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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA13/2018
[2020] NZCA 657

BETWEEN	JASON IAN AITCHISON Appellant
AND	THE QUEEN Respondent

Hearing:	16 September 2020 and 30 November 2020
Court:	Kós P, Cooper and Collins JJ
Counsel:	G H Allan and N P Chisnall for Appellant M J Lillico and K S Grau for Respondent
Judgment:	18 December 2020 at 10.00 am
Reissued:	24 September 2021

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Aitchison's appeal requires us to consider the role of communication assistants in criminal trials and whether a miscarriage of justice arose through the way one of the complainants, JK, was questioned by the communication assistant in Mr Aitchison's trial. The principal questions raised by the appeal are explained at [15].

[2] Mr Aitchison was convicted on one charge of raping JK and one charge of raping WP, who are the daughters of two of Mr Aitchison's former partners. He was sentenced by Palmer J to 14 and a half years' imprisonment, with a requirement that he serve seven years and three months in prison before he is eligible to be considered for parole.[1] Mr Aitchison's appeal is confined to his convictions.

[3] Mr Aitchison's convictions followed a retrial that was ordered after this Court quashed his convictions following his first trial because of errors by his first trial counsel.[2]

The allegations

[4] Mr Aitchison faced six charges in his second trial. He was found not guilty of two charges and the jury were unable to reach verdicts on two other charges. He awaits another retrial in relation to those two charges. Because Mr Aitchison is to be retried, we have put in place suppression orders in relation to this judgment so as to preserve his fair trial rights.

[5] WP alleged Mr Aitchison started offending against her in 2000 when she was four years old and continued until her mother separated from Mr Aitchison in 2009.

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1 *R v Aitchison* [2017] NZHC 3218.
2 *Aitchison v R* [2016] NZCA 529.

Mr Aitchison faced four charges in relation to the allegations made by WP. He was found guilty of a representative charge that he raped WP.

[6] JK alleged Mr Aitchison started offending against her in 2012 when she was 12 years old and after Mr Aitchison formed a relationship with JK's mother. JK gave evidence that Mr Aitchison raped her in Hamilton in January 2012 and at G, just north of I in June 2012. The offending in G was said to have occurred in conjunction with a tangi for JK's father. Mr Aitchison was found guilty of raping JK at G.

[7] The focus of the appeal was upon the conviction arising from JK's allegations. The appeal was advanced however, on the basis that the allegations of JK and WP were linked through cross-propensity evidence. It was contended that if we quashed the conviction relating to JK's allegations we should also quash the conviction arising from WP's allegations.

The issues raised by the appeal

[8] The issues raised by this appeal stem from the fact JK has very impaired cognitive and communication abilities. We describe her circumstances in more detail at [18]–[22].

[9] JK's difficulties led to the High Court appointing a communication assistant to enable her to give evidence at Mr Aitchison's second trial about the allegations she had made about him and which had been recorded in an evidential video interview (EVI).

[10] The communication assistant was appointed pursuant to s 80 of the Evidence Act 2006. The relevant parts of that section state:

> **80 Communication assistance**
>
> …
>
> (3) A witness in a … criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.

No regulations have been promulgated under s 80 of the Evidence Act. The absence of regulations has led to Judges modifying court practices and procedures so as to make best use of communication assistants.

[11] Communication assistance is defined in s 4 of the Evidence Act as including:

> … oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who—
>
> …
>
> (b) has a communication disability.

The term "communication disability" is not defined in the Evidence Act. The natural and ordinary meaning of that term encompasses those who lack the ability to communicate effectively when giving evidence in court.[3]

[12] Palmer J ruled the communication assistant was to ask the questions of JK that Mr Aitchison's defence counsel in his second trial, Mr Sutcliffe, wished to put to her.[4] Those questions were recomposed by the communication assistant and supplemented with images. Mr Sutcliffe agreed to the communication assistant questioning JK and to the content of the questions and images prepared by the communication assistant.

[13] The communication assistant also prepared a series of "test of concept" questions to assess JK's ability to respond to the questions that she was to be asked about her allegations. Some of JK's responses to those test of concept questions were not accurate. Palmer J determined the jury should nevertheless assess JK's reliability based upon her answers to the test of concept questions and all other evidence.[5] The questions and whether JK answered them correctly was put before the jury in an agreed statement of facts pursuant to s 9 of the Evidence Act.

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3 See *R v Moeke* [2017] NZHC 1314 at [9].

4 *R v Aitchison* HC Hamilton CRI-2014-019-1004, 18 October 2017 (Minute No 3 of Palmer J) at [4].

5 *R v Aitchison* HC Hamilton CRI-2014-019-1004, 26 October 2017 (Bench Note 1 of Palmer J) at [3]; and *R v Aitchison* HC Hamilton CRI-2014-019-1004, 17 December 2019 (Minute No 6 of Palmer J) at [7]–[11].

[14] Palmer J also assigned to the communication assistant the task of informing JK under s 77(4)(b) of the Evidence Act of the importance of JK telling the truth and not telling lies.

[15] It is contended on behalf of Mr Aitchison that a miscarriage of justice arose through the way JK was cross-examined by the communication assistant and through other roles performed by the communication assistant. The specific grounds of appeal are encapsulated in the following questions:

(a) Could the trial Judge assign to the communication assistant the role of cross-examining JK in place of Mr Aitchison's trial counsel?

(b) Did allowing the communication assistant to question JK and the questions asked by her deny Mr Aitchison his right to effectively examine JK?

(c) Did the questions put to JK by the communication assistant invoke answers from JK that were so unreliable that they were irrelevant and therefore inadmissible under s 7 of the Evidence Act?

(d) Was the probative value of the answers provided by JK to the questions put to JK by the communication assistant outweighed by the risk that the evidence had an unfairly prejudicial effect on the proceeding and ought therefore to have been excluded under s 8 of the Evidence Act?

(e) Did Palmer J err by delegating to the communication assistant the task of informing JK of the importance of telling the truth and not telling lies?

[16] The answers to these questions are underpinned by two basic principles:

(a) Mr Aitchison's immutable right to a fair trial affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990 (the NZBORA), which,

includes his right to "present a defence",[6] his "right to examine the witnesses for the prosecution"[7] and, his right to natural justice.[8]

(b) The need to ensure communication assistance is provided to persons who need that assistance to give evidence.[9]

[17] It is important to emphasise that the grounds of appeal do not allege:

(a) Trial counsel error. This was appropriate because Mr Sutcliffe, faced with a difficult task, took a professional and co-operative approach to the way JK was questioned by the communication assistant.

(b) The verdicts were unreasonable. This was also appropriate particularly as no application was made to have the charges against Mr Aitchison dismissed pursuant to s 147 of the Criminal Procedure Act 2011 at the conclusion of the Crown case.

(c) JK was not a competent witness.[10] Again this was appropriate because her EVI contained a coherent account of her allegations against Mr Aitchison.

JK's circumstances

[18] JK was born with a condition that is often characterised by developmental delays, intellectual disabilities and speech deficiencies. She was assessed by Dr Hosking, a neuropsychologist in March 2017, after this Court allowed Mr Aitchison's first appeal.

[19] Dr Hosking explained that JK has a very low level of intellectual functioning, which places her in the lowest two per cent of the population. The speed with which JK processes information, her ability to concentrate, learn, retain information and

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6 New Zealand Bill of Rights Act 1990, s 25(e).
7 Section 25(f).
8 Section 27(1).
9 Evidence Act 2006, s 6(c).
10 Also see the recent discussion of this Court in *T (CA26/2020) v R* [2020] NZCA 626 at [78]–[82] and [108]–[109].

reason are all well below normal levels. JK also has significantly impaired adaptive functioning abilities, hearing loss and speech deficiencies.

[20] Dr Hosking assessed the degree to which JK might be subject to suggestibility and concluded that her memory for events tends to be good when the events in question were particularly emotionally arousing or distressing and that "she lacks the cognitive ability to develop convincing fabricated stories". On the other hand, JK is very easily confused when presented with information that is outside of what she knows well. She does not have the cognitive capacity to process or understand complex or abstract information that does not fit with her understanding, or is not directly related to her situation.

[21] Concepts such as time are confusing for JK. Thus, although she is likely to be able to remember important significant distressing events, she is also likely to be unsure about detail such as times and dates.

[22] Dr Hosking explained that JK's speech pattern is quite tangential and that she lacks insight into how her conversation appears to others. She does not appreciate when other people are confused by what she is saying.

The trial issues

[23] To place the trial issues in context, it is first necessary to explain the family relationships involved in this case.

[24] WP was born in the mid-1990s. WP's mother and Mr Aitchison lived together from the late 1990s to the mid-2000s.

[25] JK was born in the late 1990s. Her biological father passed away and was buried at G. JK's mother and Mr Aitchison lived together in Hamilton from the late 2000s to the early 2010s. JK has two brothers and a sister. For most of her life JK was raised by her paternal grandmother in G.

