ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT UNTIL FINAL DISPOSITION OF RETRIAL PURSUANT TO S 200(2)(d) OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

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

NOTE: PUBLICATION OF DETAILS OF APPELLANT'S PREVIOUS CONVICTIONS PROHIBITED BY S 199A OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://legislation.govt.nz/act/public/2011/0081/latest/LMS409626.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 51/2025
[2026] NZSC 77

BETWEEN	TW Appellant
AND	THE KING Respondent

Hearing:	12–13 March 2026
Court:	Winkelmann CJ, Ellen France, Kós, Miller and Cooke JJ
Counsel:	J N Olsen and A N Gruebner-Ballantine for Appellant M J Lillico and J M Pridgeon for Respondent
Judgment:	11 June 2026

JUDGMENT OF THE COURT

A The appeal is allowed.

B The convictions are quashed and a retrial is ordered.

C Any bail application should be made to the District Court.

D We make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant until final disposition of retrial pursuant to s 200(2)(d) of the Criminal Procedure Act 2011.

REASONS

WINKELMANN CJ, MILLER AND COOKE JJ
(Given by Cooke J)

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Introduction

[1] Following a jury trial, the appellant was found guilty of five charges of sexual offending against his young son over a period of years. He was sentenced to 12 and

a half years' imprisonment.[1] His appeal against conviction was dismissed by the Court of Appeal, but his appeal against sentence succeeded, the Court of Appeal substituting a sentence of nine years and 10 months' imprisonment for that imposed by the trial Judge.[2] He now appeals his conviction to this Court on the basis that evidence concerning misconceptions potentially held by jurors about the behaviour of child sexual abuse victims was misused, and that appropriate directions were not given to the jury about the proper use of this evidence. He argues that a miscarriage of justice accordingly arose.

[2] This appeal was heard together with the appeal in *MB v R*, and this judgment should be read alongside the judgment of the Court in *MB*.[3] Following the hearing, we released a results judgment allowing TW's appeal by a majority and ordering a retrial.[4] These are our reasons for doing so.

Background

[3] The appellant was convicted on five of nine charges of sexual offending against his young son. The conduct for which he was convicted involved incidents of indecent touching and sexual violation.

[4] The complainant first reported the offending around the time of the last incident. At a second police interview, his disclosures led to charges being laid. When asked why he did not report the offending earlier, he said he was too scared to do so and that the appellant had threatened him into silence. TW's defence at trial was fabrication.

[5] In sentencing the appellant, Judge Bidois described the appellant's offending as serious abuse of his son, noting that it was sad to have watched the complainant give evidence and that it was evidently a harrowing experience for him.[5] As noted above, the final sentence was 12 and a half years' imprisonment.

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1 *R v [TW]* [2023] NZDC 13562 (Judge Bidois) [Sentencing notes].
2 *[TW] v R* [2025] NZCA 136 (Hinton, Woolford and Edwards JJ) [CA judgment].
3 *MB v R* [2026] NZSC 76.
4 *[TW] v R* [2026] NZSC 34 (Winkelmann CJ, Ellen France, Kós, Miller and Cooke JJ) [SC results judgment].
5 Sentencing notes, above n 1, at [8].

Court of Appeal decision

[6] The appellant appealed both his conviction and sentence. The appeal against conviction was advanced on the ground that there was a miscarriage of justice because the prosecutor misused counter-intuitive evidence in his closing address and the Judge failed to give proper directions on the use of that evidence. The counter-intuitive evidence had been admitted by consent under s 9 of the Evidence Act 2006.

[7] After setting out the relevant principles from the authorities, the Court found the prosecutor had made no error, but the Judge had failed to direct the jury as to proper use of counter-intuitive evidence.[6] He failed, in other words, to meet the requirement set out by this Court in *DH v R* that:[7]

> Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

[8] The Court concluded, however, that there was no miscarriage of justice. It held that the following were the most significant reasons why there was no such miscarriage:[8]

> [31] First, the specific caution at the beginning of the agreed facts provides that "[t]his evidence does not prove or disprove that the complainant was sexually abused by the defendant."
>
> [32] Second, the explanation given in the prosecutor's opening address states:
>
> > This is general evidence though. It's not about something specific in this case, but rather it goes to address some misconceptions that we have by applying more general evidence that we do know to be true.
>
> [33] Third, the Judge's reference to the purpose of the agreed facts in his summing up states:

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6 CA judgment, above n 2, at [26]–[27].
7 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30(e)] (footnote omitted).
8 CA judgment, above n 2.

> It has been felt that there is a risk jurors may reason, because there was a delayed complaint, therefore, the complainant cannot be believed for that reason only. The section 9 admissions cover this matter in some detail.
>
> [34] We therefore consider that there is no risk of a miscarriage of justice relating to the utilisation of counter-intuitive evidence in this case.

[9] As noted above, TW's appeal against sentence was allowed.

Submissions for the appellant

[10] For the appellant, Mr Olsen argued that the appropriate limits on the scope and use of counter-intuitive evidence, and mandatory judicial directions to prevent its misuse, were clearly set out by this Court in *DH*. But there was a significant departure by the Court of Appeal in this case from these requirements, upon which admissibility was contingent.

