NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 97/2018
[2019] NZSC 69

BETWEEN	H (SC 97/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	4 April 2019
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	A M S Williams and A J Bailey for Appellant C A Brook and P D Marshall for Respondent
Judgment:	3 July 2019

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by Glazebrook J)

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Introduction

[1] In 2017 Mr H[1] was convicted after a jury trial on eight charges of sexual offending against his sister "Dianna" and his daughter "Emily" (not their real names).[2] He was sentenced to seven years' imprisonment.[3]

[2] Mr H's appeal against conviction and sentence was dismissed by the Court of Appeal on 20 September 2018.

[3] On 21 February 2019, this Court granted Mr H leave to appeal against one of the convictions: for the rape of Dianna.[4] This offending was alleged to have occurred between 1 December 1955 and 21 July 1959 when Mr H was aged between 16 and a

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1 As explained in more detail later, "Mr H" has been used because, despite the appellant's name not being suppressed, identifying him by name would breach the complainants' protections under s 203 of the Criminal Procedure Act 2011 due to the nature of this offending and the complainants' relationship to him.

2 These fictional names were given to the complainants the courts below: *R v [H]* [2017] NZHC 1316 at [5] and [13]; and *[H (CA376/2017)] v R* [2018] NZCA 376 (Kós P, French and Miller JJ) [CA judgment] at [3(a)], n 2. We have done the same to avoid confusion.

3 The convictions in relation to Dianna were on: one charge of rape, four charges of indecency with a girl aged between 12 and 16 (three of which were representative charges) and one representative charge of indecent assault on a girl over 16. The convictions related to Emily were on: one representative charge of indecent assault on a girl aged under 12 and another of indecent assault on a girl aged 12–13 years.

4 *H (SC 97/2018) v R* [2019] NZSC 4 (William Young, O'Regan and Ellen France JJ).

half and 20 years and Dianna was aged between five years and four months and eight years and 11 months.[5]

[4] The approved question on which leave to this Court was granted was whether, in dealing with the question of delay, the Court of Appeal correctly dealt with Mr H's age at the time of the offending. This includes the question of whether s 322 of the Oranga Tamariki Act 1989 applies.

Legislation

[5] Section 322 of the Oranga Tamariki Act provides:

> **322 Time for instituting proceedings**
>
> A Youth Court Judge may dismiss any charge charging a young person with the commission of an offence if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

[6] A young person, for the purposes of Part 5 of the Act where s 322 is situated, is defined in s 2(1) as a person over the age of 14 years but under the age of 17 years. Also in s 2(1), a child is defined as a person under the age of 14 years.[6]

[7] Section 2(2) and (3) are also relevant:

> (2) Where any proceedings are being considered or have been taken in respect of any offence allegedly committed by a person when that person was a child or young person, the age of that person at the date of the alleged offence shall be that person's age for the purpose of—
>
> (a) whether there is jurisdiction to take any proceedings in respect of that alleged offence, and, subject to paragraph (d), which court has jurisdiction in respect of proceedings that may be taken; and
>
> (b) the proceedings taken,—
>
> but nothing in this subsection shall—
>
> (c) require or authorise any family group conference in respect of the alleged offence before or at any stage of the proceedings

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5 There was dispute at trial and in this Court about whether it was possible to narrow this date range further. We do not need to resolve this matter for the purposes of the appeal.

6 This definition is for the purposes of the Act as a whole.

> if, at the time the conference would otherwise be required, that person has attained the age of 18 years; or
>
> (d) require any proceedings to be taken in the Youth Court if, at the time the charging document is filed, that person has attained the age of 18 years; or
>
> (e) derogate from the provisions of section 6 of the Sentencing Act 2002 (which shall apply in respect of proceedings under Part 4 as if the proving of a charge was a conviction).
>
> (3) Where any charging document is filed in the District Court pursuant to subsection 2(d), section 322 shall apply, with all necessary modifications, to the proceedings.

[8] Mr Williams, for Mr H, submits that the following sections are also important in interpreting the scope of s 322:[7]

(a) Section 4(f)(ii) which is a general object under the Oranga Tamariki Act. It aims to ensure that where children or young persons commit offences:

> … they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

(b) Section 5(f) which notes the principles to be applied in exercise of powers conferred by the Oranga Tamariki Act:

> … the principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time:

[9] Section 147(1) of the Criminal Procedure Act 2011 (CPA), under which Mr H twice applied for a dismissal of the charges against him,[8] provides:

> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.