WP's allegations

[26] WP alleged Mr Aitchison's offending against her started with him inserting his fingers into her vagina on a number of occasions when she was in a bed at a farm at Te Aroha (Charge 1). About two years later, WP's mother moved to Hikurangi, which is approximately 15 kilometres north of I. WP alleges her mother lived with Mr Aitchison for a period of time in Hikurangi and that while there, Mr Aitchison raped her on several occasions when her mother was at work (Charge 4). She said that the intercourse made her sore and caused her to bleed. On one occasion she says she was showering when Mr Aitchison entered the bathroom and raped her (Charge 2).

[27] WP also alleged that Mr Aitchison offended a number of times against her when she was a young child and got into the bed occupied by her mother and Mr Aitchison. She alleged Mr Aitchison indecently assaulted her in the same bed that was shared by her mother and Mr Aitchison (Charge 3).

[28] Mr Aitchison elected to give evidence. He refuted WP's allegations and said he did not have the opportunity to commit some of the offences she described. Mr Aitchison said the alleged offending when WP was in bed with her mother and Mr Aitchison lacked credibility and that WP had conflated her allegations against Mr Aitchison with sexual offending committed against her by a Mr Ashby, who was convicted in 2017 of having committed sexual offences against WP when she was 10 to 11 years of age.

JK's allegations

[29] Mr Aitchison met JK's mother when her mother was living in Hamilton and when JK was living with her paternal grandmother in G. JK says that she went to stay for a short while with her mother and Mr Aitchison in Hamilton and that while there Mr Aitchison raped her on two occasions (Charge 5).

[30] The first occasion Mr Aitchison is alleged to have raped JK her mother was at a supermarket. JK says Mr Aitchison told her to go into her mother's room where he raped her on the bed and that he caused her to be sore and bleed. JK says her

two-year-old brother was watching and that afterwards Mr Aitchison told her to clean up the blood with a towel, soap, and water.

[31] The second occasion Mr Aitchison was said to have raped JK in Hamilton coincided with the eighth birthday of her other brother, H. JK says she was wearing a black nightie and that when she expressed pain H woke up and saw what was happening. JK says she was sore because Mr Aitchison did "it hard" and that she was bleeding and Mr Aitchison made her brother clean up the blood stains. In her EVI, JK explained in detail H's presence and his role in cleaning up the blood stains.

[32] JK said Mr Aitchison raped her three times in G at her maternal grandmother's house. She said this offending occurred in various bedrooms of the house, including on a Saturday night which the Crown submitted, was two days before JK's father was buried.

[33] JK's allegations about Mr Aitchison were first made to her care assistant, Ms H, about two months after the tangi took place in G. Ms H explained that she took JK for a walk in a park and that during their conversation JK said Mr Aitchison hurt her and pointed to her genitals. Arrangements were then made for JK to be interviewed by Ms Kingi, a trained specialist interviewer at the Ministry of Social Development. Using props and a series of questions that were designed to allow JK to explain her allegations, Ms Kingi skilfully adduced the essential elements of all the allegations that JK made against Mr Aitchison, including the matters we have summarised at [29]–[32]. Ms Kingi's interview of JK was recorded and became JK's EVI.

[34] At some point in time between JK's complaint to Ms H and the interview with Ms Kingi, a note was found that had been written by JK. The note read "Jay", "sex" and "[JK's name]". Mr Aitchison was often referred to as "Jay".

[35] Mr Aitchison's case was that the allegations made by JK were obviously false. He was able to rely on the fact H was not staying with Mr Aitchison and her mother at the time JK says she was raped by Mr Aitchison in Hamilton.

[36] In relation to the alleged offending at G, Mr Aitchison again said the allegations were false and that he had no opportunity to rape JK because he did not stay at the same house as her in G on the Saturday before JK's father's funeral.

[37] The Crown called evidence from JK's maternal grandmother and her partner who said Mr Aitchison did stay in their house at G along with various children, including JK, on the Saturday night. JK's mother also said she stayed at her mother's place with "Jay and the children". Thus, there was evidence from three adults that supported the Crown's case that Mr Aitchison and JK stayed in the same house on the Saturday.

[38] The Crown relied on the cross-propensity nature of the evidence of JK and WP to demonstrate that he had a tendency to offend in the way alleged by WP and JK. The similarities relied upon by the Crown were:

(a) Both complainants were vulnerable because of their ages and, in the case of JK, because of her cognitive challenges.

(b) Mr Aitchison, was, at all material times in a relationship with the mothers of WP and JK.

(c) WP and JK looked upon Mr Aitchison as being a father figure to them.

(d) WP and JK described acts of sexual intercourse that resulted in both being hurt and that they both said they bled as a result of intercourse.

There was no suggestion WP and JK had colluded.

Appointment of a communication assistant

[39] On 8 August 2017 Ms Kedge, a speech-language therapist, was appointed by the Court as the communication assistant for the trial that was scheduled to commence on 30 October 2017.

[40] On 29 August 2017, Ms Kedge filed a comprehensive report with the Court in which she explained the issues concerning JK's ability to communicate and a proposal for assisting JK's ability to understand any questions put to her and to enhance her ability to respond. In this report Ms Kedge noted that JK had been reluctant to discuss sensitive topics in the presence of a male police officer.

[41] Ms Kedge recommended that a "Ground Rules hearing" be conducted between the trial Judge, counsel and the communication assistant to consider 32 "ground rules" proposed by Ms Kedge. A "ground rules hearing" is a procedure in England and Wales where legislation and protocols have been developed for the use of communication intermediaries in criminal cases.

[42] Ms Kedge provided the Court with a number of recommendations, including:

(a) Using the communication assistant to help counsel with the wording of questions. Ms Kedge suggested consideration be given to counsel providing her with proposed questions to enable her to assess any potential communication difficulties that might arise from the proposed questions.

(b) Using a range of visual aids to assist JK with communicating.

(c) Using very simple sentences when communicating with JK. Ms Kedge recommended questions asked of JK be short. She said it was important to avoid complex questions and the use of confusing concepts such as double negatives.

[43] Four pre-trial case management conferences were conducted by Palmer J with counsel between 7 September and 20 October 2017. During that period Mr Sutcliffe provided Ms Kedge with the questions he wished to ask JK. Ms Kedge recomposed those questions and supplemented them with images. Ms Kedge then returned the recomposed questions to Mr Sutcliffe for his consideration. During one of the case management conferences Palmer J raised with counsel the possibility of pre-recording JK's cross-examination and having Ms Kedge conduct the cross-examination of JK.

Both counsel agreed to these proposals, provided they had the opportunity to ask through Ms Kedge any supplementary questions they considered necessary. Palmer J also raised with counsel having test questions put to JK by Ms Kedge before cross-examination commenced.

[44] In a minute issued on 18 October, Palmer J recorded the arrangements that had been reached regarding JK's evidence.[11] In particular, Palmer J said:

> [4] It is agreed by all parties that the questions will be asked by Ms Kedge as [c]ommunications [a]ssistant … Ms Kedge will need to "swear in" [JK] before she gives evidence, as proposed in … ground rule 22...
>
> …
>
> [6] Mr Sutcliffe has provided to Ms Kedge the questions he wishes to have asked …
>
> [7] If Mr Sutcliffe has follow up questions during cross-examination, he will write them down for Ms Kedge to ask in terms she considers appropriate. Mr McWilliam [Crown counsel] will follow the same process if he has any re-examination questions.
>
> …
>
> [11] Counsel agreed to the ground rules proposed in Ms Kedge's [earlier report].

[45] At the last pre-trial case management conference, the Judge and counsel considered amongst other matters, draft "test of concept questions" that Ms Kedge had prepared.[12] These comprised 19 factual questions that were to be put to JK to test whether the proposed method of questioning JK could work. Palmer J recorded that if JK did not answer the test of concept questions correctly, "that would indicate the answers to further questions would not be reliable. In that case, Ms Kedge's view is that there may be no point in proceeding further".[13]

[46] At the conference Palmer J:

(a) Directed that JK would be questioned by Ms Kedge in a jury room with an AVL link to the courtroom where the Judge, counsel and

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11 *R v Aitchison* HC Hamilton CRI-2014-019-1004, 18 October 2017 (Minute No 3 of Palmer J).
12 *R v Aitchison* HC Hamilton CRI-2014-019-1004, 20 October 2017 (Minute No 4 of Palmer J).
13 At [6].

Mr Aitchison would observe and hear the questions put to JK and the answers she provided.[14] Contact between the rooms would be possible.

(b) Said he would delegate to Ms Kedge the responsibility under s 77(4) of the Evidence Act of ensuring JK understood the importance of telling the truth and not telling lies before she gave evidence.

(c) Directed that JK would watch her EVI with Ms Kingi immediately before she was questioned by Ms Kedge.

(d) Recorded that counsel were content with the course of action that was to be followed provided counsel were able to ask additional questions.

Test of concept questions

[47] The questioning of JK by Ms Kedge occurred on 25 October 2017, five days before the trial commenced. The questioning of JK started with 19 test of concept questions devised by Ms Kedge in consultation with two experienced communication assistants in New Zealand and Ms Chamberlain, an experienced communication intermediary and speech-language therapist in the United Kingdom. The test of concept questions were designed to see if JK understood the vocabulary, concepts and grammar in the questions Mr Sutcliffe wished to have JK answer.