[11] First, Mr Olsen argued that the agreed facts had strayed beyond the *DH* principles. The statement did not clearly state that the relevant research was generic and said nothing about the particular case. This was important because, otherwise, there was a risk of the evidence being used diagnostically in a way that *DH* had said was inappropriate. This was further compounded by references to such offending being more likely committed by someone known, like a parent. These departures from *DH* set the scene for the following errors.

[12] The second error was that the prosecutor linked the circumstances of the case to the counter-intuitive evidence in closing, risking impermissible reasoning by the jury. This was prohibited by the *DH* principles. The Court of Appeal had erred in finding that linkage is only prohibited when the prosecutor uses the evidence diagnostically. In Mr Olsen's submission, the prosecutor is prohibited by *DH* to refer to counter-intuitive evidence at all once it is admitted.[9] The concern is not what the prosecutor does, but what the jury might do. Jurors are educated upon receiving

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9 Mr Olsen referred us in particular to *DH*, above n 7, at [30(b)] (footnote omitted), where this Court stated: "The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case."

counter-intuitive evidence, and that evidence thereafter has no significance to the trial.

[13] Finally, whilst the earlier errors might have been salvageable by the trial Judge, he instead aggravated the breaches. He failed to give the mandatory directions concerning the proper purpose and use of the evidence, and to warn against improper use in accordance with the *DH* principles. The jury were accordingly left to their own devices, primed to misuse the evidence.

[14] For these three reasons, Mr Olsen argued that justice had miscarried and the appeal should be allowed.

Submissions for the Crown

[15] Ms Pridgeon for the Crown advanced submissions on both TW's and MB's appeals. She argued that criminal trials require nuance and contextual judgement, not unduly rigid rules in relation to counter-intuitive evidence. There needs to be sufficient flexibility to respond to trial evidence in accordance with trial realities.

[16] The prosecutor's closing reference to the counter-intuitive evidence did not invite diagnostic reasoning. The Crown is entitled, like the defence, to refer to all admissible evidence in its closing address. The two short references the prosecutor made did not impermissibly reason that because the complainant conducted himself in a counter-intuitive way, that itself was indicative of the truth of his evidence.

[17] In developing its submissions, the Crown made reference to Te Aka Matua o te Ture | Law Commission's work on counter-intuitive evidence. In its 1999 commentary on the proposed evidence code, the Law Commission explained that the purpose and use of counter-intuitive evidence is educative and not diagnostic.[10] The Commission recently noted that jurors may still believe myths and misconceptions—that which counter-intuitive evidence is adduced to correct—in

[10] Te Aka Matua o te Ture | Law Commission *Evidence* (NZLC R55, 1999) vol 2 at [C110]–[C111].

sexual and family violence cases.[11] Similar sentiments have been expressed overseas.[12]

[18] Ms Pridgeon argued *DH* does not prohibit prosecutors from referring to counter-intuitive evidence in closing. That case was about admissibility, not use, of counter-intuitive evidence. It would be a radical departure from the current position if the Crown could not draw on the counter-intuitive evidence to address misconceptions the jury might hold. Jurors must understand how counter-intuitive evidence relates to the case before them. Prosecutors cannot use counter-intuitive evidence diagnostically, but otherwise, prosecutors are entitled to contend forcefully but fairly for a verdict of guilty.[13]

[19] The possibility of misconceptions affecting fact-finding was raised in the appellant's case, albeit, Ms Pridgeon submitted, only to a minor degree. The defence contended that the complainant was lying and relied on the fact that it took a long time for him to fully articulate the allegations against the appellant. There was accordingly nothing unfair or improper in the prosecutor relying on the counter-intuitive evidence to respond to those points.

[20] Ms Pridgeon also pointed out that New Zealand research shows that the reliance on rape myths and stereotypical beliefs about rape victims remains a staple in defence closing statements.[14] So the counter-intuitive material was important, and its significance reiterated by the recent enactment of s 126A of the Evidence Act.[15] The real concern with improper use involves a reasoning process of the kind the Court of Appeal described in *M (CA23/2009) v R*: delayed reporting (for example) is common among sexually abused children; the present case involves delayed

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11 Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.1]–[12.2].

12 See, for example, *R v Barton* 2019 SCC 33, [2019] 2 SCR 579 at [1] per Moldaver, Côté, Brown and Rowe JJ; and Equally Ours *Rape and serious sexual offences: public understanding and attitudes* (Crown Prosecution Service, January 2024) at 23.

13 *R v Hodges* CA435/02, 19 August 2003 at [20].

14 Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 390.

15 Section 126A was enacted, by s 21 of the Sexual Violence Legislation Act 2021, to require judicial directions about misconceptions in sexual cases.

reporting; therefore, this child must have been sexually abused.[16] Reference to counter-intuitive evidence in closing only to correct erroneous beliefs that the jury might otherwise hold is permitted. Cases where improper use has been identified by the Court of Appeal involved an invitation to use the evidence diagnostically, rather than simply a reference to it in closing.[17] Here, all the references by the prosecutor in closing used the evidence only for educative reasons, and not diagnostically. The Court of Appeal was accordingly right to say that there had been no error by the prosecutor.

[21] In terms of the jury directions, Ms Pridgeon acknowledged that the direction mandated by *DH* was not given. But the Court of Appeal was right to find that no miscarriage of justice arose. The other references explained the evidence was only educative, and the counter-intuitive evidence had minimal relevance to the case.

