NOTE: HIGH COURT ORDERS PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES J, W AND E PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA106/2020
[2020] NZCA 656

BETWEEN	JESSE SHANE KEMPSON Appellant
AND	THE QUEEN Respondent

Hearing: 6 August 2020

Court: Kós P, Cooper and Courtney JJ

Counsel: R S Reed QC and Y Y Wang for Appellant
B H Dickey, R M A McCoubrey and O S Klinkum for Respondent

Judgment: 18 December 2020 at 10 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

C Unless extended by the Supreme Court, the suppression orders in favour of the appellant lapse with this judgment.

REASONS OF THE COURT

(Given by Kós P)

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[1] A brief encounter; a date, with death its conclusion. A young woman, Grace Millane, died; a young man, the appellant, is now serving a life sentence for her murder. He accepts his actions caused her death. But he says he is not culpable of her murder.

[2] The exact cause of death we consider later in this judgment, but it is accepted Ms Millane was strangled during sexual intercourse with the appellant.[1] On appeal at least, the Crown does not suggest he set out to kill Ms Millane. Rather, it says he intended to cause her bodily injury by strangulation, for sexual effect, knew that that was likely to cause death and consciously ran that risk.[2]

[3] Adopting the view most favourable to the appellant, it may be taken that the jury convicted him on that basis. Moore J sentenced him to life imprisonment with a minimum period to be served of 17 years' imprisonment.[3]

[4] This is an appeal against both conviction and sentence. The primary ground of appeal against conviction is that the Judge should have directed that the Crown had to disprove consent (or an honest belief in it) to obtain a conviction under s 167(b) of the Crimes Act 1961. Other conviction appeal grounds relate to the admission of probability evidence and the Judge's directions on expert and propensity evidence. The sentence appeal concerns the minimum term imposed. It is said the Judge should not have found s 104(1) of the Sentencing Act 2002 applied (compelling a minimum term of 17 years), and that the minimum term was therefore manifestly excessive.

Summary of this judgment

[5] Before addressing the arguments in detail, we now provide a summary of the judgment as a whole.

[6] First, the Court holds that the Crown was not required to disprove consent (or an honest belief in it) as part of the s 167(b) (reckless murder) charge on which it may be presumed the appellant was convicted.[4] Consent is not available as a matter of law where there is an intent to cause injury known to be likely to cause death, that risk is run, and death ensues. It follows the Judge did not err in removing consent from the jury other than in relation to manslaughter.[5] The Court also finds no credible narrative of consent, or honest belief in consent, established on the evidence.

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1 The evidence relating to cause of death is addressed at [111]–[121] below.
2 Crimes Act 1961, s 167(b).
3 *R v K* [2020] NZHC 233 [Sentencing notes].
4 See [41]–[93] below.
5 *R v K* [2019] NZHC 3219 [Consent ruling].

[7] Secondly, we find the Judge's summing-up directed the jury appropriately on propensity evidence.[6] This concerned the evidence of three witnesses who gave evidence as to the appellant's interest and/or experience with erotic asphyxiation during sexual intercourse. Two had had sexual intercourse with the appellant in the weeks before he met Ms Millane. One of these, Ms J, had been terrified by the appellant's suffocation of her and thought she was going to die. A second, Ms M, had the opposite experience and considered the appellant behaved appropriately in restricting her breath, by consent, to enhance her pleasure. We do not consider the Judge was required to give what is known as a negative propensity direction in respect of Ms M's evidence, or that a failure to do so in the context of this trial gave rise to a risk of a miscarriage of justice. The jury would have had no difficulty weighing that evidence and, as we note, each party gained support from it: the Crown, in that the appellant was an experienced practitioner of erotic asphyxiation; the defence, in that he behaved entirely appropriately with Ms M.

[8] Thirdly, we find the Judge's summing-up also directed the jury appropriately on the pathology evidence.[7] Three experts were called in relation to this evidence, four potential mechanisms resulting in death were canvassed and the force and time required to effect each were explained and then tested in cross-examination. The summing-up provided a clear summary of the competing expert opinions on cause and time without offering detailed evaluation, analysis or endorsement, given no issue as to admissibility of the competing views had arisen. That was the proper course for the Judge to have taken.

[9] Fourthly, evidence of a short study of death arising from erotic asphyxiation in Poland was put before the jury.[8] We consider the study neither reliable nor relevant to a fact in issue. It ought not to have been put before the jury or have been used in cross-examination of the expert witnesses. No objection was taken to its introduction or use at trial. It would have been preferable if a clear direction had been given that it could not be used to deduce guilt on the basis of probabilistic reasoning. However, we also find that its admission and the absence of such a direction did not give rise to a

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6 See [94]–[109] below.
7 See [110]–[132] below.
8 See [133]–[152] below.

material risk of a miscarriage of justice. The proposition that death resulting from erotic asphyxiation is very rare was an accepted fact. The jury was not invited to use statistical probability reasoning to reach a finding of guilt, and it was extremely unlikely in context that the jury would have done so.

[10] Finally, as to sentence, we conclude the Judge was correct to find that s 104(1) of the Sentencing Act was engaged here.[9] That meant the appellant would be required to serve a minimum period of imprisonment of 17 years, unless that would be manifestly unjust. The provision was engaged in two respects. First, Ms Millane was particularly vulnerable, being intoxicated, in a strange apartment, naked, in the arms of a comparative stranger with whom she thought she had "clicked" (and could therefore trust), and with his hands about her throat.[10] Secondly, the Judge was correct in finding the murder of Ms Millane was committed with a high degree of callousness.[11] We refer in the judgment to the appellant's attitude to the likely struggles of Ms Millane (and certain lapsing into unconsciousness), his disregard for her condition when he went then to take a shower, his failure to call for assistance when appreciating her condition, and then searching on the internet for methods of body disposal, looking at pornography online, taking intimate photographic images of Ms Millane's naked body, looking again at pornography online, taking steps preparatory to disposing of the body, and going on another date while Ms Millane's body remained in his room. We conclude that this behaviour is indicative of a degree of wholly self-regarding wickedness throughout the incident and its aftermath, i.e. callousness, that calls for the punitive response provided for in s 104(1). Nor, in these circumstances, was the minimum term of 17 years manifestly unjust.

[11] Suppression orders were made in this Court and the High Court prohibiting publication of the appellant's identity because of other charges faced by him. Those charges have now been heard and determined, in Judge-alone trials. Unless extended by the Supreme Court, the suppression orders lapse with this judgment. [12]

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9 See [153]–[168] below.

10 Sentencing Act 2002, s 104(1)(g).

11 Section 104(1)(e).

12 *Kempson v R* [2019] NZCA 511 at [70]–[71] [Court of Appeal judgment]; *Kempson v R* [2019] NZHC 166 at [68]; and *R v Kempson* [2020] NZHC 2929, confirming that the orders would lapse with this judgment unless a further order was made by this Court. A last minute application to extend the suppression orders was denied yesterday afternoon: *Kempson v R* [2020] NZCA 671.

Background

[12] Ms Millane was 21 years of age, a young Englishwoman spending a postgraduate gap year travelling the world. She arrived in Auckland on 20 November 2018. On 30 November 2018, she matched with the appellant on Tinder. The following day, on Saturday 1 December 2018, the appellant messaged Ms Millane. They agreed to meet for a drink that evening. It was the eve of Ms Millane's 22nd birthday. The following events were reconstructed in evidence, from CCTV footage and bar receipts. Given the importance of context, we set them out in some detail.

[13] Ms Millane and the appellant met outside the SkyCity casino at 5.45 pm. They entered the SkyCity building and went up the escalators to Andy's Burger Bar on the first floor. The appellant purchased two cocktails at 5.49 pm. An hour later he purchased seven more cocktails and two shots of tequila. At 7.12 pm they left Andy's Burger Bar, walking out of SkyCity on to Federal St.

[14] They walked along Federal St, then crossed diagonally onto Victoria St West, entering the Mexican Café at 7.16 pm. At 8.27 pm, the appellant paid for two jugs of margarita and one of sangria, after which he and Ms Millane left the Mexican Café, crossed Albert St and walked north on Albert St towards Durham St West, holding hands. From there, they walked down Durham Lane, entering the Bluestone Room, a bar, at 8.30 pm. It was opposite the CityLife hotel where the appellant was then living. They purchased two bottles of beer and a cocktail at 8.33 pm. Later they purchased another bottle of beer, another cocktail and two shots of tequila. While inside the bar, they kissed several times.

[15] Over the course of the evening, Ms Millane sent several messages to a close friend from university who was living in Dubai at the time. Ms Millane said that she was on a date with someone who was a "manager at [an] oil company". This was followed by a message referring to "[c]ocktails all round", then another message saying that the appellant had said they were "getting smashed" as it was her birthday the following day. Later in the conversation, Ms Millane said "[h]e is coming to

[London] next year", "I click with him so well", and that she would tell her friend what had happened the next day. These were the last messages Ms Millane sent.

[16] The appellant and Ms Millane left the Bluestone Room at 9.39 pm, entering CityLife at 9.40 pm and taking the lift to the floor on which the appellant's apartment was located. For the next four hours the exact events become unclear. What is certain is that, either late in the evening of Saturday 1 December 2018 or early the following Sunday morning, the appellant killed Ms Millane in his apartment.

[17] At trial, the appellant accepted that he caused Ms Millane's death. He did not give evidence, as was his right. The jury saw his evidential police interviews. In the second of them, on 8 December 2018, he offered some explanation as to what occurred (while then, at least, denying he had caused Ms Millane's death). What follows is the appellant's account. Ms Millane cannot give her account. There is no other witness. The Crown says the appellant's account is entirely unreliable.

The appellant's account

[18] According to the appellant, while they were kissing and talking in the room, Ms Millane had raised the topic of bondage, choking and other practices,[13] expressing experience in, and enjoyment of, them.[14] This led to sexual intercourse, which initially was "just normal". But then, he said, Ms Millane asked him if they could get into bondage, started biting him and asked him to bite her. He said he did so, after stopping to check this was what she wanted. The appellant said that he was "new to all that sort of stuff. I'm used to having sex that is just sex. Um and at first I was uncomfortable, um but I-I, I liked it, and so I was open to the idea."[15] They continued having sex for a "little bit" and then laid down and talked for around half an hour to an hour.

[19] The appellant went on to say that at some point they started having sex again. During this she held him around his neck and pushed down, using him as leverage.

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13 We refer to such practices in the general sense as BDSM hereafter. This umbrella term includes bondage, domination, sadomasochism, sadism and masochism, as well as other sexual interests.

14 Evidence at trial established that Ms Millane occasionally engaged in these practices, and that she subscribed to two BDSM social network accounts.

15 This was, however, contrary to the evidence given at trial by three propensity witnesses that the appellant had an interest in and had practised erotic asphyxiation and domination in a sexual context. We set out this evidence at [95]–[104] below.

They swapped over, and started having more violent sex, ending up on the floor. He said, "she told me [to] hold her arms tighter, um and then she told me to hold her throat um and-and um go harder, push harder with my genitals, and, and then at that point um we'd finished".

[20] If this account is truthful, that episode caused Ms Millane's death.

Death, and denial

[21] It was unclear on the evidence at trial precisely what time Ms Millane died. However, it is accepted on appeal that Ms Millane died sometime before the appellant made various searches on his phone, beginning at 1.29 am.

[22] The appellant said that after intercourse he went to have a shower and fell asleep while doing so. When he awoke, he went back to bed. The room was dark. He said he assumed Ms Millane had left. He slept. It was, he said, only in the morning that he discovered her body on the floor, blood coming from her nose. He said he tried to move her to see if she was awake, but then panicked and did not know what to do. He dialled 111 but did not complete the call because he was "scared how bad it looked".

[23] It is accepted on appeal that some of the foregoing account, given to the police, was untrue. By 1.29 am Ms Millane was dead, and the appellant knew that. At that time he searched "Waitakere Ranges" on his phone. At 1.35 am, he searched "hotest [sic] fire". Over the next 10 minutes or so, he accessed various pornographic sites. Between 1.46 am and 1.49 am he took eight intimate photographs of Ms Millane's body. Between 2.08 am and 2.24 am he accessed further pornographic material. A four-hour gap then followed. Just after 6.00 am, the appellant used his phone to search "car hire [A]uckland". Then he searched "large bags near me". Shortly afterwards he searched "rigor mortis".

[24] The next part of the narrative is again available from CCTV footage and other digital sources. The appellant left CityLife just after 8 am that Sunday morning. He went into the Warehouse in the Atrium on Elliott (a shopping centre on Elliott St) at 8.07 am, where he purchased a suitcase, then returned to CityLife at 8.14 am.

At 8.32 am, he got in the lift to leave CityLife again and went to the Countdown Metro supermarket on Victoria St West. At the self-checkout he purchased bleach, gloves, antibacterial wipes and gum. He returned to CityLife at 8.40 am with those items. At 10.25 am he took a taxi to Apex Car Rentals by Victoria Park and hired a one-day rental car, returning to CityLife at 11.02 am. He left there again for an hour at 1.33 pm, and then again left at 2.53 pm.

[25] Later in the afternoon, at around 4 pm, the appellant went to Revelry bar on Ponsonby Rd, having arranged to go on a date with Ms E, a woman he had met on Tinder. Ms E gave evidence at trial that the appellant had made several comments about disposing bodies in the Waitākere Ranges and the risk of something going "wrong" during rough sex and ending up in jail. The appellant arrived back at CityLife at 5.42 pm.

[26] At 7.12 pm that Sunday evening, the appellant left CityLife and went to the Countdown supermarket on Quay St in the rental car. He looked at the Rug Doctor stand but left without making a purchase, returning to CityLife at 7.45 pm. The appellant left CityLife shortly afterwards, returning to the Quay St Countdown at 8.11 pm, where he hired a Rug Doctor. He arrived back at CityLife at 8.28 pm, then left again at 8.56 pm, returning the Rug Doctor to the Countdown at 9.13 pm. He returned to CityLife and entered the lift with a baggage trolley at 9.27 pm. At 9.30 pm he re-entered the lift with the trolley, carrying two suitcases and a sports bag. It appeared that he loaded the bags into the car at 9.32 pm. He returned the empty trolley at 9.33 pm, leaving this in the hotel lobby, before driving the rental car to the nearby Wilson carpark at 9.35 pm and returning to CityLife at 9.37 pm. The rental car remained in the carpark overnight.