[48] The test of concept questions were framed in simple terms. JK had three options as to how to respond: "Yes, that's right, That's true". "Not sure" and "No, that's not right, That's not true". Ms Kedge would circle which of the responses JK indicated. For example, the first question was presented and answered in the following way:

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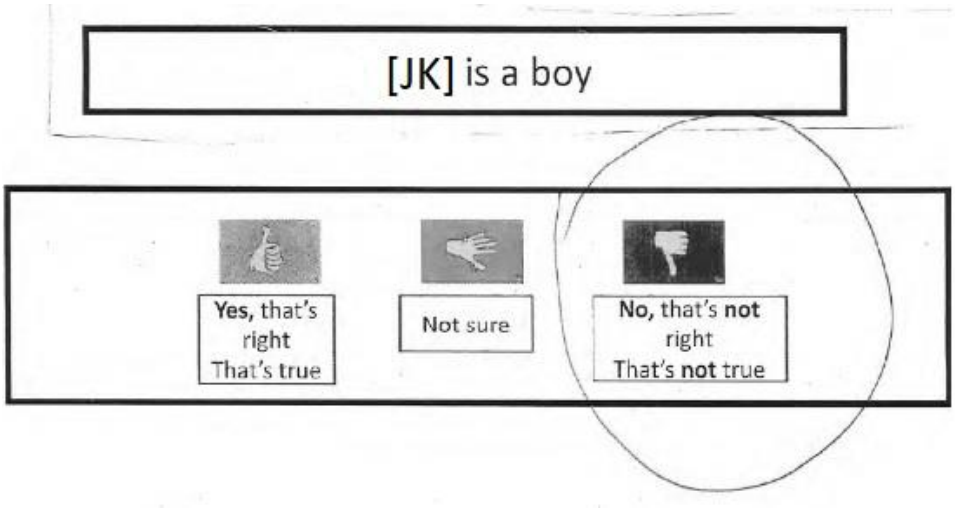
[14] See Evidence Act, s 103.



[49] In a memorandum of agreed facts filed pursuant to s 9 of the Evidence Act, the parties said JK gave incorrect answers to two of the test of concept questions:

(a) She claimed to know that Ms Kedge had a red toothbrush when in fact JK had no information about the colour of Ms Kedge's toothbrush.

(b) She said she went to I High School when in fact she had already correctly said that she went to G School.

[50] In response to a question "Did you have a blue toothbrush when you were 2 years old?" JK answered "No, that's not right. That's not true". There was no way to establish the correct answer, but it was considered highly unlikely JK could remember the colour of her toothbrush when she was two years of age. In response to another question JK said that she went under the sea in a submarine. The parties, for some reason, could not be certain if this was a correct answer. We think it highly unlikely JK answered that question correctly. We therefore proceed on the basis that JK provided incorrect answers to four of the 19 test of concept questions.

[51] Palmer J decided that notwithstanding JK's difficulties in correctly answering some questions, he was satisfied the test of concept questions did not reveal an inability on the part of JK to answer questions truthfully. The Judge explained JK "answered most of the test of concept questions accurately. While there was some uncertainty about her understanding of a few questions, [he] considered that was an aspect of her evidence that the jury could consider [when] assessing the reliability of

her answers to Mr Sutcliffe's cross-examination questions in the context of all the other evidence just as they would with other witnesses".[15]

Cross-examination questions

[52] As previously noted, Mr Aitchison was convicted of one charge of having raped JK at her maternal grandmother's home in G. Like counsel, we shall focus upon the cross-examination relating to Mr Aitchison's alleged offending in relation to that charge.

[53] The essence of Mr Aitchison's defence in relation to this particular charge was that he had no opportunity to offend in the way alleged because he did not stay at JK's maternal grandmother's house on 9 June 2012. Mr Sutcliffe had set out three questions he wished to have put to JK dealing with the proposition that Mr Aitchison did not have the opportunity to offend in the way JK alleged:

(a) On the Saturday night of the tangi you stayed with your dad's parents.

(b) Jay did not stay at that address.

(c) Jay could not have sexually assaulted you on Saturday because he did not stay at the same place as you.

[54] We interpolate at this point to note the first of the questions we have set out in [53] was probably framed erroneously by Mr Sutcliffe. While JK normally lived at her paternal grandmother's home, there was never any real dispute that JK stayed at her maternal grandmother's place in G on the Saturday night that preceded her father's funeral.

[55] The questions that Ms Kedge prepared to communicate these questions from Mr Sutcliffe to JK were set out and answered in the following way on question sheets 55, 56 and 57. We start with question sheet 55:

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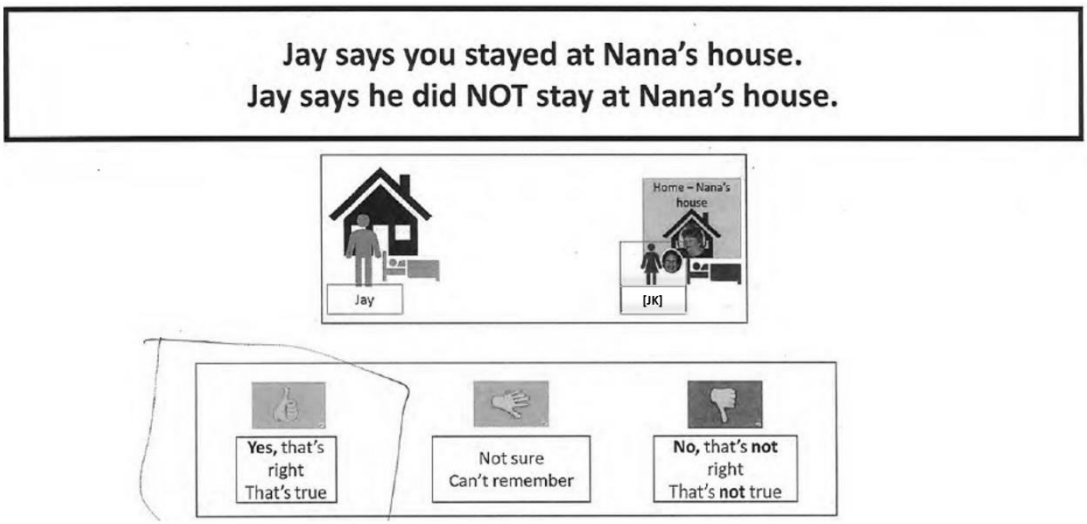
[15] Minute No 6 of Palmer J, above n 5, at [11].



[56] When talking to JK about this question sheet, Ms Kedge said:

> So this one says, "Jay says you stayed at Nana's house. Jay says he did not stay at Nana's house". So this shows Jay staying at a different place and [JK] staying at Nana's house. What do you think about that?

[57] The video recording of this part of JK's evidence shows three responses:

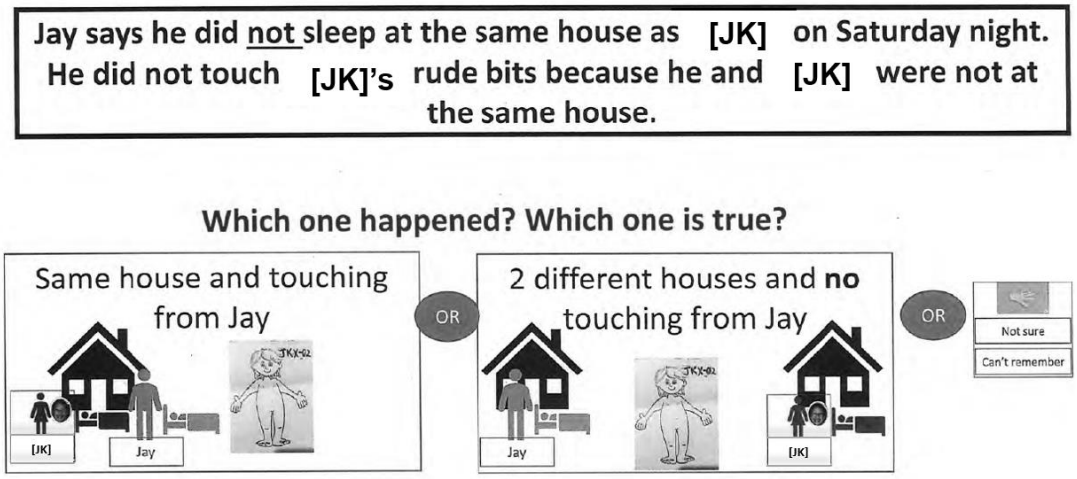
(a) First JK pointed to the response graphic of her staying at her Nana's home.

(b) Ms Kedge then pointed to each graphic and read what each one represented. JK then pointed to the graphic "Yes, that's right. That's true".

(c) Ms Kedge then said, "let's just make sure" and redirected JK to the available propositions. JK answered "Yes".

At that point, Ms Kedge understood JK to be answering the question "Yes, that's right. That's true" and circled that particular graphic on the answer sheet.

[58] The next questions were set out in the following way on question sheet 56:



[59] Ms Kedge folded the question sheet so as to present the questions and information on the sheet "one bit at a time". She explained each part and then unfolded it. Ms Kedge then said:

> Okay? So we need to know which one happened? Which one is true? Were you and Jay at the same house and the touching happened, or were you at two different houses and then there's no touching from Jay? Or you're not sure, can't remember.