[22] Ms Pridgeon submitted that, whilst *DH* requires judges to give a counter-intuitive evidence direction, whether a miscarriage of justice resulted from a failure to direct, or from a direction in imprecise terms, is fact-dependent. Here, the Judge referred the jury back to the agreed statement, which began with a prominent caution that the evidence did not prove or disprove that the abuse had occurred, and gave an orthodox direction as required by s 127 on delayed reporting. The jury then returned mixed verdicts showing careful, discriminating reasoning rather than wholesale illegitimate use of the counter-intuitive evidence.

[23] Finally, the Crown objected to the appellant's submissions criticising the agreed statement of facts. There was no challenge to the admissibility of that statement at trial, which was admitted by consent. Nor was it at issue in the Court of Appeal. In the absence of a waiver of privilege and affidavit from trial counsel, it could be assumed that the appellant was given competent advice and gave instructions about the content and form of the statement.

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16 *M (CA23/2009) v R* [2011] NZCA 191 at [32(e)].

17 In this regard, the Crown referred us to *[J] v R* [2019] NZCA 384; *[B] v R* [2023] NZCA 159; *[W] v R* [2024] NZCA 425; and *[T] v R* [2025] NZCA 256.

Analysis

[24] As we said above, the Court heard this appeal together with that of *MB*, which raised similar issues relating to the proper use of counter-intuitive evidence.[18] The judgment in *MB* is being released together with this judgment. It sets out the Court's analysis of the relevant principles and should be read alongside this judgment for an understanding of those principles.

[25] The starting point involves two matters emphasised by the Court of Appeal in *M (CA23/2009) v R* in a passage that was referred to in *DH*:[19]

> … we emphasise two important points. First, where counter-intuitive evidence is given, prosecuting counsel must be careful in the way that he or she uses the evidence. Such evidence is directed at removing misconceptions that the jury might otherwise have about children alleging sexual abuse so that they are able to consider fairly whether or not the particular complainant is to be believed. But the evidence says nothing about the credibility of the particular complainant or whether the abuse that he or she alleges actually occurred. Accordingly prosecuting counsel should not attempt to link the evidence to the circumstances of the particular complainant as this may create a risk that the jury will use the evidence illegitimately, in a diagnostic or predictive way. Second, in such cases the judge should explain to the jury what the purpose of the evidence is and should caution them against improper use of it. The judge should instruct the jury that if they accept the expert evidence, they should not reason that the fact that the complainant behaved in one or more of the relevant ways (for example, delayed in complaining or continued to express affection for the alleged abuser) is, of itself, indicative that the alleged abuse did, or did not, occur.

[26] The requirement that the counter-intuitive evidence not be linked to the complainant's evidence is not new. It was set out by the Court of Appeal in *OY v Complaints Hearing Committee*[20] and was described as important in *DH*.[21]

[27] The relevant principles have then been further explained in *MB*, including:[22]

> (a) The purpose of counter-intuitive evidence is that of correcting erroneous or prejudicial beliefs that some jury members might intuitively hold about the anticipated characteristics or behaviours of

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18 *MB*, above n 3.

19 *M (CA23/2009) v R* , above n 16, at [49]. This Court referred to this passage in *DH*, above n 7, at [30].

20 *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 at [59(b)].

21 *DH*, above n 7, at [30(b)].

22 *MB*, above n 3, at [12] (footnotes omitted).

victims of sexual abuse generally. It does not address the facts of the case or, in particular, the credibility or reliability of the complainant or the defendant. It is intended to ensure that jurors bring a neutral approach to their assessment of the other evidence in the case.

(b) The evidence should identify and address specific misconceptions that are relevant to the case, and not simply describe the usual behaviour of victims. By way of example, evidence that abused children may not take the first opportunity to complain will not be substantially helpful, and so should not be offered, if that issue does not appear to the judge to arise on the facts.

(c) The limitations expressed in (a) and (b) above are reflected in statutory provisions about judicial directions that may be given in sexual cases. The delay direction under s 127(2) of the Evidence Act may be given when evidence is offered or a comment made tending to suggest the complainant delayed or failed to complain. Directions under s 126A are given when the judge thinks it necessary or desirable to address any relevant misconception. That may be the case, for example, when an explanation for delay is in issue.

(d) The judge must tell the jury of the purpose of the counter-intuitive evidence, as noted in (a) above. The jury must also be directed that they may not use counter-intuitive evidence diagnostically; in other words, they may not reason that it makes the evidence of the complainant more likely to be true. Rather, they must base their verdicts on the other evidence in the case.

(e) To reinforce the prohibition on diagnostic use, the jury should be told that counter-intuitive evidence is based on research studies that are independent of the case, that those who compiled the evidence did not interview anyone involved in it and that it has nothing to do with the facts of the case.

(f) As explained in *DH, M (CA23/2009) v R* and *OY v Complaints Hearing Committee*, counter-intuitive evidence must not be linked to the circumstances of the complainant, to avoid the risk that the jury will use it in a diagnostic way.

(g) A prosecutor may refer to the counter-intuitive evidence when opening and closing the case to the jury, to explain a relevant misconception that may arise. It is appropriate to tell the jury that the counter-intuitive evidence shows a given behaviour is not, of itself, inconsistent with abuse. But the prosecutor may not link the counter-intuitive evidence to the complainant's account.

