NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 48/2024
[2025] NZSC 70

BETWEEN	TRISTAN LEE TAMATI Appellant
AND	THE KING Respondent

Hearing:	25 February 2025
Court:	Winkelmann CJ, Glazebrook, Williams, Kós and Miller JJ
Counsel:	J E L Carruthers and S J Bird for Appellant A J Ewing and M J Lillico for Respondent
Judgment:	3 July 2025

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by Kós J)

Table of Contents

	Para No
Background	[7]
Factual background	[8]
Trial	[20]
Court of Appeal	[28]
Ground 1: Did errors by trial counsel lead to a miscarriage of justice?	[31]
Discussion	[34]
Ground 2: Was a reliability warning required in the circumstances?	[49]
Discussion	[52]
Result	[57]

[1] Two men, aged 41 and 25 years, and three teenage girls, two aged 15 years, all fuelled by drugs and alcohol, partied overnight at a house. The upshot was the older man, Mr Tamati, being convicted of twice sexually violating the 15-year-old complainant—initially in a car and later in a bedroom—as well as doing an indecent act on her and supplying her methamphetamine.

[2] The defence advanced was one of fabrication by the complainant, on the basis her complaint was made to mitigate a later violent but mistaken attack on Mr Tamati by two of her relatives when the real culprit—if there was one—was the other man at the house.

[3] Mr Tamati was convicted on all charges and transferred to the High Court for sentence. In that Court, Simon France J sentenced him to preventive detention given his history of serious sexual assaults and his elevated risk of reoffending.[1]

[4] The Court of Appeal dismissed appeals against both conviction and sentence.[2]

[5] Leave to appeal against conviction was given by this Court on two approved questions:[3]

(a) whether errors by trial counsel may have occasioned a miscarriage of justice; and

---

1 *R v Tamati* [2021] NZHC 2885 (Simon France J).
2 *Tamati v R* [2024] NZCA 113 (Gilbert, Dunningham and Churchman JJ) [CA judgment].
3 *Tamati v R* [2024] NZSC 91 (Glazebrook, Kós and Miller JJ).

(b) whether in the circumstances a reliability warning was required.

[6] Leave to appeal against sentence was not sought.

Background

[7] We start with the narrative evidence, before summarising the trial and appeal below.

Factual background

[8] Mr Tamati was found guilty of five charges of sexual offending against the 15-year-old complainant: two charges of sexual violation by rape, two charges of sexual violation by unlawful sexual connection and one charge of doing an indecent act on a young person.[4] He was also convicted of one representative charge of supplying methamphetamine to the complainant.[5]

[9] On 30 December 2017, the complainant and two of her friends, of about the same age, were picked up by Mr Tamati and a Mr H. The complainant and Mr Tamati knew each other through her family. The party travelled to Mr H's house, where they consumed cannabis, alcohol and methamphetamine. Mr Tamati is a tattoo artist, and at the complainant's request he tattooed her on the wrist and stomach. The indecent act charge arose from her allegation that he had then pulled her onto his lap and tried repeatedly to kiss her while she pulled away and said "no".

[10] The Crown case on the remaining charges was summarised by the Court of Appeal in this way:[6]

> [8] Later that evening, the complainant found herself naked with Mr Tamati in the back of [Mr H]'s car, which she said was parked outside the back door of the house. She did not know how she ended up there. She described Mr Tamati being on top of her with his hands on her shoulders having sexual intercourse with her. She repeatedly said, "get off me" but he "just kept going". Mr Tamati then turned her over, so she was on her knees with her head down. Mr Tamati then squeezed her neck with his hand and raped her anally. The complainant said she was crying and telling him to stop

4 Crimes Act 1961, ss 128, 128B and 134(3).
5 Misuse of Drugs Act 1975, s 6(1)(c) and (2)(a).
6 CA judgment, above n 2.

> because he was hurting her. She said she remembered facing Mr Tamati at some point and he pushed her head down onto his penis. The complainant said she then bit his penis after which Mr Tamati stopped, pulled his pants up and left to go back inside the house. These events gave rise to charges 2, 3 and 4, respectively—rape and two charges of sexual violation by unlawful sexual connection.
>
> [9] The following morning, the complainant woke up on a couch in [Mr H]'s bedroom. She said that Mr Tamati was lying behind her. He pulled her underwear aside and had intercourse with her again. The complainant said she "just went along with it" because "he'd already done it before" and she did not want to "make anyone mad" at her. …

[11] In the bedroom at the time of the second alleged sexual violation were Mr H and another of the girls, Ms F, who was also 15 years old. She and Mr H were engaged in sexual activity. The complainant said that while Mr Tamati started to have sex with her on this occasion, Ms F was on the bed (seemingly still with Mr H) looking at her as it happened.