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7 Mr H also referred to the youth justice principles (in s 208 of the Oranga Tamariki Act), but we do not consider them directly relevant as they all relate to dealing with offenders while they are still children or young persons.

8 See [17]–[18] and [37]–[38] below.

Background facts

Offending against Dianna

[10] Dianna claimed that Mr H had sexually abused her from 1955 to 1967. The first charge was one of rape and was the most serious of the alleged offending. The rape allegedly occurred when Mr H was taking Dianna to visit her older sister. Mr H pulled off the road after crossing a bridge and parked behind a high hedge. He got Dianna out of the car saying they would play "mothers and fathers". He then lay on top of her and she remembered his "body going up and down, up and down" and getting "really hot and sticky". She said it was "really, really sore ... between [her] legs". Afterwards he took her to the river to wash.

[11] Dianna's memory was challenged in cross-examination. She confirmed that, while she believed Mr H may have abused her many more times, she had restricted her evidence to what she could actually remember:

> Q. And would it be fair to say that much of your evidence about what occurred all those years ago is guesswork to a degree?
>
> A. No and may I say if I wanted to guess there wouldn't be one charge there'd be a lot more charges of indecent assault or whatever you like to call it. [I]f I wanted to make a big thing out of it there's a lot of areas that I could've exaggerated or whatever but I haven't. I have told you what I remember and I think that's really important that you and everyone else understands that I have only spoken about what I remember. I am absolutely positive there could be a lot more that I can't remember.

[12] The other charges where Dianna was the victim were indecent assaults. These were said to have occurred between 22 September 1962 and 21 September 1967. For some of this period, while Dianna's parents were temporarily split up, Dianna and her mother lived with Mr H and his wife in Christchurch.[9] Mr H would touch Dianna's breasts and genitalia and force her to masturbate him. The last time he tried to touch her vagina was when she was in bed. She called her boyfriend of the time to take her away from the house. She then cut almost all contact with her brother. Her boyfriend recalled picking Dianna up from Mr H's house and understood it was because Mr H had indecently assaulted her.

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9 Mr H had married in 1962.

Offending against Emily

[13] In 1963 Mr H's daughter, Emily, was born. Emily recalled that, from the time she was very young (perhaps four years old), Mr H would reach under her bedsheets and rub her genitalia. Mr H was charged with a representative charge of indecently assaulting a person aged under 12 years (being Emily) between 11 November 1967 and 11 November 1970. The only other incident Emily could recall was the final time Mr H touched her. This was when she was about 13 years old. It occurred in the garden shed at their home, when Mr H performed oral sex on her. He told her that soon boys would take an interest in her and she needed to know what things felt like. Mr H was found guilty of indecent assault of a girl aged under 12 and indecent assault on a girl aged between 12 and 14 for this conduct.

Procedural history

[14] In early 1973 Dianna was asked by her mother why she had no relationship with Mr H. She said that he needed "to learn to keep his hands to himself". Mr H wrote a letter to Dianna (which was produced at trial) threatening legal proceedings if she repeated the allegations. Dianna's evidence was that she and her husband did not have "any money to be able [to] do a court thing or anything like that because it was really hard". They thus just kept away from Mr H.

[15] In the early 2000s Dianna indicated to Emily that she had been abused by Mr H and this led to Emily disclosing allegations of her own against Mr H. In around 2004, Dianna disclosed to another sister (M) why she was having counselling. M disclosed to Dianna that she had been abused by Mr H as well. M began counselling and M attempted, along with another brother, to confront Mr H. Mr H denied her allegations.

[16] Dianna did not want to complain to the police about Mr H's offending while her parents were alive. Her father died in 2005 and her mother died in 2014. Complaints were laid with the police by Dianna, Emily and M in 2014 after the mother's death. At the start of 2015 Dianna and Emily were evidentially interviewed.[10] Mr H was charged on 3 August 2015.

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[10] It is unclear when M was interviewed.

