IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2019-409-000144
[2021] NZHC 1171

BETWEEN	DAVID JOHN CHARTERIS Appellant
AND	THE QUEEN Respondent

Hearing: 28 October 2020

Appearances: J D Lucas and J M Campbell for the Appellant
K A White for the Respondent

Judgment: 25 May 2021

JUDGMENT OF NATION J

Introduction

[1] The appellant (Mr Charteris) faced 12 separate charges alleging various sexual offences against a young boy who was aged between 11 and 14 at the time.[1] After a judge-alone trial before Judge Neave in the District Court, Mr Charteris was acquitted on four of the charges but was found guilty on the remaining eight.[2] He was sentenced to 14 years' imprisonment.[3] He appeals against those convictions and the sentence.

[2] Four of the charges on which Mr Charteris was convicted involved sexual offending at Mr Charteris' home. One charge, laid on a representative basis, was of sexual violation of James by the insertion of Mr Charteris' penis into James' mouth (I refer to this as oral sex). There was a charge laid on a representative basis of sexual

1 To protect the privacy of the victim, I will refer to him by the fictitious name of James.
2 *R v Charteris* [2019] NZDC 4916.
3 *R v Charteris* [2019] NZDC 17880.

violation by Mr Charteris inserting his penis into James' anus (I refer to this as anal sex). There was a further charge of sexual violation by way of oral sex, the specific occasion relating to the time Mr Charteris ejaculated into James' mouth. There was another charge of sexual violation by way of anal sex.

[3] Two charges laid on a representative basis involved offending when Mr Charteris and James were at the Waimakariri River. One was a charge of sexual violation through oral sex. The other charge was of sexual violation by the connection of Mr Charteris' mouth with James' penis.

[4] The offending at Mr Charteris' home and at the Waimakariri River occurred between 1 May 1999 and 31 December 1999.

[5] Mr Charteris was convicted on a specific charge of sexual violation by oral sex, alleged to have occurred at Port Levy between 1 August 1999 and 31 December 1999 when Mr Charteris and James were walking in the countryside.

[6] Mr Charteris was also convicted of an indecent assault which James said occurred when James and Mr Charteris were at the Pohara campground in the Tasman area between 1 January 2000 and 6 January 2000. James said Mr Charteris came into his tent and indecently assaulted him in a way that involved Mr Charteris playing with James' genitals, skin on skin contact and Mr Charteris ejaculating onto James' chest.

Background

[7] Mr Charteris was a work colleague of James' mother. He became a friend of the family after James' parents separated in 1998. In May 1999, Mr Charteris was aged 44. James was aged 12.

[8] There was no dispute that for a time Mr Charteris was, with the agreement of James' mother, a friend to James. Mr Charteris took James to Mr Charteris' home. He took him on outings, including to the Waimakariri River. Mr Charteris babysat for James and his sister. He assisted with transport for James, taking him to and from ballet. In 2000 he helped James compile a children's page for a local newspaper (the broadsheet).

The District Court judgment

[9] I discuss specific determinations which were subject to challenge later.

[10] The Judge's decision was some 92 pages long.[4]

[11] The Judge, in a detailed way, traversed the evidence given by the witnesses. On occasion, he expressed an opinion about aspects of their evidence.

[12] The Judge detailed the evidence from James as to the allegations. He referred to James' evidence from his DVD interview and also what James had to say as to matters put to him in cross-examination.

[13] The Judge referred to Mr Charteris' evidence that the last time he babysat was in February 2000. He said he had slept in James' bedroom after James' mother told him to sleep there. Mr Charteris said James left his bed and had lain on top of Mr Charteris. Mr Charteris said he lifted James off and James went back to sleep in his own bed.

[14] The Judge noted Mr Charteris' evidence that he was concerned about his relationship with James, a DVD he had seen James watching and the contact James was having with someone else.

[15] Mr Charteris said he spoke to his work supervisor expressing concern that he had a target on his back because he was gay, and was being "challenged" by James' mother about James' behaviour.[5] The Judge noted it had not been suggested to the mother that she had held Mr Charteris responsible for concerns she had about James at the time.

[16] The Judge discussed Mr Charteris' denial of all the allegations made by James and his denial that any sexual activity had occurred. Mr Charteris said James would never have seen him naked because he was conscious about the extent of his body hair.

---

4 *R v Charteris*, above n 2.
5 At [144].

[17] The Judge noted, when Mr Charteris was asked what he had to say about James' allegations, his response was "I say that these are experiences that [James] has had, but they were not with me".[6] Mr Charteris had accepted there were occasions when he was alone with James at Mr Charteris' home. The Judge referred carefully to the evidence from Mr Charteris as to being concerned he had a target on his back, that James' mother was starting to cast aspersions towards him and that he was feeling vulnerable. The Judge noted the cross-examination evidence as to this and Mr Charteris' ultimate acceptance that, at the time those concerns started, James' mother knew nothing of any alleged sexual abuse involving her son and all this occurred at a time when he was being a helpful and supportive friend to the family.

[18] He considered evidence from Mr Charteris' former partner that Mr Charteris was self-conscious about the hairiness of his body, would not show the top half of his body, was sensitive about this in the context of their sexual relationship, tended to wear t-shirts and had no interest in anal sex. He noted that James had described Mr Charteris as sometimes wearing a t-shirt during alleged sexual offending.

[19] The Judge referenced evidence from the work supervisor who provided professional supervision to Mr Charteris at his workplace, that Mr Charteris had raised with her concerns about James' family and that he should not really be involved because "something was being implied".[7] The supervisor said this had occurred in one session in March 2000 and a second in April 2000. The Judge said he did not consider the evidence added anything significant to the credibility of Mr Charteris' evidence or otherwise.

[20] The Judge referred to evidence from another of Mr Charteris' co-workers. He considered this person's primary purpose appeared to be to undermine some of the mother's evidence and considered she did not add a great deal of weight to the evidence. He noted the way her evidence indicated Mr Charteris was quite deeply involved with the family, in contrast to Mr Charteris' evidence of his attempts to distance himself from the family. In discussing her evidence, the Judge observed she

---

6 At [152].
7 At [168].

had a vague recollection of Mr Charteris saying he had allowed James to drive his car, a point on which the defence had challenged James.

[21] The Judge summarised and discussed the evidence called for the defence from the partner of James' uncle, on his mother's side. The Judge said she gave "vague and generally supportive evidence of the prosecution case in terms of the relationship" between Mr Charteris and James.[8] He considered her evidence as to how the mother had described James' disclosure of sexual assault to her. She recalled the mother saying the disclosure had come after she had asked James if her new partner had done something to him, and the disclosure then followed a direct question about Mr Charteris.

[22] As the Judge considered there was never a suggestion that James' identification of Mr Charteris as the abuser resulted from a leading question, he found this evidence did not assist in either direction.

[23] The Judge turned to consider the evidence and noted the Crown case stood or fell on his assessment of James' credibility and the extent to which he was able to exclude the defence version of events. He stated Mr Charteris was entitled to an acquittal if his contentions were or might reasonably have been true.

[24] He began by considering four charges on the basis James had been completely truthful. On that assumption, the Judge considered these four charges created difficulties for the prosecution. With reasons, he dismissed each of those charges.

[25] The Judge then carefully went on to consider whether James' evidence on the remaining charges was truthful and reliable so as to establish the elements of each charge. He said he also had to be satisfied that Mr Charteris' explanation was not reasonably possible. The issues were not to be decided simply on a question of whose evidence he preferred. He had to be satisfied that the Crown had proved James' version was correct and Mr Charteris' account could not be.

---

8 At [174].

[26] The Judge then evaluated the evidence and discussed defence and Crown arguments, over some 50 paragraphs.

[27] With reference to s 122(2)(e) of the Evidence Act 2006, the Judge began by acknowledging the caution which had to be exercised in assessing the evidence because the case involved evidence about Mr Charteris' conduct which took place more than 10 years before trial. He discussed the particular difficulties both James and Mr Charteris faced in this regard. He noted how memories could fade and the ability to recall events might have diminished over time. He nevertheless observed that, if anything, the reverse seemed to apply with Mr Charteris who "seemed to have an almost uncanny ability to recollect every detail".[9]

[28] The Judge noted that, although corroboration is not a requirement in sexual cases, there was little, if any, evidence other than that given by James to support his allegations. He also expressly referred to the need for caution in relying on demeanour in assessing the credibility of a witness.

[29] The Judge concluded:

> [192] All that being said, it is fair to say that I found the complainant to be a credible witness as a matter of impression. His evidence was given without rancour or exaggeration. As noted above, there were occasions on which he gave evidence which was in essence, favourable to the defendant by not making allegations that had formed part of the charges. When given the opportunity, if anything, he was inclined to, in effect, give the defendant the benefit of the doubt and did not hold to positions in respect of which he was uncertain. He did not, in popular parlance, attempt to put the boot in. Furthermore, there were no internal inconsistencies nor was his account inherently illogical or improbable.

[30] The Judge reminded himself there was no obligation on Mr Charteris to point to James having a motive to lie. The Judge referred to the defence submissions as to why James could not be accepted as an honest or reliable witness as to the allegations he had made against Mr Charteris. That said, in essence, the defence theory of the case was that:

---

9 At [188].

(a) in the context of the dramatic separation of his parents and his mother's preoccupation, James had become closer to Mr Charteris, enjoyed his company, confided in him and sought Mr Charteris' help when facing difficulties at home; and

(b) prompted by a number of issues that concerned him, Mr Charteris cut ties with James and the family, upsetting James; and

(c) one evening, while playing a game of truth or dare in the presence of a person who did not like Mr Charteris, and under the influence of alcohol, James said he had been sexually abused by Mr Charteris. James made that disclosure again later in the presence of his sister and again when alcohol had been consumed; and

(d) some years later, when James was a troubled teenager, James' sister told their mother about James' disclosure of sexual abuse. The mother confronted James with the sexual abuse suggestion and nominated Mr Charteris as the abuser. James told her Mr Charteris had sexually abused him. This provided James with significant attention and strengthened his previously strained relationship with his mother. At that point, James had told a lie which could not be stopped.

[31] As to that, the Judge said:

> [194] I have to say this strikes me as fanciful. The complainant readily accepted that Mr Charteris was an important figure in his life at this time, and that it was a relationship from which he derived good things as well as bad. He freely acknowledged these. Quite apart from the fact that the submission is at odds with the defendant's attempts to distance himself from the relationship referred to above in his cross-examination, I can see no reason why, no matter how troubled [James] was in his teenage years, that he would have had recourse to these allegations as some kind of revenge. Furthermore, if they were revenge, they would have arisen much closer to the timeframe of the charges, rather than years later. Further, contrary to Mr Williams' submissions, the delays in dealing with this matter including the fact that the Police opted to take no action for some considerable period of time, provided ample opportunity for [James] to bring the matter to a conclusion. There is no evidence that he was trapped in a lie and he felt he had no option but to continue. Ample opportunities were there for him to retreat if he chose to do so, he did not.