[12] Mr H, being "too busy fooling around with [Ms F]", did not see Mr Tamati having sex with the complainant. However, he did see the complainant and Mr Tamati "cuddling up" earlier in the night and, later on, "laying on the couch" in Mr H's bedroom looking "cosy".

[13] Ms F's account varied greatly:

(a) In her police statement, she said that she was not aware of what had happened between Mr Tamati and the complainant at the time but that the complainant had told her "sometime later".

(b) In evidence-in-chief, she said that Mr Tamati had been "touchy feely" with the complainant, hugging and kissing her in the bedroom.

(c) Under cross-examination, she claimed that she knew Mr Tamati had had sexual intercourse with the complainant, but she was not in the room at the time.

(d) Pressed on this deviation from her original statement, she (first) claimed to have *heard* them having sex, (second) claimed to have *seen*

them doing so when she walked in on them and (third) appeared to accept that she was engaged in sexual activity with Mr H at the same time.

(e) Finally, she seemed to walk back on this evolving, tangled account, saying "I don't remember that actual like whole rape scenario happening", while then saying "I'm just telling you what happened".

[14] Less directly challenged, however, was Ms F's evidence that the complainant had complained to her (shortly after leaving Mr H's house) of being raped by Mr Tamati. Another friend of the complainant, Ms G, who had not been at the house, also gave evidence of such a complaint, although the timing of the complaint was not entirely clear.[7]

[15] The complainant subsequently contracted chlamydia, a sexually transmitted infection. At about the same time, Mr H also contracted chlamydia. This coincidence led to the defence proposition that if the complainant had had sexual contact that night, it was with Mr H. At trial, Mr H denied that he had ever had sexual contact with the complainant.

[16] On 11 March 2018, the complainant's grandmother overheard the complainant on the telephone arranging to go to a Family Planning clinic. When then asked whether she had been sexually assaulted, she eventually said she had been—by "the guy that did my tattoos". The grandmother emailed the police on 12 March 2018 stating:[8]

> What she told us is that she was raped by the man … that did the tattoos on her … and that he told her that this was payment for the tattoos. This was not the guy … that she had previously said had done the tattoos.

[17] Less than a week later, on 18 March 2018, two of the complainant's relatives procured Mr Tamati to enter a car where he was attacked, apparently in an act of

---

7 Ms G said at the time of her police statement (26 June 2018) that she thought the conversation had taken place two or three months earlier, clarifying at trial that this was a "really rough estimate". Logically, it had to have been before 27 March 2018 because Ms G was urging the complainant to go to the police and that was the date she did so: see below at [18].

8 It seems the grandmother, who did not give evidence, thought initially that the tattooist was Mr H.

retribution. On 22 March 2018, the relatives were arrested and charged in relation to that attack.

[18] Five days later, on 27 March 2018, the complainant went to the police and made a complaint of rape against Mr Tamati.

[19] Almost a year later, on 12 March 2019, Mr Tamati submitted to a voluntary police interview. He admitted that he, Mr H and the three girls (including the complainant) were together on the evening in question. He denied having sex with the complainant or even trying to have sex with her. He said there was only one time when they had been alone and that was when Mr H and the other two girls "were in the car doing a threesome". He described lying on the couch in Mr H's bedroom "just hanging out" with the complainant and the third girl, while Mr H and Ms F had sex on the adjacent bed. He acknowledged the complainant had kissed him on the lips once when he had completed the tattoo for her. He said he did not find her or the other girls "sexy" because they were "too young".

Trial

[20] The trial before Judge Davidson was short: the Crown's opening address and evidence were completed within two days. The primary witnesses were the complainant, Ms F and Mr H. The third girl did not give evidence, and nor did the complainant's grandmother, whom we mentioned above at [16]. The defence did not call evidence, but Mr Tamati's evidential interview was played the morning of day three. The closing addresses and summing-up were completed on day three. The summing-up concluded at 3.45 pm; the jury delivered unanimous guilty verdicts on the six charges just 75 minutes later.