[17] In December 2015 Mr H applied for the charges to be dismissed under s 147 of the CPA or the prosecution permanently stayed on the basis of delay. On 29 August 2016 Dunningham J allowed the application and dismissed charges concerning M[11] but dismissed the application for stay or dismissal in relation to the other charges concerning Dianna and Emily.[12]

[18] Mr H's trial began on 3 April 2017 in the High Court at Christchurch. At the conclusion of the Crown case, Mr H again applied for all the charges to be permanently stayed or dismissed under s 147 of the CPA on the basis of delay. The trial judge, Gendall J, refused that application.[13]

Court of Appeal judgment

[19] The Court of Appeal noted that Mr H may have been aged between 16 and 20 at the time of the alleged rape of Dianna. It held that s 322 of the Oranga Tamariki Act only applies to cases while they are in the Youth Court.[14] The Court of Appeal accepted, however, that youth justice principles continue to apply to a youth who is being dealt with in another jurisdiction.[15] This includes the principle that, wherever practicable, decisions must be made within a timeframe appropriate to the young person's sense of time.[16]

[20] The Court accepted the Crown's submission that s 322 would in any event have no bearing on this case as Mr H was never charged as a young person.[17] When the police began their investigation Mr H's sense of time had long been that of a mature adult. There were no other grounds raised that could not be considered under s 147 of the CPA.

[21] One of the other grounds of appeal was that the High Court twice wrongly refused to stay the proceedings and that Mr H's defence was in fact prejudiced by the

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11 *[H] v R* [2016] NZHC 2009 at [24]–[27] [First stay application].
12 At [56]–[64].
13 *R v [H]* [2017] NZHC 1121 at [20]–[26] [Second stay application].
14 CA judgment, above n 2, at [29], citing *R v M [Youth Justice]* [2011] NZCA 673, [2012] NZAR 137 at [25]–[32].
15 At [29].
16 At [27], citing Oranga Tamariki Act 1989, s 5(f).
17 At [30].

delay because of evidential issues.[18] The Court of Appeal rejected that evidential issues arising from the delay prejudiced Mr H: almost all witnesses were still available, the allegations were not vague, and the defence was still able to put the complainants' reliability in issue and to cross-examine the complainants.[19]

[22] The Court of Appeal also dismissed complaints about inadmissible evidence[20] and about the Judge's directions to the jury.[21] The Court concluded that there had been no miscarriage of justice.[22]

Issues

[23] The issues in this case are:

(a) Does s 322 apply to this case?

(b) If so,

(i) what are the principles to be applied?

(ii) what is the relationship of s 322 with stay of proceedings or dismissal of charges under s 147 of the CPA?

(iii) has the elapsed time been unnecessarily or unduly protracted? and

(iv) should the charge for rape have been dismissed?

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18 At [2] and [10]–[12].
19 At [19]–[26].
20 At [31]–[33].
21 At [34]–[39].
22 At [40].

Application of s 322

The Crown's position

[24] Both before the Court of Appeal and this Court, the Crown accepted that s 322 applies to Mr H's case.[23] The Crown submits that the Court of Appeal erred in holding that s 322 did not apply to the present proceeding. In the Crown's submission, the controlling authority is *Brown v R*[24] and not *R v M [Youth Justice]*.[25]

[25] The Crown submits that the proper ratio of *R v M [Youth Justice]* is that, prior to the enactment of the CPA, s 322 did not apply in the indictable jurisdiction of the District Court following a committal for trial in the Youth Court. The Crown accepts this is no longer the case under the CPA.

Mr H's position

[26] Mr Williams supports the Crown position that s 322 applies to Mr H. He submits that this conclusion is backed up by the legislative history, namely the introduction in 1994 of what is now s 2(3) and s 2(2)(d) of the Oranga Tamariki Act.[26]

[27] Mr Williams does not, however, accept the Crown's position that prior to the CPA, s 322 did not apply in the District Court after a committal in the Youth Court.

Our assessment

[28] We accept the parties' submissions that s 322 applies to Mr H's case.[27] The proceeding concerned an offence allegedly committed by Mr H when he was (or may have been) a young person. In terms of s 2(2) of the Oranga Tamariki Act Mr H's age would, for these purposes, be deemed to be his age at the time the offence was committed and, as he may have been 16, he would be treated as a young person for the purposes of s 322.

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23 CA judgment, above n 2, at [29].
24 *Brown v R* [2015] NZCA 325, (2015) 30 FRNZ 471.
25 *R v M [Youth Justice]*, above n 14.
26 Children, Young Persons, and Their Families Amendment Act 1994.
27 Contrary to the view of the Court of Appeal: CA judgment, above n 2, at [29].

[29] Mr H was charged by way of a charging document filed in the District Court as contemplated by s 2(2)(d) of the Act. This means, in terms of s 2(3), that s 322 applies "with all necessary modifications, to the proceedings". These "modifications" could include substituting a District Court Judge for a Youth Court Judge.[28]

[30] We do not need for the purposes of this appeal to resolve whether or not, before the CPA, s 322 applied in the indictable jurisdiction of the District Court following a committal for trial in the Youth Court.