[27] The following morning, Monday 3 December, the appellant left CityLife at 6.14 am, collecting the car from the carpark at about 6.20 am. At approximately 6.50 am, he arrived at the ITM carpark in Kumeu. He purchased a red shovel and some bolts which he paid for in cash. The appellant then buried Ms Millane's body in the Waitākere Ranges. At 9.30 am, he parked the car in the same Wilson carpark and entered CityLife barefooted and carrying a sports bag. At 9.52 am he left again carrying two bags, but was identified in the carpark with just one bag. He walked

down to Mint Drycleaners on Queen St with the bag at 9.58 am, dropping off several clothing items to be cleaned.

[28] At 10.20 am, the appellant arrived at the Warehouse store at the St Lukes shopping centre, purchasing a suitcase with cash. He then went to the nearby Washworld where he cleaned the rental car, removed a shoe from the boot of the car and left the shovel against the wall of the next bay at 10.39 am. He returned to CityLife at 11.20 am with two suitcases. He then left again at 11.27 am, going to the Mobil service station on Karangahape Rd to fill the rental car with petrol. At 12.21 pm he returned to CityLife, then left again at 3.14 pm with a sports bag. At 3.17 pm he returned to Mint Drycleaners, dropping off the sports bag which contained more clothing and bed sheets to be washed and collecting the items he had dropped off earlier in the morning. He returned to CityLife at 3.18 pm.

[29] The next day, Tuesday 4 December, the appellant collected the sports bag from Mint Drycleaners at about 2.55 pm. On Wednesday 5 December at 4.50 pm, he was observed taking items out of the sports bag and putting them in a rubbish bin at Albert Park. These items were not recovered.

[30] By this time, the police had begun a missing persons investigation in relation to Ms Millane. On Wednesday 5 December, Detective Constable Levinzon contacted the appellant on Facebook, having noticed that the appellant had commented "[b]eautiful, very radiant" on Ms Millane's profile picture at about 9.29 pm on the Saturday. DC Levinzon told him they were looking for Ms Millane and asked him to make contact. Later that evening, the police received login details for Ms Millane's Facebook account, at which point DC Levinzon read the messages between Ms Millane and her friend, described above at [15]. A priority was to find out who the person referred to in those messages was.

[31] The following morning, on Thursday 6 December, the appellant called DC Levinzon. He told her that he had been with Ms Millane on the Saturday evening, they had been at SkyCity at a bar, that he had come across her on Tinder and the last time he saw her was at 10 pm that night. DC Levinzon, whose shift had not yet started

for the day, passed on that information to a colleague at the Auckland Central police station.

[32] At 10.30 am, the appellant spoke to Detective Constables Han and Heimuli at the Crowne Plaza hotel on Albert St. During that conversation, the appellant said he had met with Ms Millane at Andy's Burger Bar from around 6 pm to 8 pm. They then left SkyCity and each walked down opposite sides of Victoria St West towards Queen St. When he turned left to head towards the Viaduct, he lost sight of her. He also said that there had been no further contact between the two of them after that night, and that Ms Millane must have "unmatched" him on Tinder. The police advised the appellant that they would need to take a statement from him, which he agreed to do after he finished work at 4 pm.

[33] However, that afternoon Detectives Jordan and Hames were conducting enquiries at the CityLife hotel to determine whether the appellant lived there and saw him outside. They approached him in a 2degrees store on the corner of Durham St West and Queen St at about 2.52 pm. The appellant agreed to go to the Auckland Central police station with the police officers. Detective Jordan's evidence was that she considered it essential to speak to the appellant at that stage of the investigation because he had provided a different address to DCs Han and Heimuli earlier that morning. The appellant was then interviewed by Detective Settle. At this point, the appellant maintained that he had left Ms Millane on the evening of December 1 at around 8 pm, denying any involvement in her disappearance. This first formal evidential interview was played to the jury. Following the interview, the appellant requested to speak to a lawyer, then exercised his right to make no further comment on the matter and was allowed to leave the station.

[34] On Saturday 8 December, Detective Settle went to speak to the appellant for a second time given the progression of the investigation. At around 2.43 pm, he found the appellant at the Attic Backpackers on Wellesley St. The appellant agreed to accompany Detective Settle to the Auckland Central police station. At the same time, an area on Scenic Drive in the Waitākere Ranges had been identified as an area of interest as a result of phone polling data obtained by the police. It was at this second

interview that the appellant gave the account described above at [18]–[19]. This second formal evidential interview was also played to the jury.

[35] During the interview, counsel for the appellant informed police that Ms Millane's body was buried in an area of bush near the Waitākere Dam. At the end of the interview, the appellant accompanied Detective Settle to that area in order to identify the specific location where Ms Millane's body was buried. The police located Ms Millane's body there the following day, Sunday 9 December 2018.

The trial

[36] The appellant's trial commenced on 4 November 2019. Much of the factual background was not in contention, and the defence accepted at trial that the appellant had caused Ms Millane's death. So, the key issue was whether the appellant had the requisite intent. The Crown contended that the appellant had either intentionally murdered Ms Millane pursuant to s 167(a) of the Crimes Act, or that he had recklessly murdered her pursuant to s 167(b), in either case by manual strangulation. The Crown case was, given the lack of evidence as to what actually occurred in the room, largely circumstantial. In particular, the Crown relied on propensity evidence, pathology evidence, the appellant's actions immediately after Ms Millane's death and the appellant's subsequent lies to the police to support its version of events.

[37] By contrast, the appellant's case was that this was a consensual sexual encounter involving (consensual) manual strangulation that had gone horribly wrong. This raised the possibility of a defence of consent. However, the trial Judge issued a ruling at the end of the defence case withdrawing consent as a defence to murder but finding it available as a defence to manslaughter.[16] This informed the construction of the jury question trail and the Judge's summing-up, and forms the basis of the first ground of appeal.[17] While consent was not available as a defence to murder, it was nevertheless open to the defence to contend (as they did) that the evidence did not establish beyond reasonable doubt that the appellant had the requisite intent for murder pursuant to either s 167(a) or (b).

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16 Consent ruling, above n 5.
17 See [41]–[93] below.

[38] Clearly, the jury rejected the appellant's version of events, returning a guilty verdict to the charge of murder on 22 November 2019. The jury asked a question shortly before the verdict was returned indicating that it was considering the reckless murder provision, and counsel for the appellant appears to have proceeded on the basis that this was in fact the provision under which the appellant was convicted. As the Judge recognised at sentencing, at the very least, the jury rejected the appellant's narrative of events and was satisfied that the appellant strangled Ms Millane, intending to cause her the sort of bodily injury likely to cause her death and was reckless as to whether she died or not.[18]

Issues

[39] We are called on to determine five issues in this appeal:

(a) Issue 1: Did the Crown have to disprove consent (or an honest belief in it) as part of the s 167(b) (reckless murder) charge?

(b) Issue 2: Did the Judge's summing-up fail to direct adequately on propensity evidence?

(c) Issue 3: Did the Judge's summing-up fail to direct adequately on the pathology evidence?

(d) Issue 4: Was inadmissible probability evidence before the jury?

(e) Issue 5: Was s 104 of the Sentencing Act engaged (and was the sentence imposed manifestly excessive)?

[40] If the answer to any of Issues 1–4 is affirmative, we will need to consider also whether the consequence is a miscarriage of justice. Issue 5 of course concerns the sentence appeal.

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[18] Sentencing notes, above n 3, at [49].

Issue 1: Did the Crown have to disprove consent (or an honest belief in it) as part of the s 167(b) (reckless murder) charge?

[41] The defence case was that this was a consensual sexual encounter, involving erotic asphyxiation by consensual manual strangulation, and that death was the result of tragic misadventure. For the appellant, Ms Reed QC submits that it was essential that the Crown disproved consent, or an honest belief in it, as an element of the s 167(b) (reckless murder) charge.[19]

[42] Relevantly, that section provides:

> **167 Murder defined**
>
> Culpable homicide is murder in each of the following cases:
>
> (a) if the offender means to cause the death of the person killed:
>
> (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
>
> …

And s 63 of the Crimes Act, which is of acute importance here, provides:

> **63 Consent to death**
>
> No one has a right to consent to the infliction of death upon himself or herself; and, if any person is killed, the fact that he or she gave any such consent shall not affect the criminal responsibility of any person who is a party to the killing.

We will return to that provision.

The ruling and summing-up

[43] As we noted earlier, at the end of the defence case the Judge issued a ruling withdrawing consent as a defence to murder but leaving it available as a defence to manslaughter.[20] That ruling informed the Judge's summing-up and the question trail he gave to the jury.

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19 Although the Crown also relied on intentional murder (s 167(a)), it is accepted that it is most likely that the jury convicted the appellant of reckless murder under s 167(b) given the way the Crown case was run and a question asked by the jury which suggests they had moved past s 167(a) on the Judge's question trail.

20 Consent ruling, above n 5.

[44] The ruling records the argument advanced by trial counsel.[21] Counsel argued that there was an evidential basis for the defence of consent. While defence counsel agreed with the Crown that consent could not provide a defence to murder, it was available to a charge of manslaughter, regardless of the appellant's level of intended harm. Whether or not the appellant intended or was reckless as to serious bodily injury, public policy required the defence to go to the jury.[22]

[45] In fact, by the ruling the Judge essentially agreed with that defence submission. He was satisfied that there was an evidential foundation (although tenuous) for the jury to be permitted to consider both whether Ms Millane consented to the appellant applying pressure to her neck,[23] and whether the appellant had an honest belief in consent (which was not necessarily removed by Ms Millane losing consciousness, requiring as it did a subjective belief, no matter how unreasonable, that Ms Millane consented to what the appellant was doing).[24]

[46] Turning to whether the defence was precluded by statute, both the Crown and defence agreed that s 63 of the Crimes Act prohibited consent from being a defence to murder. However, the Judge considered that, in light of indications from this Court in *R v Lee*[25] and other authorities, there was no principled basis why consent or honest belief in consent could not provide a defence to murder under s 167(b) provided there was a sufficient evidential basis and no public policy grounds for withdrawal. But this was "not such a case".[26]

[47] The Judge did not decide that point conclusively, as he concluded the defence should be withdrawn from the jury on public policy grounds. While appropriate to respect a young person's personal autonomy when it comes to their choice to undertake

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21 Who were neither Ms Reed QC nor Ms Wang.

22 Consent ruling, above n 5, at [17].

23 At [21] and [24], in circumstances where (i) while conscious, Ms Millane (at least initially) consented (impliedly or otherwise) to the appellant continuing to apply pressure to her neck after she lost consciousness; (ii) death followed so quickly after unconsciousness that there was insufficient opportunity to cease applying pressure to her neck; or (iii) the appellant ceased applying pressure to Ms Millane's death before she lost consciousness but had already set in train the irreversible sequence of events leading to her death.

24 At [26]–[27], noting that the appellant was highly intoxicated.

25 *R v Lee* [2006] 3 NZLR 42 (CA) at [289].

26 Consent ruling, above n 5, at [41].

sexual activity with a risk of harm, that was not so where their partner knowingly risks their death (as is the case if the mental elements for reckless murder are made out).[27]

[48] The Judge reiterated that consent could not be a defence to murder in his summing-up:

> [95] If you find [the appellant] guilty of murder you go no further. You stop your enquiry there.
>
> [96] Only if you do not, do you go on to consider the manslaughter or culpable homicide level. And it is only at that point that the issue of consent comes in. Consent is not a defence to murder.

[49] The Judge structured the question trail in such a way that the jury was presented with the s 167(b) enquiry before addressing consent. Thus, if they were satisfied that the appellant murdered Ms Millane (with either murderous intent) they would not be required to consider whether she consented or whether he honestly believed she consented. The question trail is set out below, at [53].

[50] On the subject of the recklessness element of s 167(b), the Judge directed the jury:[28]

> [121] This question emphasises the requirement that [the appellant] must have appreciated that Ms Millane's death was a likely consequence (in other words result) of his application of pressure to her neck which could cause or lead to her death but, nevertheless, carried on. In other words, [the appellant] must have appreciated that Ms Millane's death was a likely consequence; in other words could well happen, of applying pressure to her neck but was willing to run that risk. The essential difference between the first form of murderous intent under s 167(a) and the second form of murderous intent in s 167(b) reflected in the three questions under Step 3 is that the first is concerned with deliberate, intentional killing whereas the second is concerned with injuring someone while deliberately taking the risk of killing them.

[51] During their deliberations the jury asked a question about the timing of the elements of reckless murder:

> We would like clarification for question Step 3 a, b, c
>
> Does "when he applied pressure" refer to when he started to apply pressure at the beginning, or can it mean at any time during the application of the pressure?

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27 At [41]–[50].

28 Step 3(c), to which the Judge was referring, is set out below at [53].

[52] The Judge received submissions from counsel on this point, and ultimately directed the jury in the following terms:

> I have discussed your question with counsel. We are agreed, the answer to that is, when he applied pressure is not limited to the beginning. It can be at any time during the application of force leading to death.

The Judge's question trail

[53] The Judge provided the jurors with a question trail to assist their deliberations, as is now customary in New Zealand criminal trials. After reminding jurors of the burden and standard of proof lying on the Crown, it read:

> **Step 1:** **Culpable homicide:**
>
> *Note: the defence does not dispute that [the appellant] applied pressure to Ms Millane's neck and that this caused her death.*
>
> *Are you sure that [the appellant] caused Ms Millane's death by applying pressure to her neck?*
>
> If **no**, find [the appellant] not guilty of both murder and manslaughter. You do not need to go any further.
>
> If **yes**, go to murderous intent and Step 2 (and 3 if necessary).
>
> **Murderous intent**
>
> *Note:* *The Crown may prove murderous intent in one of two ways: either under section 167(a) or s 167(b) of the Crimes Act 1961.*
>
> *You do not have to be unanimous on which form of murderous intent applies provided you all agree that one of the two alternative forms applies.*
>
> **Step 2:** **Murderous intent: s 167(a) Crimes Act 1961**
>
> *Are you sure that when he applied pressure to Ms Millane's neck, [the appellant] intended to kill Ms Millane?*
>
> If **no**, go to Step 3.
>
> If **yes**, [the appellant] is guilty of murder. You do not need to go any further.