[21] The course of the evidence is set out in some detail in the Court of Appeal judgment, and we here refer only to matters arising in cross-examination given the focus on trial counsel error. Our observations should therefore be read in conjunction with [12]–[18] of the Court of Appeal judgment.[9]

---

9 CA judgment, above n 2. The Court of Appeal refers to Ms F as "C".

[22] Cross-examination of the complainant by defence counsel, Mr Taffs, focused on her consumption of alcohol and drugs over the period in question, the complainant accepting she was "in a lifestyle of near continuous alcohol and drug abuse at that time". It focused on her being "pretty much wasted" and unable to remember details of the night,[10] and counsel suggested she had also misremembered the conversation with her grandmother several months later. He alleged that she had in fact identified Mr H to her grandmother as the tattooist, and therefore her assailant, and that she had not at that time identified Mr Tamati.

[23] Noting the coincidence that both the complainant and Mr H had tested positive for chlamydia, Mr Taffs then advanced the core defence: first, that any sexual contact that night had been with Mr H; and secondly, the subsequent complaint against Mr Tamati only followed her relatives' wrongly assaulting him—intended as a means of justifying their actions.[11]

[24] As to the remaining cross-examination, we simply note:

(a) As noted above at [13], Mr Taffs made a fairly successful challenge to the evidence of Ms F who claimed to have seen Mr Tamati having sex with the complainant in the bedroom.

(b) Mr H had denied having sexual contact with the complainant in his evidence-in-chief and had said that he had just seen the complainant and Mr Tamati cuddling and looking "cosy". Cross-examination elicited that he had not seen Mr Tamati having sex with the complainant, but he was firm that he had not had sex with the complainant himself.[12]

---

10 In her evidential interview at the police station, the complainant had admitted she did not know how she came to be in the back of Mr H's car or, later, in his bedroom. When asked what she could remember from the following day, she admitted she "[did not] remember really that whole day" apart from the precise sexual acts of that morning and some other details like a car journey for food and vomiting in the car on the way home.

11 The complainant explained that she had identified Mr Tamati in a conversation with an uncle, who must have told Mr Tamati's attackers. That had not been mentioned in her evidential interview.

12 Mr H also claimed that he had contracted chlamydia from one of the other girls present, with whom he later formed a relationship.

[25] The defence closing address took approximately an hour to deliver. As it is the subject of sustained attack in this appeal, we shall take time to outline its content in some detail. It had some eccentric features, not the least being a fairly lengthy historical account of the emergence of trial by jury and—in the midst of noting the nobility of the jury trial tradition—the observation that:

> I've been at this game too long to get bothered about whether you convict Mr Tamati and too long to be jubilant if you acquit him. My aim is to ensure one matter only really. That is that you carry out your task diligently and fairly and the chips fall where they lie, where you put them.

[26] The closing address then got onto the evidence and began by responding to three points made in the Crown closing. First, it made substantial capital of evidence given by Mr H as to the location of the car (in which the first sexual violations were alleged to have occurred) that was inconsistent with the complainant's evidence.[13] Secondly, it suggested that a complaint made to another witness, Ms G, was made *after* the attack on Mr Tamati by the complainant's relatives, not before—as the Crown had suggested.[14] Thirdly, it was not true that the complainant had "told the [whole] truth" to her grandmother; it was the grandmother who had suggested a sexual assault had occurred, and the complainant's only response at that time was to refer to the tattooist. The first of these points undermined the complainant's evidence; the other two reinforced the defence case that only after her relatives had wrongly inferred the assailant was Mr Tamati, and attacked him, did the complainant actually accuse Mr Tamati of raping her.

[27] Mr Taffs' address next contextualised the circumstances of the alleged offending, describing it as a world where "sane grown men, and I don't have any respect for Mr Tamati on this score, these same men willingly pass around drugs and share drugs". The remainder of the defence address focused on the theory of fabrication, emphasising five things:

---

13 The complainant had said it was out the back of the property; Mr H said it was parked as always on the street, and that the cars out back were dismantled wrecks.

14 Although, for the reason noted above n 7, there was a logical difficulty for the defence with that timing point.

(a) the complainant being overheard on the phone to the clinic by her grandmother, and the grandmother being the one who raised the possibility of sexual assault;

(b) the undermining of the complainant's evidence on the location of the car in which she said the first sexual violation had occurred (the evidence as to location coming from Mr H, who was of course a Crown witness);

(c) the coincidence that both Mr H and the complainant contracted chlamydia at around the same time;

(d) the improbability that if Mr Tamati had brutally raped the complainant, he would have willingly gone for the drive with her relatives during which he was attacked; and

(e) finally, and at some length, the initial complaint to police being made by the grandmother without identifying the assailant; the complainant's relatives then being involved in the attack on Mr Tamati; and the complainant only then taking steps to complain to the police—now naming Mr Tamati in order to back her relatives up.