What are the principles to be applied?

[31] The next issue is how s 322 is applied when the accused is no longer a child or a young person. In our view, the section is to be applied taking into account the youth justice principles that are still relevant, even though the accused is now an adult. We accept Mr H's submission that the general object set out in s 4(f)(ii) of the Oranga Tamariki Act is relevant, as is the principle contained in s 5(f) of that Act that decisions should be made in a timeframe appropriate to a child's or young person's sense of time.

[32] In the case of a person charged as an adult for an offence committed as a young person, this principle will usually have no direct application. When the person is charged when an adult, he or she will usually no longer have the sense of time of a child or young person. We recognise that the principle may still, however, have direct application to persons charged in their late teens and early twenties for offences committed as children or young persons.

[33] The reasons behind the s 5(f) principle will still need to be considered in relation to those charged as adults. One important reason for the s 5(f) principle is to enable rehabilitation to occur in line with the general object in s 4(f)(ii). It is also recognised that there are particular factors related to the stage of development that may have contributed to the offending of children and young persons and that may be seen

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[28] *R v Brown* [2015] NZHC 1155 at [26]–[29].

as reducing or explaining culpability and also as meaning rehabilitation is more likely. As the Court of Appeal in *Churchward v R* said:[29]

> [77] Youth has been held to be relevant to sentencing in the following ways:
>
> (a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.
>
> (b) The effect of imprisonment on young people, including the fact that long sentences may be crushing on young people.
>
> (c) Young people have greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult.
>
> [78] Additional factors recognised by the England and Wales Sentencing Guidelines Council are: offending by a young person is frequently a phase which passes fairly rapidly and thus a well-balanced reaction is required in order to avoid alienating the young person from society and; criminal convictions at this stage of a person's life may have a disproportionate impact on the ability of the young person to gain meaningful employment and play a worthwhile role in society.
>
> [79] Looking at these related factors in more detail, we note first the matters discussed by Dr Chaplow as to the differences between young people and adults. As he notes, there is a growing body of scientific evidence on adolescent brain development that demonstrates that young people are significantly different to adults.
>
> [80] The New South Wales Department of Education and Training has stated that adolescence is a period of development, particularly in the ability to produce, establishing an individual identity and developing logical and rational thought processes. It summarises the research as follows:
>
> (a) the ability to plan, consider, control impulses and make wise judgements is the last part of the brain to develop;
>
> (b) adolescents are built to take risks and it is simply part of their biology;
>
> (c) most adolescents know right from wrong, but the environment in which risk-taking and other behaviours occur can lead to inappropriate behaviour; and

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[29] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446. See also references to *Churchward* in, for example, *Arahanga v R* [2014] NZCA 379 at [26]–[27]; *Curtis v Commonwealth of Australia* [2018] NZCA 603 at [92]–[94]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [210], n 150.

(d) adolescents are more prone to react with gut instincts and impulsive and aggressive behaviour.

…

[98] We accept that Ms Churchward was almost past being a child as defined in the United Nations Convention on the Rights of the Child, but youth is seen as a larger concept than childhood and extends past 18 years of age.

(footnotes omitted)

[34] The above factors may mean that it is inappropriate to try a person for an offence allegedly committed as a child or young person after unnecessary or undue delay. This would particularly be the case where the offence was committed when the person was very young or if the alleged offending was not serious. Even where the alleged offending was serious, however, youth justice principles may still mean that the discretion to dismiss a charge under s 322 should be exercised. This would especially be the case where there is good reason to consider the person has been rehabilitated (for example where there has been a long period without any serious offending).[30]

Relationship of s 322 with s 147 of the Criminal Procedure Act and stay jurisdiction

Submissions

[35] Mr Williams submits that the rape charge should have been stayed by the High Court on the basis of delay, particularly having regard to s 322. Mr Williams submits that Dunningham and Gendall JJ were wrong to consider ordinary stay principles without reference to s 322.

[36] The Crown submits the Courts below were correct not to regard Mr H's age at the time of the offence as a material factor in whether to stay or dismiss the charge. Mr H was not "very young" at the time of the rape. This was not "comparatively minor offending"[31] and Mr H was unlikely to have been prejudiced by the fact rape

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30 Other youth justice principles may be relevant in other cases, particularly if the person offended as a child or young person but is charged in their late teens or early twenties.

31 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [31].

charges were not laid against him at the time of his offending, even if he had been 16 years at that time.