Step 3: **Murderous Intent: s 167(b) Crimes Act 1961**

(a) *Are you sure that when he applied pressure to Ms Millane's neck, [the appellant] intended to cause Ms Millane bodily injury that was more than minor in nature?*

If **no**, go to consent and Step 4.

If **yes**, go to Step 3(b).

(b) *Are you sure that when he applied pressure to Ms Millane's neck [the appellant] knew (that is, consciously appreciated) that there was a real risk his actions could cause Ms Millane's death (in other words, that Ms Millane could well die from the pressure to her neck)?*

If **no**, go to consent and Step 4.

If **yes**, go to Step 3(c).

(c) *Are you sure that, when he applied pressure to Ms Millane's neck, [the appellant] consciously ran the risk Ms Millane would die as a result of his actions (in other words, knowing there was a real risk of death he nevertheless carried on applying pressure to Ms Millane's neck)?*

If **no**, go to consent and Step 4.

If **yes**, [the appellant] is guilty of murder.

Consent

Note: *"Consent" means true consent freely given by a person who is in a position to make a rational decision.*

Consent may be express or implied.

A person does not consent if they are so drunk that they cannot consent. However, consent given by someone who is disinhibited by alcohol is still consent.

Consent may be revoked at any time.

A person cannot consent if they are unconscious for any reason whatsoever.

A person may consent to any risks associated with an activity. If a person understands the scope of the activity they are consenting to, they will be assumed to consent to any associated risks.

If a person consents to an activity and what is done goes ***beyond*** *what they consented to, they no longer consent.*

Step 4: **Consent:**

Are you sure that Ms Millane did not consent to [the appellant] applying pressure to her neck in the way you find that he did (that is, with the force and for the length of time he did)?

If **no**, find [the appellant] not guilty of both murder and manslaughter. You do not need to go any further.

If **yes**, go to consider honest belief in consent and Step 5.

Honest belief in consent

Note: *An honest belief is a belief that is genuinely held. It does not matter if it is mistaken or unreasonable.*

Step 5: **Honest belief in consent**

Are you sure that [the appellant] did not honestly believe that Ms Millane consented to him applying pressure to her neck in the way you find that he did (that is, with the force and for the length of time he did)?

If **no**, [the appellant] is not guilty of both murder and manslaughter.

If **yes**, [the appellant] is guilty of manslaughter.

[54] As noted earlier, it is assumed the jurors used the question trail and completed their deliberations, with a verdict of guilty of murder, at Step 3.

Submissions

[55] Ms Reed submits that the Judge erred by failing to put the defence of consent before the jury prior to their consideration of the elements of reckless murder. As Ms Reed puts it, consent would direct the jury as to the appropriate time and circumstances for the consideration of recklessness. If a jury decides (as this one appeared to) that the alleged assault commenced lawfully (with consent) but that the consent was withdrawn and the defendant appreciated it had been withdrawn (honest belief in consent then being absent), then the jury should consider both whether the defendant: (1) meant to cause a bodily injury which was known to the defendant to be likely to cause death, and (2) was reckless as to whether death ensued — at that moment, or between that moment and death, when consent was withdrawn and honest belief dissipated.

[56] A risk of miscarriage arose if the jury did not have the opportunity to consider consent, the bounds of consent, withdrawal of consent and the appellant's honest belief in consent prior to recklessness. The jury may have incorrectly found recklessness because: (1) they may not have appreciated that whether the appellant was reckless cannot be influenced by the fact of death; (2) they were not presented with the alternative that the appellant maintained an honest belief in consent, not turning his mind to the danger of the ongoing consensual act; (3) they may have inflated the risk of death the appellant appreciated at the time the act became unlawful; and (4) this meant the jury did not focus on the evidence of how long Ms Millane might have been unconscious before she died — if the period was short or instantaneous, the appellant might not have formed reckless intent (or even noticed she lapsed into unconsciousness).

[57] By removing consent entirely from the jury's consideration of reckless murder, it permitted a predetermination that there was an unlawful act if recklessness was found. It "removed the unlawful nature of the assault as an essential element of the offence and concertinaed the elements of reckless murder down to intention to inflict bodily injury likely to cause death and recklessness".

[58] The appellant's defence was not that Ms Millane consented to die (and nor could it have been), but that she consented to the act of the appellant placing pressure on her neck. The removal of consent from the jury's consideration effectively declared the pressure applied to Ms Millane's neck to be unlawful from its initial application (in other words, that the answer to the first question in the question trail, "[a]re you sure that [the appellant] caused Ms Millane's death by applying pressure to her neck", was "yes"), in circumstances where consent was clearly in issue.

[59] To accord with this Court's decision in *R v Lee* and the conditional removal of consent in the context of recklessness if found, Ms Reed submits that the question trail ought to have reflected that:[29]

(a) The assault and consent to the assault needed to be the subject of directions, including: (1) whether Ms Millane gave her consent to

[29] *R v Lee*, above n 25.

the appellant applying pressure on her neck, (2) whether the pressure the appellant applied to her neck exceeded the bounds of her consent, (3) whether her consent was withdrawn by her resistance or unconsciousness, and (4) whether the Crown had excluded the appellant's honest belief in consent persisting.

(b) Whether the act was inherently dangerous needed to be addressed as an objective assessment; before considering intent to cause bodily harm and whether recklessness would remove consent.

[60] Had the question trail guided the jury to determine the unlawfulness of the act in this way, consent would nonetheless be removed by a finding of recklessness. However, recklessness would be found after a clear concentration on when the act would have otherwise become unlawful and what was in the appellant's mind at that point (the honest belief assessment). Alternatively, if the jury found that the act was lawful and there was no recklessness, it would lead directly to the verdict on manslaughter. Because the question trail was not constructed in this way, recklessness was determined in a factual vacuum without considering the element of consent, thereby leading to a miscarriage of justice.

[61] For the Crown, Mr Dickey submits that the Judge's ruling accorded with the defence argument that preceded it,[30] and was correct as a matter of law, save in one respect. That was that it was unnecessary for the Judge to withdraw the defence on public policy grounds. As a matter of law, a defence of consent is simply unavailable to murder charged under s 167(b). Its withdrawal does not enter the equation.

Analysis

[62] The appellant's argument fails as a matter both of law and fact.

[63] Generally speaking, consent (including an honest belief in consent) may offer a complete defence, justification or excuse for a defendant's actions irrespective of the existence of the required physical or mental elements. Alternatively, it may be relevant

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30 See [44] above.

to one of the elements of the offence — for instance, where unlawful conduct is required, consent may render lawful an act which would otherwise be unlawful. Consent must be left to the jury if there is an evidential basis for it, unless it is precluded by statute,[31] or the judge withdraws the defence on public policy grounds.[32] But in our view it has no place in a s 167(b) charge of murder, as defence counsel had correctly acknowledged before the trial ruling was made. That is the consequence of s 63, and of a series of authorities to which we now turn.

[64] The history and policy underlying the enactment of s 63 supports the exclusion of consent in the context of a s 167(b) charge. Section 63 derives from the common law and Sir James Fitzjames Stephen's proposed codification in the late nineteenth century.[33] The common law took the position that there was no right to consent to one's own death. In part that drew on Christian precepts prohibiting suicide (and assisting suicide), a debate which continues to this day. As the Court of Criminal Appeal noted in *R v Donovan*, the common law once showed "remarkable leniency" towards crimes of personal violence, so that consent to bodily injury short of maiming was permitted.[34] In *R v Bradshaw* in 1878 a footballer died after being struck in the stomach during a game. Relevantly for this appeal, Bramwell LJ instructed the jury that if the accused intended to cause serious hurt or knew he might do so by his act, and was indifferent or reckless about that, consent would not answer the charge and the act would remain unlawful.[35]

[65] In 1877, Stephen published his celebrated *A Digest of the Criminal Law*, to demonstrate the form that a complete codification of the criminal law might take. Article 228 provided:[36]

> No one has a right to consent to the infliction upon himself of death, *or of an injury likely to cause death*, in any case (other than those mentioned in

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31 Crimes Act, s 20(1); and *R v Lee*, above n 25, at [311].

32 *R v Lee*, above n 25, at [317].

33 James Fitzjames Stephen *A Digest of the Criminal Law (Crimes and Punishments)* (5th ed, MacMillan and Co, London, 1894). See also *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 at [90]–[91].

34 *R v Donovan* [1934] 2 KB 498 (Crim App) at 507, citing Stephen, above n 33.

35 *R v Bradshaw* (1878) 14 Cox CC 83 (QB) at 84–85. See also *R v Brown* [1994] 1 AC 212 (HL) at 261 per Lord Mustill, giving the example of consensual mercy-killing by a doctor as murder.

36 Stephen, above n 33, at 165–166 (emphasis added), citing *R v Barronet* (1852) Dears 51, 169 ER 633 (QB) as support for this proposition in the context of duelling. Stephen also noted at 166, n 1 "[t]he law has never, I believe, been disputed."

> Article 225 [relating to surgical purposes]), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public …

Stephen did, however, note in art 230 that "[i]t [was] uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another".[37] Stephen was not aware of any authority on this point but noted that the rationale on which prize fights were illegal might include such a case.[38]

[66] The success of Stephen's *Digest* led him to be instructed to produce a draft penal code, as well as a code of criminal procedure. The draft penal code was introduced into the House of Commons as the Criminal Code (Indictable Offences) Bill in 1878. Clause 125 provided "[i]f any person inflicts death upon another person by his consent he commits the same offence as if such consent had not been given". The Bill was referred to a Royal Commission comprising three judges and Stephen himself.[39] The Code prepared by the Commission contained a similar section, s 69, which provided:[40]

> No one has a right to consent to the infliction of death upon himself ; and if such consent is given, it shall have no effect upon the criminal responsibility of any such person by whom such death may be caused.

[67] The Commission's report includes detailed discussion of the draft code, but there is no commentary on s 69 specifically, or any relevant provisions. The resulting bill, the Criminal Code Bill, had its first two readings in the House of Commons, but ultimately never received a third reading, and the provision regarding consent to death was not discussed explicitly during the Bill's passage through the House of Commons.

[68] Consent in England and Wales remains governed by the common law, as Lord Mustill noted in *Airedale NHS Trust v Bland*:[41]

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37 At 166.

38 At 166–167, n 4.

39 AH Manchester "Simplifying the Sources of the Law: An Essay in Law Reform" (1973) 2 Anglo-Am LR 527 at 532.

40 Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (C 2345, 1879) at 75–76.

41 *Airedale NHS Trust v Bland* [1993] AC 789 (HL) at 892. See also *Seales v Attorney-General*, above n 33, at [94].

> It has been established for centuries that consent to the deliberate infliction of death is no defence to a charge of murder. Cases where the victim has urged the defendant to kill him and the defendant has complied are likely to be rare, but the proposition is established beyond doubt by the law on duelling, where even if the deceased was the challenger his consent to the risk of being deliberately killed by his opponent does not alter the case.

However, the Domestic Abuse Bill (UK), which has passed through the House of Commons and presently awaits its second reading before the House of Lords, provides that "[c]onsent to serious harm for sexual gratification" is not a defence where serious harm (grievous bodily harm, wounding and actual bodily harm) is inflicted.[42]

[69] The Criminal Code Bill and the Commission's report formed the basis for the first codification of the criminal law in New Zealand, the Criminal Code Act 1893. Section 71 of that Act provided:[43]

> No one has a right to consent to the infliction of death upon himself ; and, if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

Section 87 of the Crimes Act 1908 was in the same terms, and as can be seen, s 63 is in materially identical terms: see [42] above. Neither the provisions themselves nor the modest drafting changes to them elicited any observations by Parliament, it seems.

[70] This Court has considered the issue of consent in relation to crimes of violence on a number of occasions, most particularly in *R v Lee* (manslaughter), *Barker v R* (injuring and wounding, both with intent to injure) and *S v R* (wounding with intent to injure).[44] It will suffice to focus on the first and third of these decisions.

[71] *R v Lee* is a manslaughter case. The appellant, a probationary minister in a small Pentecostal church, was convicted of the manslaughter of a woman who died while he was performing an exorcism on her. The primary ground of Mr Lee's appeal against conviction was the removal from the jury of the issue of consent.

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42 Domestic Abuse Bill 2019-21 (UK), cl 65.

43 This provision was an exact replica of cl 69 of the draft Criminal Code appended to the report of the Statutes Revision Commission on the Criminal Code 10 years earlier: Joint Statutes Revision Committee *Report on the Criminal Code* (7 August 1883), cl 69.

44 *R v Lee*, above n 25; *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235; and *S v R* [2017] NZCA 83, (2017) 28 CRNZ 422.

The Full Court engaged in an extensive review of the statutory and common law history of consent, both in New Zealand and in overseas jurisdictions, with particular focus on the English authorities, including the leading (but controversial) decision of the House of Lords in *R v Brown*.[45]

[72] This Court concluded that, in New Zealand, s 63 precludes a defence of consent to the intentional infliction of death. That clearly meant murder as defined in s 167(a), and it "probably" included murder under s 167(b), (c) and (d).[46] The preclusion in s 63 did not however extend to culpable homicide caused by an assault where the common law regards consent as rendering that assault lawful.[47]

[73] Applying an intention-based, rather than results-based, test, this Court held that consent is a complete defence to any charge of assault where injury is not intended and there is no reckless disregard for the safety of others.[48] Consent is also a defence for all levels of intentional infliction of harm, *short of death*, unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and the high value placed by our legal system on personal autonomy.[49]

[74] More relevant to a s 167(b) context, however, is this Court's analysis of offending where grievous bodily harm is intended (or a perpetrator acts with reckless disregard for the safety of others). That, of course, is a step behind the murderous intent required by s 167(b). Of that it was said:

> [301] In cases where grievous bodily harm is intended, however, there may be policy reasons for criminalising such conduct despite consent, even on the test we propose. Excluding consent for the intentional infliction of grievous bodily harm can be justified on a similar basis to the justification for the common law rule as to maim — that is, that the persons on whom grievous bodily harm is inflicted may become a charge on society. ... Finally, as people, absent mental impairment or illness or duress, do not generally consent to the infliction of harm of such magnitude, there will also always be concerns about the reality of any supposed consent and whether it is truly voluntary … There may similarly be questions as to the rationality of any belief in consent.
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> (citations omitted)

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45 *R v Brown*, above n 35, a case concerning sado-masochistic practices between consenting male adults.