Court of Appeal

[28] Two grounds supporting the conviction appeal were advanced before the Court of Appeal: (1) trial counsel's closing address was inadequate; and (2) the Judge should have given a reliability warning in respect of the evidence given by the complainant and Ms F. A further ground as to the unreasonableness of the jury's verdicts was abandoned.[15]

[29] As to the first ground—inadequacy of the closing address—the Court of Appeal held that while the closing address was not a comprehensive account of every available point to be made against the Crown case, it was a legitimate (and

[15] CA judgment, above n 2, at [5].

sometimes more effective) strategy to limit the address to the strongest points.[16] The Court concluded:

> [37] While we accept that Mr Taffs' closing address could have been better, as he himself acknowledged when cross-examined before us, we are not persuaded his address fell below the standard reasonably expected of competent counsel. In our view, he advanced the defence case adequately.

[30] On the second ground—the need for a reliability warning—the Court of Appeal concluded that the Judge had not erred: neither counsel had sought such a direction, and the potential unreliability of the evidence given by the complainant and Ms F, due to their high level of intoxication, would have been obvious to the jury and did not require further emphasis. Both witnesses were frank about their condition. Standard directions on reliability and credibility had been given, the key issue here being the credibility of the complainant's evidence.[17]

Ground 1: Did errors by trial counsel lead to a miscarriage of justice?

[31] Mr Carruthers' challenge to the sufficiency of the closing focused on the second alleged sexual assault, which took place in the bedroom. His essential complaint is that trial counsel did not address it at all. Mr Taffs did not seek to exploit the several different accounts given by Ms F, nor Mr H's non-observation of what was alleged. As a result, Mr Carruthers submits, the prosecutor's muted attempts to reconcile the Crown's evidence about this incident went unopposed. Rather, it was the Judge who came to remind the jury of the discrepancies in that evidence, thereby supplementing what had been said by defence counsel in closing. But that was an incomplete account, saying nothing of the consistencies between Mr Tamati's evidential interview, the evidence given by Mr H, and that initially given by Ms F. As Mr Carruthers put it, the discrepancies in the Crown's evidence—between Mr H and Ms F's account on the one hand, and the complainant's on the other—were directly relevant to whether the complainant was lying. There were not often eyewitnesses to an alleged rape (let alone within touching distance); their failure to observe it in this case was surely directly relevant.

---

16 At [31]–[36].
17 At [43]–[50].

[32] Counsel was also critical of evidence given by Mr Taffs in the Court of Appeal. That evidence suggested he had given Mr Tamati's evidential interview little attention. He had not attempted to point out consistencies between what Mr Tamati had said and the evidence of other witnesses, noting only that it was a "[p]ossibility" that doing so would have been useful to suggest that Mr Tamati was telling the truth—in contrast to the complainant.

[33] As Mr Carruthers put it, having exposed weaknesses in the Crown's evidence about the bedroom incident in cross-examination, defence counsel should have exploited them in closing. He could have highlighted how little support the complainant's evidence about the incident drew from the evidence given by Mr H and that initially given by Ms F and contrasted that with the support that Mr Tamati's account drew from the same evidence. He could have pointed out how the prosecutor had (a) skirted around the evidence given by Mr H and (b) asked the jury to rely on the evidence eventually given by Ms F, who had changed her account under oath. Compounding these errors was the fact that trial counsel failed to advocate for Mr Tamati's credibility and appeared not to have familiarised himself with his client's lengthy, detailed and exculpatory police interview.

Discussion

[34] The primary burden on an appellant alleging trial counsel error is to show that their counsel acted unreasonably, assessed in the overall context of the trial, and that it is reasonably possible this deprived them of a more favourable verdict, thereby producing a miscarriage of justice.[18] As this Court explained in *R v Sungsuwan*, if trial counsel makes a tactical decision that was reasonable in the context of the trial,

---

[18] See *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [66] and [73] per Gault, Keith and Blanchard JJ; and Criminal Procedure Act 2011, s 232(2)(c) and (4)(a) as interpreted by this Court in *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [46]–[48]. We describe this as the "primary" burden because, as this Court recognised in *Sungsuwan*, there may still be "rare cases" where the conduct of counsel, although reasonable in the circumstances, nevertheless caused justice to miscarry: at [67] and [70] per Gault, Keith and Blanchard JJ. There may also be cases where the conduct of counsel is so deficient as to give rise to an unfair trial in terms of s 232(4)(b) of the Criminal Procedure Act: see, for example, *Kaka v R* [2015] NZCA 532 at [41] and [44]; and *Karaka v R* [2023] NZCA 283 at [32].

generally the appeal will not be allowed even if the outcome of the trial may have been affected:[19]

> There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. … Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

[35] Some general observations, based on case law, may be noted.[20] They inform our analysis, although none of course displaces the *Sungsuwan* approach just described.

