in 2013. The complainants were the appellant's son (K) and his daughter (S) who were respectively aged between six and seven, and 10 and 11, at the time of the alleged offending. From separation Ms H had primary care of the children but they saw the appellant during access visits. In June 2014, the appellant slapped K who was then six. This occurred during an access visit. Present at the time was the appellant's mother who did not intervene on behalf of K. Ms H brought the incident to the attention of the police who, in September 2014, spoke with the appellant regarding the incident and later issued him with a formal warning.

[42] Further allegations were made of assaults occurring during access visits between August and December 2014 and, as a result, access ceased from January 2015.

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47 See the discussion in *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [26]–[35].

48 A similar point was made in both *Taniwha*, above n 47, at [29]; and *Munro*, above n 23, at [74].

[43] On 15 December 2015, the Family Court directed the resumption of access but on a supervised basis, the supervisors being the appellant's mother and sister. Access was exercised pursuant to this order on 19 and 26 December 2015 without incident. There was further access on 9 January 2016. Present when the appellant had the children were his parents and a Spanish friend (Tamara Rojas) of his sister. His sister was present for part of the day. On the case for the police, the appellant assaulted both children on this occasion.

[44] The appellant's case was premised on the contentions that Ms H had caused the children to be estranged from the appellant and that the complaints which were the subject of the charges were a function of this estrangement. There were a number of components to this theory of the case. Much attention was paid to family dynamics. It was argued that there were incongruities between the allegations against the appellant and what had been said in contemporaneous emails between him and Ms H. As well, there was considerable focus on inconsistencies between the evidence of the children and that of the others who were present on 9 January 2016. More generally, the evidence was sharply conflicting and the case hard fought.

[45] The charges on which the appellant was found guilty alleged that:

(a) Between August and December 2014 the appellant pinched the children.

(b) In December 2014, while playing hide and seek with the children, the appellant accidentally opened a door onto K's toe. When K began to cry the appellant became angry and slapped K twice across the face.

(c) On 9 January 2016, the appellant pinched both K and S.

Our general approach

[46] In his submissions in support of the appeal, Mr Jones challenged the factual findings of the Judge in a number of respects and on a number of grounds. Amongst his arguments was the contention that we should conclude, on the basis of a reconsideration of the evidence, that the charges on which the appellant was found

guilty had not been established beyond reasonable doubt. Given that we propose to allow the appeal on other grounds and direct a new trial, it is not appropriate for us to engage with this argument in any detail. For present purposes, it is sufficient to say that we do not consider it appropriate for us, on the basis of the written record of the proceedings, to determine the case.

[47] Mr Jones' alternative argument was that the reasons given by the Judge for finding the appellant guilty were inadequate. As will be apparent, we are satisfied that the appeal must be allowed on this ground. We propose to address this primarily by reference to the way in which the Judge dealt with the offending which was alleged to have occurred on 9 January 2016 and, in particular, with the defence evidence from those who had been present in the house on that day. As will become apparent, we consider that the Judge's reasons show that she "erred in … her assessment of the evidence to such an extent that a miscarriage of justice has occurred". Given this provides a sufficient basis to allow the appeal in respect of all the convictions, we need not deal in detail with other aspects of her reasoning which were challenged by Mr Jones, albeit that we will revert to them briefly later in these reasons.

The events of 9 January 2016

[48] On the evidence of the children, the offending on 9 January 2016 involved the appellant pinching them both. Their evidence was that after they had been pinched, they took refuge in a room and blocked the door into it with a chair. According to S (whose evidence was generally more detailed than that of K), the appellant came into the room through a window. She was terrified. K was crying and the appellant told him to shut up. K cried out for help which resulted in the appellant trying to punch him. Afterwards, at a point when the children were in the living room, K ran, screaming, outside to a trampoline, got onto it and closed the net to stop the appellant getting on. He was crying and the appellant told him to shut up as he might be heard by the neighbours. S said that she went to her grandmother for help but that she provided no assistance.

[49] The prosecution evidence included a photograph which Ms H said she had taken. It depicted bruising on K's arm which, on the prosecution case, was caused by

the appellant having pinched him. The defence challenged the authenticity of the photograph. The photograph was supplied to the police (undated) on 3 April 2016 but, on the eve of the trial, a second version was sent to the police dated 15 January 2016. Neither the bruise, nor the photograph, were mentioned in contemporaneous email exchanges between Ms H and the appellant.

[50] The appellant gave evidence in which he denied assaulting the children on 9 January 2016. As we have noted, for the entire period that the children were in the house that day, the appellant's parents and Ms Rojas were present. As well, for part of the day, the appellant's sister was also at the house. The appellant's mother, sister and Ms Rojas (who had returned from Spain for the trial) all gave evidence to the effect that they saw and heard nothing untoward. All three were cross-examined on the basis that the assaults may have occurred without them noticing, a proposition which they generally denied (save that the appellant's sister could speak only of the time that she was at the house). As well, it was suggested, albeit not very explicitly, to the appellant's mother that she was giving evidence in an attempt to help the appellant out. It was not put to Ms Rojas in cross-examination that she was lying.