[60] JK responded by pointing to the middle graphic which says "2 different houses and no touching from Jay".

[61] Ms Kedge then continued saying:

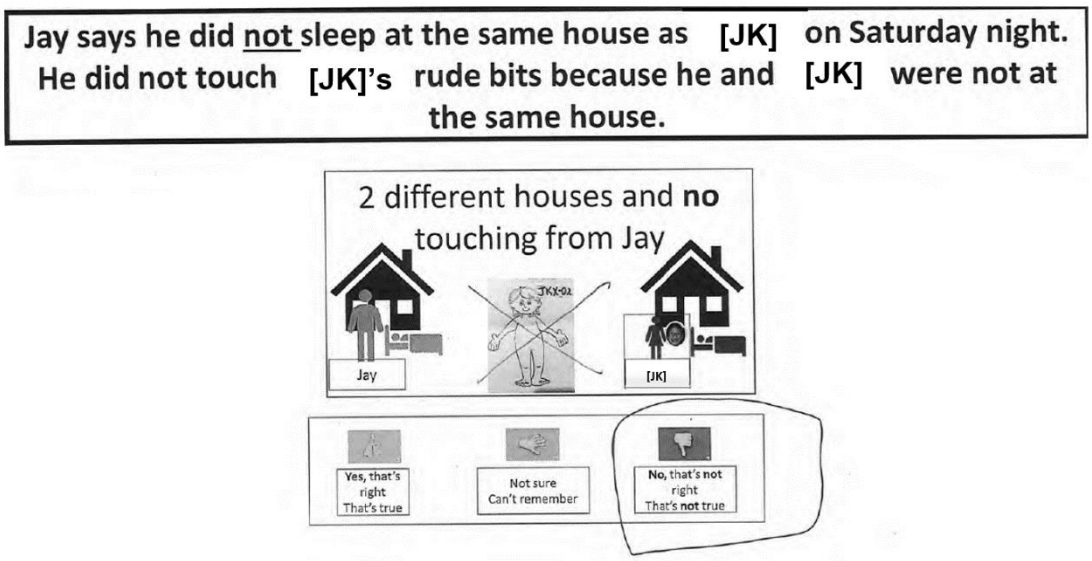
> A. No.
>
> Q. So what do you mean "No"? Maybe this one is a little bit confusing … Or do you know which one you think happened?

[62] JK again put her finger on the centre image and said, "That one". Ms Kedge again explained to JK that the graphic meant "Two different houses and no touching from Jay". JK responded "No". Ms Kedge then said:

> No. I don't know whether you mean "No, that's wrong", or "No, that's what happened". I think we're going to leave this one and I'm going to put a star on that one, okay?

Ms Kedge then moved to the next question.

[63] The 57th question sheet relating to the allegation that Mr Aitchison raped JK at her maternal grandmother's place on the Saturday night of the tangi weekend was presented in the following way:



[64] Ms Kedge introduced this question sheet in the following way:

> Let's look at this one. This says, "Jay says he did not sleep at the same house as [JK] on Saturday night. He did not touch [JK's] rude bits because he and [JK] were not at the same house". So I want to know if this is right, that's what happened, that's true, you're not sure, can't remember or no that's not right. So this shows two different houses, Jay's in one house [JK's] in a different house, and no touching.

Ms Kedge explained the "no touching" aspect of this statement by placing a cross through the image of JK.

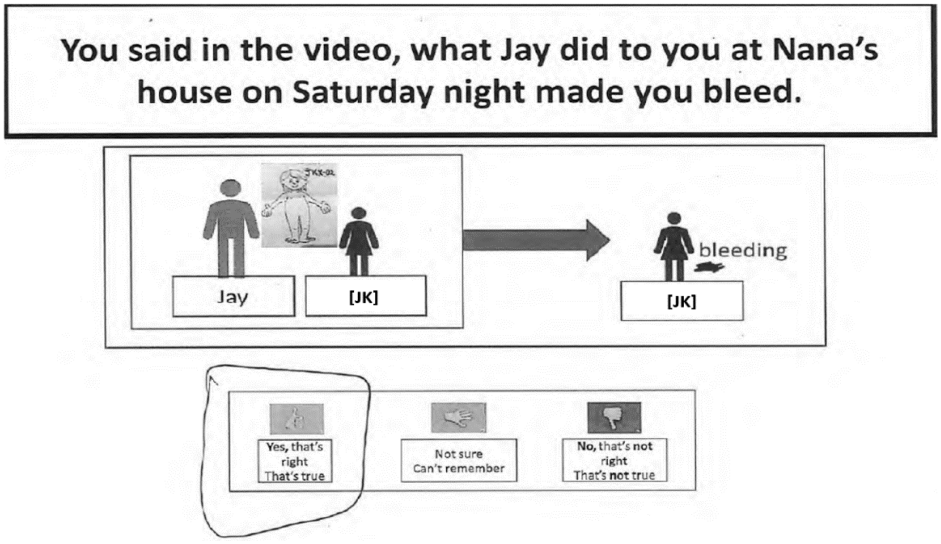
[65] JK responded by saying, "No" and placing her finger under both the image of her and "Not sure. Can't remember".

[66] Ms Kedge then said:

> You're saying, 'No, that's not right"? 'cos you pointed to "not sure", which one do you think out of that's true, not sure, can't remember or no, that's not right?

[67] JK then pointed to the bottom right image saying, "That one"; "No, that's not right. That's not true".

[68] The next tranche of question sheets focused upon JK's allegations of offending on the Sunday and Monday of the tangi weekend. The questions about what happened on the Saturday night resumed with Question Sheet 72, which was presented in the following way:



[69] This question sheet related to six questions Mr Sutcliffe wished to have put to JK:

(a) You said that what Jay did on the Saturday night at your grandparents' house made you bleed.

(b) That you cleaned the blood off your sister's bed with soap and water.

(c) That because the bed was wet, you slept with your mum.

(d) It is not true that Jay made you bleed.

(e) It is not true that you cleaned blood up with soap and water.

(f) It is not true that you slept with your mum at your grandparents' house on the Saturday night.

[70] When introducing Question Sheet 72 to JK, Ms Kedge said:

> You said in the video what Jay did to you at Nana's house on Saturday night made you bleed. Okay, and there's a picture of Jay and [JK] and a picture you drew on the video and you said that made you bleed and there's some bleeding. We need to know is that right, is that what happened, that's true, not sure, can't remember or no that's not true, that's not right?

[71] JK's response was construed by Ms Kedge as "Yes" and that JK pointed to the bottom left image, "Yes, that's right. That's true". Mr Sutcliffe did not seek to ask any supplementary questions at the conclusion of Ms Kedge's questioning of JK.

Judge's directions

[72] In his summing-up, Palmer J addressed JK's evidence with the following directions:

> You will have seen [JK] has difficulties understanding and speaking about some things. You have heard Dr Hosking's expert evidence about that. Among other things she said [JK] has a very low level of intellectual functioning, in the lowest two per cent of the population, and is very vulnerable and does not have a good understanding of time. You can take Dr Hosking's evidence into account as expert evidence. But you may still accept or reject it as you think appropriate. You may choose to accept parts of her evidence and reject other parts, for example. After all, this is trial by jury, not trial by expert. You are in the best position to assess all the evidence given in court. Mr McWilliam says [JK] is not someone who could make up a story with the detail she has and be able to answer questions about it some months later. Mr Sutcliffe says it is clear she suffers from cognitive impairment and measures were agreed to allow her to give evidence, but that doesn't change the need for you to be sure she is telling the truth. Again, use your common sense. There are no special rules for assessing [JK's] evidence. As with any witness it is for you to decide whether you accept her evidence, and what weight you give it.

Critiques of the questioning of JK: two psychological perspectives

[73] Leave has been sought to produce reports from two psychologists, who have reviewed the way JK was questioned by Ms Kedge and the responses provided by JK. Leave has also been sought to allow Ms Kedge to file an affidavit explaining the basis upon which she assessed JK, the processes she followed in preparing the questions and her understanding of the role of communication assistant. We grant leave to file all three statements of evidence because we are assisted by all three witnesses in understanding the issues that arise in this appeal and because there is no objection to

the production of this evidence. We also had the benefit of both psychologists being cross-examined in the presence of each other via AVL links at a hearing on 30 November 2020.

Dr Frumkin

[74] Dr Frumkin is a clinical psychologist in the United States. He is one of approximately 350 forensic psychologists certified by the American Board of Professional Psychology. He has given expert evidence in more than 100 cases throughout the United States, Canada and in other countries on issues relating to the potential for psychologically vulnerable individuals to provide false information in light of the questioning processes that have been used.

[75] In his comprehensive report prepared for counsel for Mr Aitchison, Dr Frumkin reached 10 key conclusions:

(a) Based on Dr Hosking's assessment of JK, Dr Frumkin was satisfied that she is a person who functions intellectually in the lower two percentile of the population and her "verbal abstract reasoning skills and her ability to process information in memory are at the lower one-tenth of one percentile range".

(b) Persons with JK's limitations and characteristics are "much more suggestible to influence than others".