46 *R v Lee*, above n 25, at [289] and [312].

47 At [165] and [289].

48 At [313].

49 At [300].

[75] It followed that a wider range of public policy factors may require the Judge to withdraw the defence from the jury where intentional infliction of serious harm is involved. These include weighing the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.[50] But as the Supreme Court said later, in *Ah-Chong v R*, "[w]here grievous bodily harm is intended, it will be rare for a court to accept that consent is available as a defence".[51] It may well be thought that if the availability of the defence is *rare* where *grievous bodily harm* is intended, the prospects of its availability will (and should) be vanishingly thin where an injury likely to cause death is intended, and death then ensues. We will return to this and explain why that must be so.[52]

[76] In terms of how the test is to be applied in a context of consent to activity likely to cause serious injury — in the more limited class of case where the defence of consent remains available — a judge must determine whether public policy requires the defence to be withdrawn as a preliminary matter, after full argument and having heard any necessary evidence. Where this determination rests on factual findings to be made by the jury — for instance, whether the Crown has proved that there was intent to inflict grievous bodily harm — the defence will be conditionally withdrawn and the jury must be instructed accordingly.[53] As this Court went on to observe:[54]

> … it is very important in these cases for the jury to assess exactly what was consented to. Consent will only be operative if the impugned acts come within the scope of the activity consented to. This will, in most cases, limit the ambit of the defence to minor harm and reasonable risks as people are unlikely to consent to the infliction of serious harm or to unreasonable risks. Consent is only a defence if what was done does not exceed what was consented to or what a perpetrator honestly believed was consented to. It will thus be necessary to identify either the exact level of injury the victim consented to have perpetrated on him or her or, more commonly, the level of risk of injury consented to. As pointed out by Lord Mustill [in *R v Brown*], however, in many instances there will have been no express consent to a level of risk. Consent must be implied from the undertaking of the activity itself …

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50 At [316].

51 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [50(e)]. The full passage is set out below at [78].

52 See [82]–[85] below.

53 *R v Lee*, above n 25, at [307].

54 At [308].

> The scope of any implied consent will be determined by reference to largely objective criteria …

If the defence is left to the jury, the jury must decide whether the Crown has proved both lack of consent (either explicit or implied) and lack of honest belief in consent or whether the Crown has proved that what happened does not come within the scope of any consent and that the perpetrator did not honestly believe that it did.[55]

[77] Applying these principles to the facts of *R v Lee*, the Court considered there was a strong evidential basis for consent to the assault that constituted the exorcism, at least initially. The more contentious question was whether consent was withdrawn during the exorcism. There was also an evidential basis for Mr Lee to have had an honest belief in consent, even if there was a lack of actual consent. The Court therefore considered that consent was available as a matter of law, subject to a possible exclusion on public policy grounds if Mr Lee was reckless or intended to cause the victim grievous bodily harm, and there was an evidential foundation for the defence to be left with the jury. The failure to do so in that trial was an error of law.[56]

[78] It may be observed that in 2015, in *Ah-Chong v R*, the Supreme Court summarised the principles in *R v Lee* — with apparent approval — in these terms:[57]

> [50] The circumstances in which consent can be a defence of a charge of assault were considered in some detail by the Full Court of the Court of Appeal in *R v Lee.* In that case, the Court held so far as the common law of New Zealand was concerned:
>
> (a) The common law position in relation to consent is preserved by s 20 of the Crimes Act, except to the extent that consent is dealt with specifically in particular statutory provisions.
>
> (b) Where consent is available as a defence, an honest but mistaken belief by the perpetrator in consent will also provide a defence. The mistaken belief need not be reasonable.
>
> (c) Consent can be a defence to an assault where no serious injury is intended and caused except in the case of fighting.
>
> (d) In relation to intentional infliction of harm that is greater than "mere bodily harm", consent may be a defence unless:

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55 At [318].
56 At [338]–[344].
57 *Ah-Chong v R*, above n 51.

(i) there are good public policy reasons to forbid it; and

(ii) those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy.

(e) Where grievous bodily harm is intended, it will be rare for a court to accept that consent is available as a defence. It will be different where an activity (a contact sport, for example) involves the *risk* of serious injury. In such cases, a court is more likely to accept that consent is available, ie, that participants consent to run the risk of serious injury.

The important feature of this description for present purposes is that public policy considerations are relevant to the courts' determination of the scope of the consent defence in the context of assault.

(footnotes omitted)

[79] In *S v R* this Court was concerned with a charge of wounding with intent to injure.[58] The case involved an abusive relationship, the appellant being 38 years of age, and the complainant a runaway aged 17, who was prone to depression and episodes of self-harm. The appellant had a daughter aged 6. He claimed the complainant confessed to an incident of brief molestation of that child. (At trial the complainant denied having done so, but admitted the confession, saying it was the product of duress by the appellant.) The appellant wanted the complainant to stay with him, but said she would have to leave "unless they could work out some way in which she could pay for what she had done".[59] He brought a brick indoors, and placed the complainant's right index finger on it. He then hit it with a hammer, with the intent of breaking it — an outcome which his act achieved. The complainant required surgery and was hospitalised. Further assaults followed upon her return from hospital, including an attempt to extract her upper front teeth, causing three to be broken or chipped.

[80] Applying the principles laid down in *R v Lee*, the trial Judge, Brewer J, withdrew the defence of consent advanced by the appellant. He said:[60]

… applying *Lee* as summarised by the Supreme Court in [*Ah-Chong v R*], the common law of New Zealand does not permit consent to be used as a

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58 *S v R*, above n 44. There was also a charge of disfiguring with intent to injure and a charge of kidnapping.

59 At [8].

60 *R v S* [2016] NZHC 1185 at [25].

> defence to the intentional infliction of serious harm to a domestic partner where the purpose of the infliction of serious harm is to punish the consenting partner and where the consenting partner is particularly vulnerable by age, financial reliance, psychological problems and gender.

[81] This Court upheld that ruling on appeal. The heart of the appeal was an argument that the defence should not be withdrawn short of an intent to cause grievous bodily harm, the appellant not having been so charged. That argument was rejected, applying *R v Lee* and *Ah-Chong v R*. *R v Lee* did not create a sharp distinction between intent to cause grievous bodily harm and intent to cause other forms of harm.[61] A sliding scale existed, "with the result that the more serious the level of intended harm, the more likely it is that public policy considerations will exclude consent".[62]

[82] On the facts of that case, the harm both intended and inflicted lay "at the serious end of the spectrum".[63] The intended level of harm there was patent on the appellant's admissions, and the defence did not need to be put provisionally. It did not need to be put at all, because the Judge was right to withdraw the defence altogether for public policy reasons: the complainant was vulnerable and dependent on the appellant, having nowhere else to go. Her submission to the violence was tantamount to acting under duress; it could not properly be described as an exercise of personal choice or autonomy.[64] There was no social utility benefit to the complainant; "it [was] a pure case of serious violence".[65]

[83] In our view this Court was right to say in *R v Lee* that s 63 "probably" precludes a defence of consent to a charge of murder under s 167(b), as well as under s 167(a). This Court qualified its opinion in that case because the issue did not arise squarely before it. In this appeal it does.

[84] We consider that, as a matter of both precedent and policy, consent falls away altogether if murderous intent exists. That is so whether the charge proceeds via s 167(a) (means to cause the death of the person killed) or s 167(b) (means to cause to

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61 *S v R*, above n 44, at [41].
62 At [43].
63 At [45].
64 At [46] and [48].
65 At [47].

the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not). This can be reasoned in a number of different ways.

[85] First, to hold otherwise would offend s 63 directly, and the policy underlying it. That provision (and its predecessors) codified the common law as at 1893. That common law did not recognise a defence of consent as available where that consent (to bodily injury) was combined with an intent to kill (or cause an injury known likely to kill) and death then ensued.[66] Here murderous intent trumps all: if a dangerous act initially attracts consent, but the other actor forms murderous intent (i.e. means to cause bodily injury known to the offender to be likely to cause death *and* is reckless whether death ensues or not), it revokes as a matter of law whatever consent has preceded it. Thus, in the paradigm case of a prize fight, consent may well be available even where grievous bodily harm is intended, subject to considerations of public policy (which may be affected by whether rules are applied and a referee is in charge).[67] But if matters get out of hand, and one pugilist forms the intent requisite to s 167(b) and then inflicts an injury that proves fatal, the preceding consent given will assist him not a bit. Section 63, drawing on Stephen's drafting, codified these principles. There is no indication in the parliamentary record of intent to depart from Stephen's analysis. The omission of the words in Stephen's art 228 "or of an injury likely to cause death" is not material, as *R v Lee* in effect holds.

[86] Secondly, more proximate in time *R v Lee* and *Ah-Chong v R* conclude that it will be rare for the defence of consent to be available where grievous bodily harm is intended. In our view the law preceding and following the enactment of s 63 is clear that the defence is not available where intent to cause an act known to be likely to cause death exists and death then ensues. By definition in a s 167(b) case, the account given at trial is likely to be one-sided. Unlike in *S v R*, the victim is not there to give their account of what has occurred. Ms Millane may indeed have consented to some degree of asphyxiation. But in the intimate circumstances that occurred, involving the reposal of trust in a relative stranger in a private room and away from sight or

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66 *R v Bradshaw*, above n 35. See also discussion at [64]–[65] above.

67 At 85. See also Paul J Farrugia "The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law" (1997) 8 Auckland U L Rev 472 at 475–476; and K L Koh "Doctrine of Consent in Criminal Law" (1967) 9 Malaya L Rev 181 at 187–188.

assistance, the formation of murderous intent — even in the marginally reduced s 167(b) degree — out of necessity negates consent. To hold otherwise is inconsistent with the limits placed by s 63, and it is to invite the very argument made here which is bad as a matter of public policy and which has seen legislative intervention in the United Kingdom. There the reform noted at [68] above — that consent to serious harm for sexual gratification is not a defence where serious harm (grievous bodily harm, wounding and actual bodily harm) is inflicted — was introduced to the Domestic Abuse Bill at the third reading stage in the House of Commons. One of the Home Office ministers, Victoria Atkins MP, explained:[68]

> We have been clear that there is no such defence to serious harm that results from rough sex, but there is a perception that such a defence exists and that it is being used by men — it is mostly men in these types of cases — to avoid convictions for serious offences or to receive a reduction in any sentence when they are convicted. As my right hon friend the Lord Chancellor indicated on Second Reading, this area of law is extremely complex. It is therefore important that anything that is placed in the Bill does not have unintended consequences. In acting with the best of intentions, we do not want to inadvertently create loopholes or uncertainties in the law that can then be exploited by those who perpetrate such crimes.

[87] Thirdly, while denial of effect to consent in a matter as personal as sexual relations may seem paternalistic or moralistic, it is in fact an orthodox, contemporary expression of the absolute premium the law places on the sanctity of life. That principle is eroded with only the greatest of care, as the recent debates in this country over assisted dying for terminally ill patients demonstrates. There, reform was effected only by a combination of legislation[69] and plebiscite, involving intense consultation, debate, amendment and a series of detailed layers of legislative protection. In contrast to what is advanced here for the appellant, it could never have been sufficient to erode the principle of sanctity of life for a doctor, easing the passing of a terminally ill patient, to say, "they asked me to do it".[70]

[88] Fourthly, it may also be observed that the sanctity of life is not the only public policy consideration engaged. Dangerous acts potentially involving the termination of life engage other public interests: those who survive but are grievously injured may

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68 (6 July 2020) 678 GBPD HC 703.

69 End of Life Choice Act 2019.

70 See, for example, *Seales v Attorney-General*, above n 33, at [96]–[99].

become a charge on the state. Furthermore, but particularly when death ensues, there are complex questions of criminal law involved in the aftermath; the criminal justice and corrections systems are then taxed by such cases. Personal autonomy is not the only interest engaged, even in matters concerning sexual relations.

[89] Fifthly, it follows therefore that we do not agree with the Judge that consent (including an honest belief therein) may in principle provide a defence to murder under s 167(b) (assuming sufficient evidential basis and no public policy grounds for withdrawal).[71] The Judge's reasoning proceeded from what we consider a false premise: that in the prize fight example given earlier, it would be perverse to find a pugilist who caused death guilty of murder if he had the requisite intent and appreciation of the likely fatal consequence. We see no such incongruity. In an ordinary boxing match, an informed contestant will know that death is a possibility, but of low likelihood (albeit greater than in rugby or other more civilised contact sports). Continuing the match under the Queensberry Rules is not likely to cause death. But it may be otherwise if one contestant is very grievously injured and the other continues to pound him, appreciating now that further injury is likely to cause death *and* being reckless whether that ensues or not. Differing from the Judge, and agreeing with Mr Dickey's submission, we find that the murderous intent required for s 167(b) excludes the availability of consent as a defence. Nor is it an element the Crown was obliged to negative. It follows that the question trail posed by the Judge to the jury was entirely correct.

[90] Had the defence been available, contrary to the analysis above, then we would have agreed with the Judge that the public policy considerations we have traversed *would* have required removal of the defence in this case. We have found however that, as a matter of law, it was not available. It is unnecessary to examine this theoretical possibility further, here.

[91] Finally, the appellant's argument fails in any case as a matter of *fact*. There are two aspects to this. The first is that a credible narrative of consent or honest belief in consent is not established on the evidence. The Judge found there was only a thin

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[71] Consent ruling, above n 5, at [40]–[41]. See also [44]–[47] above.

evidential basis for that narrative. Apart from contextual evidence suggesting an interest by Ms Millane generally in BDSM practices, the only evidence in support of the giving of consent to strangulation came from the appellant's own accounts of events in his evidential interviews. Those accounts were replete with falsehoods. But in the second of those interviews is to be found the only evidential support for consent. It is the appellant's account that we have set out already at [19]. That is, "she told me [to] hold her arms tighter, um and then she told me to hold her throat um and–and um go harder, push harder with my genitals, and, and then at that point um we'd finished". As Mr Dickey puts it, the appellant's submission on consent "[stems] from this one sentence in [his] second police interview to holding Ms Millane's throat at her request". But, as Mr Dickey also observes, on that account Ms Millane had told the appellant to push harder with his genitals — not grasp her throat more tightly.