[32] The Judge said he could detect nothing in the evidence of James, his mother, sister or stepsister to suggest the relationship between James and his mother was at such a point that he was desperate to attract her attention and the allegations were a means of restoring the relationship. He noted, inconsistent with the defence case, James had encouraged his stepsister and sister to keep what he had told them in confidence and not tell his mother of the disclosures. He noted Mr Charteris seemed to accept that James had been abused but suggested someone else was the abuser. The Judge could not detect why James would have any motive to name Mr Charteris as the abuser as opposed to someone else.

[33] In discussing the circumstances in which James told his mother Mr Charteris had sexually abused him, the Judge noted there were questions about the exact way and context in which James ultimately made this disclosure. The Judge saw limited relevance as to this uncertainty, noting it was never suggested to James that the terms of his disclosure were influenced by his mother's questions or that somehow it had been put into his head that Mr Charteris was the abuser and he was, effectively, mixing him up with someone else. He indicated the defence was purely that James was lying in relation to the allegations against Mr Charteris.

[34] The Judge found the mother's evidence of James' eventual disclosure to her "harrowing".[10] His Honour said that, unless James was an absolute superb actor, of which there was no evidence, there could be little doubt he was abused by someone.

[35] He then summarised the Crown argument but with his own comments as to the points the Crown made. In doing so, the Judge accepted there was opportunity for the alleged offending. Mr Charteris was a welcome member of James' family household from late 1998 until early January 2000. There were occasions when James spent time at Mr Charteris' house. James was also taken away from his own home for outings with Mr Charteris to Godley Head, Waimakariri River and Port Levy. Mr Charteris had joined James' family on a trip to Pohara.

[36] Mr Charteris had referred to his speaking to a work supervisor because he felt he had a target on his back.

---

[10] At [196]

[37] The Judge said he could not see anything in the evidence of Mr Charteris' interaction with James' family "that could have justified a view that somehow the defendant [was] vulnerable, unless of course he was abusing [James]".[11] He expressed doubt about the defence contention that Mr Charteris' anxiety could have resulted from his concern at James and his sister watching an "American Pie" DVD during an evening when Mr Charteris was babysitting them at their home, noting that none of the Crown witnesses agreed it was watched by the children. The Judge found Mr Charteris had continued his contact with the family after that time.

[38] The Judge did not make much of James saying nothing about Mr Charteris being hairy and commented that James was not asked about Mr Charteris' hairiness expressly.

[39] The Judge then discussed the defence arguments. In doing that, he said:

> [216] I have already made it plain I can see no evidence which would suggest that the complainant would want to obtain revenge on the defendant. Even if he were upset by the cessation of contact, sudden or otherwise, with the defendant, the notion that 20 years later he should still be wishing to exact revenge strikes me as fanciful. It is not consistent with his approach to any of the witnesses at the time and certainly not consistent with the way in which he gave his evidence, and not consistent with his attempts to be reasonable and his acknowledgement of the value he got from the relationship with the defendant.

[40] The defence referred to a lie James had admitted telling someone. The Judge accepted this occurred years after the alleged offending and was an isolated incident about which James did not seem very proud. James explained the lie was made in "the heat of an argument during a separation"[12] and he was trying to hurt the person concerned. The Judge said he could not find a reason why James would want to hurt Mr Charteris. The Judge considered the evidence of a lie years after the alleged offending did not mean James was a habitual liar.

[41] The Judge explained why he did not accept the argument that James could have made false allegations through wanting to be the centre of attention. He noted this

---

11 At [210].
12 At [217].

was inconsistent with James initially making a private disclosure to one individual rather than telling lots of people. He also said:[13]

> The complainant's evidential interview certainly does not display a tendency to drama and exaggeration. Rather, at all times, his evidence showed someone who was careful and considered in his responses, someone who did not resort to embellishment or exaggeration or over-dramatisation.

[42] The Judge referred carefully to the submissions made by Mr Charteris' counsel as to James' allegations being the result of troubled teenage years, his dramatic and passionate nature, his submitted tendency to lie, attention seeking personality and the circumstances surrounding James' disclosure of sexual abuse. The Judge said none of these submissions explained the allegations.

[43] The defence suggested Mr Charteris had been truthful in saying he distanced himself from the family after a series of events made him feel uncomfortable. The Judge considered it unlikely Mr Charteris pulled away because of incidents making him feel uncomfortable, noting there were a number of reasons why Mr Charteris may have become less involved with the family.

[44] The defence suggested Mr Charteris had shown himself to be a truthful witness in giving evidence of specific contact he had with James, for instance, having him sleep over at his home on two occasions. The Judge acknowledged Mr Charteris' acceptance he took James on multiple excursions but said "given the state of the evidence he could hardly do otherwise".[14] The Judge said the contact may well have started because of a willingness to assist James but "regardless of how the contact began, in my view it did not stay innocent".[15]

[45] The Judge referred to a submission that, if James' evidence was true, at times the activity was quite brazen. The defence submitted Mr Charteris would not plausibly have acted in that way. The Judge said, unfortunately, he had sat on too many cases where the offending had been "quite brazen, or at least opportunistic".[16] He did not consider this detracted from the force of James' testimony.

---

13 At [220].
14 At [227].
15 At [227].
16 At [231].

[46] The Judge noted James had admitted there were details he could not recall. In contrast, Mr Charteris seemed to have an answer for "virtually everything".[17] The Judge said while Mr Charteris had time to ponder James' allegations, this could not explain his ability to recall details so many years after the event. The Judge said "[b]earing in mind, on his evidence, his interaction with [James] was entirely innocent, if so he would have had no need to recall all the details of that contact".[18]

[47] The Judge said:

> [233] One might have expected there to be points of uncertainty or gaps in the memory if the account were genuine. Given my earlier comments about the changing emphasis of the defence case, the defendant's account seemed to me to be an ex post facto reconstruction to suit the narrative of the Crown case. Moreover, the shifts in the defence position to lead [sic] to Crown testimony further served to reinforce that impression.

[48] In earlier referring to matters put to James in cross-examination, the Judge said it was put to James that his descriptions of the sexual acts were very general. James suggested, if a single traumatic event had occurred, he might have been able to remember more details. However, James said there were numerous instances of offending over quite a period of time and a significant time had passed since the events, making it difficult to recall specifics. The Judge considered this a reasonable response to the question and said there could have been cause for suspicion if James had recalled every detail.

[49] The Judge concluded:

> [234] It will be abundantly plain from all the foregoing that I accept the evidence of the complainant and reject the evidence of the defendant. In summary, the following points, which is not an exhaustive list, can be made. As to the complainant:
>
> i) His evidence was clear, logical and compelling, given without exaggeration or rancour and readily willing to concede points in favour of the defence.
>
> ii) While there were gaps in his memory and perhaps occasional mistakes (i.e. the broken window pane which one might have expected [Mr Charteris' flatmate] to remember), these matters don't really cast any significant doubt on his accuracy or veracity.

---

17 At [232].
18 At [232].

iii) To a limited extent there is support for his general narrative at least from his mother in particular and also by the defendant and his witnesses.

iv) There was clearly ample opportunity for the offending to occur.

v) There is no discernible motive for him to lie.

[235] As to the defendant:

i) His narrative appeared to be changing.

ii) There were some significant inconsistencies in his narrative, both with other witnesses and his own case. This is particularly so in relation to the depth and length of the relationship with [James]. In this respect his case appeared to change as the case progressed.

iii) The defendant had a complete answer to everything down to significant levels of detail. Given the time lapse since these events occurred, this ultimately became unconvincing.

[50] The Judge had already explained why, on the evidence of James, four of the charges could not be proven. On his assessment of the evidence as summarised, he found the remaining charges had been proved beyond reasonable doubt.

Legal principles

[51] Relevantly, s 232 of the Criminal Procedure Act 2011 provides:

232 First appeal court to determine appeal

(1) A first appeal court must determine a first appeal under this subpart in accordance with this section.

(2) The first appeal court must allow a first appeal under this subpart if satisfied that,—

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

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

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

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

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

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

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

(5) In subsection (4), trial includes a proceeding in which the appellant pleaded guilty.

[52] The Court of Appeal in *Wiley v R* explained how s 232 is to be applied.[19]

[53] The enquiry on appeal involves a two-step process. Was there an error, irregularity or occurrence in or in relation to or affecting the trial and, if so, did either of the two states of affairs in subss 4(a) or (b) arise in consequence?[20]

[54] Under subs 4(a), the Court must be satisfied an error has created a real risk that the outcome of the trial was affected. A real risk arises if there is a reasonable possibility that a not guilty (or a more favourable verdict) might have been delivered if nothing had gone wrong.[21]

[55] The use of the term "real" means that the enquiry is concerned with realistic rather than theoretical possibilities.[22]

[56] As to s 232(4)(b) of the Act, there is no suggestion on this appeal that there was an error which resulted in the trial being a nullity. The issue is whether, if there was an error, it resulted in an unfair trial. Not every error, irregularity or occurrence will result in an unfair trial. If an accused person has not received a fair trial, then any conviction arising must be set aside.[23] The error, irregularity or occurrence must be of sufficient seriousness to warrant the verdict being set aside without further enquiry.[24]

[57] The definition of "miscarriage of justice" in s 232 of the Act excludes from its scope cases in which an "otherwise fatal, uncorrected error is of no consequence

---

19 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1.
20 At [24].
21 At [27].
22 At [28].
23 At [37].
24 At [41].

because conviction was inevitable", with "inevitable" meaning the only reasonably possible verdict.[25]

[58] The approach taken by the Court of Appeal in *Wiley v R*, as to how s 232 is approached, was largely endorsed by the Supreme Court in *Misa v R*.[26]

[59] After a judge-alone trial, the appeal proceeds by way of rehearing.[27] Section 232(2)(b) requires a focus on the Judge's assessment of the evidence, a focus which presupposes the existence of reasons from which the substance of that assessment can be discerned.[28]

[60] If an appellate court comes to a different view on the evidence, the trial judge necessarily would have erred and the appeal must be allowed.[29] But, it is not the role of an appellate court to consider the issues anew as if there had been no judge-alone trial.[30] It is for the appellant to show that an error has been made. In assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had.[31] Because of this, where the challenge is as to credibility findings based on contested oral evidence, an appellate court will exercise "customary caution".[32] As to that, the Supreme Court said there are two main overlapping reasons for this:

> [39] The first is that a slow-paced trial, at which the evidence emerges gradually, provides a good opportunity for evaluating the strengths and weaknesses of a case. In assessing the plausibility of what is said by the witnesses, the judge has the advantage of being also able to form a view as to what sort of people they are. This is an appreciable consideration despite the now well-recognised difficulties with demeanour-based credibility assessments.
>
> [40] The second consideration, in effect the other side of the coin to the first, is that appellate judges dealing with a case on the basis of a written record of what happened at trial and the submissions of counsel are unlikely to be as well-placed as a trial judge to determine contested questions of fact based on contested oral evidence. For instance, what a witness means may be conveyed,

---

25 At [43].
26 *Misa v R* [2019] NZSC 134 at [37]–[48].
27 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [32].
28 At [28].
29 At [38].
30 At [38].
31 At [38].
32 At [38].