(c) The communication procedures used by Ms Kedge made comprehension and communication very difficult because JK lacks the cognitive and intellectual capacity to accurately respond to the forced choice answer options. That is, she could only respond using the options of either "Yes, that's right, That's true". "Not sure, Can't remember" or "No, that's not right, That's not true" that were presented to her. Dr Frumkin was concerned that the forced choice answer methodology used by Ms Kedge may have caused JK to answer in a particular way, not because the answer was true but because she

guessed at the answer or thought that it was the answer that she believed Ms Kedge wanted to hear.

(d) Allowing JK to review her EVI with Ms Kingi before she was questioned by Ms Kedge risked contaminating JK's memory. "Even if [JK] understood the options given and how to answer (by pointing to the pictures), she may think she has independent recollection of an event when in fact, she is remembering instead what she told Ms Kingi (which may have been true or false)."

(e) By repeating and adjusting some questions Ms Kedge was inviting JK to provide what Ms Kedge believed to be the more accurate response, that was consistent with the alleged offending. This constituted pro-prosecution bias on the part of Ms Kedge, which was compounded by Ms Kedge having viewed JK's EVI before she questioned JK.

(f) When Dr Frumkin asks questions of persons with low intelligence he tries not to ask "yes" or "no" questions. He says he asks the same question in different ways to see if he gets the same answer and whether there is consistency in the response that is given.

(g) JK's responses to the test of concept questions showed she gave answers she could not have known and professed to have memory she could not have had. The questioning of JK should not have proceeded in the way Ms Kedge had planned.

(h) The putting of defence propositions to JK was fraught with comprehension and communication risks arising from poor questions, forced choice answers and the unnecessary use of props and pictures.

(i) A consultant trained in forensic interviewing of alleged sexual abuse victims could have worked with Ms Kedge and Mr Sutcliffe. This would have allowed Mr Sutcliffe to ask a series of questions to get JK to answer questions in a narrative fashion with some context. Even if

JK was incapable of providing a narrative, a series of simply stated questions could have been devised, each building on the earlier response, to be able to assess whether JK provided information that was consistent with other evidence.

(j) Dr Frumkin opined Ms Kedge's questioning of JK produced a profound risk of JK giving inaccurate and unreliable evidence about her alleged abuse.

Professor Bull

[76] The Crown produced a report from Professor Bull, who is a Professor of Criminal Investigation at the University of Derby and Emeritus Professor of Forensic Psychology at the University of Leicester, as well as having received multiple awards and honours for his research, teaching, publications and clinical work as one of the United Kingdom's leading psychologists. He has contributed to the official guidance on interviewing children and other vulnerable witnesses which we discuss at [78]. Professor Bull's response to Dr Frumkin can be distilled to eight points:

(a) He disagrees with Dr Frumkin's criticisms of allowing JK to see her EVI before she was questioned by Ms Kedge. Professor Bull says the EVI was not "suggestive" or "objectionable" and that JK could not have been inappropriately influenced from having reviewed her EVI.

(b) He disagrees with Dr Frumkin's criticisms of allowing JK to be questioned by Ms Kedge after JK answered some of the test of concept questions incorrectly. Professor Bull says the test of concept questions procedure was designed to ensure JK was familiar with the methodology being used by Ms Kedge. In Professor Bull's opinion, the decision of Palmer J to allow the questioning of JK to continue was "sensible" as she had answered most of the questions correctly and the jury could assess the reliability of JK's testimony in light of all the available evidence.

(c) Professor Bull rejected Dr Frumkin's view that JK should have been questioned in a way that enabled her to respond in a "narrative" fashion. Professor Bull points out Dr Hosking's report showed that JK was unable to give narrative evidence.

(d) Professor Bull discounted Dr Frumkin's suggestion that the technique used by Ms Kedge showed a prosecution bias. Professor Bull says that rather than display bias Ms Kedge simply adjusted questions that were too complex or complicated for JK.

(e) Professor Bull agrees with Dr Frumkin that some of Ms Kedge's questions were too complex. For example, Professor Bull commented upon the question we have referred to at [63] in which Ms Kedge said:

> This says, "Jay says he did not sleep at the same house as [JK] on Saturday night. He did not touch [JK's] rude bits …

Professor Bull points out that the question from Ms Kedge inappropriately covered two topics and also contained two negatives.

(f) Professor Bull disagreed with Dr Frumkin's concerns Ms Kedge asked "blatantly leading" questions of JK. Professor Bull considers that the "either/or" questions put to JK by Ms Kedge were not leading.

(g) Professor Bull was also unable to agree with Dr Frumkin's criticism of the use of images when questioning JK. Professor Bull says that after watching the video recording of JK's evidence and after reading the transcript, he was satisfied that "[w]hen most of the questions were put to [JK] she appeared to be able to point to one of the alternatives offered". Professor Bull acknowledged that a few of the questions posed by Ms Kedge were too complex and as a result JK sometimes appeared unsure of her response.

(h) Overall, Professor Bull was satisfied that "in light of [JK's] communication limitations, the measures adopted in this case … regarding the cross-examination of [JK] would have assisted her. It is

likely they enabled [JK] to provide evidence that would not have been possible under the usual cross-examination process"

Vulnerable witnesses

[77] Before considering the specific grounds of appeal we have set out at [15], we shall review changes that have taken place, particularly in England and Wales, to enable vulnerable witnesses to give evidence without compromising the fair trial rights of defendants. The developments that have taken place in England and Wales have been underpinned by legislative provisions such as the Youth Justice and Criminal Evidence Act 1999, and reports such as from the Advocacy Training Council entitled "Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court"[16] and a comprehensive report from the Ministry of Justice for England and Wales "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures".[17]

[78] The developments that have taken place in England and Wales in relation to vulnerable witnesses giving evidence have been considered and endorsed in a series of decisions from the Court of Appeal of England and Wales, which has also issued "best practice" guidelines.[18] The approaches now taken in the United Kingdom concerning the way vulnerable witnesses give evidence has also been the subject of academic commentary.[19]

[79] For the purposes of this overview the key changes that have taken place concerning the cross-examination of vulnerable witnesses in England and Wales may be summarised in the following way:[20]

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16 Advocacy Training Council Working Group on Vulnerable Witness and Defendant Handling "Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court" (2011).

17 Ministry of Justice for England and Wales "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures" (March 2011). The 2011 report was preceded by earlier versions, dating from 1992. See Ray Bull "The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice" (2010) 15 Legal and Criminological Psychology 5 at 8.

18 *Practice Direction (Criminal Proceedings*) [2013] EWCA Crim 1631, [2013] 1 WLR 3164 at [3E.1]–[3F.6]; and *R v Hampson (Practice Note)* [2018] EWCA Crim 2452, [2019] 1 WLR 3243 at [21].

19 See for example, Emily Henderson "All the Proper Protections" (2014) 2 Crim LR 93.

20 *R v Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579 at [42].

> [Courts are] required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, Judges are taught, in accordance with the criminal practice directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness…

And:[21]

> All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case.
>
> …
>
> When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial.

[80] In New Zealand, the Law Commission has monitored the developments that have occurred in England and Wales and, as evidenced by the current appeal, trial Judges have started to adopt some of the practices that have been sanctioned by the Court of Appeal for England and Wales. We observe the emerging practice of holding ground rules hearings prior to trial to establish the procedures that will be followed when questioning a vulnerable witness and the involvement of the communication assistant.[22] Trial judges have also adopted directions in summing up to explain to

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21 At [40], citing *Practice Direction (Criminal Proceedings)*, above n 18, at [3E.4].

22 See for example *R v Mehrok* [2020] NZHC 1812 at [51]; and *T (CA26/2020) v R*, above n 10, at [25]–[28] and [99]–[100].

the jury the reasons for any special measures and not to hold these against the defendant.[23]

Could the trial Judge assign to the communication assistant the role of questioning JK in place of Mr Aitchison's trial counsel?

[81] Mr Aitchison contends that a miscarriage of justice arose in his trial when Palmer J assigned to Ms Kedge the task of asking questions of JK in place of Mr Sutcliffe.

[82] Mr Allan, for Mr Aitchison, acknowledges that s 80 of the Evidence Act did not specifically prohibit Palmer J from assigning to Ms Kedge the task of asking JK the questions that Mr Sutcliffe wished to put to her. Mr Allan argued, however, that the legislative history and background to s 80 demonstrates that when s 80 was enacted, Parliament did not intend courts would adopt arrangements of the kind that Palmer J employed in this case. This submission requires us to examine the legislative history to s 80 of the Evidence Act and Law Commission reports concerning this section.

[83] The predecessor to s 80 of the Evidence Act was s 23E(4) of the Evidence Act 1908, which allowed for assistance to be provided to complainants in sexual trials who were children or who were "mentally handicapped".[24] Section 23E(4) authorised a Judge to direct questions be put to a witness through an approved person so as to enable witnesses and complainants who lacked communication abilities to give evidence. The section did not, however, allow for the approved person assisting the witness to rephrase questions or interpret the answers provided by the witness.[25]

[84] In its 1996 report, *The Evidence of Children and other Vulnerable Witnesses*, the Law Commission examined the law in cognate jurisdictions concerning the appointment of communication assistants, generally referred to as communication intermediaries.[26] One example was the model adopted in Ireland where a

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23 *R v Hetherington* [2015] NZCA 248 at [26]; and *T (CA26/2020) v R*, above n 10, at [65]–[66] and [117].