[92] The second factual aspect is that, as Mr Dickey submits, if the jury had considered the appellant did not intend to kill or inflict life threatening harm upon Ms Millane, but was only acting to fulfil her wishes for sexual gratification, they would not have found murderous intent, because neither of the bases for murderous intent would have been made out. But if he initiated the activity with a sexual gratification motive in mind, and then formed one or other of the murderous intents (as the jury must have found), he was rightly convicted of murder. Since Ms Millane died as a result of the pressure he deliberately applied to her neck he committed a homicide, and the jury specifically found he had the necessary intent to constitute murder.

[93] For these reasons, anchored in both law and fact, we answer Issue 1, "No". The Crown did not have to disprove consent (or an honest belief in it) as part of a charge of murder brought under s 167(b).

Issue 2: Did the Judge's summing-up fail to direct adequately on propensity evidence?

[94] Three witnesses, Ms J, Ms M and Ms W, were called by the Crown to give evidence at trial as to the appellant's interest in and/or experience with erotic

asphyxiation during sexual intercourse. This ground of appeal focuses on the evidence of Ms M.

Ms J's evidence

[95] Ms J's evidence was led to show that the appellant had a tendency to knowingly or deliberately restrict the breathing of a sexual partner during intercourse, without consent. It was powerful propensity evidence and was the subject of pre-trial objection and an appeal to this Court.[72] Ms J had also met the appellant via Tinder earlier in the year. They met again at his apartment on 2 November 2018, a month before his encounter with Ms Millane.

[96] In her evidence Ms J described how the appellant had suffocated her. In the course of sexual activity she was lying on her back on the bed. He then squatted over her, placing his genitals in her mouth before sitting on her face and covering her nose and mouth. His knees were to either side of her head and he was holding down her forearms. Ms J could not breathe, panicked and began to struggle. She said:

> A. I couldn't breathe. He sat down so that he wasn't supporting any of his body like, but he had grabbed my forearms as well. So I was lying on the bed still and he was leaning forward and putting all the pressure on my arms so I couldn't move my arms and I couldn't breathe. So I started kicking, like trying to indicate like I can't breathe. And I was kicking violently. I was trying to lift my arms and he would have felt me fighting against his arms because, yeah, his hands, I couldn't move my arms 'cos he had too much weight on them.
>
> Q. How hard were you kicking and how hard were you trying to move your arms?
>
> A. With all my might.
>
> Q. Why?
>
> A. 'Cos I couldn't breathe.

Because the appellant was holding her forearms she could not escape. The appellant did not move. After half a minute or so, she gained the "tiniest little bit" of air. She then went "limp" feigning unconsciousness for 30 or 40 seconds in the hope it would make a difference. Then, desperate and still unable to breathe, Ms J fought

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72 *R v Kempson* [2019] NZHC 2077; and Court of Appeal judgment, above n 12.

against the appellant, kicking her legs and struggling against his arms. She said she tried to shout out and thought she was going to die. He then sat up and moved off her. As she gasped he said, "[o]h what's wrong?" She said that she could not breathe. "And then he said, turned to me like almost accusing and quite cold, he's like, 'Oh you don't think I did that on purpose, do you?'"

[97] The Judge ruled that Ms J's evidence was admissible. There was a pre-trial appeal to this Court. The Judge's ruling was upheld. The incident involving Ms J was close in time to the date on which Ms Millane died in the appellant's apartment. It provided another example of the appellant being prepared to become involved in an activity that resulted in his sexual partner being unable to breathe. We said:[73]

> The circumstances that J described suggest that [the appellant] deliberately continued to apply pressure to J even though he knew she could not breathe. The evidence is therefore plainly relevant to the issue of what caused Ms Millane's death in [the appellant's] apartment. It is admissible as a result.

Ms W's and Ms M's evidence

[98] No objection was taken to the evidence of Ms W and Ms M being given. Ms W's evidence was peripheral to the Crown case; Ms M's evidence was something of a curate's egg; in forensic terms, efficacious to each party.

[99] Ms W never met the appellant but had contact with him by Tinder, other social media and by phone. This included discussions with him regarding sexual preferences, in which he expressed interest in strangulation and domination which made him feel "more superior and in control". As Mr Dickey notes, that evidence was mentioned only briefly by the Crown in closing, and by the Judge in summing-up, was not challenged substantively by the defence (who said it was a mere "distraction") and it was not a central or significant part of the Crown case. We need say no more about Ms W.

[100] Ms M's evidence was that she had met the appellant also via Tinder. Before meeting they exchanged messages about their sexual preferences. Both evinced interest in rough sex. Ms M said she liked to be choked. A week before

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[73] Court of Appeal judgment, above n 12, at [22].

the appellant met Ms Millane she went to his apartment. They had consensual intercourse, which she described as "just sex in general". During it he put his hand around her neck, applying "just … the right pressure": not so hard she had trouble breathing, but not so soft she could not feel it. It was "fine, it was consensual … my breath was a bit restricted but it was something that gave me pleasure".

[101] The Crown described Ms M's evidence as such in closing:

> I'll talk about just, and hopefully a little more quickly, three of the women involved in this case otherwise; [Ms M] the first who had safe sex with the defendant on the 23rd of the 11th which involved an element of choking. There were no difficulties in that experience at all. I mean … [the appellant] is perfectly capable of safe sex with that minor form of BDSM engaged.

[102] Defence counsel also discussed Ms M's evidence in closing:

> … when you consider the evidence of [Ms M] you may well wish to ask whether or not there's internal consistency in the Crown case about this so-called propensity to dominate women sexually, because if it was there with [Ms J], as they say it was and she appears to claim it was in early November, where was it was towards late November when [Ms M] had sex with [the appellant], because she gives no indication of a dominating male at all. In fact, her evidence is that he simply did what she asked him to do.
>
> …
>
> … when you come to consider [the appellant], well the evidence about his experience in this field, as he said, "I'm new to this," is certainly consistent with what he said in the police interview. He had tried it with [Ms M] some 10 days or so prior to the 1st of December but he only did it when [she] asked for it. She asked him to do it, there wasn't any discussion or anything, it was during sex. She brought it up and asked him to do it and they did it, there's no safe words, none of that. It's just something that people are doing as part of the leisure activity of sex.
>
> But consider for a moment [Ms M's] messages with [the appellant], exhibit E, in the discussions before they meet up it's pretty clear that this is a hook-up situation and both of these people make it pretty clear that they're looking for a one-night stand, if I can put it that way, and the question is put to [Ms M], "What do you like?", and she says, "I like being choked and having rough sex." She says, "You?" The answer is from [the appellant], "I love rough sex too haha, but also love a great blowjob." So you would think that if indeed he had an interest, a real serious interest in choking during sex, that would have been the opportunity to say, "Great, me too," but he doesn't say that. He says, "Rough sex," whatever that is, and oral sex. So that's something that you might think is quite interesting.
>
> So he's keen to give it a try as well, that's what he said in his interview. "I'm new to all this, I'm used to having sex but I was keen to give it a go," and that's also what you see with [Ms M]. This is not someone who's

> experienced, this is not someone who's plugged into the BDSM world. He's not a member of these sites, there's no evidence of that. He's really just a young man who's prepared to do what his sexual partners want him to do in the bedroom.
>
> And so now you might think that the evidence does rather tend to suggest that what we have here is two young individuals and a logical basis to conclude that these two young people did engage in these activities that night, they did [get] carried away in the moment, they were affected by alcohol and they were not experienced in these types of activities, especially pressure to the neck. So I suggest to you that that evidence in relation to the respective interest and experience of these two participants also tends to confirm what it was that [the appellant] said happened.
>
> …
>
> If in fact it is correct that [Ms J] encountered this dominating sexual man who gambled with her life effectively, fast forward after that to [the appellant's] sexual liaison with [Ms M] where [Ms M] in advance of that said, "I like choking during sex." What about her experience. Was her experience, [Ms M]'s experience, consistent with this dominating sexual man who gambles with the safety of women? No, not at all. She described it as a perfectly pleasant situation where she initiated the pressure to her neck and [the appellant] did it and there were no problems. You might even think that from that [the appellant] might have gained some false confidence about his ability and experience in terms of choking in a sexual context.

[103] The Judge referred to Ms M's evidence only briefly in his summing-up:

> [180] And you will remember Mr Brookie suggested that if [the appellant] was really interested in strangulation, he would have said as much to [Ms M] who told him that she enjoyed it as well.
>
> [181] And on the topic of [Ms M], Mr Brookie asked whether her experience was consistent with the dominating sexual man who gambles with the safety of women that the Crown suggests you characterise [the appellant] as. It was she who initiated the application of pressure to her neck. And he responded without any safety concerns. Mr Brookie went so far as to suggest that [the appellant] might have gained a degree of false confidence from this experience.

[104] The Judge did not give a propensity direction concerning Ms M's evidence. He did with Ms J's, which was said by the Crown to be demonstrative of a tendency on the appellant's part to asphyxiate sexual partners without their consent.

Submissions

[105] Ms Wang, who delivered the submissions on this point for the appellant, submits the jury was not sufficiently directed on the proper or potential use of

the evidence given by Ms M as propensity evidence which tended to rebut the evidence of Ms J. It is said to be the "polar opposite" of Ms J's evidence. The Judge should have given the jury direction on Ms M's evidence as negative propensity evidence which tended to contradict the propensity of domination, control and deliberate risk-seeking behaviour advanced by the Crown. Alternatively, the Judge should at least have addressed the jury on how Ms M's evidence was relevant to the jury's consideration as to whether the appellant had the tendency alleged by the Crown. Ms Wang submits the Judge should have noted the defence contention that Ms M's evidence contradicted that tendency, and if accepted, neutralised the probative effect of Ms J's evidence. The propensity directions were, therefore, unbalanced and had the effect, Ms Wang submits, of excluding the relevance of the negative propensity evidence.

Analysis

[106] We do not accept the appellant's submissions on this ground. We do not consider the Judge was required to give a negative propensity direction in respect of Ms M's evidence, or that a failure to do so in the context of this trial gave rise to a risk of a miscarriage of justice.

[107] In relation to the evidence of Ms J, the Judge's direction was impeccable. The jury were told to consider whether they accepted Ms J's evidence and whether they considered it established the tendency alleged. If they considered it did so, it was still only one strand in all the evidence available to them, which included the evidence of Ms M and Ms W.

[108] Ms M's evidence was not presented as propensity evidence at all, either by the Crown or the defence, using it in a negative sense. The Crown called that evidence to demonstrate that the appellant was experienced in BDSM practices and the use of consensual choking in sexual intercourse, the defence suggesting otherwise. *Wi v R* held "good propensity evidence" (or "negative" propensity evidence) in the form of an absence of convictions did not require the trial judge to give a specific direction as to the relevance of that evidence, and in general that directions should not be mandatory unless, without them, there is a real risk the jury will approach the matter

in an inappropriate way or in a way that does not do the defendant's case justice,[74] noting:

> [38] It must be obvious to a jury that evidence that the defendant has no previous convictions is adduced for the purpose of suggesting that he or she is thereby the less likely to have committed the offence charged. Defence counsel will almost certainly have addressed them to that effect. It hardly needs the judge to remind them of the point. …

We add that the jury needed no assistance with the weight needing to be given to Ms M's evidence; it was largely uncontroversial because each party gained from it in different ways.

[109] The defence had made much of the contrast between the experiences of Ms J and Ms M. We have set the essential extracts out at [102]. The defence characterised Ms M's evidence as tending to prove that the appellant was compliant and careful, as opposed to dominating, controlling and dangerous — as the Crown contended. This contrast could not have been lost on the jury. It was clear from both the defence closing and the Judge's summing-up. The Judge directed that Ms J's evidence was one strand of the evidence that the jury had to consider, and highlighted how the defence considered Ms M's evidence to be relevant. In these circumstances, no further direction was required and there is no risk of a miscarriage of justice in relation to the propensity evidence.

Issue 3: Did the Judge's summing-up fail to direct adequately on the pathology evidence?

[110] We start with the expert evidence on cause of death.

The cause of death

[111] The post-mortem observations of the pathologist, Dr Stables, were that Ms Millane had some pre-mortem bruising to her left arm, shoulder and back, and to her right armpit and elbow. He identified the bruises on her arms as being consistent with "restraint bruises", where a person is being held down. In addition, Dr Stables found bruising to muscles below the skin on the left side of Ms Millane's neck, albeit

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[74] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [37] and [41]. See also *Perkins v R* [2011] NZCA 665 at [19]–[20]; and *Williams v R* [2017] NZCA 176, (2017) 28 CRNZ 471 at [32]–[34].

that was not visible externally. It was six by three centimetres in dimension and would have required "some force" to achieve. The right side of Ms Millane's neck was too altered by decomposition to enable comparison or analysis. That also meant Dr Stables could not state whether petechial haemorrhaging had occurred to Ms Millane's face or eyes.[75]

[112] Three experts gave evidence on the mechanism by which death could occur via manual strangulation: the pathologist who conducted the post-mortem, Dr Stables, Dr Healy, a forensic physician and Dr Garavan, a forensic pathologist who had been called by the defence.

[113] All three experts agreed that there were four mechanisms by which death *could* occur via manual strangulation. Their evidence on how these mechanisms operate was also broadly similar, although there were some differences in relation to timing.

[114] The first mechanism was *occlusion of the airways* — interfering with air getting to and from the lungs by obstructing the trachea. All three experts agreed that this would require a significant degree of force because the trachea is a flexible structure supported by cartilage. Dr Healy suggested as much as 15 kilograms would need to be applied. It did not appear any of the experts subscribed to this mechanism as the cause of death in this case.