> at least in part, by gesture or intonation, something which will not be apparent on the written record. More generally, the appellate process in which appellate judges are taken, sometimes rather selectively, to the aspects of the evidence on which counsel rely does not replicate the advantages of a trial judge which we have just described.
>
> (footnotes omitted)

[61] Mr Charteris contends the trial Judge erred in his assessment of the evidence to the extent that a miscarriage of justice occurred due to various errors. I deal with them in turn.

The alleged errors of trial counsel in not cross-examining James on the circumcision issue and of the trial Judge in drawing an inference adverse to Mr Charteris because of that

[62] An issue emerged at trial as to how James would have known Mr Charteris was circumcised. Mr Charteris said it could have been because of a dinner table discussion, at which James was present, when there was a conversation about circumcision. The Judge said he considered this was an explanation made up on the spot and that explanation had not been discussed with his counsel before trial. That assumption was wrong.

[63] Counsel submitted this error "dramatically affected the trial" as it had a significant impact on how the Judge perceived Mr Charteris' credibility. He argued this error was material as evidenced by the District Court Judge deeming it relevant enough to recall the witnesses to give evidence on this matter.

[64] James was asked in cross-examination if there was anything about Mr Charteris' physical appearance he remembered. He responded "[n]o tattoos, circumcised, and as I mentioned, his face pre-orgasm would, you know, bloods rushing around, you know, red face, veins, yeah". Counsel had James confirm that his memories of Mr Charteris' body was of circumcision, no tattoos and James' description of his face pre-ejaculation.

[65] Under cross-examination, Mr Charteris said James had never seen him naked but accepted that James knew he was circumcised. Mr Charteris' counsel re-examined Mr Charteris on how James knew about the state of his penis. Mr Charteris replied

that he and James' mother knew because of a discussion that took place around the dining table when he, James' mother, the mother's new partner, James and James' sister were present. They were talking about a television news item about a man who was suing his doctor and parents because he had been circumcised. The mother's new partner was particularly vocal about it.

[66] Crown counsel objected to the evidence as it had not been put to James. The Judge allowed the Crown to recall James and his mother for the evidence to be put to them. James accepted it was likely there were occasions when he would have sat around the table and eaten dinner with Mr Charteris, his mother, her new partner and perhaps his sisters. He said he could not remember an occasion when there was a discussion at the table about a man who was suing his doctor and parents for the fact he was circumcised, but he did not discount it as a possibility.

[67] James' mother did not recall any occasions when Mr Charteris had dinner with her and her family. She did not remember anything about an occasion when there was an item on the television news relating to a man who was suing his doctor and parents because he had been circumcised. She was certain she did not remember any conversation that took place with other members of her family relating to circumcision.

[68] In his judgment, the Judge referred to Mr Charteris' evidence and the explanation he gave as to how James might have been aware Mr Charteris was circumcised. The Judge said:[33]

> [163] None of this had ever been put to [James] or [his mother] or raised prior to this. I have to say that gave me the impression of an answer on the hoof, as it were, to explain something that might otherwise be a little awkward from the defence point of view. I did permit both the complainant and his mother to be recalled to discuss this evidence. Neither had any recollection of such a conversation.

[69] The Judge referred to this again in the context of his discussing the evidence from Mr Charteris and James about Mr Charteris' physical appearance. The Judge said:

---

33 *R v Charteris*, above n 2.

> [214] In relation to the defendant's evidence about the circumcision conversation, I find it highly unlikely such a conversation occurred. Given the defendant's apparent ability to recall significant detail, it seems improbable that he remembered it but omitted to mention it to anyone. One might have expected the issue to have been raised in the very thorough cross-examination of [James' mother] and [James] had the defendant raised it previously. I think it much more likely this was an improvisation on the part of the defendant in the face of a difficult issue.

[70] In bringing this evidence into account as adversely affecting his assessment of Mr Charteris' credibility, the Judge assumed Mr Charteris had not disclosed the evidence to anyone prior to the trial.

[71] In evidence for the appeal, this Court received affidavits from Mr Charteris and a community mental health support worker who said he had supported Mr Charteris during the prosecution process and at his trial. Both Mr Charteris and this witness said, at a meeting they had both attended with trial counsel, Mr Charteris had given a detailed account of the discussion which took place at the dinner table around circumcision.

[72] Mr Williams, trial counsel for Mr Charteris, swore an affidavit in which he described his detailed preparation for the trial and the extensive engagement he and junior counsel (Ms Basire) had with Mr Charteris prior to the trial. He said he made it clear to Mr Charteris on a number of occasions that the complainant or other witnesses would have to be cross-examined about matters on which Mr Charteris would be giving evidence. He told Mr Charteris it could be held against Mr Charteris if they did not do this.

[73] Mr Williams said Mr Charteris advised him and possibly Ms Basire that he had been involved in a conversation, in the presence of James and James' mother, where Mr Charteris disclosed he had been circumcised. Mr Charteris said the conversation occurred in the context of a television news article about a man in Australia who sued a hospital for circumcising him. Mr Williams said he had received an email from Ms Basire at 11.18 pm on 4 March 2020 reminding him about the issue. This was after they had prepared a table identifying cross-examination points. Mr Williams said they must have received this information in the days leading up to the trial (the trial began on 4 March 2019) when counsel were preparing their mock cross-examinations of Mr

Charteris. The information had not been included in a very detailed account which Mr Charteris had provided on 9 January 2018, a further account which Mr Charteris had prepared on 10 June 2018 for a private investigator or a brief of evidence that was signed on 6 March 2020 following James' evidence.

[74] In his affidavit, Mr Williams said, at the conclusion of Mr Charteris' evidence at trial, he spoke with the trial prosecutor about the circumcision issue. Mr Williams said he indicated to the trial Judge that James and his mother would need to be recalled. Mr Williams told the Judge he took responsibility for that need. In his affidavit on appeal, Mr Williams said the failure to raise the issue in cross-examination was his. He suggested no adverse inference should have been drawn against Mr Charteris because of this.

[75] It was apparent from correspondence annexed to Mr Williams' affidavit that, in a letter of 29 April 2020, Mr Charteris had raised a number of concerns as to the way his trial proceeded. Mr Williams responded to those concerns. As to the circumcision issue, his response was consistent with the evidence he provided with his affidavit. Other concerns were not the subject of evidence or submission on appeal.

[76] I accept, based on the evidence which emerged after trial, the Judge was in error in assuming Mr Charteris had not disclosed the issue of circumcision prior to cross-examination. With Mr Williams indicating he did not consciously decide to refrain from cross-examining James about the claimed dinner table conversation when James was first giving evidence, it cannot be said this was an instance of counsel making a strategic decision not to cross-examine as to that matter.

[77] Nevertheless, what happened has to be kept in perspective. On leading Mr Charteris' initial evidence, Mr Charteris was not asked to give evidence about the dinner table conversation. There was no mention of it in the brief of evidence Mr Charteris signed after James had given evidence. Mr Charteris was to give evidence about his hairiness, his sensitivity about revealing that to others and that he always wore a t-shirt when engaged in sexual activity.

[78] When Mr Williams cross-examined James as to what he remembered of Mr Charteris' appearance, James referred to Mr Charteris being circumcised and having no tattoos but said nothing about Mr Charteris' body hair. With that response, the defence were able to argue that James' description of Mr Charteris did not include a distinctive feature of Mr Charteris' appearance that the defence argued he would have mentioned if James had truly been engaged in sexual activity with Mr Charteris.

[79] Had there been further questioning about the circumcision issue, it would have highlighted evidence given by James as to Mr Charteris' physical appearance, i.e. circumcision, a characteristic James could have been aware of through the way Mr Charteris sexually engaged with him. If there had been questioning about the dinner table conversation, for the defence to be able to make anything of that conversation, the defence would have had to suggest to James that he had described Mr Charteris as being circumcised only because he knew of this through that conversation. Had that been put to James, given the way in which James had given evidence up to that point, counsel might reasonably have considered further cross-examination on the subject could well have led to James being quite specific that he knew Mr Charteris was circumcised through seeing his penis when oral or anal sex occurred.

[80] Such a response was confirmed as likely when James, on being recalled, said he could not remember any dinner table conversation about circumcision. If James had no memory of the conversation, it is hard to see how the fact such a conversation did occur or might have occurred could have been the reason why James said Mr Charteris was circumcised.

[81] It seems likely that counsel fully appreciated those risks. When James was recalled to give evidence, trial counsel did not then suggest that James had described Mr Charteris as being circumcised only because of what he had learned from a dinner table conversation.

[82] In the context of this trial, I do not consider trial counsel's failure to cross-examine on this point resulted in a material error in the Judge's assessment of the complainant's evidence of such gravity as to require this Court to allow the appeal on the basis a miscarriage of justice has occurred.

[83] It is apparent from the judgment itself that trial counsel had, in detailed fashion, carefully and firmly tested the evidence of James and other Crown witnesses in light of Mr Charteris' firm denial of all allegations of the sexual offending with which he was charged. Mr Williams had clearly put before the witnesses and the Judge the defence theory as to why James would have made up these allegations and maintained them through to trial. The Judge had, for reasons he carefully articulated, found James to be a reliable and honest witness as to the matters the Crown had to prove for Mr Charteris to be guilty of the charges on which he was convicted. There is no criticism of how the Judge went about doing this. It will be apparent from my earlier discussion of his decision that, consistent with the expectations of a trial Judge, as confirmed by the Supreme Court in *Sena*,[34] the trial Judge's verdicts were carefully reasoned. The Judge acquitted Mr Charteris on four charges but that was because, as to those matters, he accepted James had been an honest witness at trial in indicating he was uncertain as to precisely what had occurred in relation to those particular charges.