…

[28] In this judgment, we apply these principles to the circumstances of this case. We do so in comprehensive terms to illustrate the proper use of counter-intuitive evidence. As we will explain, this case is an example of a misunderstanding of the

proper use of counter-intuitive evidence, and a majority of the Court consider that the misuse of the evidence has given rise to a miscarriage of justice.

[29] The arguments advanced by the appellant both in this Court and the Court of Appeal involve alleged misuse of the counter-intuitive evidence, particularly in the Crown's closing to the jury, and alleged failure by the Judge to give proper directions. But in order to understand whether and, if so, how the evidence was misused, it is also necessary to consider the reference to this evidence in the Crown's opening, the content of the evidence itself, as well as the directions given by the Judge about the evidence.

Crown opening

[30] The first reference to the counter-intuitive evidence was in opening. The prosecutor referred to the counter-intuitive evidence as one category of evidence the Crown would be relying upon. When doing so, the prosecutor said:

> The final form of evidence that I want to talk to you about is a set of agreed facts. Now, agreed facts are entirely ordinary in every case, that the lawyers get together and say well on these things there is no dispute, there's no need to call a witness and so these things are agreed to be true. …
>
> Now some of those are going to be some pretty basic things, what [the complainant's] birthday is, but another part of that is going to be what I'll call counterintuitive or educative evidence and the point of this evidence is that it will talk about some of the misconceptions that we have about sexual offending against children and how people might respond to that. Again, this is agreed. This is general evidence though. It's not about something specific in this case, but rather it goes to address some misconceptions that we have by applying more general evidence that we do know to be true. That will be another part of the evidence.

[31] In this passage, the prosecutor correctly described the counter-intuitive evidence as educative and stated that it concerned misconceptions. But the explanation of the relevance of the evidence was incomplete. The prosecutor did not clearly explain that the evidence was not about the case before the jury, nor that it must not be used by the jury as evidence concerning the facts of the case. So it remained important that the proper use of the evidence be more clearly and completely explained at a later point.

The evidence

[32] The next reference to the counter-intuitive evidence occurred when the agreed facts under s 9 of the Evidence Act were provided to the jury. This occurred immediately after the Crown's opening and defence counsel's short opening statement. The agreed facts were read to the jury. They were later provided in writing to the jury. The first eight paragraphs involved more routine and factual matters such as the ages of the complainant and appellant and other uncontroversial factual material. Paragraphs nine to 24 then dealt with misconceptions.

[33] That evidence did not involve evidence from an expert witness, but more simply propositions about the counter-intuitive behaviour of young victims of sexual abuse. The statement was admitted by consent. We understand that it is not uncommon for counter-intuitive evidence to be placed before a jury in agreed form in this way, albeit that the practices appear to vary around the country.

[34] As we explain below, we consider that there are issues with some of this material notwithstanding that it was admitted by consent. In any given case, potential issues of misuse could be mitigated or aggravated by the content of the evidence, which should in any event be expressed in the way this Court directed in *DH* as now restated in *MB*.[23] In this case there is also a question whether, as Ms Pridgeon argued, the content of the statement addressed the proper use of the counter-intuitive evidence, and did so sufficiently to respond to criticism of the directions given by the Judge or any alleged misuse by the prosecutor. In those circumstances, we consider it necessary to address the contents of the statement in order to address the issue of alleged misuse in the circumstances of this case. We do not accept Ms Pridgeon's submission that we should not do so.

[35] First, the statement said:

> **Counter intuitive evidence**
>
> 9. The following admissions constitute educative evidence about the behaviour of sexually abused children. This evidence does not prove or disprove that the complainant was sexually abused by the defendant.

[23] *DH*, above n 7, at [30], [110] and [113]; and *MB*, above n 3, at [12] and [31]–[34].

[36] This paragraph correctly explained that the evidence was educative, but it was not adequate, standing alone, to explain the use that may be made of counter-intuitive evidence or to prohibit its diagnostic use. Whilst the explanation that the evidence does not "prove or disprove" the allegations is commonly used, without more it may have been confusing for some jurors. The counter-intuitive evidence was *not evidence at all* of the allegations.[24]

[37] The statement then proceeded:

> ***Reporting patterns in child sexual assault***
>
> 10. There is no typical reporting pattern for sexually abused children; reporting may be immediate or delayed, direct or indirect, purposeful or accidental. Reporting of abuse by a child or adolescent may also be a gradual or incremental process.
>
> ***Delayed or non-reporting of child sexual assault***
>
> 11. The research, literature and professional experience indicate that reporting of childhood sexual offending is most commonly delayed. However, the timing of a complaint does not assist in determining whether the complaint is true or untrue because false complaints may be immediate or delayed and true complaints may be immediate or delayed.

[38] These paragraphs are focused on the normal behaviour of victims rather than identifying a relevant misconception about the behaviour of victims that jurors may hold. We understand that the relevant misconception being addressed is the view that child victims will complain about the abuse when it occurs. We consider it is preferable for counter-intuitive evidence to explicitly identify the relevant misconception so that the risk of misuse by the jury is minimised.