The Judge's reasons

[51] In her judgment, the Judge reviewed the evidence at some length. She did not, however, engage closely with the detail of what the children alleged in respect of 9 January 2016. And her reasons for finding the appellant guilty of pinching the children on that day were succinct:

> [68] Charge 5029 assault on child, on 9 January 2016 when the children were visiting the defendant's home and [K] was watching television the Court his satisfied that the defendant pinched him on his arm and caused to become red. A photograph was produced by the mother to the Court, both [K] and his mother have said that this is a bruise from that pinching and the Court has accepted their evidence and as a truthful account of events and has accepted that that pinching and that bruise was inflicted by the defendant.
>
> [69] Charge 5031 and on the same visit on 9 January 2016 [S] was alleged to have been pinched by the defendant on her legs. She is a very sensitive and highly intelligent young woman, she has been extremely stressed with her relationship with her father and said that she has been afraid of him almost as long as she can remember. She had rejected the father, the grandmother and the aunty. She had previously been on a good relationship with aunty and probably grandmother in the past but events have occurred for which she feels

> that her grandmother and her aunty are unable to protect her or unwilling to protect her when they are in the custody of their father at the house.
>
> [70] The Court listened to the evidence of the defendant, the aunty, the woman from Spain and gave weight to it but Court accepted beyond reasonable doubt that the evidence of [S] was reliable. That the defendant put on a good front when other people were around but when he had moments alone with the children that he would change his personality and unexpectedly or unexplainably turn on them and either pinch or slap them. The assault the Court finds [S's] evidence to be correct and that she was pinched by her father on the same visit of the night of 9 January 2016.

[52] The events of 9 January 2016, as described by both children and particularly S, were florid in nature. It is not likely that the events as described would have escaped the attention of other adults in the house at the time. So the evidence of the children and that of the appellant's mother and Ms Rojas at least, could not be sensibly reconciled on the basis that everyone but the appellant was telling the truth and the assaults occurred when the children were alone with the appellant.

The High Court judgment

[53] In the High Court, Downs J dealt with this aspect of the case in this way:

> [65] Mr Jones also submitted the children's description of the events of 9 January were such these could not have gone unnoticed by the defence witnesses. For example, K said:
>
> > We came to visit him when he just didn't feel like it and on the last visit erm he like pinched me on the arm and turned red and then it started to turn into a bruise and then erm and then erm he started to pinch my sister as well and then, then she didn't like it and I didn't like it. So we just, just erm, so we just, just went into our room and erm locked the door and yeah but the door didn't have any locks but we put a chair in it…. And like keep it stuck in the door so
>
> [66] The Judge considered the evidence from Ms Rojas and Mr Sena's sister and mother added little, which explains why the Judge did not treat their testimony as giving rise to a reasonable doubt. More particularly, the Judge noted Mr Sena's sister was only present for two hours on the 9th, … .
>
> [67] In any event, it was open to the Judge to place little weight on this evidence. Mr Sena's sister and mother said they disbelieved the children's allegations, so bias was a live issue. On S's account, Mr Sena's mother was frequently in the bedroom on her computer, uninterested in what was going on, and according to S, an untruthful witness. Mr Sena's mother said she saw the June 2014 slapping; in turn implying Mr Sena was untroubled to act in this manner in front of her.

> [68] Mr Jones described Ms Rojas as an "independent" witness. However, Ms Rojas is a friend of Mr Sena's sister and stayed with her from December 2015. In evidence-in-chief, Ms Rojas said she saw nothing untoward on the 9th in circumstances in which Mr Sena was never alone with the children. In cross-examination, Ms Rojas accepted there was at least one occasion K was not in her presence while Ms Rojas was watching a belly dancing performance on a laptop computer. And, S said Mr Sena pretended to be nice in front of the "Spanish lady". Experience suggests a defence based on absence of opportunity often lacks realism. That view was open to the Judge.
>
> (footnote omitted)

Do the reasons reveal an error in the "assessment of the evidence"?

[54] In *Connell* Cooke J observed:[49]

> When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

It may be that, at a stretch, the Judge's reasons can be read as encompassing an implicit rejection of the appellant's mother's evidence; this based on her lack of response to the June 2014 incident and affinity for the appellant. At what would be more of a stretch, the reasons might be treated as a rejection of the evidence of the appellant's sister. But in relation to the evidence of Ms Rojas, no such rejection is even implicit in the Judge's reasons and no reason proffered for such a rejection.

[55] We consider that it may have been open to the Judge to find the appellant guilty on the 9 January 2016 charges. There was, as she noted, a photograph of K's arm which showed marks consistent with his evidence, albeit that the authenticity of this photograph was challenged.[50] Further, if the Judge had squared up to what we see as the inconsistency between the evidence of the children and that of the appellant's witnesses she might, conceivably, have been able to justify convictions; this on the basis that:

(a) the children, and particularly S, may have been guilty of exaggeration but the essence of their evidence was correct; or

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49 *Connell*, above n 26, at 238.

50 To the extent to which the Judge relied on the photograph, reasons for rejecting the challenge to its authenticity were necessary. No such reasons were provided.