[84] With the advantage he had in hearing and assessing the evidence of all witnesses at trial, the Judge found it highly unlikely the dinner table conversation had even occurred.

[85] Mr Charteris had faced charges of oral and anal sex from the time he was first charged with this offending in 2017. There had been no mention of this conversation in a detailed account Mr Charteris provided to counsel on 9 January 2018 or a further account he provided for an independent investigator on 10 June 2018.

[86] As it has transpired, with the further evidence before the Court on appeal, the Judge was mistaken in assuming Mr Charteris had not told anyone of the dinner table circumcision conversation before James and his mother gave evidence. That was however only one matter that the Judge had regard to in deciding Mr Charteris was not a credible witness in saying he never sexually engaged with James. The Judge found that James was a credible witness. He had various reasons for rejecting crucial evidence of Mr Charteris.

---

[34] *Sena v Police*, above n 27, at [36].

[87] I do not consider there is or was any reasonable possibility that the Judge's assessment of Mr Charteris' credibility or his determination as to whether the Crown had proved the relevant charges beyond reasonable doubt would have been different had the Judge been aware of the fact Mr Charteris discussed the dinner table circumcision conversation with counsel before James and his mother were cross-examined and before Mr Charteris gave evidence.

The refusal to allow questioning about James' lack of disclosure to other parties and delayed complaint

[88] During the trial, the Judge intervened in the cross-examination of James and said counsel should not continue with questions that appeared to be about James' delay in making a complaint.

[89] On appeal, counsel submits the Judge was in error in saying it was not a proper question and in thinking that, if the trial had been before a jury, he would have been telling the jury to ignore the question.

[90] Mr Lucas referred to s 127 of the Evidence Act 2006 which states:

> **127 Delayed complaints or failure to complain in sexual cases**
>
> (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
>
> (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

[91] Counsel referred to *Bian v R* and the recognition there that, although a s 127 direction may be given, it does not mean the factfinder cannot take anything adverse from a delayed complaint.[35] It remains a matter for the factfinder.[36]

---

35 *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 at [51].
36 At [51].

[92] Mr Lucas submitted that the "complete shutting down of questioning by the Judge" was wrong and the Judge was wrong to say he would have directed a jury to ignore this line of questioning.

[93] Mr Lucas submitted:

> The denial by the trial Judge to allow a line of questioning as to why he hadn't b[r]ought to the attention of his mother or others until she prompted him and gave him a name was wrong as it may have exposed some of the flaws as to why he hadn't complained earlier.

[94] It is not apparent from the transcript precisely what questions Mr Williams had contemplated asking James when he was cut short by the Judge. There is no evidence in the affidavits of Mr Williams and Mr Charteris admitted on appeal as to the questioning Mr Charteris asserts the defence was unable to pursue as a result of the Judge's intervention. However, Mr Lucas' submission refers to questioning of James as to his delay in making a complaint to his mother or others and the circumstances in which he eventually told his mother that Mr Charteris had sexually abused him.

[95] James' stepsister gave evidence. She said she met James when she was 13 and James was 12. She met James when her mother and James' father starting dating. She remembered that James and his sister would stay with her every second weekend and during the school holidays. James came to live with them permanently when he was about 14, when she and James were both at High School. She recalled being about 14 when she met Mr Charteris. She gave evidence of the contact she had with Mr Charteris and James when James was in the third or fourth form. She said, when James was about 13 or 14 and they were living at the home with her mother and James' father, James told her he had been abused by Mr Charteris. She recalled James said the sexual abuse occurred at the home where James lived with his mother and at the property Mr Charteris lived in at the time. She asked him what happened and James referred to anal sex and oral sex both performed and received. She said there were two further conversations in which James made this disclosure, one in which James' sister was present and another where a friend of the stepsister was present. She said it was something they kept secret between themselves.

[96] James said he first talked to his stepsister about what happened with Mr Charteris in late 2000 or 2001, when he was living at the home of his father and step-mother. He believed they first talked about it when they were in a truth or dare type game, talking about various aspects of their lives. He did not recall his sister being present the first time he had talked to his stepsister but recalled her being around at some point. Mr Williams cross-examined James about his first telling his stepsister he had been abused. James was clear that the first person he told was his stepsister. Counsel cross-examined James about where he was when he made the first disclosure. Counsel said there was information from James' sister that there had been a disclosure at a campground in New Brighton.

[97] In the course of the cross-examination about where the disclosure happened, the Judge addressed counsel. The transcript indicates the Judge had a concern as to relevance. The Judge noted the stepsister had said there had been a disclosure to her. The stepsister had not been challenged as to the fact of that disclosure. The Judge said where it happened was not particularly important to him.

[98] The questioning, as to where it happened, continued but the Judge said he was struggling to find its relevance and wanted counsel to "get a move on". After further questioning about the location of the disclosure, the Judge directed counsel to move on.

[99] In further questioning, counsel suggested James liked to be the centre of attention, he liked the attention the stepsister gave him after his disclosure to her. Counsel also suggested James disclosed to his mother after she talked to him at a time of his life when he was at rock-bottom.

[100] It was put to James, and James accepted the proposition, that his mother had asked him directly whether he had ever been sexually abused and then "named some names". When asked who his mother named first, James said there was reference to the mother's partner. James said he denied any sexual abuse by his mother's partner and the discussion moved to what happened with Mr Charteris.

[101] It was put to James that, after this, his relationship with his mother began to improve. James said she helped in obtaining both physical and mental health support.

[102] Counsel then asked James about a lie he told someone with whom he had been in a relationship. He was also questioned as to the circumstances around the potential meeting with Mr Charteris at a café before going to Mr Charteris' house in connection with the occasion which was the subject of the last alleged sexual offending.

[103] Counsel agree the notes of evidence and the audio recording of the hearing record the following:

> Q When you had confided in your friend [the step-sister] or your step-sister's friend […], that these things had happened, why did you not disclose –
>
> **The Court addresses Mr Williams – rephrase question** (16:20:23)
>
> Well no that's not a proper question. There's all sorts of reasons why and I can't draw any conclusions from that. I'd be telling a jury to ignore it so I don't see why I should listen to it.
>
> **Mr Williams addresses the Court – request to take instructions** (16:20:55)
>
> Sir, I need to take some instructions from my client in relation to the matter that we raised earlier to see whether or not I advance any application so if we could have five minutes.
>
> **Court adjourns: 4.21 pm**
>
> **Court resumes: 4.34 pm**
>
> **Mr Williams addresses the Court** (16:34:20)
>
> There's not going to be an application
>
> **The Court**:
>
> On the facts I think you would have been pushing it. I think we –
>
> **Mr Williams**:
>
> I'm about to embark on a brief flow of enquiry. My friend knows about it and we're confident amongst ourselves that it doesn't get over that line.

[104] The record shows that the Court resumed at 4.34 pm. After that brief adjournment, Mr Williams moved on to another topic.

[105] I accept the Judge was in error in thinking it would have been improper for questions to be put to a witness as to a delay in making a complaint if the matter was before a jury. I accept the Judge was in error if he thought he would have to ignore the response from the witness as to a delay in making a complaint. In a judge-alone trial it would however have been permissible for the Judge to indicate he was unlikely to be much assisted by continuing cross-examination as to the delay in making a complaint and counsel should desist from such questioning. The Judge could reasonably have given this indication in the interests of efficiently progressing the trial and avoiding unnecessary questioning of the witness where that questioning was likely to be of little assistance to the defence. Reasonably, this should have been done in a way that gave counsel the opportunity to consider such an intervention and respond in such manner as counsel considered appropriate.

[106] Here, the Judge's intervention was more directive than that. The Judge intervened in a way that indicated he did not want counsel to continue with the questioning which had just begun. Nevertheless, he allowed an adjournment for Mr Williams to have a discussion with Mr Charteris, in which counsel could consider the position and how to respond.

[107] After that adjournment, counsel indicated he was going to move on to another topic. Counsel could have but did not explain to the Judge that he had intended to ask questions not about any omissions in the complaint made to the stepsister but as to why James had delayed in making a complaint to the mother.

[108] As a result of what happened, counsel did not cross-examine James about why he delayed making a complaint to his mother until 2004, some four years later when James was 17. This happened at a time his mother was concerned with problems James was having in his life and his sister had told the mother that James had previously disclosed to her that he had been sexually abused.

[109] I am not however persuaded that any errors in the way the Judge intervened caused a miscarriage of justice.

[110] There was no dispute that James made disclosures to his stepsister and sister not long after the alleged offending but did so on the basis they kept those disclosures confidential.

[111] The Judge was fully aware of the delay that occurred between the alleged abuse and the disclosure to the mother. Both James and his mother were cross-examined as to the circumstances in which James disclosed to his mother that Mr Charteris had sexually abused him, the nature of his relationship with his mother both before and after the disclosure, and the way she had questioned him before he named Mr Charteris as the abuser.

[112] Applying s 127 of the Evidence Act to himself, as would have been appropriate, the Judge was entitled to conclude that there could be a good reason for James' delay in making the complaint to his mother and the delay did not necessarily have to detract from James' credibility as to the allegations he was making.

[113] It would have been obvious to the Judge that a young teenager might not have wanted to tell his mother of his involvement in the alleged sexual activity with Mr Charteris when he had willingly gone with Mr Charteris to situations where such acts could occur. The Judge would have been quite entitled to assume, as he probably did, that James would have had feelings of embarrassment, even guilt, about the activities he had been involved in. It was likely that James was also conflicted in his feelings at the time about what had occurred. In his evidence and when cross-examined, James said Mr Charteris had supported James' mother by helping to look after James and, on the whole, James had enjoyed Mr Charteris' company and had become attached to Mr Charteris. James acknowledged there were aspects of the relationship that he found beneficial or helpful.

[114] After the brief adjournment, trial counsel decided not to pursue a proposed line of questioning of James as to the reasons for his delay in making a complaint to his mother. In the absence of any evidence to the contrary, I consider it likely that Mr Charteris' trial counsel decided, in consultation with Mr Charteris, that, in light of the Judge's earlier interventions, it was likely further questioning of James as to his delay

in making a complaint to his mother would be unlikely to assist Mr Charteris in his defence.

[115] I thus conclude, had the Judge permitted the questioning Mr Williams had embarked upon to continue, there is no reasonable possibility it would have affected the outcome of the trial. I do not consider the Judge's intervention over this questioning caused a miscarriage of justice.

The erroneous rejection of Mr Charteris' evidence based on his evidence about the length and depth of the relationship with James

[116] It was noted by counsel for Mr Charteris that the Judge had to reject Mr Charteris' evidence to the point there was no reasonable possibility that his denial of the sexual offending was true.