[39] We also consider that these paragraphs demonstrate the need for clear directions to the jury. By expressing the conclusions from the research in terms of probabilities in para 11—"most commonly"—there was a prospect this was taken as evidence that confirmed the offending occurred here.[25] In *DH*, this Court accepted that counter-intuitive evidence might be expressed in probabilistic terms when necessary to correct a misconception, but observed that greater detail creates risk.[26]

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[24] See *MB*, above n 3, at [12(a)], [24] and [26]–[27].
[25] See at [12(k)], [33] and [84]–[86].
[26] *DH*, above n 7, at [42]–[49] and [55].

When the evidence is expressed in probabilistic terms, there is a greater need for clear directions on proper use.[27]

[40] Paragraph 11 also states that delay does not assist in determining whether a complainant is telling the truth. When considered in the context of the generality of cases, that is so from a statistical point of view, but that does not mean that delay cannot have relevance in the case before the jury. It may be necessary for the jury to consider delay in the context of all the other evidence in the case.[28] We consider it was necessary for this to be explained to the jury in this case. We address this further below.[29]

[41] The statement went on to say:

> ***Continued contact between victims and offenders***
>
> 23. Children are most likely to be sexually abused by those well known to them, such as family members, friends and authority figures, and therefore it is possible that the offender will have been, or have become, close to the child. The portrayal of a child or adolescent necessarily hating the offender ignores the common dynamics of child sexual abuse, which often involves continued contact with, and even affection for, offenders, despite their abusive behaviour and the fact that much abuse may be normalised, both by the offender and the child alike. Many children may have no choice but to maintain contact with an offender who is a family member or someone close to the family of the child.

[42] This paragraph refers to relevant misconceptions, including the erroneous belief that abused children will hate their abuser and for that reason not continue an apparently normal relationship with them, which we understand to be the relevant misconceptions. But the misconceptions are not clearly identified, and they are then addressed in a prejudicial way. The paragraph states that such abuse will "most likely" be by a family member, friend or authority figure. That is not information directed to misconceptions about the behaviours of victims. It is describing the usual characteristics of abusers and does so in probabilistic terms. The defendant here fell within the category of persons "most likely" to abuse. As we said in *MB*, counter-intuitive evidence directed at misconceptions about abusers

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27 *MB*, above n 3, at [12(k)] and [91].
28 See at [12(i)], [28] and [95].
29 Below at [57]–[59].

requires special care—in particular, it heightens the practical need for judicial directions.[30]

[43] This evidence is similar to the example addressed in *DH*, where the Court said in relation to an answer to a question by an expert:[31]

> [55] We do not see any issue with [the expert's] answer that a factor in delay is that the perpetrator is usually someone well known to the child. But we think it was not then appropriate to go on to say "the large majority of perpetrators are family members, family friends, neighbours or authority figures" because the more irrelevant detail that is added, the greater the risk that jurors could consider the factors identified are diagnostic of sexual abuse. The point about the influence on delay of the relationship between victim and perpetrator could have been made without these additional details. However, we see this as unnecessary emphasis rather than as something more serious. [Counsel for the appellant] did not suggest that the jury would have seen this evidence as diagnostic of sexual abuse having occurred in this case.

[44] The statement in para 23 of the agreed facts is almost identical to evidence described in *DH* as not appropriate. The Court concluded that the inappropriate material did not give rise to a miscarriage on the facts of *DH*. But here, such material risked misuse for the reasons we have addressed.

[45] The statement of agreed facts also provided further detail about the normal behaviour of victims, including three paragraphs about the issue of "freezing" during sexual assault. As we have held in *MB*, counter-intuitive evidence should be relevant to the issues potentially arising in the case.[32] This evidence went further than providing evidence about the relevant misconceptions—as to delay and that a child victim would not continue an apparently normal relationship with their abuser. Rather, it provided details about the normal characteristics of sexual abuse victims, which runs the risk of misuse described in *MB*.[33]

[46] For these reasons, we do not accept that the counter-intuitive evidence itself addressed what was required by way of directions to the jury. We consider that it contained material that gave rise to a risk of confusion about the role the

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30 *MB*, above n 3, at [12(l)] and [91].
31 *DH*, above n 7.
32 See *MB*, above n 3, at [12(b)], [16], [30] and [41].
33 At [21]–[22].

counter-intuitive evidence could play in the jury's deliberations. Given that, the way the material was used in closing by the prosecutor and the directions from the Judge were particularly important.

Crown closing

[47] The counter-intuitive evidence was addressed twice in the prosecutor's closing. The first time, the prosecutor said:

> What about the type of allegation itself? Now for many of you on Sunday night before you were coming to court and thinking about it you probably, hopefully, never had to think about whether this type of offending occurred, and you know from the agreed facts that it does, that family members and people close to children sexually offend against them. The type of allegation is not something that means this could not have happened.
>
> What about could it have happened and then [the complainant] just kept quiet, didn't go running out immediately and told Mum, kept quiet for years until the relationship with Dad was drifting away, he was visiting less and less? Well you've got the agreed facts that I read to you at the beginning of the case, and you know that children are sometimes not in a position for various reasons to make a complaint, and you will have a copy of those agreed facts and that counterintuitive evidence correcting some of the misconceptions that we might have had on Sunday night to take into account.
>
> Could this have happened? Yes. But that's not enough, it is not enough for the Crown to say it's possible, the Crown must make you sure, and I don't shy away from that. …