[36] First, a closing address must be looked at in its context and entirety. Such an address is a product of preparation, experience and judgement. Seldom will counsel sit down without thinking, shortly afterwards, that there was a point made that could have been made better or a point not made that should have been. Counsel must make their judgements as to content, imperfect though they may be, in real time. Those judgements must then stand, subject to the miscarriage exception explained in *Sungsuwan*.

[37] Defence counsel's closing address will ordinarily highlight deficiencies in the Crown case and emphasise factors in the defence case suggesting the requisite standard of proof of the charges has not been met.[21] It may distil these points to their essence, and it may be succinct where appropriate.[22] It need not mention every inadequacy in the Crown case, nor every point damaging to the complainant's credibility.[23] There may be very good reasons for a selective approach. Good closing addresses are seldom exhaustive: good counsel use their time selectively to avoid

---

19 *R v Sungsuwan*, above n 18, at [66] per Gault, Keith and Blanchard JJ. See also at [116] per Tipping J; and *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [8]–[11].

20 See also Criminal Procedure Act, ss 105 and 107. Our observations are to be read subject to, in particular, s 105(4), which imposes restrictions on closing addresses in judge-alone trials: see *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [60]–[64].

21 See *E (CA113/2009) (No 2) v R* [2010] NZCA 280 at [27].

22 *Kaka v R*, above n 18, at [41]. See, for example, *Turner v R* [2018] NZCA 175 at [35].

23 See, for example, *Blake v R* [2010] NZCA 61 at [59]–[61] per Potter and Ronald Young JJ; and *Ikinepule v R* [2017] NZCA 125 at [17]–[24].

exhausting the jury. As the United States Supreme Court observed in *Yarborough v Gentry*, research suggests an upper limit to the number of arguments counsel may persuasively make, so that "judicious selection of arguments for summation is a core exercise of defense counsel's discretion".[24] Reasonable counsel may differ on what those key points are.

[38] Secondly, it is not unusual for a trial judge to detect what seems to be a good point for the defence that has not been taken in closing. The judge's job in the summing-up is to ensure the prosecution and defence cases are fairly canvassed.[25] That summing-up need not summarise every point made, but it *must not* materially misstate the defence case.[26] In general, the judge is entitled to sum up the defence as it was presented, without "topping up" an evidently weak defence by adding further points.[27] The apparent "good point" may have been omitted by counsel for good reason—not least because, on reflection, it is not actually that good. In exceptional cases, a judge may confer in chambers with counsel over an apparent omission.[28] And in certain other cases, the judge may feel it is appropriate, with due caution, to draw the jury's attention to an additional, important point without such pre-conferral. This case was an example of the latter course: the Judge discussed the evidence of what happened in the bedroom despite defence counsel having chosen not to do so (or simply having omitted to do so).[29]

[39] Thirdly, appeal courts will not usually intervene unless the closing address is so deficient that the essential defence is not adequately put to the jury. Examples of such deficiency include the following:

(a) *E (CA113/2009) (No 2) v R*, *Kaka v R* and *Mason v R* (in each of which the closing address was wholly deficient);[30]

---

24 *Yarborough v Gentry* 540 US 1 (2003) at 7–8.

25 *R v Clayton-Wright* (1948) 33 Cr App R 22 (Crim App) at 29; *R v Mordecai* (1930) 22 Cr App R 146 (Crim App) at 147; *R v Ryan* [1973] 2 NZLR 611 (CA) at 614; and *Waters v R* [2018] NZCA 84 at [8].

26 *R v T* CA466/99, 22 February 2005 at [8]. See, for example, *Rana v R* [2012] NZCA 587 at [22]–[30].

27 *R v Shipton* [2007] 2 NZLR 218 (CA) at [37]. As to the risk of the judge unilaterally enlarging the *Crown* case, see *Sharpe v R* [2020] NZCA 475.

28 See *Waters v R* [2020] NZCA 93 at [15].

29 See discussion below at [45]–[46].

30 *E (CA113/2009) (No 2) v R*, above n 21; *Kaka v R*, above n 18; and *Mason v R* [2019] NZCA 459.