[117] In summarising his reasons for rejecting Mr Charteris' evidence, the Judge referred to his finding that there were:[37]

> … significant inconsistencies in [Mr Charteris'] narrative, both with other witnesses and his own case. This is particularly so in relation to the depth and length of the relationship with [James]. In this respect his case appeared to change as the case progressed.

[118] Counsel submitted the determinations just referred to were in error and the Judge had been in error in relying on them as reasons for rejecting Mr Charteris' denials.

Length of relationship

[119] The Judge found that Mr Charteris continued to have contact with James' family until well after March 2000.[38] In reaching that conclusion, he rejected the evidence from Mr Charteris that Mr Charteris' contact with James had ceased in early 2000. This indicated to the Judge that Mr Charteris had continuing contact with James and his family despite his claim that he felt vulnerable at the time due to James' actions and comments from James and his family.

---

37 *R v Charteris*, above n 2, at [235].
38 At [170].

[120] After this, Mr Charteris continued to be involved with James in helping him prepare the broadsheet. As Mr Charteris recorded, James worked on probably three or four editions. Mr Charteris accepted, during that time, James went to Mr Charteris' home to work on the broadsheet and went into his bedroom when Mr Charteris' flatmate was away. Mr Charteris also accepted he had taken James to James' father's new address. The Judge accepted the evidence of James' stepsister that her mother and James' father had moved into that address in April 2000. There was also evidence from the stepsister that Mr Charteris would turn up to ballet when James was in the third or fourth form at high school. The Judge noted that Mr Charteris contradicted the stepsister's evidence that he was still picking up James from ballet in the third or fourth form, reiterating that his association with James' family ended in early 2000.[39]

[121] In referring to the evidence of James' stepsister, the Judge said there was clear evidence of Mr Charteris having contact with James when James was living at the father's new address on or after April 2000, meaning Mr Charteris must have had contact with James after this date. The Judge said this was a material inconsistency with the evidence of Mr Charteris.

[122] Mr Charteris argues the Judge's determination was inconsistent with James' acceptance in cross-examination that he had no contact with Mr Charteris between a time when Mr Charteris said he had babysat James and his sister at their home and had slept in a loft bedroom with James until the time they met up at a café when James was at high school in 2002. Mr Charteris says the Judge's determination was inconsistent with James' mother's acceptance that Mr Charteris' contact finished in early 2000.

[123] Mr Charteris argues the Judge was wrong to have relied on the evidence from James' stepsister that Mr Charteris used to pick up James from ballet in 2000 and 2001 when the evidence from James' sister was that the ballet trips occurred in 1999.

[124] The extent to which Mr Charteris continued to have contact with James during 2000 was significant because Mr Charteris claimed he had become alarmed and felt vulnerable after he had been with James at Pohara at new year 2000 and James was

---

[39] At [160].

about to start high school, and James had talked openly to him about James' sexuality. Mr Charteris said he felt vulnerable because he was openly gay and, from what he had been told, James was exposed to homophobic rhetoric in his home.

[125] Mr Charteris has not established the Judge was in error in saying there were inconsistencies between the way his case was presented and the evidence as to when his relationship with James ended.

[126] Mr Charteris did mention in his evidence his collecting James and a friend from town, at the request of James' mother, and taking them to James' father's address, at a time which would have been after February 2000. He also said his contact with the family had ceased before James' birthday in April 2000. The tenor of his evidence in chief was that contact with James had dropped off significantly in the early part of 2000. Nevertheless, his counsel questioned him for clarification about that, beginning with the statement "you said you weren't alone with [James] again after that incident in February 2000". He was asked what he recalled of any time he was present with James after that incident. Mr Charteris said the next contact was towards the end of 2002 (the occasion James contacted Mr Charteris, they met at a café and then went back to Mr Charteris' home).

[127] Mr Charteris said in 2000 he had talked to his work supervisor about his concerns with his engagement with James' family, concerns about James' interactions with another person, a DVD he had seen James watching when he was babysitting and what James had told him about his sexuality and how his family might react to that. He said he was being challenged by James' mother about James' actions. Mr Charteris said he felt he had a target on his back. His supervisor said those conversations occurred in March and April 2000.

[128] It was put to James in cross-examination that Mr Charteris cut contact with James after an occasion in 2000 when Mr Charteris had babysat James and his sister at their mother's home when James was at high school. Except for an occasion when, at James' request, he was picked up from outside the Ballantynes Department store and returned to his father's home.

[129] This Court now knows, from Mr Williams' affidavit, that a brief of evidence had been prepared for Mr Charteris. Mr Charteris had signed that brief of evidence on 6 March 2019. He also signed an acknowledgement that his counsel had cross-examined James based on the account previously given by Mr Charteris to Mr Williams and relevantly formalised on 6 March 2019 in his brief of evidence. In that brief, Mr Charteris referred to being asked by James' mother and her new partner to babysit the children, his being asked to stay over and being asked to sleep on a mattress in James' bedroom. His evidence as briefed was that he chose not to babysit or be alone with James again after that night until he heard from James in 2002, but for an occasion when he picked up James from town after James had run away from his father.

[130] James' stepsister recalled, consistent with evidence from other witnesses and as accepted at trial, that she, her mother and James' father moved to James' father's new home around April 2000. She recalled meeting with James when they were both at their different high schools, James was approximately 13 or 14. They would meet in town and James would attend ballet rehearsals while she watched. She recalled Mr Charteris picking up James from there on a few occasions. She said it was around that time and also when she was living at the father's new address that James first told her of Mr Charteris' sexual acts with him.

[131] James' sister is some three and a half years younger than James. She recalled there were times after their parents' separation when Mr Charteris picked them up from ballet. She recalled Mr Charteris becoming very involved over the broadsheet after the Pohara camping trip. It was her recollection that Mr Charteris ceased being actively involved in their lives when James was at high school and living with his father. She said that was when "it started easing off".

[132] A significant inconsistency between Mr Charteris' evidence and case as to when he ceased personal contact with James emerged through cross-examination.

[133] In cross-examination, the prosecutor asked Mr Charteris why James would have had Mr Charteris' computer. In answering, Mr Charteris said:

> [James] had been coming to my house to use my computer to assemble his [broadsheet] and his computer at home was broken and the printer was broken and so I loaned him my computer.

[134] That answer suggested James had gone to Mr Charteris' home in connection with assembling the broadsheet on more than one occasion. Through further cross-examination, it emerged from Mr Charteris that this could have been in connection with three or four editions of the broadsheet. The prosecutor ultimately contrasted the evidence that had emerged as to James going to Mr Charteris' home and being in Mr Charteris' bedroom when the flatmate was not present with Mr Charteris' evidence as to claimed feelings of vulnerability and his reasons for those feelings. Mr Charteris accepted the visits to his house had occurred at a time when he claimed to have been feeling vulnerable, apprehensive and that he had a target on his back.

[135] It is correct that, in cross-examination and in accepting a proposition put to him, James accepted contact with Mr Charteris ended after January 2000. James' mother also, at one point, said the contact had ceased in early 2000.

[136] It was however apparent from the mother's evidence, in a number of respects, she was vague about timing. For instance, she could not recall whether Mr Charteris' involvement with the broadsheet had occurred before or after his being with the family at Pohara. She said on a number of occasions that she was not sure of dates or times.

[137] I note also that the evidence of Mr Charteris' work supervisor was that Mr Charteris had talked to her in March and April 2000, that he had spoken of concerns about feeling unsafe about James' family and that he really should not be having anything to do with James. Her evidence was that she recommended Mr Charteris did not go near the family again and, as far as she knew, he did not do so. It is hard to see why Mr Charteris would have needed to have those conversations with this colleague or why she would have advised him not to have anything further to do with the family if, in February 2000, he had decided to cease all contact with James and had in fact done so.

[138] The Judge had some concerns as to why she would have remembered the specifics of the conversation as she claimed to some 20 years after the discussions

took place but, accepting she had been correct in her recollection, he considered her evidence was inconsistent with Mr Charteris claiming he was withdrawing from contact in February 2000.

[139] The Judge's assessment, as to how long and in what circumstances James' contact with Mr Charteris had continued in 2000, was for him to make in light of all the evidence he heard. He did not have to accept that everything either James or his mother had said was correct.

[140] It was particularly important in this case that the Judge have regard to the evidence from all witnesses in making his determination because of the difficulty all witnesses had in accurately timing particular events.

[141] In James' evidential interview, he was describing events which had occurred some 17 years previous. At trial, he and other witnesses were describing events which had occurred some 19 to 20 years previous. There was thus potential for discrepancies between witnesses as to precise times when particular events occurred or as to when the last contact might have been between James and Mr Charteris.

[142] There was also potential for there to have been a discrepancy between what a witness might have indicated at one point with evidence given at another point. For instance, James' acceptance of a proposition put to him in cross-examination, that contact with Mr Charteris essentially ceased after January 2000, had to be weighed in the balance against specific evidence from James and his stepsister that Mr Charteris had contact with James when he was at his father's new home. Also to be weighed in the balance was the evidence that emerged as to Mr Charteris' involvement in helping James with the publication of the broadsheet.

[143] The Judge reached his determination, as to how long Mr Charteris' contact with James continued into 2000, with all the advantages of a trial Judge, as referred to in *Commissioner of Police v Dryland*.[40] His verdict judgment shows he carefully considered the evidence as to how and when Mr Charteris ceased his contact with James. Mr Charteris has not persuaded me the Judge was wrong in the determination

---

[40] *Commissioner of Police v Dryland* [2013] NZCA 247 at [24].

he made in this regard or how he weighed that in the balance in assessing Mr Charteris' credibility. Mr Charteris has not established that, by reason of an error in his determination as to when Mr Charteris ceased contact with James in 2000, there was a real possibility the Judge wrongly rejected Mr Charteris' denials of any sexual offending with James.

Depth of relationship

[144] Mr Charteris said it was unfair of the Judge to find there were significant inconsistencies in his narrative, both with other witnesses and his own case, as to the depth of his relationship with James and, in that respect, his case appeared to change as the case progressed.

[145] Counsel referred to specific evidence from Mr Charteris as to the nature of his relationship with James, his agreement with evidence from James' mother that she was keen on having his support for James and let James go on outings with Mr Charteris, that she had a positive view of the relationship and encouraged Mr Charteris to be with James. Mr Charteris submitted he did not try to hide his association or limit his involvement with James and the only inconsistency related to a comment by Mr Charteris in evidence that he was not asked to be a mentor for James. He said the evidence from Mr Charteris was simply to explain how the relationship had developed and the Judge was unfair to categorise inconsistencies in the way he did and to then weigh that against Mr Charteris in commenting on Mr Charteris' credibility.