24 Evidence Act 1908, s 23C.

25 *R v Accused* HC Wellington T91/92, 5 March 1993 at 5.

26 Law Commission *The Evidence of Children and other Vulnerable Witnesses* (NZLC PP26, 1996) at [167]–[169].

communication intermediary can be engaged to ask questions of witnesses under the age of 17 or who have a "mental handicap".[27] In Ireland, questions are put either in the words used by the questioner, or by the communication intermediary in a way that is appropriate to the age and cognitive abilities of the witness.

[85] The Law Commission proposed conferring a wide discretion upon Judges over the appointment and role of intermediaries and recommended that:[28]

> … an intermediary may rephrase questions to assist witness comprehension. Intermediaries will have special skills to enable them to communicate with those few witnesses who have real difficulties understanding questions put to them in court. In order for these witnesses to give reliable evidence it seems important that provision is made for the use of intermediaries rather than rely on counsel to ask questions in an appropriate manner. However, we do not suggest that intermediaries should interpret the witness's response to the court. It is envisaged, however, that an intermediary will ask questions in order to elicit a clear and unambiguous response from the witness.
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> …
>
> The use of intermediaries must be subject to procedural fairness. It would be part of the judge's role to give guidance to the intermediary on how they are to perform their function in a particular case and to oversee the fairness and accuracy of rephrased questions.

[86] The Law Commission addressed the issues arising from the appointment of communication assistants in its 1999 report, which formed the foundation of the Evidence Act 2006.[29] The Law Commission considered the appointment of communication assistants to "explain questions put to a witness".[30] However, based on concerns that facilitators in the United States may not have always accurately conveyed the witness's evidence, the Law Commission recommended against the use of persons to interpret the questions relating to the evidence of a person who required communication assistance.[31]

[87] The clause recommended by the Law Commission largely resembled what was enacted by Parliament in s 80 of the Evidence Act 2006.[32]

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27 At [169], citing s 14 of the Criminal Evidence Act 1992 (Ireland).
28 At [173] and [175].
29 Law Commission *Evidence Vol 1 — Reform of the Law* (NZLC R55, 1999) at [370].
30 At [370].
31 At [373]–[374].
32 Law Commission *Evidence Vol 2 — Evidence Code and Commentary* (NZLC R55, 1999) at 200.

[88] The Law Commission again revisited the role of communication assistants in its 2012 report, *Alternative Pre-Trial and Trial Processes: Possible Reforms* and recommended a more precise definition of the role of communication assistants.[33] The Law Commission recommended an incremental approach that would allow for communications assistants to "assist with the phrasing of questions in an appropriate way. Their primary initial role would be to assist with communication and questioning issues rather than actually question the witnesses".[34] No amendments were made to s 80 of the Evidence Act following the Law Commission's 2012 report.

[89] In its second review of the Evidence Act in 2019, the Law Commission again made no recommendations to amend s 80.[35] The Law Commission commended "the pragmatic approach the courts have taken to communication assistance" and said legislative reform was unnecessary.[36] In doing so, the Law Commission referred to the approach taken by Palmer J in this case.

[90] Mr Allan also drew our attention to the approach taken in England and Wales towards the appointment of communication intermediaries. The process of appointing communication intermediaries and their roles in England and Wales is set out in ss 16 and 29 of the Youth Justice and Criminal Evidence Act.[37]

[91] Intermediaries in England and Wales facilitate the way in which witnesses give evidence through a collaborative "ground rules" procedure.[38] They may review the questions counsel may wish to put to a witness. Section 29(2) of the English statute does not appear to contemplate a communication intermediary taking over the role of actually questioning a witness. Rather, their role is to communicate the questions that

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33 Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 38–40.

34 At 39.

35 Law Commission *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.43].

36 At [18.43].

37 Unlike in New Zealand, there is no legislation currently in force for the appointment of an intermediary for a defendant in England and Wales; see s 104 of the Coroners and Justice Act 2009, inserting new ss 33BA and 33BB into the Youth Justice and Criminal Evidence Act 1999, which have yet to commence. The High Courts of England and Wales may, however, exercise an inherent common law power to appoint an intermediary to assist a defendant.

38 See discussion in *R v Lubemba*, above n 20, at [42]–[43]; *R v Dinc* [2017] EWCA Crim 1206, [2018] Crim LR 263; and Penny Cooper, Paula Backen and Ruth Marchant "Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court" [2015] Crim L R 420.

counsel or the court wishes to put to the witness, and the answers given by the witness. A communication intermediary may go so far as to "explain … questions or answers so far as [is] necessary to enable them to be understood by the witness or person in question".[39]

[92] Mr Allan submitted that it is clear that Palmer J incorrectly decided JK should be questioned by Ms Kedge, rather than Mr Sutcliffe cross-examine JK through, or with the assistance of Ms Kedge. Mr Allan submitted that the approach adopted by Palmer J was a significant departure from the way in which communication intermediaries function in England and Wales and that "[c]ritically … it was not an approach mandated by s 80 of the Evidence Act …".

[93] We agree with Mr Allan that the approach followed by Palmer J was not in accordance with s 29(2) of the English statute. We do not, however, accept that the process put in place by Palmer J offended the intention of s 80 of the Evidence Act.

[94] Section 80 of the Evidence Act is, as the Law Commission has observed, deliberately cast in broad terms so as to enable the courts to adopt a pragmatic and principled approach in order to ensure witnesses are able to communicate when giving evidence in court proceedings.

[95] It is significant that when passing s 80 Parliament refrained from following the prescriptive approach that can be found in the United Kingdom legislation and did not seek to prevent a communication assistant asking questions of a witness.

[96] Before assigning to Ms Kedge the role of asking the questions that Mr Sutcliffe wished to put to JK, Palmer J considered the reports from Dr Hosking and Ms Kedge and he sought the views of counsel. He was particularly concerned that JK had been unwilling to discuss sensitive topics related to the offending in the presence of a male police officer.[40] Neither Mr McWilliam or Mr Sutcliffe saw any difficulty with the course of action proposed by Palmer J.

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39 Youth Justice and Criminal Evidence Act, s 29(2).

40 *R v Aitchison* HC Hamilton CRI-2014-019-1004, 7 September 2017 (Minute No 1 of Palmer J) at [10].

[97] The needs of a witness to be able to communicate in court proceeding will generally not require a Judge to assign to the communication assistant the responsibility of asking questions that would normally be asked by counsel. The ability of a witness to communicate effectively when giving evidence can be facilitated by a number of different measures, especially with the support of a communication assistant. There is, however, nothing in the text or in the materials concerning the purpose of s 80 to indicate that a communication assistant should never ask questions of a witness in circumstances where the questions have been composed by the communication assistant in consultation with counsel. The ultimate question is whether that course of action achieves the objectives of allowing the witness to give evidence without compromising the rights of a defendant to a fair trial. We consider those questions at [99] to [104].

[98] The decision by Palmer J to require the communication assistant to conduct the cross-examination of JK by asking the questions that defence counsel were content to have asked did not offend either the text or the purpose of s 80 of the Evidence Act.

Did the process deny Mr Aitchison the right to effectively examine JK and to put his defence?

Right to examine a Crown witness

[99] The right of a defendant to effectively examine a Crown witness through cross-examination is one of the trial rights affirmed by s 25(f) of the NZBORA. This right is based on the right to challenge one's accuser which, is a right that can be found in the European Convention on Human Rights,[41] and the Sixth Amendment of the United States Constitution. It is so basic that it can be reasonably described as an integral feature of the common law,[42] and forms part of the right of a defendant to natural justice.[43]

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41 European Convention on Human Rights, art 6(1) and 6(3)(d).

42 *R v Paine* (1696) 5 Mod Rep 163, 90 ER 527 (KB).

43 *W v Health Practitioner's Disciplinary Tribunal* [2019] NZHC 420, [2019] 3 NZLR 779 at [78]–[86]; and *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435 at [39].

[100] In the present case, Mr Sutcliffe was content to allow Ms Kedge to recompose and ask the questions that he wished to have put to JK. There is no suggestion Mr Sutcliffe failed in his professional responsibilities when following this course.

[101] When tested on how Mr Aitchison's right to cross-examine JK was compromised through the way Ms Kedge questioned her, Mr Allan pointed to Ms Kedge's "practice" of asking questions of JK after she had obtained answers that assisted Mr Aitchison. For example, Mr Allan was concerned that after JK answered the questions that we have set out at [63] in a way that was favourable to Mr Aitchison, Ms Kedge proceeded to ask similar versions of the same question. Mr Allan said no lawyer versed in the art of cross-examination would have pursued that course of action and that in doing so, Ms Kedge signalled to the jury her concern that JK had not given the "right" answer to question 56.

[102] We make the following three points:

(a) While, with the benefit of hindsight it could be said Ms Kedge erred by asking too many questions of JK about some topics, the reality is JK's conflicting answers to questions 55, 56 and 57 assisted Mr Aitchison's case because the conflicting answers enabled Mr Sutcliffe to submit to the jury that they could not be certain about the reliability of JK's evidence.

(b) Mr Sutcliffe agreed to the series of questions that Ms Kedge had pre-prepared.