(b) the inconsistent evidence adduced for the appellant was rejected, albeit that the limited challenge to Ms Rojas in cross-examination may have stood in the way of this.

As will be apparent, the reasons given by the Judge did not proceed on either of those bases.

[56] It follows that we see this aspect of the case as falling squarely within s 232(2)(b). The Judge assessed the evidence of the children as being broadly consistent with that of the appellant's witnesses, particularly Ms Rojas (and also that of the appellant's mother unless her evidence is to be treated as rejected). In this respect, the substance of the evidence which the children had given was mischaracterised. The chain of events as described by the children could hardly have escaped the attention of people who were in the house, particularly given some of them were there for the purpose of supervising access against a background of complaints as to what had happened on earlier occasions.

[57] In this context, we do not regard the convictions as saved by Downs J's reconsideration of the arguments. In the first place, he addressed the point by specific reference only to the evidence of K rather than the more detailed narrative given by S.[51] His reference to defences based on absence of opportunity often lacking realism did not engage with the narratives given by the children.[52] And in the case of Ms Rojas, in particular, he attributed to the Judge a rejection of her evidence which goes beyond anything she said in her judgment.

[58] We accordingly conclude that the Judge erred in her "assessment of the evidence to such an extent" that the process miscarried. The basis upon which she found the appellant guilty of the 9 January 2016 offending is thus not sustainable and it is not practicable for us, on a consideration of the transcript of the hearing, to be satisfied of guilt. The result is that those convictions must be quashed.

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51 *Sena* (HC), above n 2, at [59]–[66].
52 At [68].

The other charges

[59] We are satisfied that the inadequacies we have identified in respect of the charges in relation to 9 January 2016 cast a shadow over the other convictions which is sufficient to warrant them being quashed as well. The allegations against the appellant related to what, on the police case, was a single course of conduct involving a pattern of very particular behaviour against the children. The events of 9 January 2016 were investigated shortly after they occurred and the evidence in respect of them was far more detailed than that in respect of earlier alleged offending. The Judge's reasons in respect of all charges she found proved came down largely to a preference for the credibility of the children. If she had not been satisfied beyond reasonable doubt that the 9 January 2016 charges had been made out, reasons more finely grained than those provided would have been required to justify convictions on the earlier charges.

Other complaints about the reasons

[60] Section 105 of the Criminal Procedure Act provides:

> **105 Conduct of Judge-alone trial**
>
> (1) Unless the court directs otherwise, neither the prosecutor nor the defendant may make an opening statement other than,—
>
> (a) in the case of the prosecutor, a short outline of the charge or charges the defendant faces; and
>
> (b) in the case of the defendant, a short outline of the issue or issues at the trial.
>
> …
>
> (4) Unless the court directs otherwise, neither party may—
>
> (a) make submissions on the facts; or
>
> (b) address the court on the evidence given by either party.
>
> (5) Despite subsection (4), the defendant, whether or not he or she intends to call evidence, may address the court at the end of the prosecutor's case to submit that the charge should be dismissed.

[61] This section is based on s 67 of the Summary Proceedings Act which applied only to summary trial.

[62] In the present case, neither the prosecutor nor defence counsel made closing addresses. The transcript we have does not record any discussion about this but we infer from a document to which we are about to refer that there was such a discussion, the upshot of which was that: (a) counsel was to file a chronology; but (b) there were to be no submissions on the facts. As it turned out, counsel for the defendant did file a memorandum with the Court around a week after the hearing which was described on the cover sheet as "submissions on behalf of defendant". In it, counsel observed:

> There are specific issues which the defence wishes to raise in terms of the court's consideration of the charges. As discussed at the hearing, these issues will not be submissions on the facts relating to the individual charges but relate to matters the defence considers are particularly relevant to the overall consideration of the evidence.

The submissions addressed a number of points: the context provided by antipathy on the part of the children to the appellant and his family; the contemporaneous emails; the context around the 9 January 2016 incident (including nearly all of the points on which we have decided to allow the appeal); and general comments on the evidential interviews and evidence of the children. These last comments were prefaced by the observation that the Court did "not wish to have submissions on the various EVIs and the children's evidence generally". Presumably for this reason the comments were general in nature only. Attached to those submissions was the chronology.

[63] Despite counsel's characterisation of what he was doing, it would be understandable if the Judge had seen the document filed as submissions on the facts which had been proffered despite her not having given permission for this to happen as required under s 105(4). Possibly for this reason she did not, in her judgment, refer to the document.

[64] Given our conclusions on the adequacy of the reasons of the Judge which we have already given, we need say no more about this aspect but we add that in cases of factual complexity, judges would be well advised to seek submissions from counsel on the facts. These would be of assistance to judges in ensuring that the prosecution and defence cases are understood and dealt with in the reasons.

Result

[65] In the result:

(a) The appeal is allowed.

(b) The convictions of the appellant are quashed.

(c) We direct a new trial.

Whether a retrial is in fact practical or appropriate given the elapse of time will be, in the first instance, a matter for the prosecutor to determine.

Solicitors:
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