[115] The second mechanism was *obstruction of the jugular veins*, which carry deoxygenated blood from the brain back to the heart. If these veins are obstructed, blood cannot travel back from the brain to the heart. It backs up, and blood trying to get to the brain is working against pressure. This deprives the brain of oxygen, eventually resulting in death. This process, known as "venous congestion", can also give rise to facial swelling, possible rupture of small vessels and petechial haemorrhages. All three experts agreed that this would require much less force than the first method — roughly two kilograms according to Drs Stables and Healy, or as little as one kilogram according to Dr Garavan. Dr Stables described this as being "quite light". Evidence as to timing for the second method varied between the experts.

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[75] Petechial haemorrhaging, looking like "little tiny red dots", is caused by breakage of tiny blood vessels from prolonged strangulation.

Dr Stables considered the brain would need to be starved of oxygen for at least four or five minutes to cause death, and quite a bit of effort or strength would be required to maintain sufficient pressure for that period, although unconsciousness could occur quite quickly. Dr Healy considered that the pressure required to block the vessels and cause unconsciousness would need to be applied over several minutes. Dr Garavan did not express a view on the timing of the jugular mechanism alone, although noted that within a short period of time, 10 to 40 seconds, you would begin to see the face of the person getting redder or more congested.

[116] The third mechanism was *obstruction of the carotid arterie*s, which carry oxygenated blood from the heart to the brain. Death occurs if they are obstructed, because the brain is deprived of oxygen. Drs Healy and Stables agreed that this would require more pressure than the second, venous method — around five kilograms. Dr Healy explained that was because the blood pressure inside the artery is greater than inside the vein. Dr Garavan did not discuss this mechanism in detail. In terms of timing for the third method, Dr Stables considered that it would be the same as the venous method because it is also stopping blood (and therefore oxygen) from getting to the brain. Dr Healy considered loss of consciousness may occur within 10 to 20 seconds of sustained pressure, and death after as little as one and a half minutes of sustained pressure. Dr Garavan simply noted that this method could quickly bring on a state of unconsciousness.

[117] The fourth mechanism was *pressure on the vagus nerve* — one of the cranial nerves, which helps to control blood pressure and heart rate. Activation of that nerve by pressure can send signals to the heart to reduce the heart rate. If stimulated on both sides of the neck this may lead to death as the heart rate becomes abnormally low (inducing bradycardia). Dr Healy considered that pressure would need to be maintained for a lengthy period for this to be the sole cause of death. Drs Stables and Garavan both identified some rare cases where the vagus mechanism had resulted in a sudden death (Dr Garavan instancing hangings), in which case there would not be time for any signs of venous congestion to arise. However, both also seemed to accept there could be instances where it would take longer. Dr Stables noted that the mechanism still operates if the pressure is removed, so it does not necessarily need to be maintained for four or five minutes for death to result. Dr Garavan stated that

the sudden death does not happen in every case — in some people it occurs more slowly and various signs can be observed. He noted that in order for it to have an observable effect on the heart, pressure needed to be applied for some time, maybe minutes, as opposed to just touching.

[118] Dr Stables did not clearly identify one mechanism which he considered to be the most probable in this case. Indeed, Dr Stables' evidence was that it was very rare for there to be purely one mechanism or another. Rather, it was quite often a mixture of pressure on the veins or the arteries or the nerves and if the hand is applying pressure and then releasing it and moving, it may include any of the mechanisms or touch the nerves at any particular time. Dr Stables was of the view that it was "incredibly rare" for people to die solely as a result of the vagus mechanism. If this was the mechanism of death, Dr Stables would not expect to see the bruise on Ms Millane's neck — the autopsy would likely be completely negative (i.e. no evidence of congestion or changes). However, he did not go so far as to rule out a particular mechanism. His evidence was that the bruise, combined with a potential blood nose, meant there had been pressure on the neck and it had been "long enough" for those changes to occur. He was unwilling to say precisely how long that would be.

[119] Dr Healy noted that because of the increased pressure required to obstruct the air supply, that tends to form a less important part of the symptoms that arise from strangulation. Additionally, pressure on the vagus nerve was not thought to be a major contributor to death or injury in strangulation because of the length of time that pressure would need to be maintained. In cross-examination, Dr Healy noted that death was unlikely to result solely from this mechanism except perhaps in elderly patients who had other cardiac conditions. However, Dr Healy accepted that she did not have particular expertise in this area, and it was not easy for anyone to study the contribution of the vagus nerve to death in strangulation cases because research in this area is very limited. Dr Healy did not express any further view on which mechanism was likely to be in play in this case.

[120] Dr Garavan was of the view that the venous mechanism was "the most susceptible", as the veins are very superficial, lie directly under the skin and are very easy to compress. Dr Garavan considered there was evidence of haemorrhages in

the eyes, particularly on the left side.[76] In this particular circumstance, given the particular activity that was taking place, it was very likely that two mechanisms were in play at the same time. Those mechanisms were the obstruction of venous return to the heart which over a sufficient period of time would have a knock-on effect on the cardiovascular system, and chronic stimulation of vagus nerves would have come into play by reducing the heart rate at a time when the blood returning to the heart was also being reduced (which may have been indirectly affected by the high alcohol content likely present in Ms Millane's blood).

[121] Dr Garavan's evidence as to timing related to the combination of these two mechanisms — first described as three to 10 minutes, and then five to 10 minutes, noting in re-examination that he favoured the longer estimate because of Ms Millane's youth and general health. However he accepted that he could not put a precise timeframe on death given the lack of data from controlled experiments. He also noted that if the hands were being taken off the neck it would prolong the experience.

The summing-up

[122] In summarising the Crown case, the Judge noted that the Crown took the view that Dr Garavan's five to 10-minute estimate remained the same irrespective of the mechanism. This was the period of consistent, sustained pressure to the neck in a way that would activate one of the various mechanisms ultimately resulting in death once the brain had been starved of oxygen. However, if the mechanism was venous obstruction, this would result in the congestion or reddening of the face, apparently followed by petechial haemorrhages, bleeding to the whites of the eyes and bleeding from the nose. Dr Stables was not so emphatic on the question of timing but both he and Dr Garavan felt that 90 seconds (which Dr Healy suggested sat at the lower limit of her range) was way too short. All three experts seemed to agree that if the pressure is released, the person would be likely to revive, particularly if young and fit, so this had to be forceful and sustained pressure over a period of five to 10 minutes, while Ms Millane was struggling enough to receive restraint bruises, her face reddening with congestion, a blood nose and, on losing consciousness, going limp.

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[76] In this respect his evidence differed from Dr Stables who did not observe such haemorrhaging: see [111] above.

[123] In summarising the defence case, the Judge noted that the defence had warned the jury of the dangers of over-simplifying the pathology evidence. Dr Stables could see no significant injuries and it was not until he received an excerpt of the appellant's police interview that he was prepared to conclude the cause of death was pressure to the neck. In terms of the question of timing, the Judge noted the defence position that the evidence was simply unclear because the experts just did not know. None of the experts were able to assist on when the person would lapse into unconsciousness before death. The Judge also noted the defence submission that bleeding from the nose might have happened, or at least been visible, after Ms Millane's death, accounting for blood found on the carpet.

Submissions

[124] Ms Reed submits the Crown closing erroneously focused on Dr Garavan's five to 10 minute estimate, without adequately reflecting the reservation all experts offered as to timing, especially because experimentation was ethically impossible. In particular, the Crown closing was not balanced by other estimates suggested: "four to five minutes" (Dr Stables), "1.5 to six minutes" (Dr Healy) and "three to 10 minutes (Dr Garavan).

[125] Ms Reed accepts the (as she sees it, unfair) emphasis of the Crown closing would be insufficient to give rise to a miscarriage of justice in and of itself, but submits it required a firm and clear direction from the Judge to help the jury reconcile the various indicative timeframes. It is also accepted the summing-up was an orthodox recitation of the prosecution and defence submissions (noting Dr Garavan's five to 10 minute estimate, the evidence of Dr Stables, the fact that all the experts seemed to agree that it was probably not as brief a period as 90 seconds, and the defence submission that the evidence was "just not that clear because the experts just don't know"). But, Ms Reed submits, the expert evidence on timing required an independent, true analysis from the Judge in the form of a firm direction.

[126] The Judge needed to explain to the jury the various indicative timeframes given by the experts, the evidence on the amount of pressure and time required to cause bruising, petechial haemorrhages, unconsciousness and death, evidence regarding the

precise mechanism by which asphyxiation could have occurred and the qualifications expressed by all experts regarding the inability to give a clear or precise timeframe in the absence of controlled studies and sufficient data. At the very least, the limitations of the expert evidence on timing needed to be clearly and objectively presented to the jury. This was compounded by the Judge's lengthy quotation of Dr Garavan's answer to a question from the bench, as this had the effect of singling out Dr Garavan's evidence as the final authoritative view on the matter.

Analysis

[127] We do not accept the appellant's submission. We consider the summing-up captured fairly the critical points of agreement and disagreement among the experts.

[128] All three experts were of the view that the venous method required the least pressure and was also consistent with the pathology evidence from the post-mortem examination. However, none of the experts went so far as to say that this was likely to be the sole mechanism at play. All three experts also expressed the view that the vagus method was rare or unlikely in the case of manual strangulation, and that it was unlikely this was the sole mechanism of death. We have summarised the relevant evidence in more detail above.[77]

[129] The summing-up of the Crown case, which we have noted at [122] above, is in our view a fair reflection of the pathology evidence. It was then followed by an entirely fair account of the defence case, summarised at [123] above.

[130] The critical point for the jury to consider was whether this evidence supported the Crown contention that the appellant maintained pressure for long enough to establish he intended injury likely to cause death, and was reckless as to whether death ensued or not, to a standard of beyond reasonable doubt. This was the heart of the entire case; it was far from being a "who-dunnit". The appellant "dunnit"; the issue was what the physical evidence (including post-mortem evidence) told the jury about his state of mind.

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[77] See [117] above.

[131] The defence closing occupies 48 pages of transcript. Nine of these involved a close examination by trial counsel of the pathology evidence, focusing on the four different mechanisms that might have caused death, and on the varying time estimates. It is worth quoting in full what counsel said on the latter topic:

> The Crown case hinges on he knew, he knew that she must have been unresponsive. But in fact we don't — we'll come to the timing in a minute but the evidence on the timing it's just not clear at all for how long a person would be unconscious for and also whether or not the other person in this situation may even notice.
>
> So we've had three different experts have a go at, and I say, "have a go", I don't mean to criticise them but they're all asked, "How long does this take? We need to know how long it takes, can you please tell us." They don't know. They can't be precise. And that is, I would suggest to you, what you take away from the evidence, not set in concrete five to 10 minutes. Because in my submission to you, if you look at all of this evidence it's clear, and particularly Dr Garavan, that he can't be precise about a time. He's giving perhaps a conservative estimate but he cannot be precise about it.
>
> Now where did the 90 seconds to six minutes come from. It almost appeared at some point that maybe it was being suggested that I just made up 90 seconds. Well I didn't actually make up 90 seconds. Ninety seconds to six minutes comes from Dr Healy's statement. So that's what she says in terms of time for death in a manual strangulation-type situation.
>
> Well Dr Garavan, and this is at 556, there's some re-examination which I suggest to you ties together really what it is that Dr Garavan's saying about timing. "So, well no, I'm not" — he's not too keen on 90 seconds. He thinks that's a bit short, and that's fine because we're not talking about a situation that's going to be over necessarily in 90 seconds. They're having sex, it's going to go on for minutes, right?
>
> So then Dr Stables. Well Dr Stables wouldn't even give a timeframe at all, if you remember. So I asked him about the Dr Healy 90 seconds to six minutes and he's like, "Where's this coming from? I'm not even going to put a timeframe on it at all." Earlier in his evidence on the mechanism of simply a venous obstruction he said four to five minutes, maybe.
>
> And then we come down to Dr Garavan, because he also said three minutes as well, "It could be a minimum of three minutes, I'm not sure. It could be five." So I asked him about the 1.5 to six minute timeframe and he said, "Yeah, I would have to, it's possible," and this is at 557, "It's possible on the simple basis being unfortunately due to the subject matter, the ethics involved, we can't actually carry out the experiment to find out. So we rely on our knowledge of physiology and anatomy and so on and if there's alcohol involved, look, it could happen I guess quickly. It could be a more moderate amount of time. It could be a longer length of time. It's a dynamic thing. It's possible, it's possible."

> So then I go down and I ask him about, "I think you gave a marker of three minutes earlier in your evidence. I mean, can we be precise about this?" Answer, "No, we can't. No."
>
> So you might think that some care is required before you simply settle on, "Well it has to be at least five minutes or in between five and 10 minutes." The evidence is just not that clear because the experts just don't know. Dr Garavan is trying to be helpful, he's giving you a conservative estimate, he puts it five to 10 or three to 10, he's probably saying not 90 seconds. The defence has got no issue with that, but the point is, three minutes to 10 minutes, again that's consistent with the situation where you're applying sustained pressure during sex in order to cause someone pleasure.

[132] In these circumstances, doubt favoured the defence, as the passage above makes clear. This was not a case where the expert evidence involved "formidable complexity", requiring more than usual assistance by the Judge.[78] The job of the jury was not to reconcile the scientific evidence, but rather to decide whether the Crown had proved murderous intent beyond reasonable doubt. And the job of the Judge was most certainly not to wade into that and provide firm direction as to how to pierce the veil of doubt drawn by the defence over cause and timing. The job of the Judge was what the Judge in fact did; to provide a clear summary of the competing expert opinions on cause and time, without offering detailed evaluation, analysis or endorsement, given no issue as to admissibility of the competing views had arisen.

Issue 4: Was inadmissible probability evidence before the jury?

[133] This ground of appeal relates to evidence led by the Crown about the relative rarity of death by erotic asphyxiation, and what was made of that in submissions and the summing-up. It is said this evidence engaged the so-called "prosecutor's fallacy": demonstrating the improbability of an innocent explanation and deducing guilt from that fact.[79]

Evidence

[134] To place the Crown evidence in context, the defence case was that Ms Millane's death was a tragic accident. As defence counsel put it in his opening statement, after the Crown opening:

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78 *Hutton v R* [2008] NZCA 126 at [148].