[48] In these paragraphs, the prosecutor interwove, and thereby inappropriately linked, the counter-intuitive evidence with the complainant's allegations. In *MB*, we have confirmed, as *DH* made clear, that counter-intuitive evidence should not be linked *at all* to the complainant's evidence.[34] The prosecutor should not make the link that the evidence cannot itself make.[35] The Court of Appeal concluded that this reference was not inappropriate.[36] We agree that the reference can be seen as limited to correcting a possible misconception when the jury came to assess the facts, notwithstanding it is linked with the facts of the case. But a risk of misuse by the jury arose from this interlinking with the complainant's evidence. That risk was more acute given the initial reference to family members committing this type of

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34 *MB*, above n 3, at [12(f)–(g)] and [99]; *DH*, above n 7, at [30(b)]; *M (CA23/2009) v R*, above n 16, at [49]; and *OY*, above n 20, at [59(b)].

35 *[W] v R*, above n 17, at [21].

36 CA judgment, above n 2, at [26].

offence. We are not suggesting that references of this kind necessarily give rise to a miscarriage of justice themselves, and Mr Olsen did not argue that they did. But in this case they did make it necessary—if only to avoid the risk of a miscarriage—to explain the proper use of the evidence.

[49] Mr Olsen's submissions focused on the second time the prosecutor referred to the evidence. It was referred to in the course of providing the jury the first of five points the prosecutor gave to the jury as to the complainant's credibility. The prosecutor referred to the complainant's demeanour and the difficulty of talking about sexual abuse before saying:

> It make[s] sense doesn't it, when you think about it that way, that the way in which [the complainant] came across in those videos might be a bit different to a person just providing an explanation of something ordinarily that happened. He is [young], he is talking about something which on any view of it would be deeply upsetting, it is a secret he has kept a long time, and he's doing so in a foreign environment, and you know from those agreed facts that children's complaints are often delayed and they can be incremental, they come out bit by bit as they feel more comfortable, that's an agreed fact, but in looking at those interviews, the fact of him coming along and the way in which his story came out you can assess that as part of whether he's telling the truth.

[50] Interlinking it in this way was inappropriate and went beyond neutralising general misconceptions. The prosecutor is relying on the fact that such complaints are "often delayed" and come out incrementally (potentially inviting probabilistic reasoning), but more significantly, he is inviting them to use this evidence as a reason why they should accept that the complainant is telling the truth. This is an express invitation to rely on the counter-intuitive evidence to corroborate the complainant's account.

[51] The Court of Appeal found that this second reference was again not inappropriate, finding that the link to the complainant's evidence was "not direct", "fleeting in nature" and did not necessarily invite diagnostic reasoning.[37] For the reasons just given, we disagree.

[52] We make it clear that the prosecutor linking the counter-intuitive evidence to the complaint's evidence was an error, but it remains necessary to separately address

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[37] At [26].

whether that error gave rise to a miscarriage of justice.[38] We address that further, and separate, question below.[39]

Summing up

[53] We consider that there were two related errors in the summing up to the jury. First, the misuse by the prosecutor that we have addressed above was not corrected in the summing up. Second, the Judge failed to give the directions required by *DH*,[40] which we have further addressed in *MB*.[41]

[54] The omission meant that the jury were not told how to use this evidence correctly, and how not to use it, at any point.

[55] As we have explained above, we do not accept Ms Pridgeon's submission that the s 9 statement sufficiently addressed what was required by way of directions. The statement did not replicate the content of the required directions, nor have the judicial imprimatur. It was not fully consistent with *DH* nor our restatement and clarification of the relevant principles in *MB*.

[56] The direction given by the Judge in this case was limited to a delay direction of the kind contemplated by s 127 of the Evidence Act. It also contained statements that were unclear and potentially prejudicial to the defendant. The Judge said:

> [77] I want to talk to you about the "delay in complaint". In sexual abuse cases a complaint may be made immediately, being soon after the event, or sometimes after a delay. In this case there was a delay in complaint. I am required by law to tell you that there are delays in complaint and very often very good reason for such delays. It is recognised that there are legitimate and accepted reasons for not telling. That position is the law and it is supported by research.
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> [78] It has been felt that there is a risk jurors may reason, because there was a delayed complaint, therefore, the complainant cannot be believed for that reason only. The section 9 admissions cover this matter in some detail. That is for you to determine, bearing in mind all the evidence presented to you in this case.

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38 See Criminal Procedure Act 2011, s 232(4).
39 See below at [62]–[65].
40 *DH*, above n 7, at [30(e)].
41 See above at [27].

[57] Paragraph 77 is appropriate and complies with s 127(2) of the Act. But para 78 then cross-references the s 9 statement which raises the issues we have addressed above about that statement. As we have said above at [40], there was a need for the jury to be told that the counter-intuitive evidence did not mean that delay could not be relied upon by the defence. As the recommended directions in the *Criminal Jury Trials Bench Book* conclude:[42]

> That does not necessarily mean, however, that the amount of time taken to make a complaint is never relevant or cannot be relevant. That is a matter for you to judge on the facts of this case.