[146] In cross-examination of Crown witnesses, the defence had highlighted the extent of Mr Charteris' involvement with James and his family.

[147] In cross-examination of James' sister, defence counsel highlighted the supportive relationship between Mr Charteris and James' mother and how James' mother had spoken of Mr Charteris being a "male influence" on her brother. It was put to the mother that she had told a work colleague she had asked Mr Charteris to mentor James.

[148] The prosecution led evidence that Mr Charteris had offered James a higher level of support than his father had in the past. It was put to James' mother that Mr

Charteris was like a male role model for James, that he was a regular part of her family members lives. None of that evidence was challenged by Mr Charteris' counsel.

[149] There was thus evidence on which the Judge could reasonably conclude that, before Mr Charteris gave evidence, the case had been presented for him on the basis that Mr Charteris had a particular interest in James and a particular influence on him.

[150] Inconsistent with all of that, when Mr Charteris was called to give evidence, he spoke of his relationship with James' mother as being typical of others he worked with. When asked as to the nature of his relationship with her and her family just before James' parents separated, Mr Charteris said the relationship with her and her family was occasional. When asked if his relationship with the family had changed after the father left, Mr Charteris said "[n]ot really". He said it was as the mother described it in the sense he "was sort of peripheral, you know, … just someone who would, you know, pop in and visit and be supportive and respective [sic] and helpful". Mr Charteris was then asked to talk about specific contact he had with James.

[151] When asked what he understood to be the mother's view of his friendship with James, Mr Charteris said he considered she was:

> Positive, yeah, very happy to, you know, have someone encouraging, someone around. I know that she perhaps wanted [James], well, she welcomed someone who would, you know, take [James] off her hands for a while, you know, she needed wee spells from him from time-to-time.

[152] The Judge referred particularly to evidence Mr Charteris gave under cross-examination as to the circumstances in which he claimed to have felt vulnerable and have a target on his back. It was put to him that, at the time, he claimed to feel vulnerable because James' mother was casting aspersions towards him. James' mother knew nothing about the sexual abuse. Mr Charteris accepted it was not then being directly suggested Mr Charteris was responsible for aspects of James' behaviour that were causing James' mother concern. In the course of that cross-examination, there was this exchange:

> Q: Wasn't it the case that you were really seen by [the mother] as a mentor for [James] at the time?

A: There was never any discussion or agreement about me being a mentor for [James].

Q: No.

A: That is, yeah.

Q: But that's your background isn't it? You are all about supporting those that are vulnerable?

A: Mhm.

Q: And this is what you were doing in this family?

A: Not in a deliberate way. Just in a, you know, as [the mother] described herself. I was out here on the periphery. You know, I didn't have a key role within the group. Of mentoring anybody. I was just being helpful, a friend. Helping out and um, yeah. Being supportive in that way.

[153] As to that, the Judge said:[41]

> [156] I regard this exchange as significant. This appears to me to be a real attempt on [Mr Charteris'] part to try and distance himself from the closeness of the relationship that he had with [James] and the family. To this extent, this echoes the attitude of [James' mother] in her evidence. However, this exchange with [the prosecutor] seems to be directly at odds with the very clear attempt in cross-examination of [James' mother] to show that [Mr Charteris] was there as a mentor for [James] and indeed, she was expressly asked about that very thing. This gives me a very clear impression of [Mr Charteris] tailoring his answers to suit the evidence that had come out earlier in the case and is clearly inconsistent with the way in which earlier witnesses were questioned by his counsel. It is also inconsistent with [James' mother's co-worker's] evidence and to some extent, the concerns he claimed to have raised with [Mr Charteris' work supervisor].

[154] The Judge had the real advantage of hearing all the evidence in the case as it emerged at trial with a detailed knowledge of evidence that had been given by earlier witnesses and the context in which they had been questioned. He had that advantage when considering all the evidence, deciding on his verdicts and giving reasons for them in his judgment. The determination he made in considering Mr Charteris' evidence as to the nature or depth of his relationship with James were open to him on the evidence of which the Court has a record. Mr Charteris has not demonstrated there was any error by the trial Judge in this respect.

---

41 *R v Charteris*, above n 2.

Was the Judge in error in rejecting evidence of witnesses for the defence?

[155] Mr Charteris submits the Judge had rejected or distinguished most of the evidence from various witnesses called by the defence. He submits, despite the advantage a trial Judge has, the evidence was such that he was wrong to do so.

[156] Mr Charteris said there was an error in the way the Judge dismissed the evidence of a man who had previously been in a sexual relationship with Mr Charteris. This man said Mr Charteris did not like anal sex. He also noted that Mr Charteris was quite hairy over all his body and did not like being shirtless due to self-confidence issues about his body. The Judge said the only really significant aspect of his evidence was he "confirmed [Mr Charteris'] self-consciousness about the hairiness of his body".[42] The Judge referred to, without rejecting, this person's evidence that Mr Charteris would not show the top half of his body and, in the context of their sexual relationship, did not like the lights on, and that anal sex was not part of their sexual activities.

[157] Nevertheless, I infer the Judge did not consider it assisted Mr Charteris in his defence. It cannot be said there was any error in that regard. This witness was in a relationship with Mr Charteris from 1977 through to approximately 1990. There was no suggestion the witness was a teenager or child at the time of the relationship. Just how a person might engage in sexual activity in one relationship does not have to be an indication of how he might be sexually involved in another relationship. He said only that, in the context of their sexual relationship, Mr Charteris did not like the lights on. This witness did not say Mr Charteris was never naked during sex.

[158] The Judge did say it was interesting to note that James said Mr Charteris wore a t-shirt during sexual encounters sometimes. I accept, to the extent the Judge noted this, it was adverse to Mr Charteris but it was not an observation which appeared to be material to his assessment as to credibility or to his ultimate verdicts. It was suggested for Mr Charteris that it was an observation which, on the evidence, the Judge should not have made, given what James had said when cross-examined about whether Mr Charteris was naked in his presence during sexual encounters at Mr Charteris'

---

42 At [235].

home. Having carefully read that exchange, both James' initial response and the way a particular proposition was put to James and accepted by him, I consider it was open to the Judge to record that James had said Mr Charteris wore a t-shirt during sex sometimes.

[159] Another defence witness was called to give evidence that James' mother had told her she [the mother] had named Mr Charteris during the conversation that James disclosed his sexual abuse to her.

[160] Mr Charteris contends on appeal that, in terms of the defence theory of the case, this evidence was important because it was helpful to Mr Charteris' case.[43]

[161] Mr Charteris said the Judge was wrong to disregard this evidence on the basis it had never been suggested James' identification of Mr Charteris was prompted by a leading question. Mr Charteris said that proposition was put to James through the exchange:

> Q: And she began asking you or putting some things to you didn't she about sexual abuse?
>
> A: Yes.
>
> Q: She asked you point blank if you had been abused and named some names didn't she?

[162] In the exchange Mr Charteris relies on, it was not put to James that his mother had named Mr Charteris as the abuser.

[163] In the continuation of that exchange, James said his mother had initially named her partner at the time but that he had then gone on to say it was Mr Charteris who had abused him.

[164] It was suggested to the mother in cross-examination that she suggested names to James. The mother responded that she could not remember "word for word" what was said but suggested, because of her professional background, she deliberately said as little as possible to protect James.

---

[43] Discussed above at [30]–[42].

[165] As already referred to, the Judge found James to have been an honest and reliable witness as to the sexual offending alleged on the charges on which Mr Charteris was convicted. The Judge had rejected as fanciful the defence theory that James had become committed to a lie after his mother had nominated Mr Charteris as the abuser. James firmly rejected propositions put to him in cross-examination that Mr Charteris had never kissed him, never had anal sex with him and never touched his penis. That being the case, had the Judge found that James' mother had suggested to James that Mr Charteris had sexually abused him, I am satisfied there was no reasonable possibility that would have resulted in a different verdict. Had it been suggested to James he had named Mr Charteris as the sexual abuser only because the name had been mentioned to him by his mother, he would have likely rejected that proposition. It was probably for that reason this particular proposition was not put to James by defence counsel.

[166] There was also undisputed evidence that, well prior to the disclosure James made to his mother, James had told his stepsister, one of her friends and his own sister that Mr Charteris had sexually abused him. It would thus not have weakened the prosecution case or assisted the defence with its theory of the case if James had told his mother that Mr Charteris was his abuser after the mother named Mr Charteris.

[167] I accordingly consider there was no error in the way the Judge treated the evidence of this witness.

[168] Another defence witness was Mr Charteris' work supervisor. She said, in March and April 2000, Mr Charteris told her he had concerns about feeling vulnerable because of what was happening with James and his family. The Judge expressed some surprise at their ability to recall the detail of these conversations given how long ago they had occurred. He nevertheless dealt with the evidence as if it were true. He considered her evidence conflicted with Mr Charteris' evidence as to when he was withdrawing from having personal contact with James. The Judge said the fact Mr Charteris raised these concerns could have been a protective measure.[44] Mr Charteris

---

[44] *R v Charteris*, above n 2, at [170].

suggested it was not fair for the Judge to have reasoned that way given that proposition had never been put to Mr Charteris.

[169] There was no error with the way the Judge referred to this evidence and what he inferred from it. In his decision, the Judge was entitled to draw inferences from established facts. In doing that, he was entitled to consider all the evidence given at trial. He decided the time for him to do that was after he had heard all the evidence and the addresses of counsel. Fairness did not require him or the Crown to put to Mr Charteris all inferences that could have been drawn from particular evidence, especially so as to a matter which was not crucial to the verdicts the Judge ultimately reached.

[170] I do not accept there was any error in the way the Judge dealt with this witness's evidence.

[171] Mr Charteris criticised the Judge for not referring to, and thus having no regard to, evidence called from the mother's new partner's son. This witness had shared a tent with James at Pohara when James said Mr Charteris had also slept in the tent and had indecently assaulted him.

[172] This witness gave evidence that he was never aware of Mr Charteris being involved in any sexual contact with James in the way James had described.

[173] The Judge did not refer to this witness's evidence when reviewing the evidence for the defence. However, I do not accept this means he ignored it. The Judge had clearly been conscious Mr Charteris had been sharing a tent with two young boys when he went to Pohara because the Judge referred to this in considering whether Mr Charteris would have been feeling vulnerable at that time.[45]

[174] This witness was giving evidence of a situation he had been in while on holiday with his father at new year 2000. For a time, the witness had lived with the witness's father, James, James' sister and James' mother. When asked how long he had lived with the family he said that, in his "vague memory", it would have been about a year.

---

[45] At [145].