79 See Susan Glazebrook "Miscarriage by Expert" (2018) 49 VUWLR 245 at 248.

> But what sets this night apart is that Ms Millane died as a result of what they consensually engaged in during their time together. The acts designed to enhance their sexual pleasure went wrong and she died as a result. That act was done with her knowledge, encouragement and only with the goal of sexual pleasure in mind. That act was the restriction of her breath by applying pressure around the throat. It is known that this act can heighten sexual pleasure. However those who are better informed about or more experienced in this practice would know of the potential risks. But it's clear members of the jury that on this night this couple did not have that knowledge or any real experience. However, what's important here is that they were both keen to give it a go and they did.

Expert evidence was called by the defence as to the nature and frequency of BDSM practices. This witness was Professor Clarissa Smith, then of the University of Sunderland, who gave her evidence by audio-visual link. Professor Smith was asked about how widespread "breath play" (or erotic asphyxiation) was amongst people in their twenties, and about risks and risk-mitigation techniques used by those experienced in that practice.

[135] Prior to that evidence, however, Dr Stables was being examined as to the likelihood of what we earlier called the "fourth mechanism" of causation, vagus nerve stimulation.[80] Obviously, the probability of that *mechanism* being *causative*, given its possible speed of onset, was a very relevant enquiry in the context of this case. Dr Stables was asked:

> Q. And with the nerve mechanism do you get that blood nose occurrence?
>
> A. There are some very rare occurrences, and these are very rare where there's been pressure on the neck and it's been the nerve mechanism only. It's been the nerve mechanism only and these people have literally dropped down dead very quickly. In those situations, no, you wouldn't expect to see a congested face, you wouldn't expect to see petechial haemorrhages, you wouldn't see a blood nose, there hasn't been time for any of that to occur.
>
> Q. Those very rare circumstances, what do you mean by that, are we talking about one in a hundred or one in a million?
>
> A. These are very, very rare. There's only a few recorded cases in the literature. I did find a paper recently which was from Poland, actually, and they've had seven cases in the last nine years over a population of nearly 40 million people, so it gives you an idea of how—

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80 See [117] above.

Q. How many over how many years?

A. Nine years. Seven cases over nine years, over 40 million people. Prior to that I can only find a scattering of reports throughout the literature.

[136] That evidence appears to have been given rather in passing and very much in the context of the likelihood of vagus nerve stimulation being causative of death. In cross-examination, defence counsel asked Dr Stables:

Q. And you said before the break that in your experience, you haven't seen death resulting from consensual sexual pressure to the neck, is that right?

A. I've never seen a case before.

Q. And there's a lack of literature out there about when it does occur or if it has occurred?

A. There's a lack of literature and there's a lack of reported cases, yes, in terms of being fatal sexual asphyxia.

Q. But you would have to accept, wouldn't you, that the scenario that we've talked about here, could well have caused the death of this person?

A. If it is, it's incredibly rare. We see people that come through our department who have died during having sexual intercourse, it's usually related to an underlying natural disease. We [don't] see any bruising on the neck in those situations, so that's — I'm just saying, these do occur from other reasons, or they've had a ruptured aneurysm. If it happens, this is incredibly rare.

Q. So you haven't seen it?

A. I haven't seen it.

Q. There's a lack of literature about the reporting of it, out there in the world?

A. As far as I can find.

Q. So it can happen, can't it?

A. I'm not saying it can't happen, I'm just say — I'm just putting in context, if it does, it's incredibly rare.

Q. And when you say it's incredibly rare, that's just from your experience, not from any literature that tells you that?

A. No, that's from the literature.

Q. So you are saying—

A. I cannot find many cases where there has been fatal sexual asphyxia related to manual strangulation.

Q. All right but if there's a lack of literature about it and an underreporting of it in the literature, then how can you gauge from the literature how rare it is?

A. Well how else am I meant to gauge how rare it is?

In re-examination Dr Stables referred again to the Polish study. By this stage the forensic debate had moved from vagus nerve stimulation to death by any mechanism in the course of erotic asphyxiation.

[137] Dr Garavan also gave evidence that mechanical asphyxiation outside the auto-asphyxiation scenario was "not the most common thing you see". He pointed out that "we get cases all the time which are extremely or incredibly rare. … My work in a year I'll do probably 20 or 30 cases that are one-offs [that] I may never see … again in my career". Dr Garavan was cross-examined by the Crown on the Polish study, but noted the lack of database material and the potential for underreporting: "I don't think that paper's saying what you're saying it is. But if you want to make the point that this is not common, I have no problem agreeing with you."

Closing addresses

[138] The Crown rather backed away from the "rarity" thesis in closing, perhaps because of its fundamental lack of relevance, a point we shall return to later. But this is what the Crown said in closing:

> So we then discussed other matters and to be honest you can review this evidence for yourself but [Dr Garavan] accepts that death by this sexual encounter would be extremely rare or very rare whatever the terminologies he referenced. I described it as incredibly rare because those are the words of Dr Stables and he seemed to accept that and we looked quickly at that journal from Poland because when Dr Stables gave his evidence he told us nine year study in Poland, 38 million people, seven cases of asphyxiation in a sexual context.
>
> When we looked into that study and I looked at it with Dr Garavan, we confirmed that only two of the seven were manual or mechanical asphyxiation and they had other attributes as well. So you're down to two over nine years of a population of 38 million.
>
> Now that's only reported cases to the judicial authorities of course and you have to report the case for it to be picked up as in New Zealand of course, but

> it just begs to the absolute extraordinary case if death was caused by the sexual activity because in that case the sexual activity would have to mean that the sexual partner held the throat of her neck for that length of time. You know hard enough to activate these circumstances, hard enough. A couple of kilos I think people spoke about in the minimum for venous and more like five for arterial but you've got to hold on. That's really determined killing. That person is there. By definition they were within arm's reach.

But the Crown then referred to the subject again shortly afterwards:

> And just finally on that, I should mention Dr Stables and in particular the rarity of death by strangulation from sex. He'd never seen it. Dr Garavan had never seen it. He'd looked for it and could barely find it in the literature and that's why he said it is incredibly rare. "I'm not saying it can't happen. I'm just saying, I'm putting it in context, it does, it's incredibly rare."

[139] The defence focused on what indeed was most relevant: the contest between the Crown theory of murderous intent and the defence theory of accident. So the defence focus was on the four causative mechanisms, and the possibility that death might ensue suddenly and unexpectedly under at least one of those. As to rarity, defence counsel said:

> I'm not sure really whether there's any need to talk to you about this idea of what's rare, I think I've mentioned it briefly in terms of Dr Stables' seeming willingness to rely on [the appellant's] account to complete his report and come to a view on how Ms Millane died and yet in the courtroom, it's all about how rare it is and we had studies from Poland. No one seemed to know which study the other was talking about. You don't have the study, I'm not really sure that you've been assisted by any of that, so I'm just going to stop talking about it because at the end of the day, it can happen, it does happen, and here the evidence points to it.

The summing-up

[140] The summing-up traversed the pathology evidence in the manner described earlier.[81] We have expressed the view that it reviewed in a proper manner the alternative theories of causation and timing. But in a late paragraph, almost as an afterthought, the Judge said:

> [140] And you will also remember [the Crown's] submission that both experts, although the adjectives they used differed, shared the view that death from a consensual manual strangulation was very rare. And you will remember the Polish study discussed.

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[81] See [122]–[123] above.

Submissions

[141] As noted earlier, Ms Reed submits the Crown relied on the probability (or rarity) evidence noted above to support its contention that it was improbable that Ms Millane died during a consensual sexual encounter involving erotic asphyxiation. This amounted to a "prosecutor's fallacy": demonstrating the improbability of an innocent explanation and deducing guilt from that fact. The evidence should not have been before the jury, or it should not have been suggested it could be used to determine the likelihood of a fatal erotic asphyxiation by manual strangulation, given the high risk of unfair prejudice to the appellant if the evidence was interpreted as proving whether or not the event in fact occurred.

[142] Ms Reed submits the error was not identified by the Judge. Rather, he compounded it in the passage above at [140], and in not referring to the defence submission that no weight should be placed on the findings of the Polish study because the events in question were supported by the evidence in this case. Nor did the Judge provide a direction on the relevance of the statistics and their limits in line with the approach recommended by this Court in *Sami v R*.[82]

[143] Mr Dickey submits the Polish study was merely used by Dr Stables to support the accepted medical proposition that death by manual strangulation is very rare, rather than a probability finding that the appellant was guilty of murder. This was not probability evidence of guilt. It was led by the Crown not to deduce the appellant's guilt from statistics, but to rebut the defence case that consensual restriction of breath is a common and inherently dangerous activity, readily leading to accidental death, particularly in the case of inexperienced practitioners. The Crown was not submitting that death could never result from consensual manual strangulation, nor that this was so rare that such a claim must be treated very sceptically, but merely that it is not an activity that readily leads to accidental death as suggested by the defence case. The Crown did not invite the jury to deduce guilt from the statistical study, or suggest that the corollary of the rarity of death through manual strangulation was that the appellant must be guilty by this reasoning alone. Indeed, the Crown repeatedly

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82 *Sami v R* [2019] NZCA 340, (2019) 29 CRNZ 252.

invited the jury to look at the totality of the evidence, of which this was a very small part only.

Analysis

[144] The Polish study ought not to have been put before the jury in the way that it was, or at all. Nor should it have been used in cross-examination of Dr Garavan. But it being before the jury nonetheless — because there was no objection taken — it would have been preferable if clear direction had been given that it could not be used to deduce guilt on the basis of probabilistic reasoning. As this Court recently emphasised in *Sami v R*, it is important that evidence of a low statistical probability that a particular event occurs does not become, in the mind of the jury, equated with an equally low probability the defendant is not guilty.[83]

[145] The primary issue with the Polish study is that its limited data source and set means it is neither statistically significant nor reliable. Nor, as we shall see, was it relevant to a fact in issue. Dr Garavan initially struggled to deal with it on the fly, but quickly zeroed in on its weaknesses. At the end of the day it gave only somewhat spurious authority for something the jury was entitled to take as established by common sense alone: that death by erotic asphyxiation is a very rare event. As Dr Garavan said, "if you want to make the point that this is not common, I have no problem agreeing with you".

[146] The emphasis given to rarity or probability was not assisted by the sequence of defence cross-examination set out at [136] above, which exacerbated the misuse of this material. The evident problem with the evidence, in part caused by the way in which it emerged and then was questioned, is that no one seemed particularly clear about what to make of it, or what to use it for. Relevance is a good starting place. This had very little. It emerged initially as support for the proposition that vagus nerve stimulation causing death — the fourth causative mechanism — was very unlikely because such a form of death was extremely rare. In fact, the study was unspecific as to causative mechanism. From there it developed an unmanaged life of its own.

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[83] At [14].

[147] The Crown's justification for its continued relevance — to rebut impending evidence from Professor Smith supporting a defence narrative that death was the not altogether unsurprising result of inexperienced practitioners engaging in erotic asphyxiation — is unpersuasive. That evidence was yet to be given, and was never given; Professor Smith's evidence did not support that narrative beyond saying that BDSM practices were more common than people might think, and that practitioners of erotic asphyxiation often take precautions.[84] Rebuttal of that narrative did not require the distorted application of a study introduced by Dr Stables for another purpose altogether.

[148] We accept the submission for the Crown that it had not sought to invite the jury to infer guilt by reason of the rarity of death by erotic asphyxiation. But in its cross-examination and closing submissions it came perilously close to doing that. It may be taken as common ground, or simply blindingly obvious, that death by erotic asphyxiation is very rare. But its rarity is not probative as to the competing theories of murderous intent versus accident. As Dr Garavan said in his evidence, "we get cases all the time which are extremely or incredibly rare. … My work in a year I'll do probably 20 or 30 cases that are one-offs [that] I may never see … again in my career." In these circumstances, it would have been preferable for a clear direction to have been given to the jury that they should not reason from rarity to the absence of reasonable doubt.

[149] Ultimately, however, we are simply not persuaded that there was a material risk of the jury reasoning in that way. Rather, the pathology evidence before them had an entirely dominant, different focus: could they be sure that the *force and time* required to cause Ms Millane's death by manual strangulation meant the appellant either intended to kill her or intended to cause her injury he knew likely to cause death (and was reckless whether death ensued or not)? It was that enquiry that meant the plain focus of the pathology evidence was on causative mechanism and timing. In that context, the jury had to have appreciated that the Polish study and simple rarity of death by erotic asphyxiation offered them no short answer. Inadmissible it may have

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[84] The jury had heard something of that already, in evidence from a former partner of Ms Millane.

been, but the underlying thesis that death by erotic asphyxiation is a very rare event was ultimately uncontroversial.

[150] In *Sami v R* the potential risk of impermissible reasoning (from a one in two million risk of child death from a low fall to a one in two million risk of innocence) was potentially greater than here: the prosecutor invited the jury to decide whether "those fatal injuries are the one in two million kind of accident" the expert had referred to.[85] But this Court concluded the risk of the jury misusing the statistics was not established.[86] Here there was no explicit invitation to reason by probability. Instead, as we have noted already, the dominant forensic focus was on causative mechanism (force) and timing. Resolving that issue was extremely unlikely to be either "assisted" or confused by the Polish study of an obvious and uncontroversial fact. Ultimately, it was a blind alley; as defence counsel said in closing, again stating the obvious about death by erotic asphyxiation, "at the end of the day, it can happen, it does happen".

[151] In our view, despite the inadmissibility of the statistical evidence referred to by the Crown, its admission did not give rise to a material risk of a miscarriage. The jury was not invited to use statistical probability reasoning to reach a finding of guilt, and it was extremely unlikely the jury would have done so. In the broader context of the trial, the closing arguments and the Judge's summing-up, the real task before the jury was plain; this inadmissible evidence became an immaterial irrelevancy.

[152] It follows the appeal against conviction will be dismissed.

Issue 5: Was s 104 of the Sentencing Act 2002 engaged (and was the sentence imposed manifestly excessive)?

[153] The primary challenge to the appellant's sentence is that the Judge erred in finding that the circumstances under either s 104(1)(e) or (g) of the Sentencing Act were met. Relevantly, that section provides:

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85 *Sami v R*, above n 82, at [16].
86 At [20].