[58] This is consistent with the wording of s 127(2), which says when the defence puts delay in issue:

> … 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.

[59] These formulations leave open reliance on delay by the defence on the facts of the particular case. But the s 9 statement and the Judge's directions effectively said that delay was not relevant. Section 25(e) of the New Zealand Bill of Rights Act 1990 guarantees the right of a defendant "to present a defence". That right is potentially limited if the evidence is presented in the way it was in this case. A defendant is entitled to rely on factors the defendant says are consistent with the allegations not being true—including, for example, that the complainant did not make any allegation at the time.

[60] Moreover, the Judge himself linked the counter-intuitive evidence to the facts of the case by then saying: "That is for you to determine, bearing in mind all the evidence presented to you in this case." This gave the jury permission to use the counter-intuitive evidence diagnostically. Given the lack of explanation to the jury on how to use the counter-intuitive evidence, this linkage created a further risk of misuse.

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[42] Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* at [7A.5.1.1].

Conclusion

[61] For these reasons, we accept that there was misuse of the counter-intuitive evidence in this case and a failure to give the necessary directions, and these were errors in the conduct of the trial. The prosecutor described the evidence in opening without clearly identifying the proper use of the evidence. The evidence itself contained statements that involved potential misuse of the counter-intuitive evidence in a way prejudicial to the defendant. The prosecutor in closing then misused the evidence by linking it to the complainant's evidence. The Judge then failed to give the required directions, and also provided directions that were confusing, potentially prejudicial to the defendant, and which inappropriately linked the counter-intuitive evidence to the facts of the case.

Was there a miscarriage?

[62] Whether the errors we have identified must give rise to a successful appeal depends on whether, collectively, the errors have created a real risk that the outcome of the trial was affected.[43] That depends on whether there was a reasonable possibility that another verdict would have been reached but for the errors.[44] Even when that is the case, an appeal can be dismissed if the court remains sure of guilt—that is, through the application of proviso reasoning. The Crown rightly does not contend that proviso reasoning applies in this case.

[63] We broadly accept Ms Pridgeon's submission that rigid rules are inappropriate, and it is always necessary to focus on the trial context when deciding whether the requirements have been met, and whether any failure to do so led to a miscarriage of justice. But that in no way detracts from the importance of meeting those requirements, which are not onerous. The requirements protect fair trial rights by ensuring that the evidence is not misused in a prejudicial way. Compliance with them avoids the prospect of a successful appeal and all that entails.

[64] Here we conclude that there were errors that give rise to a reasonable possibility that a different outcome would have been reached. The trial involved a

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[43] Criminal Procedure Act, ss 232(4)(a) and 240(2). Mr Olsen did not contend the errors gave rise to an unfair trial.

[44] *Haunui v R* [2020] NZSC 153, [2020] 1 NZLR 189 at [67].

credibility contest and depended on the jury accepting the complainant's evidence. There was no independent evidence proving guilt. The errors that we have identified went to the jury's assessment of the credibility of the complainant's evidence. We do not consider that the possibility of misuse can be discounted because the misconceptions were not prominent in the case. The counter-intuitive evidence was relied upon by the Crown as evidence diagnostic of the defendant's guilt. We cannot assume that the risks of misuse that arise from impermissible linking and from the lack of the required directions did not manifest themselves in the jury's deliberations.

[65] We accept that the prosecutor's misuse of the counter-intuitive evidence could have been corrected by directions from the Judge addressing the proper use of the evidence, but this did not occur. For those reasons, we consider that there was a miscarriage of justice, hence we allowed the appeal, quashed the convictions and ordered a retrial.[45]

Result

[66] The appeal is allowed.

[67] The convictions are quashed and a retrial is ordered.

[68] Any bail application should be made to the District Court.

[69] For fair trial reasons, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant until final disposition of retrial pursuant to s 200(2)(d) of the Criminal Procedure Act 2011.

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[45] SC results judgment, above n 4.

ELLEN FRANCE AND KÓS JJ
(Given by Kós J)

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[70] We do not consider departures here from the principles laid down in *DH*,[46] now restated in *MB*,[47] were material or gave rise to a real risk that the outcome of the trial was affected. Accordingly, we would dismiss the appeal.

The s 9 statement

[71] No challenge to the s 9 statement constituting the agreed counter-intuitive evidence adduced at trial was made in the Court of Appeal.[48] We do not consider the challenge, made for the first time in this Court, is sound.

[72] The opening passage—set out at [35] above—makes clear that the written evidence the statement represents is educative to the jury and not itself probative of the charges. It does not go on to state, as *MB* would require, that its purpose is to neutralise jury deliberation against erroneous, generalised juror perceptions of victim conduct. In our view, however, that purpose is clearly implicit in the content of the statement and would be evident to, and understood by, most jurors.

[73] Even if that were not so, only a few minutes before the s 9 statement was read to the jury, the prosecutor had made its purpose and non-probative quality clear to the jury at the end of his opening address.[49] After describing the status of the statement as evidence in the trial that the parties agreed was true, he continued—in the passage set out at [30] above—to explain that the point of the evidence was to "talk about some of the misconceptions that we have about sexual offending against

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46 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30].
47 *MB v R* [2026] NZSC 76 at [12].
48 See *[TW] v R* [2025] NZCA 136 (Hinton, Woolford and Edwards JJ) [CA judgment] at [11].
49 Between the Crown's opening address and the reading of the s 9 statement, the only intervening events were a very short opening statement by defence counsel and very brief address by the Judge.

children and how people might respond to that", that it was "general evidence though" and "not about something specific in this case, but rather it goes to address some misconceptions that we have by applying more general evidence that we do know to be true". While these observations would usefully have been included in the statement itself, in more detail, we do not think the jury would have misunderstood why they were receiving it.