(c) The questions posed by Ms Kedge and JK's answers were recorded five days before the trial. If there really was a fundamental issue with the way JK was cross-examined, then there was plenty of opportunity for Mr Sutcliffe and the Court to take corrective measures. The fact this was not done reaffirms our assessment that although there were issues with the way Ms Kedge questioned JK, those issues did not impede Mr Aitchison's ability to examine JK.

[103] These points lead us to conclude that the way Ms Kedge questioned JK did not cause a miscarriage of justice by denying Mr Aitchison the right to effectively examine a witness for the prosecution.

Right to present defence case

[104] Nor did the assignment of the task of cross-examining JK to Ms Kedge undermine Mr Aitchison's ability to present his defence particularly as he gave evidence and fully explained to the jury why in his view JK's allegations were false. Mr Sutcliffe also fully explained Mr Aitchison's defence when he presented his closing address to the jury.

Was the evidence that JK gave in response to questions put by Ms Kedge so unreliable that it should have been excluded under s 7 of the Evidence Act?

[105] Dr Frumkin has raised the following issues about the way in which JK was questioned by Ms Kedge:

(a) Allowing JK to watch the EVI exacerbated the risks of suggestibility and memory distortion. He considers it "deeply problematic" that JK viewed her EVI immediately prior to being asked questions as this process rendered it "impossible to ascertain whether [JK] had an independent recollection of the events surrounding the alleged sexual assault or whether what she recollected or thought she remembered is based only on remembering what she had just seen on the video".

(b) Allowing Ms Kedge to watch JK's EVI with Ms Kingi before Ms Kedge questioned JK risked Ms Kedge developing a pro-prosecution bias, which in turn adversely affected the reliability of JK's answers.

(c) The use of "forced choice questioning" did not allow the jury to determine whether a "Yes" response really meant "Yes" to a question JK understood, or was that answer to a question what she thought she understood, or because she believed that that was the expected answer.

There is also a risk that JK's answers were simply a matter of "lucky guessing".

(d) Dr Frumkin is concerned the process adopted was "overly complex", that some questions were far too long and involved multiple concepts.

[106] As noted above, while Professor Bull accepts that some questions were too complex and involved too many concepts, overall, he was satisfied that JK was cross-examined in a way that allowed her to give her evidence without undermining its reliability.

[107] Determining that evidence is inadmissible under s 7 of the Evidence Act is a high threshold as the jury, as fact-finder, normally evaluates reliability of evidence "in the context of the trial as a whole".[44] In order to be inadmissible under s 7, evidence would have to be so unreliable that it should not be considered by the jury. In assessing whether or not Palmer J erred when he determined JK's answers to Ms Kedge's questions were sufficiently reliable as to be admissible under s 7, we shall address each of the matters raised by Dr Frumkin.

Allowing JK to watch her EVI before being questioned

[108] Nothing in the Evidence Act affects the practice of witnesses refreshing their memories before they give evidence by reviewing any statement or EVI they have previously provided to the police.[45] This practice occurs in a number of cognate jurisdictions.[46]

[109] Any concerns that refreshing a witness's memory prior to them giving evidence affects the reliability of their evidence can be explored by counsel challenging the witness about the source of their memory. In the present case, Mr Sutcliffe took no issue with JK viewing her EVI before she was questioned by Ms Kedge.[47] Nor did

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44 See discussion in *W (SC38/2019) v R* [2020] NZSC 93 at [40].

45 *Foreman v R (No 2)* [2008] NZCA 55 at [47].

46 *R v B* [2010] EWCA Crim 4, [2011] Crim LR 233 at [14]; and *R v R* [2010] EWCA Crim 2469, (2010) All ER (D) 131 (Sep).

47 The decision for JK to watch the EVI and when she should watch it in relation to her cross-examination was reached through a discussion between counsel, the trial Judge, and Ms Kedge: see Minute No 4 of Palmer J, above n 12, at [13]–[14].

Mr Sutcliffe attempt to challenge the reliability of JK's answers to Ms Kedge on the basis that her answers were affected through her having watched her EVI.

[110] As we have previously noted, there has been no challenge to the way Mr Sutcliffe conducted Mr Aitchison's defence. Absent any suggestion of trial counsel error, we can see no basis upon which it can now be said that it was wrong to follow the usual practice of allowing JK to see her EVI before she was questioned by Ms Kedge.

Allowing Ms Kedge to see the EVI

[111] We see no merit in the proposition that allowing Ms Kedge to see JK's EVI before she questioned JK led to Ms Kedge adopting a pro-prosecution bias in the way she questioned JK.

[112] Ms Kedge was retained by the Court because of her expertise as a communication assistant. We think it would have been very difficult for Ms Kedge to question JK without her seeing JK's EVI in order to assist Ms Kedge in understanding the context in which JK was to be questioned.

[113] Furthermore, after examining the recording of Ms Kedge's questioning of JK, we can see no basis to conclude that she lacked independence when questioning JK. Ms Kedge took the opportunity to revise or repeat questions when it appeared that JK struggled to comprehend what was being asked of her. This reflected Ms Kedge's professional judgment rather than unconscious pro-prosecution bias.

Forced choice questions

[114] Posing forced choice questions to vulnerable witnesses is potentially fraught because:

(a) the witness may guess the answer when selecting one of the options provided; or

(b) the answer given may relate to only part of the question that is asked.

[115] It is therefore generally recognised that forced choice questions should not normally be put to vulnerable witnesses. For example, in Achieving Best Evidence in Criminal Proceedings, the Ministry of Justice in England and Wales suggests forced choice questions "should be avoided if at all possible and only be used as a last resort".[48]

[116] There is, however, an important qualification to this recommendation. Professor Bull, whose research and publications informed the guidelines issued by the Ministry of Justice for England and Wales explained to us that forced choice questions should be avoided when adducing a witness's evidence-in-chief. Forced choice questions may not be so objectionable when they form part of the cross-examination of a vulnerable witness. This distinction reflects the purpose of each type of questioning. Evidence-in-chief and other investigatory interviews seek to gather as much information as possible from a witness. Conversely, questions in cross-examination are generally targeted at challenging a witness's narrative. It is important to stress, however, that counsel and communication assistant should strive to avoid asking complex and confusing questions of any witness, let alone one as vulnerable as JK.[49]

[117] Professor Bull's explanation about the limitations to forced choice questions reflects the growing realisation by judges and lawyers that conventional cross-examination may not always be appropriate where evidence is being adduced from a vulnerable witness.

[118] The limitations of allowing suggestive questions to be put to vulnerable witnesses, even in cross-examination, is illustrated by *R v W*, in which the Court of Appeal for England and Wales focused upon direct propositions that counsel put to an eight-year-old complainant whose answers appeared to retract her allegations.[50] The Court of Appeal rejected the argument that the complainant's evidence should have been withdrawn from the jury by the trial Judge because, the jury was entitled to

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48 Ministry of Justice for England and Wales, above n 17, at [3.55].

49 We also note the trial Judge's role in controlling unacceptable questions: see s 85 of the Evidence Act.

50 *R v W* [2010] EWCA Crim 1926.

conclude the complainant's apparent retractions were themselves unreliable because they were the product of highly suggestive questions.[51]

[119] All the experts in this case, including Ms Kedge, accept the cross-examination of JK should have involved simple, non-suggestive questions. Framing such questions will at times be a difficult exercise.

[120] We also observe that those tasked with cross-examining vulnerable witnesses may need to distinguish between questions that are likely to produce information that is of real value to the jury and questions that run the risk of producing unreliable evidence or dissuade the witness from continuing to give evidence.[52] Communication assistants and other health professionals can assist with this task. In addition, ground rules hearings can usefully set out appropriate boundaries for questioning a vulnerable witness.

[121] We also note that although questions 55, 56 and 57 are likely to have confused JK, Ms Kedge's strategy of asking JK the same question in different ways was consistent with Dr Frumkin's practice which we have summarised at [75(f)]. The mistake that Ms Kedge made, however, was to construct these questions in a way that was too complex for JK.

[122] In assessing the reliability of the answers given by JK to the forced choice questions posed by Ms Kedge about the offending on 9 June 2012, we reach the following conclusions:

(a) Any confusion in the answers given by JK may have been the product of the way the questions were put and not necessarily an indication of uncertainty or confusion on the part of JK about what actually happened.

(b) The jury were able to assess the reliability of JK's answers in the context of other evidence, including JK's EVI, the evidence of

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51 At [32]–[34].

52 *R v B*, above n 46, at [42].

witnesses concerning Mr Aitchison having the opportunity to offend against JK on 9 June 2012 and the propensity evidence that the Crown relied upon.

(c) The jury were also able to assess the reliability of JK's answers after considering the arguments advanced by Mr Sutcliffe about the reliability of her evidence.

[123] While we have reservations about the wisdom of some of the forced choice questions put to JK by Ms Kedge, we are satisfied Palmer J correctly allowed the jury to assess what weight it wished to place upon JK's answers to Ms Kedge's questions, bearing in mind the jury were fully appraised of JK's limitations and her responses to the test of concept questions.

[124] We are therefore satisfied this was not a case where the response to the questions put to JK should have caused Palmer J to rule her evidence inadmissible under s 7 of the Evidence Act.