Decisions of the High Court

[37] The focus of the first application before the High Court was for a stay (although Mr H argued in the alternative that the charges should be dismissed under s 147 of the CPA). Dunningham J cited *CT v R* as authority for relevant considerations for granting a stay[32] and held that, although the delay was significant, the sum of the issues did not make it unfair to put the allegations before a jury.[33]

[38] The focus of the second application before the High Court was s 147 of the CPA. Under s 147, the Court may dismiss a charge any time before the defendant pleads guilty or before the defendant's guilt has been determined. Gendall J referred to *CT v R* as determining whether or not to dismiss a charge on the grounds of delay. No "new material of any substance" had arisen beyond that considered by Dunningham J.[34] He therefore dismissed the s 147 application.

Our assessment

[39] It was accepted by Gendall J that the approach to stay applications and s 147 applications is the same where the issue is delay. The question therefore for both Dunningham and Gendall JJ was whether the risk of prejudice from the delay was such as to render Mr H's trial unfair. This required "an evaluative judgment based on all relevant circumstances".[35]

[40] By contrast, as noted above, s 322 of the Oranga Tamariki Act requires the application of youth justice principles. In some cases, this may entail considering some of the factors that may be relevant to a decision whether to dismiss a charge

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32 First stay application, above n 11, at [28]–[29], citing *CT v R*, above n 31, at [29] and [32].
33 At [64].
34 Second stay application, above n 13, at [20].
35 *CT v R*, above n 31, at [29]; see generally at [27]–[32].

under s 147 or to stay the proceedings. Section 322 should, however, be considered separately.[36]

[41] We therefore do not accept Mr H's submission that Dunningham and Gendall JJ erred by not considering s 322 in the course of their decisions on the applications for stay and dismissal under s 147.

Has the time elapsed been unnecessarily or unduly protracted?

Submissions

[42] It is accepted by both parties that, while the term "unnecessarily protracted" in s 322 imports a notion of fault (usually by the Crown), the term "unduly protracted" does not. Mr Williams relies on *Police v T* for that submission.[37] The Crown submits that nevertheless the terms can be assessed together.

Our assessment

[43] We accept that there is a notion of fault in the term "unnecessarily protracted". There was no fault involved in the delay in this case. There are often good reasons for delays in the reporting of historic sexual offending.[38] Above, we have set out the procedural history, outlining the reasons for delay in reporting in this case.[39]

[44] We agree that the term "unduly protracted" does not, however, import a notion of fault. Whether the time elapsed has been unduly protracted must be considered from the perspective of the accused and may also depend on the application of the particular youth justice principle at issue. If an accused is still young, a relatively short delay may be considered unduly protracted, whereas such a delay would not be

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36 We do not consider that in this case factors that were relevant to the s 147 and stay applications are also relevant under s 322. The particular factors Mr H says should have been considered with regard to s 322 are memory loss and potential forensic disadvantage. It is difficult to see forensic disadvantage as ever being relevant as a consideration in terms of youth justice principles and it is not so relevant in this case. We accept that memory loss could be relevant if the offence was committed when the offender was very young. This was not the case here as Mr H was at least 16 at the time of the offending.

37 *Police v T* [2006] DCR 599 (HC) at [14]–[15].

38 As recognised in s 127 of the Evidence Act 2006, which provides that a judge may tell a jury that there can be good reasons for victims of sexual offending to delay or fail to complain.

39 See above at [14]–[16].

protracted for an older accused. Indeed, depending on the circumstances even long delays may not be considered unduly protracted for an older accused.

[45] In this case we accept that the time elapsed between the offending and the trial was so long that it would be considered unduly protracted, even for an accused of Mr H's age at the time of trial.

Should the charge have been dismissed?

[46] The next issue is whether the discretion to dismiss the charges under s 322 should have been exercised. As noted above, this is considered in accordance with youth justice principles.[40]

[47] We agree with the Court of Appeal that, when the police began their investigation, Mr H's sense of time had long been that of a mature adult. This means that s 5(f) of the Oranga Tamariki Act is not directly engaged. As noted above, it may nevertheless be indirectly engaged and the general object in s 4(f)(ii) will also be relevant.[41]

[48] Applying these principles to this case, the rape charge was very serious, particularly given Dianna's age at the time. Mr H was not very young, at least 16 years old, at the time he committed the offence. Most importantly, the other convictions for offences against Dianna and Emily show that he has not led a blameless life since the rape. Indeed, it is particularly concerning that the later offending was a similar type to the rape, albeit not as serious. Mr H offended against Dianna long after he became fully adult and he added another very young victim in a gross breach of trust and in a manner that was totally inconsistent with his proper role as Emily's father.