(b) *Sales v R* (where the closing failed to properly develop a theory as to false complaint or to address one of the charges);[31]

(c) *Karaka v R* (where the closing was exceptionally brief—405 words, resulting in the Judge calling counsel into chambers—and "did nothing to highlight matters favourable to Mr Karaka", "did not focus on the elements of the offences", had "no real differentiation between the two charges" and had "little to no engagement with the evidence as it related to Mr Karaka");[32] and

(d) *Waters v R* (where counsel failed to highlight a key challenge made in evidence to the complainant's credibility).[33]

[40] We turn now to the present appeal. The defence advanced was based entirely on fabrication. There is no suggestion this was inconsistent with instructions.[34] Rather, it was entirely consistent with Mr Tamati's evidential interview, in which he denied any attraction on his part to the teenage girls present and admitted to only one, chaste kiss, allegedly initiated by the complainant on completion of the tattoo on her stomach. The thrust of the defence was that no sexual activity had taken place between Mr Tamati and the complainant. Context made this a difficult case to defend on that basis. It involved two grown men, three teenaged girls and the consumption of alcohol and drugs. There was an air of implausibility in Mr Tamati's explanation and in particular his denial of sexual interest in the complainant while still "cuddling" and getting "cosy" with her (as Mr H, whose evidence was otherwise helpful to Mr Tamati, put it). With straw like that, defence counsel was hard-pressed to make bricks.

[41] Consistently with the general considerations noted above at [36]–[37], we consider it was a reasonably available defence strategy to concentrate on fabrication and in particular the attack on Mr Tamati by the complainant's relatives (which would explain the making of the non-immediate complaint in the first place). The effect of

---

31 *Sales v R* [2022] NZCA 373.
32 *Karaka v R*, above n 18, at [26].
33 *Waters v R*, above n 28.
34 In his affidavit in support of the appeal, Mr Tamati says he "didn't have any input" into the closing. But he does not suggest the direction it took was contrary to instructions.

Mr Tamati's evidential interview was to remove the ability of the defence to argue consent or reasonable belief in consent. Realistically this left only false complaint. The grandmother's overhearing of the Family Planning clinic call, her proposition of sexual assault (agreed to by the complainant) and the attack by the complainant's relatives provided essential reinforcement for that defence proposition. So too did the fact the complainant had contracted chlamydia, which condition Mr H also had, suggesting that it was Mr H who had in fact had sexual contact with the complainant rather than Mr Tamati. These pillars of the defence were put adequately by counsel once his history lesson ended and he got to the essence of the defence. They were buttressed further by other points made in closing: the illogicality of the evidence about the first assault happening in a car at the back of the house (when the only cars there were dismantled wrecks); the timing of the complaint made to Ms G; and the improbability of a rapist willingly entering a car with his young victim's relatives.

[42] Mr Taffs, in evidence to the Court of Appeal, took the view that the evidence of the bedroom incident was still fresh in the jurors' minds and "repetition of the minutiae of matters not central to the [defence] narrative would distract" them from the only sensible defence available—that is, fabrication. We agree with Mr Carruthers that that was a misjudgement. While it is true the jury would be unlikely to have forgotten that Mr H claimed not to have seen Mr Tamati having sex with the complainant and that Ms F's credibility was badly damaged under cross-examination, what really mattered was the *complainant's* credibility. The inconsistencies in the evidence of the bedroom incident offered a potentially valuable means to attack the complainant's credibility and reinforce the fabrication defence: if her account of the second incident (in the bedroom) could not be relied on, it could have been said forcefully that nor could it be relied on in relation to the even graver allegations of the first incident (in the car), where there were no other witnesses. Mr Taffs acknowledged that under cross-examination.

[43] We cannot, however, conclude that this misjudgement by counsel had the likely effect of causing a miscarriage of justice in the result. First, the point would have been stronger had Mr H's failure to see Mr Tamati violate the complainant not been explicable by his own distraction. Ms F's variable evidence on what had occurred in the bedroom was patently unreliable, possibly due to intoxication. So, on

further examination, the net effect was hardly a convincing evidential basis for saying the complainant was lying about what had occurred in the bedroom. This was not, therefore, an omission comparable in nature to that in *Waters* (having the effect that the essential defence was not put).[35] In *Waters*, the omission was to canvass primary evidence that threw substantial doubt on the defendant's ever having driven alone with the complainant in circumstances where the offending was alleged to have occurred in a car (the defendant had a medical condition making driving unsafe, and family members testified that he followed his doctor's instruction in that respect). In the present appeal, we see the omitted argument as a good but not compelling forensic point that could, and probably should, have been put—but not one depriving the defendant of his essential defence.