> **104 Imposition of minimum period of imprisonment of 17 years or more**
>
> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
>
> …
>
> (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
>
> …
>
> (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; …

[154] This Court adopted a three-step methodology for the application of s 104 by a sentencing judge in *Davis v R*, requiring the sentencing judge to decide:[87]

> (a) what notional minimum period of imprisonment would apply under s 103;
>
> (b) whether a s 104 category applies; and
>
> (c) if s 104 applies but the notional MPI would be less than 17 years, whether the imposition of a 17-year minimum term would be manifestly unjust.

[155] We note first that Ms Reed raised two complaints about the factual analysis in the Judge's sentencing notes. The first concerned the extent of bruising; the second the Judge's observation that the lack of defence injuries and absence of DNA under Ms Millane's fingernails was consistent with her being forcibly restrained.[88] We consider these factual objections rather beside the point. The appellant was convicted because he killed Ms Millane, and did so with intent to cause bodily harm he knew to be likely to kill, while being reckless as to whether that occurred. For reasons that will become apparent, neither factual objection, even if sound, alters

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87 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25].
88 Sentencing notes, above n 3, at [53].

the enquiry as to whether this murder was committed with a high degree of callousness, or whether Ms Millane was particularly vulnerable.

Sentencing

[156] The Judge observed that the jury, by its verdict, was necessarily satisfied that at the time the appellant had his hands around Ms Millane's throat, he intended, at the very least, to cause her the sort of bodily injury which he knew was likely to cause her death, and was reckless whether she died or not.[89] Some sustained pressure, over a period of minutes, would have been needed.[90] It was common ground that she would have lost consciousness and gone limp at some point in the sequence:[91]

> … [F]or her to have died it required you to have knowingly maintained sufficient pressure past that point and continued to apply that pressure until she died. Again, that is necessarily implicit in the jury's verdict.

[157] It was likely that she had struggled. Manual strangulation "is a particularly intimate and intimidating form of physical violence".[92] The Judge continued:

> [59] Viewed in isolation, the actual mechanics leading to Ms Millane's death may not meet the threshold of a high level of brutality, cruelty, depravity or callousness when compared to other cases. But to stop there would be to view your offending in a vacuum and that I must not do.
>
> [60] There are other factors which need to be considered and the first of these is Ms Millane's vulnerability. There can be no doubt that she was vulnerable. Certainly she was vulnerable in the sense that she was a young woman on her own travelling in a foreign land. You were a complete stranger. She trusted you. Her messages to her friend reveal that she believed the lies you told her about yourself. She trusted you enough to go into your room with you alone. That certainly placed her in a position of some vulnerability. But, in my view, what then happened after she entered your room made her particularly vulnerable.
>
> [61] On your admission you were both naked. You were engaged in the most personal and intimate of human activity. You are a large and powerful man. She was diminutive. On your account she asked you to hold her arms and then her throat. On your account this was happening while you were having sexual intercourse. In that position and in those circumstances, Ms Millane was particularly vulnerable. You were in a position of total physical dominance. In my view that meets the definition of particular vulnerability. But even if it does not it is a material and highly relevant

89 At [49].
90 At [50].
91 At [51].
92 At [55].

aggravating factor in the assessment of the circumstances of Ms Millane's death. It also meets the definition in s 104(1)(c).

[62] The next aggravating factor which particularly goes to callousness and depravity is your behaviour after you had killed Ms Millane. It is uncontroversial that an offender's conduct subsequent to murder may be taken into account in terms of the s 104(1)(e) analysis.[93] Under this heading, the Crown lists four factors; what you did immediately after Ms Millane's death; what you did the following day; your treatment and disposal of Ms Millane's body and, finally, the lies you told the Police in an attempt to avoid detection. Your counsel has provided explanations for your post-death conduct, but s 104(1)(e) is applied to the objective circumstances of a murder.[94]

[63] I agree that each of these aggravating factors is engaged and relevant to varying levels in the contextual assessment of culpability. I shall deal with each.

[64] I start with what you did immediately after Ms Millane was murdered. I find as a fact that Ms Millane must have died at some time before 1:29 am on Sunday, 2 December 2018. That is because at that time you undertook a Google search of the [Waitākeres]. Self-evidently, you would not have done that unless you knew that Ms Millane was dead and you were researching possible places to dump her body. That the [Waitākeres] were, in fact, where you concealed her supports that conclusion. It is also reinforced by the second search conducted five minutes later when you looked for "hottest fire".

[65] But what then followed over the next three minutes provides an insight into your state of mind at that time. Ms Millane's lifeless body was with you in that room when you searched for and accessed four pornographic sites. The title to the first was extremely explicit. The next three related to teenagers and slaves.

[66] Then, over the following three minutes, you took seven photographs of Ms Millane's dead body. These photographs were highly sexualised and grossly intrusive. In one your hand is visible. Such a violation of a victim's body is relevant to the s 104(1)(e) assessment, even when it occurs after death.[95]

[67] Then, over the next quarter of an hour or so, you went back to the same porn site and searched and viewed eight further images. To borrow a phrase from the Court of Appeal, this was "hardly the spontaneous outpouring of remorse that might point away from callousness."[96]

[68] This conduct also strongly supports the statutory requirement of callousness and depravity to a high degree. It is plainly a serious aggravating factor. It was conduct closely connected in time to Ms Millane's death. It is rightly described as depraved. These were not the actions of a man in panic.

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93 *Frost v R* [2008] NZCA 406. See also *Singh v R* [2019] NZCA 436; *R v Solomon* [2016] NZHC 1653; *R v Swain* [2015] NZHC 3241; *Bracken v R* [2016] NZCA 79; *Preston v R* [2016] NZCA 568, [2017] 2 NZLR 358; *R v Marong* [2018] NZHC 748; and *Roigard v R* [2019] NZCA 8.

94 *Gottermeyer v R* [2014] NZSC 115 at [5].

95 *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010 at [13].

96 *Frost v R*, above n 93, at [40].

> Far from it. Your actions reveal a complete disregard for your victim. This conduct is inextricably connected to the manner in which the murder itself was committed.[97] It is conduct which underscores not only the total lack of empathy you had for Ms Millane but the sense of self-entitlement, objectification and sexualisation that is reflected in other parts of the evidence.
>
> [69] And then, as I have already discussed, you set about covering your tracks by searching for car hire businesses, buying suitcases and cleaning products. Again, this conduct on its own would not attract the application of s 104. But it must be relevant to a broader, contextual assessment of callousness. That you also contacted other women and went to a bar with one of them must also be relevant to this assessment.
>
> [70] When you got back to your room after meeting with "M" you set about squeezing Ms Millane's naked body into the suitcase. You then carried it downstairs and put it in the back of the car. That conduct compounds the other indignities you had already subjected her body to.
>
> [71] The next morning you buried her before embarking on further, elaborate activities designed to shift the eye of suspicion from you.
>
> [72] In my view you can claim little credit for showing the Police where Ms Millane's body was buried. At the trial we heard that the Police, through cellphone polling off your phone, were already close on your heels and would certainly have discovered Ms Millane in short order even without your help.
>
> [73] But your attempts to divert suspicion did not end there. I have already discussed the two Police interviews undertaken on 6 and 8 December 2018. Giving false accounts to the Police may also support a finding of a high degree of callousness, particularly where the behaviour involves attempts to avoid detection and the return of a loved one's body to their family.[98]
>
> [74] Standing back and viewing all these factors of varying weight in combination and comparing your offending with other cases of murder, to the limited extent that is possible in this case, I am of the view that the starting point for the MPI should be 17 years.

Submissions

[158] Ms Reed submits that the Judge erred in considering the vulnerability of Ms Millane when also assessing whether the murder involved a high level of brutality, cruelty, depravity or callousness. In so doing, it is said the Judge was using the moderate presence of one factor (vulnerability) to increase the moderate presence of another factor (callousness), and thereby erroneously found both factors to be present. That was inconsistent with the approach of this Court in *Marong v R*.[99]

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97 *R v Gottermeyer* [2014] NZCA 205 at [79]; and *Bracken v R*, above n 93, at [63].

98 *Singh v R*, above n 93; *R v Solomon*, above n 93; *Roigard v R*, above n 93, at [113]; and *R v Marong*, above n 93, at [26].

99 *Marong v R* [2020] NZCA 179 at [28]–[29].

[159] Secondly, Ms Reed submits that Ms Millane did not reach the standard of a particular vulnerability. Although in the ordinary sense she was somewhat vulnerable because of her comparatively smaller stature and expectation that she would not be attacked while engaging in an intimate activity, this does not reach the high threshold required for s 104(1)(g). This was not a scenario where the victim was asleep (and therefore an imbalance between the power and alertness of the victim and attacker) — the interactions likely began with consensual intercourse. Both parties were similarly exposed in the sense of being naked and Ms Millane had some interest and experience with erotic asphyxiation. The Judge erred in finding that the female sexual partner must be inherently particularly vulnerable in the context of consensual sexual activity.

[160] Thirdly, while accepting that post-death conduct may be relevant to the Court's assessment of callousness under s 104(1)(e), Ms Reed submits that the focus of the enquiry must, given the statutory language, be at the time of killing. Post-death conduct must therefore have some connection with, or serve as a reflection of, the defendant's state of mind at the time of the killing.[100] The Judge erroneously focused on the appellant's internet searches and taking of photographs of Ms Millane as providing an insight into his mind at that time, as this was after Ms Millane had already been killed. The absence of mitigating factors such as immediate reporting of Ms Millane's death and assistance to the police could not be considered of themselves relevant to the s 104(1)(e) enquiry.

Analysis

[161] We do not think the Judge erred in his s 104 analysis. The relevant enquiry on appeal is whether there was a proper evidential foundation upon which the Judge could form the view that s 104 was engaged.[101] An appellate Court will be slow to overturn a s 104 finding, given the advantage the sentencing Judge has in seeing and hearing first-hand all the evidence at trial.

[162] To be plain about matters, it really is very difficult to imagine much greater vulnerability than the situation Ms Millane found herself in on the evening of Saturday,

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100 Referring to *Frost v R*, above n 93, at [35]; *Bracken v R*, above n 93, at [63]; *Marong v R*, above n 99, at [33]; and *Roigard v R*, above n 93, at [113].

101 *R v Slade* [2005] 2 NZLR 526 (CA) at [41].

1 December 2018. Intoxicated, in a strange hotel room, naked, in the arms of a comparative stranger with whom she thought she had "clicked" (and could therefore trust), and with his hands about her throat. Unable to cry out, unable to breathe, lapsing into unconsciousness.

[163] It is the very combination of these things that means s 104(1)(g) is made out here. We do not think the Judge combined, and thereby depreciated, the elements of vulnerability and callousness, contrary to this Court's (subsequent) decision in *Marong v R.*[102] In any case, we take the view that each element of vulnerability and callousness in fact is made out in its own right to the extent required to engage s 104(1).

[164] We turn to the second aspect, callousness and the application of s 104(1)(e). Two preliminary points should be made. The first is that "callousness" is about the perpetrator's attitude to the offending. It has been described in the High Court, in terms we adopt, of "a want of feeling or insensibility amounting to a numbness of the soul".[103] The second is that conduct after death is relevant to the s 104(1)(e) enquiry. In *Frost v R* this Court said:[104]

> [Counsel] submitted that the appellant's conduct following the murder could not be used in assessing whether the murder came within s 104(e). We reject that. For the appellant to help himself to the contents of the refrigerator of the person he has just murdered, and then drive off in her car, is hardly the spontaneous outpouring of remorse that might point away from callousness.

In that case the appellant had cut the victim's throat, and then stabbed her through the chest, as she was about to make his dinner. He then took food from her refrigerator and drove away in her car. The next day, while visiting another female friend, he told her he "liked the killing" and was "quite good at it". He also said he liked "watching all the blood come out".

[165] In this case the appellant's callousness was demonstrated by a series of strands of remote disregard: his attitude to the likely struggles of Ms Millane (but certain lapsing into unconsciousness), his disregard for her condition when he went then to take a shower, his failure to call for assistance when appreciating her condition, and

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102 *Marong v R*, above n 99.
103 *R v Mason* [2012] NZHC 1849 at [44(b)]. See, to similar effect, *Frost v R*, above n 93, at [36].
104 *Frost v R*, above n 93, at [40].

then the steps he took that we have set out at [23] to [25], the order of which is important: searching on the internet for methods of body disposal, then looking at pornography online, then taking intimate photographic images of Ms Millane's naked body, then looking again at pornography online, taking steps preparatory to disposing of the body, going on another date while Ms Millane's body remained in his room. As the Judge said, "[t]hese were not the actions of a man in panic. Far from it. Your actions reveal a complete disregard for your victim."[105]

[166] It is little wonder that Ms Reed quite properly says she does not seek to condone or excuse in any way these actions. They were, as she says, inexcusable. But they are also indicative of a degree of wholly self-regarding wickedness throughout the incident and its aftermath, i.e. callousness, that calls for the punitive response provided in s 104(1).

[167] Ms Reed contrasts the High Court decision in *R v Callaghan*, which also involved the concealment of the victim's body, and in which s 104(1) was not considered to be engaged.[106] Concealment of the body is, however, the only common feature of the two cases. Notably, Mr Callaghan was deeply remorseful, had pleaded guilty — and the Crown conceded the non-engagement of s 104.[107]

[168] In our view the Judge did not err in his application of s 104(1). The Judge did not consider the imposition of the 17-year term manifestly unjust. In the circumstances just related, nor do we. It must follow that the sentence imposed was not manifestly excessive, and the appeal against sentence will be dismissed.

Result

[169] The appeal against conviction is dismissed.

[170] The appeal against sentence is dismissed.

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105 Sentencing notes, above n 3, at [68].
106 *R v Callaghan* [2012] NZHC 596.
107 By coincidence, Crown counsel in *R v Callaghan* became in due course the trial Judge in this case.

[171] Unless extended by the Supreme Court, the suppression orders in favour of the appellant lapse with this judgment.

[172] We express our appreciation to counsel for both parties for the quality of the submissions we received.

Solicitors:
Crown Solicitor, Auckland for Respondent