[49] These factors in combination mean that the charge should not have been dismissed under s 322.

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40 Above at [31].
41 Above at [33].

Suppression

Background

[50] On its own motion, the Court of Appeal in its judgment on the appeal suppressed publication of Mr H's name, address, occupation and identifying particulars pursuant to s 200 of the CPA.[42] Name suppression had not been sought by Mr H. On 14 May 2019, that suppression order was discharged by the Court of Appeal after application by the Crown.[43]

[51] As the Crown notes s 200(6) of the CPA provides that, when determining whether to suppress an offender's name permanently, the "court must take into account any views of a victim of the offence conveyed in accordance with section 28 of the Victims' Rights Act 2002". The Crown submits that the "latter section requires the prosecutor to make all reasonable efforts to ascertain the victims' views and then inform the Court of them". That had not been done at the time of the original Court of Appeal judgment because the Crown was not aware that suppression was being considered.

[52] The victims were consulted before the application to the Court of Appeal to lift the suppression order was made. Neither of them supported suppression of Mr H's name or identifying details.[44]

[53] The Crown notes that revoking the suppression order does not affect the operation of s 203 of the CPA, which continues to prohibit publication of the name, address or occupation of each complainant, or any other particulars that may identify them. The Crown submits that this may require distribution of our judgment on this appeal to be limited to law reports or digests, or that the judgment be redacted (for example, to remove references to the relationship between Mr H and the victims) if it is to be made publicly available.

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42 CA judgment, above n 2.

43 *[H] v R* [2019] NZCA 153.

44 While the complainants did not want suppression of Mr H's identity under s 200, no application was made by the complainants under s 203(3)(b) of the CPA to lift the automatic suppression of their identities.

Our approach

[54] We do not consider it practical or desirable to redact our judgment to remove references to the relationship of Mr H to the victims. The fact of the relationship is very important to the seriousness of the crimes of which he was convicted and also important to other issues in the appeal, such as explaining the delay in the case coming before the courts. Further, the dates on which the offending took place are also important to our decision, both because of Mr H's possible age at the time of the rape and also because of the time span covered by the charges. Even were we to replace the exact relationship with a reference to, for example "two young relatives", these dates and other details about the offending could nevertheless lead to identification of the complainants.

[55] We do not accede to the Crown's alternative suggestion of using Mr H's full name and not redacting the judgment but restricting publication of the judgment to law reports or digests. This is for two reasons.

[56] First, as the final court, all of our judgments (and this is no exception) deal with important points of law, in which the public has a clear interest.[45] It follows that our judgments should be available to the public unless there are very good reasons why this should not be the case. For example, in some cases, we have restricted publication to law reports and law digests but only as a temporary measure and for fair trial reasons.[46]

[57] Secondly, and perhaps most importantly, we do not see how there could be publication in a law report or law digest of an unredacted judgment with Mr H's full name without risking breaching s 203(3) of the CPA, which provides that "[n]o person may publish the name, address, or occupation of the complainant, unless— (a) the complainant is aged 18 years or older; and (b) the court, by order, permits such

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45 The Supreme Court only hears cases which meet the threshold of being "necessary in the interests of justice", that is, matters of "general or public importance", "general commercial significance" or "substantial miscarriage of justice": Senior Courts Act 2016, s 74(2).

46 For example, *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 and *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 had publication initially restricted to law reports or digests but are now available publicly as the substantive trials have been heard.

publication".[47] Publishing the judgment with Mr H's name in full could lead to the identification of Dianna and Emily because of their relationship to Mr H.

[58] For the above reasons, we release this judgment publicly but have referred to the appellant as Mr H to protect the identity of the complainants. We stress that there is no suppression order in force relating to Mr H. His name and identifying details and the nature of his offending can be published as long as this is done in a manner that does not breach the protections for the complainants in s 203 of the CPA.

Result

[59] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[47] "Publish" is defined in s 195 of the CPA as having a corresponding meaning to "publication" which means "publication in the context of any report or account relating to the proceeding in respect of which the section applies or the order was made (as the case may be)". "Publish" applies generally to publication beyond the courtroom, including disclosure by media, word of mouth, or social media, even where there is no reference to the proceedings where the suppression order was made: see *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777; *Karam v Solicitor-General* HC Auckland AP50/98, 20 August 1999; and *Police v News Media Auckland Ltd* [1998] DCR 134 (DC).