Complex questions

[125] We agree with Dr Frumkin and Professor Bull that some of the questions posed by Ms Kedge were too complex because they involved more than one concept and, in some instances, included double negatives.

[126] Our reasons for concluding that the forced choice answer questions did not produce answers that should have been ruled inadmissible under s 7 of the Evidence Act apply with equal force to the complex nature of some of the questions asked by Ms Kedge, in particular, the reasoning we have set out at [122] and [123] is apposite to the challenge to the complex nature of some of the questions asked of JK.

Was the evidence that JK gave in response to questions put by Ms Kedge such that they should have been excluded under s 8 of the Evidence Act?

[127] The challenges to the admissibility of JK's evidence in the fourth ground of appeal requires an assessment of the admissibility of her evidence against the criteria in s 8 of the Evidence Act. This involves:[53]

(a) an assessment of the probative value of the evidence;

(b) determining if the evidence will have had an "unfairly prejudicial effect on the proceeding";[54] and

(c) determining if the evidence compromised Mr Aitchison's right "to offer an effective defence".[55]

[128] There are two ways to view the probative value of JK's answers to questions 55, 56 and 57:

(a) Her answers to questions 55 and 56 may have supported Mr Aitchison's case that he did not stay at the same house as JK on the night of 9 June 2012 and that he did not touch her "rude bits".

(b) Her answer to question 57 supported the Crown case that Mr Aitchison and JK stayed at the same house on the night of 9 June 2012 and that he did touch her "rude bits".

Either way, JK's answers to the questions had some probative value.

[129] Assessing the probative value of the evidence that Mr Aitchison now challenges also involves an assessment of whether or not the evidence presented some credible risk of unfair prejudice in the proceeding and whether any such risk outweighed the probative value of the evidence.

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53 See also *W (SC38/2019) v R*, above n 44, at [70]–[73].
54 Evidence Act, s 8(1)(a).
55 Section 8(2).

[130] The following factors are pivotal to this determination:

(a) JK's answers to questions 55, 56 and 57 were inconsistent and demonstrated confusion on her part about the questions.

(b) JK's confused and inconsistent responses to the key questions did not necessarily mean she was confused about what actually happened to her. Her confusion could have been caused by the nature of the questions she was asked.

(c) Inconsistency and confusion on the part of JK and the way she answered the key questions is likely to have aided Mr Aitchison's argument that JK could not be relied upon as a witness.

[131] These considerations lead us to conclude the answers JK gave to questions 55, 56 and 57 fell short of having any prejudicial effect on the proceeding.

[132] The third inquiry under s 8 of the Evidence Act in this case requires us to assess whether JK's answers to questions 55, 56 and 57 adversely impacted on Mr Aitchison's right to offer an effective defence. This right, set out in s 8(2) of the Evidence Act, reflects the rights of a defendant in s 25(e) of the NZBORA. An effective defence is, however, not the same as a successful defence. Generally, a defendant will be denied an effective defence where the evidence in question risks causing an "illegitimate prejudicial impact" on the defendant's case.[56]

[133] We are satisfied that JK's responses to questions 55, 56 and 57 from Ms Kedge did not compromise Mr Aitchison's right to an effective defence, which was guaranteed in the following ways:

(a) her conflicting responses provided some support for Mr Aitchison's case;

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[56] *R v Taea* [2007] NZCA 472 at [25].

(b) Mr Aitchison was able to explain his version of events to the jury and why JK should not be believed; and

(c) through Mr Sutcliffe's comprehensive closing address, in which he pointed out why Mr Aitchison said there were risks in the jury relying upon JK's answers to Ms Kedge's questions.

Could Palmer J delegate his responsibilities under s 77 of the Evidence Act?

[134] Mr Allan submitted that Palmer J failed to discharge his responsibilities under s 77 of the Evidence Act by ensuring JK was "informed" of "the importance of telling the truth and not telling lies". Although Ms Kedge set out for JK the rules that had been agreed to before she was questioned, Mr Allan maintains that at no stage did JK clearly manifest an understanding of any of the "rules" that were designed to ensure she knew the importance of telling the truth and not telling lies.

[135] Section 77(4) of the Evidence Act requires Judges to take special measures in a proceeding where a witness is permitted to give evidence without taking an oath or making an affirmation. Under s 77(4)(b) such a witness must be informed by the Judge of the importance of telling the truth and not telling lies, before the witness gives evidence. The provision is cast in mandatory terms.

[136] We agree with Mr Allan that the Judge's obligation to ensure a witness in JK's position is informed of the need for them to tell the truth and not tell lies could not be delegated to a communication assistant, which is effectively what occurred. We do not think, however, that the omission caused a miscarriage of justice in this case. What was essential was that the Judge be satisfied that the witness was aware of their fundamental obligations to tell the truth and not tell lies.

[137] In the present case, Ms Kedge devised a series of questions and propositions with which the Judge was satisfied before JK answered the questions that had been agreed to by Mr Sutcliffe and Ms Kedge. Those questions and propositions were designed to ensure that JK understood the importance of telling the truth.

[138] The Judge was satisfied that JK had been properly informed of the need for her to tell the truth and not tell lies. In these circumstances, the breach of s 77 of the Evidence Act did not give rise to a miscarriage of justice.

Summary

[139] We are concerned that questions 55, 56 and 57 which Ms Kedge put to JK were complicated and confusing. In future communication assistants should ensure questions posed to a vulnerable witness involve single concepts and avoid the use of double negatives.

[140] Nevertheless, we are satisfied that Palmer J did not err when he allowed the jury to consider JK's answers to Ms Kedge's questions.

[141] We are also satisfied that Mr Aitchison's fair trial rights were not compromised because:

(a) he was able to effectively examine JK through the questions prepared by his counsel and the communication assistant; and

(b) his ability to advance his defence was not compromised.

[142] Having concluded that there is no basis upon which we should quash the conviction relating to JK's allegations, it follows that the challenge to the conviction relating to WP's allegations must also be dismissed.

[143] It may assist future cases if we summarise our observations about the procedures adopted by Palmer J in this case in relation to the way the evidence of vulnerable witnesses may be adduced:

(a) We endorse the practice of conducting a hearing in advance of the trial so as to provide an opportunity to put in place special measures and to ensure all parties understand those measures.

(b) We see considerable merit in pre-recording the evidence of a vulnerable witness before trial. Not only does this provide a vulnerable witness with a more accommodating environment in which to give their evidence, it also provides counsel and the trial Judge with an opportunity to take any remedial steps that may be required after the vulnerable witness gives his or her evidence.

(c) Arrangements to pre-record a vulnerable witness's evidence must ensure the defendant is able to observe the evidence as it is given.

(d) We endorse the arrangements put in place in this case, which involved the appointment of a communication assistant who prepared, in consultation with defence counsel, the questions that the defence wished to be asked in cross-examination.

(e) In future cases, however, those composing questions to be put to a vulnerable witness should use short questions that deal with a single concept. Complex questions and double negatives should be avoided.

(f) Although it will be unusual to do so, there may be occasions when it is appropriate that the questions that counsel wish to be put in cross-examination are asked instead by a suitably qualified communication assistant provided defence counsel and the defendant agrees to that course of action. It is also essential that counsel for both parties have the opportunity to ask further questions either in cross-examination or re-examination that may be put to the witness through the communication assistant.

(g) Judges need to be alert to the possibility of a vulnerable witness being confused or intimidated by leading and forced choice questions. Where such concerns arise, the Judge may need to instruct counsel to adopt a more appropriate style of cross-examination.

(h) Counsel may, in some instances, need to consider whether it is necessary to put the defence case to a vulnerable witness.[57]

(i) A direction pursuant to s 122 of the Evidence Act should be given in relation to a witness' reliability if there is sufficient concern about the reliability of the evidence that has been given.[58]

(j) The jury should be fully informed of the reasons why any special arrangements are put in place to enable a vulnerable witness to give evidence.[59]

[144] Nothing we have set out in [143] should be construed as suggesting a defendant's right to a fair trial needs to be compromised in order to assist a vulnerable witness give evidence. Both objectives can and should be accommodated.

Conclusion

[145] The appeal is dismissed.

[146] In order to protect Mr Aitchison's fair trial rights in relation to the charges that are subject to a retrial, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent

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57 See *Browne v Dunn* (1893) 6 R 67 (HL); and *Dewar v R* [2008] NZCA 344 at [41]–[46]. Also see the comments of the Court of Appeal of England and Wales, first in *R v Lubemba*, above n 20, at [45] that defence counsel cannot "insist on any supposed right "to put one's case" … to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness"; and in *R v RK* [2018] EWCA Crim 603 at [27] that although there is doubt as to the *right* to put every aspect of the defence case to a vulnerable witness, whatever the whatever the circumstances, it has not questioned the general duty to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible. See also this Court's discussion about the need to carefully consider whether and how the defence case can be put in *T (CA26/2020) v R*, above n 10, at [116].

58 See for example *T (CA26/2020) v R*, above n 10, at [118]–[122].

59 See for example the directions discussed in *R v Hetherington*, above n 23. This is also in addition to the trial Judge's obligation to give a direction in accordance with s 123 of the Evidence Act.