Given his date of birth, he would have been just over five and half years old at the time. When asked as to what he remembered from that holiday, he said he did not "have a vivid memory of anything at that age". He said he could remember some small things and gave an example, but said he remembered it as "a experience, the whole thing basically. But not day-to-day." He said he was a normal sleeper. He was referred to evidence James had given that James had shared a tent with him during that holiday. He said he knew of this only through what other people had told him. He had no recollection of Mr Charteris at all. Under cross-examination, he said he vaguely remembered sleeping in a tent.

[175] This evidence could not have been of any assistance to the defence case at trial. If Mr Charteris had indecently assaulted James, as the Judge accepted he had, it is highly likely it would have occurred when this witness was asleep. It might have been thought Mr Charteris was taking risks in indulging in such activity in a confined space when another child was present and, in that sense, his conduct was "brazen". The Judge considered that potential argument but rejected it as a reason to discount James evidence as to what happened.[46]

The motive to lie

[176] Mr Charteris submitted the Judge was in error in rejecting the defence proposition that James had a motive to lie, in weighing the determination that James had opportunities to back out of a lie given the Police delay in initiating the prosecution and in stating there was no evidence to suggest James was out for revenge against Mr Charteris.

[177] As referred to earlier, the defence theory as to why James did have a motive to say Mr Charteris had abused him was clearly before the Judge through the thorough cross-examination of various witnesses including James, and through the submissions of counsel. The explanation advanced was carefully considered by the Judge and rejected for the reasons he detailed. The Judge emphasised that Mr Charteris did not have to show that James had a motive to lie.[47]

---

46 At [231].
47 At [193].

[178] James did say in his evidential interview that he had tried to get revenge against Mr Charteris. He referred to the way he had contacted Mr Charteris' employer. This is likely to have been after telling his mother that Mr Charteris had abused him. He had however told his sister, stepsister and her school friend that Mr Charteris had sexually abused him years before that. There was no dispute that, in doing so, he had told them to keep that information confidential.

[179] His acknowledgement in his interview that he had actively tried to get revenge against Mr Charteris did not explain why he had claimed, years before, that Mr Charteris had sexually abused him.

[180] For all the reasons referred to by the Judge, he could properly conclude that James did not have a motive to lie in the way the defence had suggested, or in any other way. There was no material error in the way the Judge dealt with issues as to motive after that.

Conclusion as to the appeal against conviction

[181] On appeal, Mr Charteris submitted, in various specific ways, the trial Judge had erred either in the way he intervened during the trial or in the determinations he made in his judgment. I have carefully considered the thorough submissions presented for Mr Charteris and the evidence to which they refer. In most respects, I do not accept there were errors as claimed. To the extent it could be said the Judge erred over two matters,[48] I am satisfied such errors did not mean there was a real risk that, with his convictions, there had been a miscarriage of justice.

[182] Mr Charteris' appeal was primarily advanced on grounds that the Judge had either mistakenly or unfairly found Mr Charteris' was not a credible witness as to a number of issues that became significant during the trial. The Judge did so with the benefit of hearing all witnesses at trial and only after carefully considering all the evidence. Mr Charteris denied there was any sexual contact between him and the victim.

---

[48] The assumption the Judge made about Mr Charteris not telling trial counsel about a circumcision conversation before trial; the way the Judge intervened when counsel was going to ask a question about a complaint.

[183] With the assessment the Judge made as to Mr Charteris' credibility, Mr Charteris' denials were not sufficient to raise a reasonable doubt as to whether the alleged sexual offending had occurred. Mr Charteris has not persuaded me there was any unfairness or error in the Judge's reasoning in this regard.

[184] The Judge found the charges on which Mr Charteris was convicted had been proved beyond reasonable doubt because he accepted the evidence from the victim as to precisely what happened with the sexual activity the victim described and the general circumstances in which the offending occurred. For the reasons he gave, the Judge found the victim to have been an honest and reliable witness. On appeal, Mr Charteris did not make any criticism of the way the Judge had assessed the credibility of the victim as the key witness.

[185] Mr Lucas mounted a wide-ranging and thorough challenge to aspects of the conduct of the trial and aspects of the verdict judgment. I have not however been persuaded there were any errors which, either separately or in combination, created a real risk that they affected the outcome of the trial. Mr Charteris has thus not established that the Judge erred either in the conduct of the trial or his verdict judgment to such an extent that a miscarriage of justice has occurred.

[186] Mr Charteris' appeal against his convictions is accordingly dismissed.

Appeal against sentence

[187] Mr Charteris was found guilty of seven sexual violation charges and a charge of indecency.[49] In his 6 September 2019 decision, the Judge sentenced Mr Charteris to 14 years' imprisonment.[50] Mr Charteris appeals that sentence on the basis that the starting point of 16 years' imprisonment was excessive, and the Judge gave insufficient discount for Mr Charteris' health problems, his good character prior to the offending and lack of previous convictions.

---

49 *Charteris v R*, above n 2; note that sexual violation by unlawful sexual connection carried a maximum penalty of 20 years imprisonment (Crimes Act 1961, s 128B) and indecency with a boy between 12 and 16 carried a maximum penalty of 10 years' imprisonment (Crimes Act, s 140).

50 *R v Charteris*, above n 3.

District Court decision

[188] The Judge considered the ongoing impact the offending has had on James and his family. He acknowledged the victim impact statements and the "hurt and level of devastation that has been wrought on not only the life of [James] but his whole family".[51]

[189] The Judge then noted he was required to sentence Mr Charteris in terms of the guideline sentencing judgement *R v AM (CA27/2009)*.[52] He acknowledged, when following a guideline judgment, a nuanced approach is still required and reference to the facts of the particular case is needed.

[190] The Judge turned to consider the aggravating circumstances identified in *R v AM* and other authorities he believed were relevant to this offending. He found the factors of a breach of trust and vulnerability were significant given the age disparity between Mr Charteris and James, with Mr Charteris being in his mid-forties at the time of the offending while James was around 11 to 12 years old. He also noted that James' parents had recently separated in a sudden and distressing manner. Mr Charteris was a friend of the family and the Judge indicated Mr Charteris was a part of the support network for the victim. The Judge considered Mr Charteris took advantage of this situation and breached the trust he had gained as a somewhat "father figure" to James.[53] He accepted that Mr Charteris did not hold a position such as a teacher, someone employed in a relationship of trust, or a family member. However, the Judge found Mr Charteris still held a significant degree of trust and responsibility in relation to the family, which he had betrayed.

[191] Harm to the victim was also considered, with the Judge finding this was a significant factor that extended over a long period of time and affected James and his wider family.

---

51 At [6].
52 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.
53 *R v Charteris*, above n 3, at [9].

[192] Likewise, the Judge found the scale of offending to be significant to a high degree as it occurred over a period of several months, was repeated and included a "variety of indignities".[54]

[193] In terms of planning and pre-meditation, the Judge noted there was no indication that Mr Charteris entered this relationship with a view to offending, but the Judge found, over time, there was premeditation to a moderate degree through Mr Charteris organising situations in which he could be alone with the victim.

[194] The Judge found the presence of these aggravating circumstances placed the offending between the third and fourth band identified in *R v AM*. Band three has a range of 12 to 18 years' imprisonment and band four has a range of 16 to 20 years' imprisonment.[55]

[195] The Judge then considered the authorities of *Rippey v R,*[56] *F v R*[57] and *T v R*[58] that had been referred to by the Crown. He found it was difficult to draw clear conclusions from these cases and concluded they did not provide a great deal of assistance.

[196] The Judge considered a starting point of 16 years' imprisonment was appropriate. He noted Mr Charteris refused to accept responsibility for the offending, as was his right, so there was little he could do to reduce the sentence in that respect. The Judge subtracted one year based on Mr Charteris's good character up until the offending and lack of previous convictions. A further nine months was subtracted for the hardship imprisonment would bring Mr Charteris due to his health conditions and age. The Judge then applied the totality principle and fixed the final sentence at 14 years' imprisonment.

[197] Lastly, the Judge turned to the matter of whether a minimum period of imprisonment (MPI) was appropriate. He found the 14 year imprisonment period was

---

54 At [13].
55 *R v AM,* above n 52, at [105] and [108].
56 *Rippey v R* [2018] NZCA 306.
57 *F (CA844/2013) v R* [2014] NZCA 390.
58 *T v R* [2019] NZCA 150.

sufficient to hold Mr Charteris accountable for the harm done to the victim and the community and to denounce the conduct in which Mr Charteris was involved. The Judge accordingly did not impose an MPI. The Judge noted that he did not think Mr Charteris was someone who required deterrence and there was no need to protect the community from him any further because, as long as Mr Charteris maintained his denial of the offending, he would not be considered for parole.

Principles on appeal

[198] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied there has been an error in the imposition of the sentence and that a different sentence should be imposed.[59] As the Court of Appeal mentioned in *Tutakangahau v R,* quoting the lower court's decision, a "court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[60] It is only appropriate for this Court to intervene and substitute its own views if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[61]

Submissions

Appellant's submissions

[199] Mr Lucas submitted the end sentence imposed on Mr Charteris by the Judge was manifestly excessive having regard to the circumstances and offending.

[200] Firstly, Mr Lucas argued cases referred to in *R v AM* as exemplar cases for the lower end of band four involve more serious offending than in these circumstances.[62] He referred to *R v Martin*,[63] *R v N*[64] and *R v Koroheke*.[65]

---

59 Criminal Procedure Act 2011, ss 250(2) and 250(3).
60 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
61 *Ripia v R* [2011] NZCA 101 at [15].
62 *R v AM*, above n 52, at [109].
63 *R v Martin* CA251/99, 12 October 1999.
64 *R v N (CA88/05)*, 23 November 2005.
65 *R v Koroheke* CA189/01, 28 November 2001.

[201] Mr Lucas submitted an appropriate starting point in the present case would be 14 years' imprisonment.

[202] Lastly, Mr Lucas argued more regard should have been given to Mr Charteris' age and health complications, his good character and lack of previous convictions. Mr Lucas suggested a discount of three years would be appropriate for these factors.

[203] Overall, Mr Lucas submitted the end sentence should come to eleven years' imprisonment.

Respondent's submissions

[204] Ms White submitted the starting point reached by the Judge was within the available range set out in *R v AM*. She noted the District Court Judge's reference to the cases outlined above at [195]. Ms White argued the breach of trust, vulnerability of the victim, degree of premeditation, harm to the victim and the scale of offending were correctly identified as aggravating factors that went towards the Judges' placement of Mr Charteris' offending between bands three and four.

[205] It was also submitted the discount given for Mr Charteris's age and health difficulties was appropriate. Ms White highlighted the fact the Judge had not imposed an MPI, which she said was routine in cases involving multiple counts of sexual offending against children. It was noted that an MPI had been imposed in the cases suggested by the Crown for the sentencing hearing.[66] Ms White highlighted that in two of these authorities the offenders were aged 59 and 61 years respectively.[67]

[206] Lastly, Ms White submitted the discount for Mr Charteris's good character and lack of previous convictions was generous in the context of sustained and serious sexual offending against a child.[68]

---

66 *Rippey v R*, above n 56; *F (CA844/2013) v R*, above n 57; and *T v R*, above n 58.
67 See *R v AM,* above n 52; and *Rippey v R*, above n 56.
68 *Rippey v R*, above n 56 at [36].

Analysis

Starting point

[207] The Judge adopted a starting point of 16 years' imprisonment. I consider it was open to the Judge to adopt this starting point.

[208] Applying the guidelines set out in *R v AM*, the Judge identified and considered four aggravating factors present at a significant level and one aggravating factor at a moderate level. I accept the Judge's reasoning behind his conclusions in this regard (as discussed above at [188] – [194]).

[209] After considering these aggravating factors, the Judge placed the offending between band three and four. This placement was appropriate.

[210] In *R v AM* , the Court acknowledged the same factors that place offending towards the upper end of band three are likely to apply to band four however offending in band four would likely involve "multiple offending over considerable periods of time".[69] Similar cases involving repeated sexual offending against a child for a roughly similar time period have been placed at the lower end of band four, leaving it open to the Judge to adopt a starting point in this range.[70]

[211] Even if the offending was placed in band three, I consider a starting point of 16 years was still available and appropriate for this offending. The presence of five aggravating features, with four of these factors being present to a significant level, placed this offending comfortably within the higher end of band three in *R v AM.*[71]

[212] The judgments Mr Charteris relied on (referred to at para [200]) all pre-dated the guideline judgment in *R v AM*.

[213] In *R v Martin*, sexual offending occurred over a period of thirteen years and involved seven male victims aged from eight to 22.[72] The offender came into contact

---

69 At [108].
70 See *R v Dargaville* HC Hamilton CRI-2010-019-10235, 9 March 2012.
71 *R v AM*, above n 52, at [105].
72 *R v Martin*, above n 63.

with his victims through his involvement with various groups, including Māori cultural groups, Scouts and a local church. The offender became a close family friend and gained the trust of the parents. He organised activities in which the boys stayed at his home and he took them camping. The offending generally involved manual and oral stimulation and anal penetration. The Court of Appeal upheld a sentence of preventive detention.

[214] In *R v N*, a young girl, between the age of seven and nine at the time of offending, was raped, sodomised, digitally penetrated and sexually connected with in an oral manner by her stepfather over a period of two and a half years.[73] The victim was so traumatised by the offending that she attempted to take her own life. The Court of Appeal upheld a starting point and end sentence of 15 years' imprisonment with an MPI of eight years.

[215] In *R v Rippey*, the Court of Appeal upheld a sentence of 16 and a half years' imprisonment with an MPI of eight years and three months.[74] The offending was perpetuated by an uncle against a victim aged between 10 and 11 involving initial indecent touching and then progressing to more invasive forms of sexual conduct, including repeated and regular masturbation, acts of digital penetration and oral sex and then, finally, sexual intercourse over a period of 18 months. The sentencing Judge had adopted a starting point of 18 years' imprisonment but reduced that sentence to 16 years and six months on account of the appellant's health (aged 61) and otherwise good conduct.

[216] In *T v R*, the Court of Appeal upheld a sentence of 15 years' imprisonment with an MPI of seven and a half years.[75] The appellant had been convicted of an extensive range of sexual violation offences over a period of six years against a close relative, starting when she was 10. The Judge adopted a starting point of 16 and a half years for the offending, putting it at the lower end of band four of *R v AM*.[76] In rejecting the appeal, the Court of Appeal said the case fell well within band four.

---

73 *R v N*, above n 64.
74 *Rippey v R*, above n 56.
75 *T (CA239/2018) v R* [2018] NZCA 448.
76 *R v AM*, above n 52.

[217] I have also been assisted by the sentencing judgment of Potter J in the High Court in *R v Dargaville*.[77] The offender had pleaded guilty to representative charges of sexual violation by rape, sexual violation by unlawful sexual connection and doing an indecent act on a child under 12. The offender was a friend to the victim's family. The offending occurred over a period of two years when the victim was aged between 10 and 11, when the offender was a visitor to her home. After a careful review of *R v AM*, reference to *R v N*[78] and *R v Gordon*[79], Potter J considered the offending was at the bottom of band four and set a starting point of 16 years' imprisonment.

[218] The Judge gave Mr Charteris a discount of nine months for his age and health difficulties. Mr Charteris was aged 65 at the time of his trial. Mr Lucas noted Mr Charteris will not be released until he is 79 years old under the current sentence. He argued, given his prostate cancer and old age, it is likely Mr Charteris will die in prison under the current sentence (with reference to the average male life expectancy of 79.5 years for males in New Zealand).[80]

[219] In *M v R*, the Court of Appeal said:[81]

> [54] A review of the case law in this area, which is extensive, establishes that the extent to which age and ill health can be treated as mitigating factors and the amount of discount given for that varies according to the particular circumstances of the offender and the offending. There is no discernible pattern, because both the circumstances of the offender and of the offending are so varied. Generally however the reductions given are limited. Whether a discount is appropriate and the amount of a discount is a matter of fact and degree and turns on particular circumstances of the case.
>
> [55] Whilst no particular guidance is evident on a direct comparison with other cases of sentencing older prisoners for historical offending, there are guiding principles. In *R v James* Baragwanath J referred to the English Court of Appeal's decision in *Attorney-General's References Nos 37 & Ors of 2003*, emphasising that:[82]
>
> > While the sentencing Court is always entitled to show a limited degree of mercy to an offender who is of advancing years because of the impact a sentence of imprisonment can have on an offender of that age, the word

---

77 *R v Dargaville*, above n 70.
78 *R v N*, above n 64.
79 *R v Gordon* [2009] NZCA 145.
80 *C (CA100/2016) v R* [2017] NZCA 58.
81 *M (CA91/2012) v R* [2013] NZCA 325.
82 *R v James* HC Hamilton CRI-2005-073-249, 1 December 2006 at [36] citing *Attorney-General's References Nos 37 & Ors of 2003* [2003] EWCA Crim 2973, [2004] 1 Cr App R (S) 84 at [11]–[12].

> "limited" is to be emphasised. The sentencer must not make too great an allowance in this regard, thereby shrinking from their duty, however unpleasant it may be to perform.

[220] The Judge's allowance for these factors also has to be considered in the context of his deciding not to impose an MPI. In *C v R*, the Court of Appeal said:[83]

> Sexual offending of this kind – with the profound harm it has done the victims, evidenced by the victim impact report – necessitates an MPI precluding release at what otherwise might be one-third of sentence.

[221] There, the Court of Appeal imposed an MPI of 60 per cent of the finite sentence of 10 years for the qualifying sexual violation offence, that is an MPI of six years.

[222] The Judge here considered an MPI was not necessary for deterrence in the particular circumstances of the case. While he considered Mr Charteris' denial of the offending might likely preclude an early release on parole, there is the possibility that Mr Charteris may ultimately acknowledge his offending and his need to address whatever might put him at risk of further offending in a way that would improve his prospects of being granted parole. Alternatively, having regard to all his circumstances, including his age and health, without acknowledging his offending, he could still be released early on parole.

[223] I consider the discount of nine months for Mr Charteris' age and health difficulties was adequate.

[224] The Judge gave Mr Charteris a discount of one year for his lack of previous convictions and his generally excellent character prior to the offending.

[225] Mr Lucas emphasised the fact most of Mr Charteris' adult life involved assisting with various social agencies and helping those less fortunate. The offending occurred over the course of roughly 12 months, 20 or so years ago. He submitted it was not ongoing or prolific and a discount of only 6.35 per cent for Mr Charteris's good character and lack of previous convictions was insufficient.

---

[83] *C v R*, above n 80, at [26].

[226] Here, Mr Charteris had shown himself to have been of good character and had contributed positively to society through his work and involvement with various social agencies until he was about 42 years of age. He then involved himself in this serious offending over a period of about 12 months but had no convictions for any offending for the period after 6 January 2000. He was charged with this offending in 2017.

[227] On the matter of a discount for Mr Charteris's lack of previous convictions and his good character prior to offending, Ms White noted the statement from *Rippey v R* that "a claim of good character has a somewhat hollow ring to it in the context of sustained and serious sexual offending against a child."[84] Indeed, there have been many Court of Appeal authorities in which it was accepted circumstances such as these, where there has been a period of repeated and frequent offending, operate to negate the good character credit entirely.[85]

[228] Conversely, the case of *Wilson v R* involved an offender who was aged between 47 and 54 at the material time and who was found guilty of 15 charges of sexual offending against two girls in his care over a roughly seven-year period.[86] In that case the Court of Appeal acknowledged the ability to negate the aspect of good character entirely in such circumstances but found a discount for the offender's previous convictions was appropriate given the fact he "only started offending when he was well into middle age."[87]

[229] Mr Charteris' offending did involve sustained and serious sexual offending against a child, so the Judge did not have to give him credit for previous good character although it was open to him to do so. I do not however consider there was any error in him discounting the sentence by 12 months or 6.35 per cent of the starting point on that basis.

[230] As the Court of Appeal has emphasised, on appeal against sentence, the focus must be on the end sentence. The focus is not on the methodology adopted by the

---

84 *Rippey v R*, above n 56, at [36].
85 *Britow v R* [2017] NZCA 229 at [12]; *Tonga v R* [2011] NZCA 257 at [24]; and *R v W* CA482/05, 1 March 2006 at [17].
86 *Wilson v R* [2018] NZCA 489 at [59].
87 At [59].

sentencing court but rather on the end sentence and whether it is manifestly excessive.[88]

[231] As the Court of Appeal noted was the case in *Wilson v R*, the Judge "was best placed to make a just assessment of Mr Charteris' culpability given that he sat through the trial and heard all the evidence".[89]

Conclusion

[232] I have not been persuaded there was an error in the sentencing of Mr Charteris or that the sentence imposed was manifestly excessive. The appeal against sentence is dismissed.

Solicitors:
J Lucas, Barrister, Christchurch
Crown Solicitor, Christchurch.

---

88 *Lavea v R*, [2014] NZCA 192 at [20]; *Islam v R* [2020] NZCA 140, citing *Tutakangahau v R*, above n 59.

89 *Wilson v R*, above n 86, at [62].