[74] As to the content of the statement, we do not consider the objection at [38] of the majority reasons above is sound. It is unnecessary for counter-intuitive evidence to follow a formula of "jurors may think A, but research shows B". It is sufficient to meet the principles in *MB* that the purpose and limits of the evidence are made clear—as we think they were here—and then the research findings are explained in a straightforward way. We do not construe para 11 of the statement—reproduced at [37] above—as telling the jury that delay is irrelevant; rather, it tells them that timing *by itself* does not demonstrate truth or falsity. We accept, however, that the opening sentence of para 23 of the statement—reproduced at [41] above—was not appropriate, as had already been made clear in *DH*.[50]

[75] We accept also that the statement, which bears the hallmarks of a standard form document, may have traversed some misconceptions not engaged in this case, contrary to *MB*.[51] Mr Olsen did not pursue that point particularly, so we put it to one side.

The prosecutor's closing address

[76] We do not consider the first reference to the counter-intuitive evidence by the prosecutor in closing infringed the principles in *DH* and *MB* materially. The passage concerned is replicated at [47] above. It arose in the context of the prosecutor dealing with two "Sunday night" misconceptions—i.e., what jurors might have thought immediately prior to the trial: first, as to the reality of intra-family sexual offending and secondly, as to delay in reporting such offending.

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50 *DH*, above n 46, at [55].
51 *MB*, above n 47, at [12(b)].

[77] Had the first passage not referenced the family members in the case, it could hardly have been objected to. It would have been better if it had been wholly abstract. But even so, Mr Olsen had to accept in oral argument that he would be "hard-pressed" to suggest this usage did not align with the purpose for which the evidence was adduced; rather his point was that prosecutors should not refer to that sort of evidence at all in closing—a proposition now rejected by this Court in *MB*.[52]

[78] The second reference to counter-intuitive evidence in the prosecutor's closing is set out at [49] above. We accept that it interweaves forensic trial analysis and the generic counter-intuitive evidence in an inappropriate way, drawing on the latter directly to support the former. The "agreed facts" should not have been referred to in that context and in that way, in case a juror reasoned that consistency with them was probative of truthfulness by the complainant. Had the two references to the agreed facts not been made, the passage would have been unobjectionable.

[79] The Court of Appeal reasoned that the references to agreed facts in the second passage were "not direct" and were "fleeting in nature".[53] We do not agree with the former point because of the risk just noted, but the latter must be correct.

The summing-up

[80] That brings us to the Judge's summing-up. The relevant passage is set out at [56] above. On the view we take of the evidence and closing address, the failure by the Judge to correct the two errors we identify above was not material. The majority accepts that the first paragraph was appropriate. The focus lies then on the second paragraph.

[81] We do not read the second paragraph as saying delay was "effectively … not relevant", as the majority does.[54] Rather, it warned the jurors that delay alone does not disprove truthfulness, referred them to the s 9 statement and told them that the credibility of the complainant has to be judged against all the evidence adduced. As we see it, that was legitimate provided the jury was reminded not to use some of

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52 At [12(g)].
53 CA judgment, above n 48, at [26].
54 Above at [59].

that evidence—the counter-intuitive evidence—diagnostically. In this respect we accept the remaining direction did not conform to the mandatory guidance in *DH*, and now to *MB*.[55]

Miscarriage?

[82] In our view, neither the inappropriate opening sentence in para 23 of the s 9 statement, the fleeting reference to the "agreed facts" in the prosecutor's closing nor the Judge's failure to give a fuller direction in summing up, individually or collectively, give rise to a real risk that the outcome of the trial was affected.

[83] The defence in fact made very little of the matters addressed in the s 9 statement, very properly not seeking to exploit misconception reasoning. Instead, the crux of the defence case, demonstrated clearly by defence counsel's cross-examination of the complainant and the closing address, was the deeply dysfunctional family environment the complainant was living in, along with the antagonism between his mother and the defendant. The defence case was that for whatever reason, but probably provoked by his mother, the complainant had invented the allegations on which the charges were founded. Improbability based on delay or continued cohabitation was not pressed, although cross-examination of the complainant elicited that he missed the presence of the defendant, who had moved out of the family home. Very little was made of that in closing. The counter-intuitive evidence served its purpose in steering the trial away from misconception reasoning, but in doing so ultimately assumed very little continued relevance.

[84] The paradox before us is that the relevance of the counter-intuitive evidence abated over the four days of the trial, yet what was said and done about it now forms the centrepiece of this appeal. Given the marginal ultimate relevance of the counter-intuitive evidence, we consider the errors were insufficiently substantial in the whole context of the trial realistically to alter the verdict.

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[55] *DH*, above n 46, at [30(e)]; and *MB*, above n 47, at [12(d)].

[85] For these reasons, we would dismiss the appeal.

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