[44] Secondly, emphasising Mr H's evidence was also a double-edged sword. While he was in the bedroom at the same time and (because he was engaged with Ms F) did not see Mr Tamati having sex with the complainant, his evidence was that he had seen them cuddling and looking "cosy"—evidence which could not be squared with Mr Tamati's claims that he was not interested in the complainant (or any of the other girls) because they were too young. And herein lay the major difficulty for the defence, and one of Mr Tamati's making rather than his counsel's. That was the deep credibility problem with his protestation of innocence in his evidential interview—to be contrasted perhaps with the complainant's frankness in evidence as to her behavioural flaws and lack of memory of some matters.

[45] Thirdly, if there was an omission by counsel, it was substantially repaired by the Judge who offered a broader perspective of the available defence than defence counsel had expressed:[36]

> Now the defence say you should reject the complainant's account of events as unreliable and made up. The defence say there are major dents in her credibility and reliability. Firstly the implausibility that she would not know how she came to be in the car and how she came to be back in the house later. Secondly, the implausibility that she would have sexual intercourse with him on the couch while her friend [Ms F] and [Mr H] were alongside in the bed. Thirdly the fact that [Mr H] did not see any such incident and that [Ms F]'s account was confusing and contradictory. And fourthly, the implausibility that

---

35 *Waters v R*, above n 28.

36 Some of the points were repeated by the Judge later in the summing-up, referring to the defence proposition as to "the implausibility of the sexual incident on the couch in the way she described".

> she would continue to associate with him afterwards, as she did, if he had raped her.

Later in his summing-up, the Judge traversed the closing addresses in more detail, and in terms more verbatim. But here he raised additional matters which counsel had chosen not to emphasise but which the Judge thought the jury might also want to bear in mind—in the manner noted above at [38].

[46] That was an appropriate course for the Judge to take, to make sure the broader scope of the available defence was before the jury in addition to those more specific, important matters counsel had chosen to focus on.[37] None of these were essential matters, central to the fabrication defence being made. The two bedroom particulars mentioned by the Judge were highly unlikely to have been missed by the jury or forgotten by them. Their omission in closing was not therefore the material of miscarriage, but in any event the Judge reminded the jury of them, further diminishing the risk of trial error. Counsel's omission did not mean that the essential defence was not adequately put to the jury.

[47] Fourthly, we note that it is not suggested that the verdicts here were otherwise perverse.[38] We mention this simply to note that the jury was perfectly able to reach contrary views to the planks advanced by the defence in closing. The core fabrication argument (based on the grandmother's interrogation and the subsequent attack on Mr Tamati) was significantly undermined by evidence that the complainant had told both Ms F and Ms G that she had been raped by Mr Tamati prior to the police complaint. The discrepancy as to the location of the car was not a major forensic point given the acknowledged levels of intoxication involved. The contracting of chlamydia by both the complainant and Mr H was a point that really went nowhere: both explained it, both denied they had had sexual relations with each other and, notably, Mr Tamati did not suggest in his evidential interview that he had seen such relations occur. It was open to the jury in these circumstances to accept the essential evidence of the complainant as credible and reliable and to deliver guilty verdicts accordingly.

---

37 As to this, see, for example, *Kaka v R*, above n 18, at [30].

38 As noted above at [28], Mr Tamati decided not to pursue an argument that the jury's verdicts were unreasonable during the hearing before the Court of Appeal.

[48] Finally, we certainly do not regard the closing address as a model one. Counsel was at times laboured in his delivery and at times also digressed into irrelevant material. But these matters were not the focus of the appeal and, in our view, ultimately did not detract from the strength of the defence offered. The focus of the appeal was rather on the content of the address—what it did and did not contain. As to that, counsel was clear with the jury as to the defence and as to the evidence that was relied upon to support it. As we have set out, there were good reasons underlying the selection of the issues and evidence counsel highlighted and those he did not.

Ground 2: Was a reliability warning required in the circumstances?

[49] Mr Carruthers submitted that the jury had to be sure that the complainant's recollection was accurate, despite her having been severely intoxicated. There were substantial absences of memory, selective recall and inconsistencies between her evidence and that given by Mr H and Ms F. Mr Carruthers submitted that these points should have been conveyed to the jury in the form of a reliability warning centring around the complainant's severe intoxication "on a cocktail of alcohol and drugs", but that was not done.

[50] Although the Judge had encouraged the jury to look for evidence supporting the complainant's account, he did not explain why such caution was necessary. Nor did he marshal the evidence to underscore the point. Mr Carruthers argued the Judge should have told the jury to approach the complainant's purported recollection of events with caution and to subject to particular scrutiny any inconsistencies within her evidence or between her evidence and that given by Mr H and Ms F.

[51] Similar concerns were raised also in relation to Ms F's evidence, which Mr Carruthers said should also have been the subject of a warning. She too was heavily intoxicated and gave several different accounts of the second (bedroom) incident. The jury needed to be told of the reasons why the evidence of both the complainant and Ms F needed to be treated with caution, yet the Judge did not remind the jury, even in general terms, of the impact of alcohol and drugs on memory.

Discussion

[52] We can address this ground of appeal more briefly. We do not consider an intoxication-related reliability warning was required here. We take that view for four reasons, which largely turn on the particular facts and circumstances of this case.

[53] First, the giving of a reliability warning, where a judge considers admissible evidence may be unreliable, involves the exercise of judgement.[39] Intoxication does not fall within the special categories provided for in s 122(2) of the Evidence Act 2006 where jurors may lack insight into the implications of the particular condition such that, as this Court said in *CT v R*, absent a direction "the jury will be left with competing contentions from counsel and without any real assistance in addressing them".[40] A jury may be taken to understand the general implications of intoxication on recollection. No special memory-related direction was suggested as being needed here.

[54] Secondly, intoxication and its effects on memory were firmly before the jury; indeed, the Crown itself relied on it in suggesting that inconsistencies in its witnesses' recollections might be explained by the effect of alcohol and drugs. The complainant herself accepted that she had consumed RTDs, spots of marijuana and methamphetamine along with others at the house that evening. As noted earlier, the complainant had admitted she could not remember aspects of the night or much of the following day apart from the precise sexual acts in the morning and some other details like a car journey for food and vomiting in the car on the way home.[41] Her accounts of the sexual acts themselves and their immediate circumstances were, however, relatively precise in her evidential interview and at trial. Ms F, too, said she was "quite wasted", accepted that she and the complainant had been "drinking excessive amounts of alcohol and taking excessive drugs" and said that it was "all a bit of a blur"—that she "just remember[ed] bits and pieces". All of this the jury was firmly apprised of.

---

39 Evidence Act 2006, s 122(1).

40 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [51] per Elias CJ, McGrath and William Young JJ.

41 See above n 10.

[55] Thirdly, the essence of the defence here was that the complainant was caught up in a lie developed to respond to her grandmother's interrogation after hearing her call the Family Planning clinic, the perpetuation of which was then necessitated by the action her relatives took to violently punish Mr Tamati. These events all postdated the party at which the offending was alleged to have occurred. For the reasons given in the preceding paragraph, no intoxication direction was needed to draw the jury's attention to the risk of recollection of the offending being unreliable because of intoxication. Rather, such a direction could have undermined the defence case that the events as charged did not occur, because Mr Tamati—who denied any form of sexual activity with the complainant in his interview played to the jury—was himself intoxicated.[42] It followed that the Judge had good reason not to give the direction.

[56] Fourthly, while it is by no means conclusive against the point, no counsel at trial sought such a direction.[43] Despite that, and without specifically isolating intoxication, the Judge gave a form of reliability warning in relation to the critical evidence of the complainant when he said:

> As a jury you are perfectly entitled to rely on her evidence alone but you may think as a matter of prudence and caution that you should look at all of the other evidence in the case and see if there is evidence that tends to support or refute her account of events. So although you may rely purely on her evidence, prudence and caution would suggest that you look for supporting evidence.

This judgment is not to be taken to endorse such a warning as needed more generally in relation to complainants' evidence. Its significance here lies only in answering the complaint now made on appeal. Notably, the Judge did not give an equivalent direction in relation to Mr Tamati, yet of necessity any more specific reliability warning of the nature his counsel now contend for would have to have been given in relation to him—thereby undermining the reliability of his evidential interview.

---

42 In his evidential interview, Mr Tamati said "I dunno how long I'd been drinking for, probably weeks"; it was "all vague"; he was "lost with dates" and did not know what time of year it had happened. Several witnesses also referred to Mr Tamati using cannabis and methamphetamine that night, although in his interview he denied using the latter.

43 See *L v R* [2015] NZSC 53, [2015] 1 NZLR 658 at [31]. See also *CT v R*, above n 40, at [50] per Elias CJ, McGrath and William Young JJ.

Result

[57] The appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent