**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC48/2024**

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| **BETWEEN** | **TRISTAN LEE TAMATI** |
| | **Applicant** |
| **AND** | **THE KING** |
| | **Respondent** |

# CROWN SUBMISSIONS ON SECOND APPEAL AGAINST CONVICTION

**22 November 2024**


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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

**Issue**

1. A jury found Mr Tamati guilty of supplying the 15-year-old complainant methamphetamine, trying to kiss her, then repeatedly sexually violating her – first in a car, then in a bedroom next to two other partygoers. Both were called by the Crown at trial. They said Mr Tamati was "cosy" with the complainant at that point, hugging and kissing her – in stark contrast to his suggestion he was not attracted to her and never "even had a hand on her".

2. Neither consistently described seeing Mr Tamati having sex with the complainant. But it was unclear they would necessarily have noticed or remembered. Both were intoxicated; they were having sex with each other at the time and the male witness was distracted by this; and the female at one point suggested she *had* seen sex occurring, only to retract this later.

3. In closing, Mr Tamati's trial counsel kept the jury focused on the agreed defence: the complainant had entirely made up her account of sexual contact. He emphasised evidence of motive to lie, suggesting the complainant may have fabricated the rapes to protect : all her various complaints had come only after they had, mistakenly, . He pointed to various parts of the trial evidence as reinforcing the likelihood she was lying. But – like the Crown – he did not see the evidence of two other intoxicated partygoers as central.

4. This Court granted leave to appeal on two grounds: did errors by trial counsel occasion a miscarriage of justice, and was a reliability warning required?[1]

5. The Crown responds that justice did not miscarry on either ground. Trial counsel's lengthy closing address put the essence of Mr Tamati's defence before the jury, and the others' evidence of what had happened in the bedroom was at best equivocal and at worst risky. Nor was a reliability warning required: despite her intoxication, the complainant's core account was largely intact, and the issues with C's evidence were obvious.

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[1] *Tamati v R* [2024] NZSC 91, Supreme Court Case on Appeal (SCCOA) at 7.

**The Crown case**

6. On 30 December 2017 the complainant, then 15, was with two friends, C and H, when Mr Tamati ("Smudge") and his friend D arrived in D's car. All five ended up at D's house in Stokes Valley, drinking and smoking cannabis. They also used methamphetamine, which Mr Tamati supplied.[2] Around 9-10pm D saw Mr Tamati and the complainant "sitting on [his] back porch cuddling up",[3] looking cosy.[4]

7. Mr Tamati tattooed all three young women in D's bedroom. About 12.30-1am,[5] H, C and D left to have a threesome in the car. The complainant was lying on the bed in a top and underpants. Once they were alone Mr Tamati pulled the complainant onto his lap, trying to kiss her.[6]

8. Her next memory was of being in a car with Mr Tamati, naked.[7] The boot was open and the back seats were down.[8] Mr Tamati was above her holding her down and raping her.[9] She told him "get off of me". He turned her over and raped her anally;[10] she was crying and telling him to stop.[11] At some point he grabbed her hair and pushed her head down onto his penis. She bit it and he screamed at her.[12] Then he pulled his pants up and left.[13]

9. The complainant stayed in the car crying. She put her clothes back on and sat by herself "processing".[14] She could not remember returning to the house. But C saw the complainant return to the house that night, crying and incoherent.[15] C, her friend, had never seen her that "fucked up".[16]

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2 Charge 7. Court of Appeal Case on Appeal (CA COA) at 40; Notes of Evidence (NOE) at 34 and 41.
3 NOE at 59.
4 NOE at 60.
5 NOE at 64-66.
6 Charge 1: CA COA at 39.
7 CA COA at 124.
8 CA COA at 121.
9 Charge 2, CA COA at 39; CA COA at 105, 112, 123-126.
10 Charge 3, CA COA at 39.
11 CA COA at 122.
12 CA COA at 121, 130.
13 CA COA at 130-131.
14 CA COA at 131-132.
15 NOE at 42, 53-54.
16 NOE at 42.

10. The complainant's next memory was of waking up in D's room – first on the bed, then (later) on a nearby couch. It was daytime and H had left. D and C were in the bed, and she was on the couch with Mr Tamati sleeping behind her.[17] When he woke, he moved her underwear to the side and "just…started having sex with" her.[18] The complainant did not want to make anyone mad[19] so "just kind of let it happen".[20]

11. The complainant told C about being raped later that day,[21] and later told a friend, [redacted] who encouraged her to tell the police.[22]

**The defence at trial**

12. When interviewed in March 2019, Mr Tamati denied sexual contact with the complainant. There had never been a time he was alone with the complainant, and he had never even tried to have sex with her.[23] It was "one big lie";[24] if he had had sex he would remember it.[25] He had never held her or even had a hand on her, except when tattooing her.[26] She was too young and he was not attracted to her.[27] After he had tattooed her she had kissed him partly on the lips, but that was it.[28] The closest thing to sex was when the complainant had messaged Mr Tamati suggestively.[29]

13. At trial the defence was fabrication. The complainant was lying to protect who – before she had gone to the Police – had believing he had raped her. It was all a misunderstanding: the complainant had told her family about her sexual contact with D that evening, they had assumed the culprit was Mr Tamati, and she had then dutifully fabricated the rape to justify ' behaviour.

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17 CA COA at 138-140. They were on their sides and the complainant facing away from Mr Tamati.
18 Charge 5; CA COA at 140.
19 CA COA at 140.
20 CA COA at 105.
21 NOE at 45. In her police statement she had said "sometime later": NOE at 52; SCCOA at 43 paragraph 5.
22 NOE at 72.
23 CA COA at 54, 95.
24 CA COA at 54.
25 CA COA at 61.
26 CA COA at 89.
27 CA COA at 88.
28 CA COA at 88-89.
29 CA COA at 80-81 (see also at 50).

14. Trial counsel laid the foundation for that defence in cross-examination:

14.1 On the defence case it was D, not Mr Tamati, who had had sex with the complainant that evening.[30] She had contracted chlamydia,[31] and D had had it too.[32]

14.2 On 11 March 2018 the complainant's grandmother discovered her on the phone to Family Planning. When the complainant explained she needed to get checked out, her grandmother asked her if she had been sexually assaulted. The complainant just looked at her. Her nana interpreted that as a yes. The complainant did not actually say she had been assaulted; she only said it had been the person who did her tattoos.[33]

14.3 The next day, the grandmother emailed Police saying the complainant said Mr Tamati had raped her; "this was not the guy [D] that she had previously said had done the tattoos".[34]

14.4 On 18 March 2018 the complainant's had been involved in .[35]

14.5 The complainant's first police interview was on 27 March 2018. By this point she had no choice but to back up.[36]

14.6 Any complaint to was only after the motive to lie arose. On 26 June 2018, told police the complainant had told her about the rape two to three months ago – so April or May 2018.[37]

30 Both the complainant and D denied having sex with each other: NOE at 29 and 64.
31 NOE at 25.
32 NOE at 26. D suggested he had got it from H: NOE at 62.
33 NOE at 20-22.
34 NOE at 23.
35 NOE at 33.
36 NOE at 33-34.
37 NOE at 73.

**RESPONDENT'S SUBMISSIONS ON CONVICTION APPEAL**

**Did errors by trial counsel cause justice to miscarry?**

15. Mr Tamati emphasises that neither C nor D's evidence suggested they had seen Mr Tamati raping the complainant, although both were in the room at the time. He argues trial counsel's decision not to mention this when closing has caused justice to miscarry.

16. The Crown responds that trial counsel's closing address put Mr Tamati's fabrication defence squarely and unwaveringly before the jury. He chose, reasonably, not to mention the 'couch incident evidence' because it was at best equivocal. Its value to the defence is overstated: D's and C's evidence did not give the lie to the complainant's account. Nor is there any risk the outcome was affected by counsel's judgment to focus on wholesale fabrication. The jury had heard the evidence about the couch incident the previous day, and the judge reminded them of it when summing up.

***Closing addresses: the law***

17. Mr Tamati must establish his counsel acted as no reasonable counsel would have, and that it is reasonably possible this deprived him of a more favourable verdict.[38] As explained in *Sungsuwan v R,* if trial counsel makes a tactical decision that was reasonable in the context of the trial, usually the appeal will not be allowed even if the outcome of the trial may have been affected:[39]

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

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38 How counsel elects to craft a closing address is not among the "fundamental" decisions described in *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65] and [77], **Joint Bundle Tab 24**.

39 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [66] per Gault, Keith and Blanchard JJ. See also Tipping J at [116], **Tab 45** and *R v Scurrah* CA 159/06, 12 September 2006 at [18], **Tab 44**.

18. When a closing address is criticised on appeal, it must be looked at in its entirety, and in the context of the trial and the client's instructions. The significance of parts of the trial and individual pieces of evidence will necessarily be filtered by individual counsel's judgement and sense of their significance. Matters of emphasis, balance and even tone are inherently subjective. Appeals are not the time for a minute dissection of trial strategy;[40] "[h]indsight reflection" of this kind misses the urgency and fluidity of criminal trials.[41]

19. So it is not enough – armed with hindsight and unlimited time – to point out a further submission that would have bolstered the defence case.[42] As long as the defence was consistent with instructions and has been adequately explained to the jury,[43] the details of the closing are counsel's prerogative.[44]

20. An adequate closing will "highlight the weaknesses and inadequacies of the Crown case and/or…indicate the factors in the defence case which should have precluded the jury from being satisfied of essential ingredients to the requisite standard."[45] But trial counsel can distil the defence case to its essence[46] and need not mention every inadequacy in the Crown case,[47] nor every point that might dent the complainant's credibility.[48] As the US Supreme Court noted in *Yarborough v Gentry*, research suggests an upper limit to the number of arguments an advocate can persuasively make[49] and

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40 *Hall,* above n 38 at [74], **Tab 24**.

41 *McGeachin v R* [2015] NZCA 558 at [6], **Tab 33**.

42 *M (CA138/2020) v R* [2022] NZCA 506 at [86], **Tab 31**.

43 *M (CA138/2020), ibid* at [87], **Tab 31**.

44 *Duncan v R* [2011] NZCA 307 at [27], **Tab 18**; *Ross v R* [2017] NZCA 587 at [40]-[41], **Tab 46**; *M (CA138/2020)*, above n 42 at [87] ("the key issue is whether the defence was adequately explained"), **Tab 31**.

45 *E (CA113/2009) v R (No 2)* [2010] NZCA 280 at [27], **Tab 19**.

46 *Turner v R* [2018] NZCA 175 at [32] and [35], **Tab 57**.

47 *Blake v R* [2010] NZCA 61 at [59]-[61], **Tab 11.**

48 *Waters v R* [2020] NZCA 93 at [13], **Tab 59**; *Ikinepule v R* [2017] NZCA 125 at [17] and [23], **Tab 26**; *Blake,* above n 47 at [59]-[61], **Tab 11**.

49 *Yarborough v Gentry* 540 US 1 (2003), 124 S Ct 1 (2003) at 7, **Tab 100**.

reasonable counsel may differ about what the key points are.[50] Nor is it necessary to distinguish between individual charges if the defence is clear.[51]

21. Appeal courts will intervene only rarely, if the closing address is so deficient that the defence was not adequately put before the jury[52] – for example if it was "confused" and "inarticulate";[53] undermined the defendant's credibility;[54] or omitted a "key component" of the defence – something going to the "essence of the defence".[55]

22. *Waters* exemplifies the last category – "one of the rare cases [where] the defence had not been adequately put".[56] Trial counsel focused on deficiencies in the complainant's evidence, rather than suggesting (based on defence evidence) that there had been no opportunity to offend and as an "inevitable corollary" the complainant was lying.[57]

23. The ultimate focus is always whether "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".[58] A risk of miscarriage may be averted if the trial judge corrects omissions in a defence closing.[59]

***Why justice has not miscarried in this case***

24. Counsel for Mr Tamati put the "essence of his defence" in his closing and there was no failure to mention a "key component" of Mr Tamati's defence of fabrication.[60] It is not open to him to ask for a retrial just because another

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50 *Yarborough v Gentry, ibid* at 5-6, **Tab 100**.

51 *Hall,* above n 38 at [147], **Tab 24**.

52 *Waters,* above n 48 at [2], **Tab 59**; *E (CA113/2009)*, above n 45 at [27], and at [29], **Tab 19,** citing *R v Owens* [2006] EWCA Crim 2206 at [100], **Tab 87**.

53 *E (CA113/2009)*, above n 45 at [39] and [43], **Tab 19**. See also *Kaka v R* [2015] NZCA 532 at [40], **Tab 27**; *Mason v R* [2019] NZCA 459 at [22] and [30], **Tab 32**; *Karaka v R* [2023] NZCA 283 at [26], **Tab 28**.

54 *R v Boyd* [2007] NZCA 507 at [19]-[20], **Tab 38**.

55 *Waters,* above n 48 at [2], **Tab 59**.

56 *Ibid,* **Tab 59.**

57 *Waters,* above n 48 at [13], **Tab 59**.

58 *Sungsuwan,* above n 39 at [110] per Tipping J, **Tab 45**; *Hall,* above n 38 at [9], **Tab 24**.

59 *Kaka,* above n 53 at [30], **Tab 27**.

60 *Waters,* above n 48 at [2], **Tab 59**.

counsel might make different judgment calls about which parts of the trial evidence to focus on.

*What was said*

25. Trial counsel's closing took around an hour. He deliberately chose not to repeat every available point he had made during cross-examination,[61] having "seen many a jury fall asleep" during more exhaustive closings.[62] He saw his critical task as focusing the jury's attention on the complainant's motive to lie.[63]

26. Trial counsel started by responding to three aspects of the Crown closing. First, D's evidence about where the car was parked (relevant to charges 2-4) was spontaneous and truthful and "directly contradict[ed]" the complainant's. The Crown's invitation to accept her evidence required resort to "alternative facts".[64] Second, her complaint to [redacted] had been in April or May, *after* the in March (not before as the Crown suggested).[65] Third, it was incorrect the complainant had "told the [whole] truth" to her nana; it was nana who had suggested the allegation, and the complainant's only response at that stage was to mention the tattooist.[66] All this reinforced the defence case: only after Mr Tamati had the complainant first accused him of rape.

27. Trial counsel then contextualised events – alcohol-and-drug fuelled situations where guns were produced almost casually – and suggested if he moved in these circles, it would be most unlikely Mr Tamati would have got into the car with had he raped her.[67]

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61 SCCOA at 51 paragraph 8; COA at 227 (trial counsel explaining he would not "insult [the jury's] intelligence" by traversing the evidence in detail when it had "only been a day or so, the memory is clear in your mind and you will have thought about it as it was being given.")

62 SCCOA at 59 lns 2-4.

63 SCCOA at 51, paragraphs 8-9; SCCOA at 56.

64 COA at 226.

65 COA at 227-228.

66 COA at 228.

67 COA at 229-230.

28. Next, trial counsel pointed to three "little truths" that had emerged spontaneously at trial, and which confirmed the complainant was lying:[68]

    28.1 The complainant had explained her nana had 'busted' her on the phone to Family Planning.[69] So as a young person she had not corrected nana's suspicion of sexual assault: it left her blameless.

    28.2 D's spontaneous evidence about where the car was parked contradicted her account, and he had no reason to lie about that.[70]

    28.3 The defence was told only *during trial* that the complainant had had chlamydia, but lo and behold, when questioned D had also had chlamydia around that time too[71] – proof that it was D, not Mr Tamati, with whom she had sex that night.

29. Finally, defence counsel took the jury through the timeline of events, establishing that the complainant's allegations had come only after Mr Tamati. Picking up on a theme in her EVI, he explained she was the kind of person who did not make a fuss but just "went with the flow".[72] And he reminded the jury of Mr Tamati's forthright, distressed denial: "this is lies she made up".[73]

30. The defence of fabrication was squarely put before the jury, and it was reasonable for trial counsel to focus on the core of the defence case[74] – namely that to save , the complainant was lying about the sexual contact (and therefore lying about the relevant associated details).

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68 COA at 230-231 ("witnesses who are often telling big lies tell little truths which they don't believe are consequential").

69 COA at 229-230; see NOE at 21.

70 COA at 231.

71 COA at 231-232.

72 COA at 232-234.

73 COA at 234.

74 Court of Appeal judgment, SCCOA at 18 (at [25]), at 23 (at [31]) and at 24 (at [36]).

*Was the lack of corroboration from C and D part of the essence of Mr Tamati's defence?*

31. Trial counsel chose not to mention the couch incident, given the limits of the jury's attention span and the fact his cross-examination on the point would be fresh in their memory. He wanted the jury to be concentrating solely on why the complainant might be lying, and did not see the lack of corroboration from others as a core part of the defence.[75]

32. C's and D's failure to observe or recall intercourse was not essential to Mr Tamati's defence. There are three difficulties with the argument.

33. First, this was not a case where two witness accounts aligned consistently against the complainant's.[76] Both were far more equivocal – D was distracted and C inconsistent:

    33.1 Asked if he had seen anything happen on the couch, D explained he was "too busy fooling around with [C], to be honest with you. But even when they were laying on the couch, they seemed cosy."[77]

    33.2 C said Mr Tamati was being "touchy-feely", hugging and kissing the complainant on the couch.[78] In evidence-in-chief she did not describe Mr Tamati having sex with the complainant. When trial counsel attempted to exploit this inconsistency with the complainant's evidence, it evaporated: asked directly whether she had seen Mr Tamati and the complainant having sex, C said she "wasn't in the room" when it happened[79] but had heard them then "walked into the room as it was happening and sat down".[80] C agreed she "wasn't looking [the complainant] in [the face]",[81] but said she and D were "engaged intimately" at the same time as

75 SCCOA at 56 lns 7-14 and 21-31.

76 SCCOA at 23 (at [33]).

77 NOE at 61.

78 NOE at 44.

79 NOE at 46.

80 NOE at 47.

81 NOE at 47.

Mr Tamati and the complainant.[82] The ground shifted again by the end of cross-examination: "I think I don't remember that actual like whole rape scenario happening".[83] From the trial judge's viewpoint, all Mr Tamati could say about this evidence was that it was "confusing and contradictory"[84] – that is, neutral.

34. The complainant's clear, consistent account of the rape was unlikely to be much dented by the fact two intoxicated people simultaneously having sex with each other either had not noticed, or could no longer remember.

35. Second, there were genuine risks in relying on this evidence.[85] Cherry-picking just one of C's versions of events risked losing credibility with the jury. Her evidence was internally contradictory. Counsel would have had to grapple with and explain away her assertion, under cross-examination, that she *had* seen sex occurring. And drawing attention to the others' evidence would inevitably have reminded the jury of the more damaging parts of their evidence,[86] most notably C's description of Mr Tamati hugging and kissing the complainant on the couch. This was contrary to his flat denials that he had "never tried getting into her",[87] there's "no time where [he'd] even held her"[88] and that "none [of] them seen me hit on her".[89]

36. This case is far removed from *Waters.* There, defence counsel failed to make the case that there was no opportunity to offend and this meant the defence was not properly before the jury. In the present case, what Mr Tamati suggests is that the wrong inconsistency was used to demonstrate fabrication – a "failure to put a general credibility challenge as well as it could have been".[90]

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82 NOE at 47.
83 NOE at 52.
84 CA COA at 246 (at [37]).
85 SCCOA at 23 (at [33]).
86 SCCOA at 23 (at [33]).
87 CA COA at 95.
88 CA COA at 89.
89 CA COA at 94.
90 *Waters,* above n 48 at [13], **Tab 59**.

37. Third, judgment calls about what witness evidence to focus on are difficult to gainsay on appeal. They turn on what had the most impact at trial. Here, both parties focused in closing on the same issue: the conflict in evidence about where the car was parked. D's evidence about this was treated as a difficulty for the Crown, which the prosecutor spent time on in cross-examination trying to repair things,[91] then time in closing carefully explaining why the complainant's account should be preferred.[92] Trial counsel chose this inconsistency to exploit in closing.[93]

38. By contrast, experienced Crown *and* defence counsel chose to sideline C and D's evidence about the couch incident when closing. Trial counsel saw the evidence as minor[94] and the Crown focused entirely on the complainant's credibility, making no mention of D's evidence about the couch incident and two minimal references to C's evidence.[95] The jury would not have understood the prosecutor to be suggesting C had witnessed Mr Tamati penetrating the complainant. Notably the trial Judge, too, did not present this as part of the Crown case.[96] He noted "prudence and caution" suggested they should look for evidence supporting the complainant's, and listed the evidence the Crown relied on; C's evidence was not mentioned.[97]

39. In any case justice did not miscarry. Pointing out C and D's evidence in closing could not have secured an acquittal for Mr Tamati. This was a short (three-day) trial, with C's and D's evidence given the afternoon before

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91 NOE at 65-67.

92 CA COA at 212-214.

93 CA COA at 226-227 and 231.

94 SCCOA at 51 paragraph 9.

95 The Crown suggested C's evidence supported the complainant's evidence that C and D had been having sex (CA COA at 217) and that it made more sense that both couples were engaging in sexual activity at the same time rather than that Mr Tamati and the complainant had just been lying there (CA COA at 221).

96 CA COA at 246 (at [34]-[36]) and 254 (at [77]).

97 CA COA at 248 (at [44]).

closing addresses.[98] The evidence was equivocal, and the judge reminded the jury of it when summarising the defence case.[99]

*Did trial counsel fail to familiarise himself with Mr Tamati's interview?*

40. Mr Tamati submits his trial counsel erred, fundamentally, by failing to familiarise himself with Mr Tamati's video interview,[100] relying on trial counsel's on-the-spot decision to suggest the complainant had fabricated a significant addition to her EVI[101] and his comment during cross-examination that when deciding not to mention the couch incident he "didn't really think much about what Mr Tamati had said quite frankly".[102]

41. This additional criticism, which was not considered by the court below, does not advance the case for miscarriage. It is unsafe to infer a fundamental failure to prepare and, as already explained, the closing address put Mr Tamati's defence squarely before the jury.

**Ground two: Should a reliability warning have been given?**

42. Although other witnesses including the defendant were affected by substances they had ingested, Mr Tamati says the trial miscarried because no s 122 warning was given about the complainant's and C's alcohol and drug use.

43. No miscarriage arises. The complainant's intoxication was in front of the jury and a reliability warning would have cut across Mr Tamati's fabrication defence. No direction was sought. There was a risk that the Judge might

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98 SCCOA at 23 (at [33]). The evidence started on 19 October 2020 at around 12.13pm. The complainant's EVI was played on the first day. She gave another 15 minutes of evidence-in-chief on 20 October 2020, then (after a pre-trial ruling which took around 1 hour 45 minutes) was cross-examined and re-examined for an hour. Both C and D gave evidence after lunch on 20 October. On 21 October 2020 Mr Tamati's interview was played (for around 50 minutes) then both counsel closed before lunch.

99 COA at 246 (at [37]).

100 Appellant's submissions, paragraph 37-38 and 43-45.

101 NOE at 29. Before this point it would not have been clear that anyone at trial would describe the two couples engaging in *simultaneous* intercourse: Mr Tamati had said H was still in the room with him and the complainant when C and D were having sex (CA COA at 67), whereas the complainant described being raped on the couch only after H had gone home (CA COA at 105-106). Neither C nor D had told police they had had sex with each other.

102 SCCOA at 57.

invite similar caution about Mr Tamati's account, or that the jury would understand the warning in that way.

***The New Zealand position***

44. Reliability warnings arose when the law deemed it dangerous to accept certain categories of uncorroborated evidence – including complaints of sexual assault – that were considered inherently suspect. Prison informants were another classic example.[103] At common law, the *raison d'être* of such directions was "to ensure that the jury was alive" to evidence of suspect reliability, this being something judges were well-versed in but of which jurors might be ignorant.[104]

45. The Evidence Act 2006 replaced these categories with a general discretion to warn the jury to be cautious before accepting evidence which "may be unreliable": s 122(1). Like the common law, s 122(2) isolates some types of evidence – notably cellmate confessions and long-delayed prosecutions – as inherently more likely to require a warning. The Judge *must* consider warning the jury about such evidence. Section 122(2)(b), for example, "reflect[s] a concern, traceable to the common law, that juries may too readily assume that a confession must be reliable".[105] Where there are concealed risks of this kind a warning will often be required, even if the issue was traversed at trial:

    45.1 In cellmate confession cases (s 122(2)(d)), a direction will "normally be required"[106] since juries view such evidence as persuasive,[107] despite its established role in producing miscarriages of justice.[108] In such cases it could "hardly be suggested that it is appropriate for the judge to simply leave it to

103 *Archibald v R* [2014] NZCA 443 at [21], **Tab 7**.
104 *Bromley v R* [1986] HCA 49, (1986) 161 CLR 315, 323 per Brennan J, **Tab 64**.
105 *Baillie v R* [2021] NZCA 458, (2021) 30 CRNZ 185 at [76], **Tab 10**.
106 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [41], **Tab 25**.
107 *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [80], **Tab 58**. See also *Cross on Evidence* at EVA122.5(d): "The context and motivations [of such evidence] are likely well outside [the jury's] general experience".
108 *W (SC38/2019), ibid* at [78] and [211] ff, **Tab 58**.

counsel to point out the risks associated with such evidence": the warning should have the imprimatur of the judge.[109]

45.2 In cases involving at least a 10-year delay (s 122(2)(e)) a restrictive approach to directions under s 122 is not warranted.[110] There is no room for a presumption that a reliability warning will usually be unnecessary:[111] indeed once the 10-year threshold is crossed, a good reason is required *not* to give a warning under s 122(2)(e).[112] This is because "the risks will be more apparent to the judge than to the jury"[113] and if the 10-year threshold has been crossed, "there will almost always be a risk of prejudice".[114] So whether counsel have raised the matter or not,[115] trial judges should assess whether there are "actual reliability risk indicators"[116] – in delay cases, this includes signs the complainant's memory has been degraded or distorted.[117]

46. The same general approach is not apposite when dealing with "garden-variety" reliability issues, such as intoxication.[118]

47. First, there is nothing invisible about the impact of intoxication on reliability. If a witness's memory is affected by drink or drugs this will usually be patent, and the limits of their memory established by cross-examination. At common law a reliability warning was necessary only "where potential unreliability of the witness is not obvious for the jury to see"; it must be recognised that judges "are not necessarily gifted with special insight into…human behaviour not shared by jurors".[119] Similarly,

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109 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [50], **Tab 15**.

110 *CT, ibid* at [45], **Tab 15**.

111 *CT,* above n 109 at [50], **Tab 15**; *R v R* [2023] NZSC 132, [2023] 1 NZLR 507 at [49](a), **Tab 43**.

112 *R, ibid* at [49](i), **Tab 43**.

113 *R,* above n 111 at [49](b), **Tab 43**.

114 *CT,* above n 109 at [51], **Tab 15**.

115 *R,* above n 111 at [49](c) and [50] (majority), and at [169] (minority), **Tab 43**; *L v R* [2015] NZSC 53, [2015] 1 NZLR 658 at [31], **Tab 29**.

116 *R,* above n 111 at [49](g) and at [173] (minority), **Tab 43**.

117 *R,* above n 111 at [49](e), **Tab 43**.

118 *B (CA58/2016) v R* [2016] NZCA 432 at [62], **Tab 9**; *Skantha v R* [2021] NZCA 117 at [65]-[66], **Tab 49**.

119 *R v Harawira* [1989] 2 NZLR 714 (CA) at 726 per Richardson J, **Tab 39**. See also *R v Vo* CA 282-98, 14 December 1998 at pp7-8 (if the need for care would have been apparent to the jury a warning would be "otiose").

not every reliability issue demands a s 122 warning: the jury must need the judge's assistance.[120] Where the issues are obvious a warning is unlikely to be needed,[121] as this Court has recognised where motive to lie is alleged.[122]

48. Second, jurors' collective experience of ordinary human behaviour is said to be their strength.[123] Juries well know alcohol and drugs can affect recollection. How memory works is within a jury's collective common knowledge,[124] as is the impact of drink or drugs on memory.[125]

49. Third, intoxication is not an area where judges have an advantage over jurors. All cognate jurisdictions limit reliability warnings to situations where the view from the bench can correct some gap in the jury's knowledge, as under common law in New Zealand. Intoxication is not in this category. And if the law's long experience can add anything, it is the legion of cases in which a highly intoxicated complainant – despite recalling not much else – remembers being raped, and can give a clear account of it.

50. Fourth, section 122 deliberately draws no distinction between Crown and defence evidence. Singling out just one intoxicated participant's evidence for "caution" risks being seen as a judicial signal about whose evidence should be preferred.[126]

*When does an intoxicated complainant's account demand caution?*

51. New Zealand's approach has been that a reliability warning is not required if, despite intoxication, a complainant's core account is relatively intact.

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120 *B (CA58/2016)*, above n 118 at [59] ff, **Tab 9**.

121 *B (CA58/2016)*, above n 118 at [60], **Tab 9**; *Taylor v R* [2022] NZCA 345 at [31], **Tab 54**; *Taylor v R* [2010] NZCA 69 at [88], **Tab 52**; *Taylor v R* [2010] NZSC 87 at [2], **Tab 53**.

122 *H (SC 69/2023) v R* [2023] NZSC 166 at [6], **Tab 23**. See also *Archibald*, above n 103 at [22], **Tab 7**, *Taylor v R* [2010] NZCA 69 at [73], **Tab 52;** *Taylor v R* [2010] NZSC 87, **Tab 53.**

123 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [19], **Tab 48**, citing Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at [6], [7] and [60].

124 *M (CA68/2015) v R* [2017] NZCA 333 at [27], **Tab 30**; *R v M (CA419/2020)* [2020] NZCA 663 at [14], **Tab 42**.

125 *Morya v R* [2016] NZCA 325 at [51], **Tab 36**; *Taula v R* [2016] NZCA 194 at [19] and [21], **Tab 51**; *Chetty v R* [2017] NZCA 586 at [38] and [40], **Tab 14**; *Dixon v R* [2020] NZCA 667 at [33], **Tab 17**; *Falwasser v R* [2018] NZCA 79 at [23]-[24], **Tab 21**; *Ang v R* [2023] NZCA 445 at [16], **Tab 6**.

126 *B (CA58/2016)*, above n 118 at [61], **Tab 9**.

52. The fact an intoxicated complainant has memory loss for periods of the evening does not call into question the reliability of what she *does* remember.[127] What matters is the clarity, continuity, detail and internal consistency of her account of the core events[128] – although increasingly the law recognises that trauma can also cause inconsistencies[129] and expecting perfect consistency is unrealistic.[130]

53. Unreliability about peripheral matters does not justify a warning.[131] Psychological research confirms complainants of sexual violence may remember core events even if mistaken about less central matters.[132]

54. Corroboration will tend to allay reliability concerns. If a complainant's account largely aligns with the defendant's, there may be little scope to suggest her recollection is unreliable.[133] (A lack of corroboration does not negatively impact a witness's reliability, and divergence from the defendant's – or another witness's – account does not indicate it is the *complainant's* account which is unreliable.)

55. What is in issue at trial is also highly relevant. Where sexual contact is denied, intoxication may raise fewer reliability concerns:[134] even a grossly intoxicated complainant would not usually falsely imagine sexual acts.[135]

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127 *A (CA102/2022) v R* [2023] NZCA 533 at [37], **Tab 4**; *Daradkeh v R* [2016] NZCA 172 at [40], **Tab 16**.

128 *A (CA102/2022), ibid* at [25] and [37], **Tab 4**; *Toa v R* [2024] NZCA 295 at [19] and [42], **Tab 55,** *leave declined Toa v R* [2024] NZSC 147, **Tab 56**; *Daradkeh, ibid* at [40]-[41], **Tab 16**; cf *Bruce v R* [2015] NZCA 332, (2015) 28 CRNZ 150 at [12]-[13], **Tab 12** and *Pakau v R* [2012] NZCA 522 at [45], **Tab 37**.

129 Evidence Act 1977 (Qld), s 103ZY; Jury Directions Act 2015 (Vic), s 54D. The latter provision was "intended to address common misconceptions that occur in sexual offence trials: that a 'real' victim would remember all details of an offence, and be consistent in how they describe the offending whenever they are asked to do so": Victoria *Criminal Charge Book*, paragraph 7.3.1.5.

See also England and Wales' Crown Court Compendium, June 2023 at [20-7] ("Experience has shown that inconsistencies in accounts can happen whether a person is telling the truth or not. This is because if someone has a traumatic experience such as the kind alleged in this case, their memory may be affected in different ways. It may affect that person's ability to take in and later recall the experience.")

130 Te Kura Kaiwhakawā / Institute of Judicial Studies, *Responding to Misconceptions about Sexual Offending* (2023) at 5.8: "Psychological research on memory suggests that inconsistencies are a normal measure of human memory and a poor measure of the reliability of the core of the allegation."

131 *R,* above n 111 at [53] and [170], **Tab 43**; *L v R,* above n 115 at [32], **Tab 29**; *Toa*, above n 128 at [41], **Tab 55**; *Taylor v R* [2022] NZCA 345 at [34], **Tab 54**.

132 Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) at 329–339, **Tab 103**.

133 *A (CA102/2022),* above n 127 at [25], **Tab 4**; *Daradkeh (CA102/2022),* above n 126 at [41], **Tab 16**.

134 Identity-based denials are obviously in a different category.

135 *A (CA102/2022),* above n 127 at [34], **Tab 4**.

*"Good reasons" not to give a warning*

56. Even if the judge considers a witness's evidence about core events may be unreliable, a warning is discretionary. As introduced, s 122(1) made a reliability warning mandatory;[136] the Select Committee changed "must" to "may", reasoning a mandatory warning would be "too restrictive".[137]

57. Trial judges may decide against giving a warning if:

57.1 <u>any risks were fully ventilated at trial</u>.[138] If a witness's unreliability has been a central feature of the trial, there may be no risk the jury will attach undue weight to the evidence. The more obvious the issues, the less likely a warning will be required[139] and the greater the risk it will send a signal the witness should be disbelieved.[140]

57.2 <u>the witness's evidence was not central</u>. The reliability of the complainant's evidence is usually (but not always) central to a conviction for sexual assault: in incapacity cases, by contrast, the Crown case may effectively be circumstantial.[141] And a s 122 warning may not be needed for a propensity witness.[142]

57.3 <u>where the defendant was also intoxicated</u> – meaning any direction may attach to both parties to the transaction. Section 122 applies equally to Crown and defence evidence and the Act promotes fairness to both parties.[143] If a s 122 direction is limited to just

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136 Evidence Bill 2005 (256-1), cl 118, **Tab 1**; see also Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [470], **Tab 101**, and *Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at C384, **Tab 102**.

137 Evidence Bill 2005 (256-2) (select committee report) at 12, **Tab 2**. For background, see the Ministry of Justice's Departmental Report for the Justice and Electoral Committee, *Evidence Bill Part 3: Trial Process* (June 2006) at pp28-29, **Tab 3**.

138 *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [83], **Tab 34**; *Tamati v R* [2011] NZSC 153 at [2], **Tab 50**; *Taylor v R* [2022] NZCA 345 at [30] and [32], **Tab 54**; *Williams v R* [2017] NZCA 176, (2017) 28 CRNZ 471 at [47], **Tab 61**; *Brunsell v R* [2018] NZCA 156 at [30], **Tab 13**.

139 *Pakau*, above n 128 at [47], **Tab 37**.

140 *Skantha,* above n 118 at [68], **Tab 49**.

141 For example *Pakau*, above n 128, **Tab 37** and *Daradkeh,* above n 127 at [43], **Tab 16**.

142 *H (SC 49/2016) v R* [2016] NZSC 103 at [4], **Tab 22**.

143 Section 6(c) of the Act.

some of a group of intoxicated witnesses, it risks sending a subtle signal about whose evidence should be preferred.

57.4 a warning would cut across the defence case.[144] Often the defence prefers to treat inconsistencies as evidence of fabrication, rather than excusing them as a faulty memory. Again, in denial cases there may be little prospect of persuading the jury that a complainant was so intoxicated she has simply imagined sex.[145]

58. The trial judge will be best-placed to decide whether to give a direction.[146]

***Reliability warnings in other jurisdictions***

59. New Zealand's approach to intoxication-related reliability warnings accords with that of cognate jurisdictions. In Australia, England and Canada, reliability warnings are reserved for sources of unreliability that, although known to a judge, may be lost on a jury. Intoxication that was canvassed at trial will not normally be in this category.

*Australia*

60. At common law, the judge must warn the jury about potentially unreliable evidence "whenever [this] is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case".[147] If such a concern arises, the Judge must:[148]

> draw it to the jury's attention, explain how it may affect the reliability of the evidence and warn the jury of the need for caution in deciding whether to accept it and the weight to be given to it.

61. But a warning about a witness's reliability was only ever required if her evidence held some "concealed trap" for the layperson[149] – unreliability that, though "palpable or obvious to a judge",[150] "may not have been

144 *Misa v R* [2020] 1 NZLR 85 (SC) at [83], **Tab 34**; *R,* above n 138 at [52], **Tab 43**.
145 For example *A (CA102/2022),* above n 127 at [37], **Tab 4**.
146 *Wi v R* [2009] NZSC 121; [2010] 2 NZLR 11 at [40]-[41], **Tab 60**.
147 *Longman v R* [1989] HCA 60, (1989) 168 CLR 79 at 86, **Tab 69**; *Robinson v R* [1999] HCA 42, (1999) 197 CLR 162 at [19], **Tab 71**; *Huxley v R* [2023] HCA 40, (2023) 98 ALJR 62 at [51], **Tab 68**.
148 *R v GW* [2016] HCA 6, (2016) 258 CLR 108 at [50], **Tab 73**.
149 *R v Maple* [1999] VSCA 52 at [15], **Tab 74**.
150 *Tully v R* [2006] HCA 56, (2006) 230 CLR 234 at [178] per Crennan J, **Tab 79**; *Crampton v R* [2000] HCA 60, (2000) 176 ALR 369 at [132] per Kirby J, **Tab 65**.

apparent to the jury".[151] "If the danger is so obvious that the jury are fully alive to it without a warning, no warning need be given."[152] As the High Court of Australia explained more recently:[153]

> A perceptible risk of [the] kind [identified in *Longman*] arises when there is a feature of the evidence which may adversely affect its reliability *and which may not be evident to a lay jury*. The risk is perceptible to the court because judicial experience has shown that evidence of this description may be unreliable.

62. Reliability warnings under Australia's Evidence Act 1995 (Cth) are also aimed at "hidden or lurking" reliability issues.[154] Section 165 is similar to New Zealand's s 122, although it preserves common law reliability warnings.[155] If a party asks, the judge must warn the jury about evidence "of a kind that may be unreliable" unless there is good reason not to.[156]

63. All witness evidence conceivably might be unreliable, perception and memory being fallible. But the statute "is not dealing with unreliability in this sense". Rather, as Kirby J explained:[157]

> [T]he need for a warning typically arises either because the jury needs to be acquainted with the accumulated experience of courts in dealing with certain types of evidence, or because there is the danger that the jury may over-estimate the probative value of certain evidence[.]

64. So the section is not triggered just because a factor, like intoxication, might have affected reliability.[158] It must have rendered the evidence unreliable "in a manner which might not be fully or sufficiently appreciated by the jury".[159] If the judge has no advantage over the jury in assessing reliability,

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151 *Longman,* above n 147 at 91, **Tab 69**; *Bromley,* above n 104 at 325 per Brennan J, **Tab 64**.

152 *Bromley,* above n 104 at 324 per Brennan J, **Tab 64**.

153 *R v GW* [2016] HCA 6, (2016) 258 CLR 108 at [50] (emphasis added, footnotes omitted), **Tab 73**.

154 *Allen v R* [2013] VSCA 263; (2013) 39 VR 629 at [38], **Tab 63**; *AL v R* [2017] NSWCCA 34; (2017) 266 A Crim R 1 at [80], **Tab 62**.

155 Evidence Act 1995 (Cth), s 165(5). See Evidence Act 2011 (ACT), s 165; Evidence (National Uniform Legislation) Act 2011 (NT), s 165; Evidence Act 1995 (NSW), s 165; Criminal Code Act 1899, s 632 (Qld); Evidence Act 2001 (Tas), s 165; s 32 of the Jury Directions Act 2015 (Vic).

156 Sections 165(3).

157 *R v Baartman* [2000] NSWCCA 298 at [62], **Tab 72**; *AL,* above n 154 at [79] and [81], **Tab 62**; *Hudson v R* [2017] VSCA 122 at [49] and the cases cited at [51], **Tab 67**.

158 *Hudson, ibid* at [49], **Tab 67**. See also *R v Stewart* [2001] NSWCCA 260, (2001) 52 NSWLR 301 at [99] per Howie J, **Tab 76**; *R v Medich (no 25)* [2017] NSWSC 356 at [5], **Tab 75**.

159 *Hudson,* above n 157 at [52], **Tab 67**. See also *Scannell v R* [2014] VSCA 330 at [15], **Tab 77**; *Neto v R* [2020] NSWCCA 128 at [8] per Basten JA and at [57]-[58] and [60] per Hidden AJ, **Tab 70**; *Ewen v R* [2015] NSWCCA 117, (2015) A Crim R 544 at [29] per Basten JA, at [143] per Simpson J, and at [238] per Davies J), **Tab 66**.

s 165 does not apply.[160] And there will be "good reason" not to give a warning if the reliability issue is as apparent to the jury as it is to the judge: "[i]n the absence of a latent danger, known only to seasoned criminal practitioners, a s 165(1)(c) warning ha[s] no legitimate work to do".[161]

65. Because the impact of drugs or alcohol on a complainant's memory will often be obvious to a jury, that alone does not justify a s 165 warning.[162] For example, in *Young v R*[163] the complainant of a kidnapping was a drug user and the period when the offence had occurred was "just a blur of days getting fried".[164] The trial judge's refusal to give a s 165 warning was upheld on appeal: first, the jury was aware of the issues with his evidence and this was not the kind of unreliability contemplated by s 165;[165] and second, giving the warning would have seriously prejudiced one of the appellants, who had also admitted drug use.[166] Further, "the courts [cannot] be assumed to have special experience or knowledge of the likely effects of the use of a given drug on a particular witness, beyond that of an ordinary member of a jury". Expert evidence would be preferable if needed.[167]

*Canada*

66. Canadian law permits reliability warnings about "unsavoury witnesses". *Vetrovec* warnings involve "a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness".[168] The warning is aimed at "all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the

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160 *AL,* above n 154 at [80]-[88], **Tab 62**; *R v Stewart*, above n 158 at [98] per Howie J (Hume J agreeing at [38]), and at [101], **Tab 76**.

161 *Allen*, above n 154 at [38], **Tab 63**; *R v Stewart*, above n 158 at [151] per Howie J, **Tab 76**; *AL v R,* above n 154 at [88], **Tab 62**.

162 Cf *Hudson,* above n 157, **Tab 67**.

163 *Young v R* [2015] VSCA 265, **Tab 80**.

164 At [64].

165 At [70].

166 At [73].

167 At [72].

168 *R v Vetrovec* [1982] 1 SCR 811 at 831 per Dickson J, **Tab 99**.

outcome of the trial, cannot be trusted to tell the truth".[169] A *Vetrovec* warning usually has four elements:[170]

> (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny;
>
> (2) explaining *why* this evidence is subject to special scrutiny;
>
> (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and
>
> (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.

67. Five features of Canadian law stand out. First, the warning is aimed at "the evidence of a witness whose testimony *occupies a central position* in the purported demonstration of guilt".[171] If an unsavoury witness's evidence is important but not central, a *Vetrovec* warning may not be required.[172]

68. Second, the warning aims "to bring home to the lay juror the accumulated wisdom of the law's experience with unsavoury witnesses",[173] to ensure the jury is adequately able to gauge the witness's credibility and reliability.[174] The focus is on "the type of concerns which a jury might not appreciate due to inexperience", not "matters affecting credibility or reliability which are flagrant and which are in the front of the jurors' collective human experience".[175] So a warning is not required just because the witness was woefully inconsistent in a way that would have been "palpably plain".[176] This is "routine fare" for jurors to evaluate.[177]

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169 *R v Khela* 2009 SCC 4, [2009] 1 SCR 104 at [3] (referring to "witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted" and suggesting these terms were "interchangeable"), **Tab 95**.

170 *R v Khela, ibid* at [37], **Tab 95**.

171 *Vetrovec,* above n 168 at 831 per Dickson J (emphasis added), **Tab 99**.

172 *R v Brooks* 2000 SCC 11, [2000] 1 SCR 237 at [3] and [14], **Tab 90**.

173 *Khela,* above n 169 at [4]-[5] per Fish J, **Tab 95**.

174 *R v Carroll* 2014 ONCA 2, (2014) 304 CCC (3d) 252 at [78], **Tab 92**, *leave declined* [2014] SCCA No 193; *R v Rajbhandari* 2017 ABCA 251, [2017] 56 Alta LR (6th) 31 at [50] and [54], **Tab 98**; *R v Chandra* (2005) 198 CCC (3d) 80 (ABCA) at [10], **Tab 93**.

175 *Rajbhandari*, *ibid* at [57], **Tab 98**.

176 *Rajbhandari,* above n 174 at [2] and [50] ff, **Tab 98**. In that case the evidence of a key witness had "obvious inconsistencies", being "sufficiently disordered that it engaged cross-examination by both the defence and also by the Crown"; "he often flip-flopped in his evidence although certain elements persisted. His evidence also conflicted with some other evidence" (at [2]).

177 *R v Carroll* 2014 ONCA 2, (2014) 304 CCC (3d) 252 at [77], **Tab 92**. See also *Rajbhandari,* above n 174 at

69. Third, the warning does not apply to exculpatory (including defence) evidence.[178] So a complainant who is a drug user will attract the warning, but the defendant and his witnesses who are also drug users will not.[179]

70. Fourth, if trial counsel does not request a warning this will be significant on appeal,[180] given it may be for tactical reasons.[181]

71. Fifth, an 'unsavoury witness' warning is at the trial judge's discretion.[182] No particular words are required.[183] And because the trial judge is in the best position to assess the atmosphere of the trial and the effect that the evidence or instruction may have on a jury hearing the case,[184] such decisions are given "wide latitude" on appeal.[185]

72. Drug addicts and those who suffer psychiatric illness impairing reliability have been described as "typical *Vetrovec* witnesses",[186] although the warning is aimed more at credibility than reliability.[187]

73. But intoxication at the time of the offence does not require a *Vetrovec* warning. In *R v Chandra*[188] an eyewitness to a murder gave "confused and contradictory" evidence; he was a hostile witness and claimed not to remember some inculpatory details. He admitted consuming alcohol and LSD on the evening in question and that they had affected his recollection. He had lied earlier about taking drugs, and had a substantial criminal

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[56] ("Inconsistency is not an idiosyncratic phenomenon or eccentricity reserved to especially doubtful persons in extraordinary cases. It is the common lot of witness-kind"), **Tab 98**.

178 *R v Vetrovec* [1982] 1 SCR 811 at 830-31, **Tab 99**; Sopinka, Lederman & Bryant *The Law of Evidence in Canada*, 6th ed at ¶17.21, citing *R v Dadollahi-Sarab* 2021 ONCA 514 at [109].

179 *R v Hoilett* [1991] 3 OR (3d) 449 (ONCA) at [5]-[9], **Tab 94**.

180 *Khela,* above n 169 at [49], **Tab 95**.

181 *Brooks*, above n 172 at [18] (counsel's opinion is not determinative, but is "relevant and worthy of greater consideration where circumstances point to the fact that there may be tactical reasons for not requesting a warning"), **Tab 90**. See also *R v Harriott* [2002] 58 O.R. (3d) 1 (Ont CA) at [39]-[41] (*Vetrovec* warning is a double-edged sword and "trial counsel is in a particularly good position to assess whether, from the perspective of the accused, the trial judge has given an inadequate warning"), aff'd [2003] 1 SCR 39.

182 *R v Bevan* [1993] 2 SCR 599 at [31], **Tab 89**; *Brooks*, above n 172 at [1]-[4], **Tab 90**.

183 *Khela,* above n 169 at [13], **Tab 95**.

184 *Bevan,* above n 182 at [31], **Tab 89**.

185 *Bevan,* above n 182 at [34], **Tab 89**; *Brooks*, above n 172 at [24], **Tab 90**.

186 *R v Carroll* 2014 ONCA 2, (2014) 304 CCC (3d) 252 at [70], **Tab 92**. See for example *R v Buckhurst* [1997] OJ No. 4443 (ONCA), **Tab 91**.

187 *Brooks*, above n 172 at [79] and [94], **Tab 90**. See Canadian Judicial Council *Model Jury Instructions* at 11.23, suggesting the trial judge set out the matters that "bring [the witness's] *credibility* into serious question" (emphasis added).

188 *R v Chandra* (2005) 198 CCC (3d) 80 (ABCA), **Tab 93**.

record.[189] No *Vetrovec* warning was needed: "[t]he many frailties in [his] evidence were evident", including his intoxication at the time;[190] they "were such that a lay jury would be cognizant of them";[191] and the judge had sufficiently brought them to the jury's attention when summing-up.[192]

74. Finally, Canadian law accepts a complainant's evidence can be reliable despite blackouts. In *R v Kishayinew*[193] the appellant approached the complainant in a back alley. She had been drinking and did not know how she had gotten there. She walked with him to his house. As he tried to pull down her pants, she had another blackout and her next memory was of finding her underwear and clothing askew. The appellant admitted having sex with her but said it was consensual. A guilty verdict for sexual assault was held, by majority, to be unreasonable: given the complainant's level of intoxication, sufficient to call into question her capacity to consent, the judge had not provided sufficient reasons explaining how her memory could also be reliable.[194] Tholl J dissented, saying:

> [75] The trial judge demonstrated an understanding that a witness who has suffered memory blackouts cannot testify as to what occurred during periods when he or she has no memory but that factor alone does not render his or her other evidence unreliable. It creates an absence of direct evidence from the witness for the blackout periods but an absence of memory of certain portions of the crucial events does not automatically create an absence of reliability for the witness's other testimony. The trial judge found L.S. to be highly intoxicated during the sexual assault. The result of this intoxication was a fragmented memory with two memory blackouts, not a complete absence of memory. The trial judge found the memories L.S. did have were reliable. He was entitled to do so.

The Supreme Court of Canada restored the conviction, agreeing with Tholl J's reasons.[195]

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189 *R v Chandra* (2005) 198 CCC (3d) 80 (ABCA) at [5], **Tab 93**.

190 At [23].

191 At [25].

192 At [14].

193 *R v Kishayinew* 2019 SKCA 127, (2019) 382 CCC (3d) 560, **Tab 96**.

194 At [26]-[27].

195 *R v Kishayinew* 2020 SCC 34, [2020] 3 SCR 502, **Tab 97**.

*England and Wales*

75. Since 1995 English statute has prevented mandatory warnings that, in sexual cases, it was "dangerous to convict" on the uncorroborated evidence of a complainant.[196] Judges retain a discretion to "urge caution" about a particular witness if their evidence is unsupported: *R v Makanjuola.*[197]

76. Often the judge will consider no special warning is necessary. In a more extreme case, the judge may suggest it would be wise to look for supporting evidence before acting on the witness's evidence. An appeal court will only interfere if the judge's exercise of discretion was *Wednesbury* unreasonable; the trial court has an advantage in assessing the manner of a witness's evidence as well as its content.[198] If trial counsel does not request a warning, this may indicate none was seen as required.[199]

77. Even where a witness may be said to be unreliable, *Makanjuola* directions are given sparingly,[200] in "exceptional cases".[201] A warning will often be inappropriate if the issues are obvious, and the impact of drink and drugs will often fall in this category.[202] So in *Hindle v R* a direction was "unnecessary and inappropriate" for a chronic drug addict who had been on drugs when she was the sole eyewitness to a murder. Despite inconsistencies, her evidence was consistent on "many of the important issues" and not inherently unreliable.[203] Defence counsel and the judge had pointed out the inconsistencies in her evidence. A direction would have usurped the jury's fact-finding role: it was "aware of [her] chronic drug problems…and of the drugs she had taken and their effect on her… Her reliability was a matter for them."[204]

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196 Section 32 of the Criminal Justice and Public Order Act 1994.

197 *R v Makanjuola* [1995] 1 WLR 1348 (CA), **Tab 85**.

198 At 1351-2.

199 *R v Muncaster* [1999] Crim LR 409.

200 *R v Hindle* [2021] EWCA Crim 1367 at [30], **Tab 83**.

201 *R v McGhee* [2002] EWCA Crim 995 at [9], **Tab 86**.

202 i.e. *R v Groves* [2004] EWCA Crim 1545 at [67], **Tab 82**; *R v Jobe* [2004] EWCA Crim 3155 at [74]-[76], **Tab 84**.

203 *R v Hindle* [2021] EWCA Crim 1367 at [30], **Tab 83**.

204 At [31].

78. Not giving a warning will not affect the safety of the convictions if the jury would have understood the reliability issues.[205]

79. Two consistent threads run through all these cognate jurisdictions. First, reliability warnings are aimed at dangers which juries need the judge's help to properly assess. Second, intoxication and its impact on recall are well within a jury's competence.

*Why a reliability warning was not required for the complainant's evidence*

80. Applying the principles at [51]-[58] above, a reliability warning was not needed for the complainant's evidence.

81. First, the core of the complainant's account was unaffected by her intoxication. She agreed that "everybody…was willingly partaking of a continuing supply of alcohol of various sorts and drugs of various sorts",[206] drinking RTDs[207] and doing spots of marijuana.[208] She "would've drunken a lot…for me to get to the stage of can't remember, that's quite a lot."[209] And she took the methamphetamine that Mr Tamati gave her later on.[210] But despite her memory gaps, she had a detailed recollection of core events:

    81.1 By the time Mr Tamati was tattooing her, she said she was "pretty drunk"; the room was spinning[211] and the tattoo did not even hurt.[212] But she recalled what she had talked to Mr Tamati about while the tattoos were being done,[213] for example his commenting on her blue underwear which was ink-stained from the tattoo.[214] She recalled how their bodies were positioned as he held her and tried to kiss her.

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205 *R v Petkar* [2003] EWCA Crim 2668, [2004] 1 Cr App R 22 at [61], **Tab 88**.

206 NOE at 13.

207 NOE at 13.

208 NOE at 15.

209 CA COA at 113.

210 NOE at 16.

211 CA COA at 113.

212 CA COA at 112-113.

213 CA COA at 113, 122-123.

214 CA COA at 122-123.

81.2 Her memory blackouts obscured how she had gotten to the car, but although she did not "remember how it started…I remember during it".[215] She remembered the car being silver or white[216] and having lots of stuff in it – clothes and shoes.[217] She remembered being face-down in the car trying to scream but her "face was…in the ground so sound wasn't really…coming out".[218] She remembered how she put her clothes back on afterwards – underwear first, then her bra and top.[219]

81.3 The rape on the couch occurred the following day, after the complainant had been asleep for a period. And there was no sign she had any difficulty recalling what happened. Indeed, other Crown witnesses corroborated Mr Tamati's sexual interest in her at that point, even if they had not noticed (or recalled) his penetrating her.

82. Second, Mr Tamati's account suggested her memory of events was broadly accurate. He agreed they had talked about her parents while tattooing her[220] and had ended up alone in the bedroom.[221] He agreed he had gone out to the car at some point and the back seats were down. He agreed they had been lying on the couch together while C and D had sex. The only dispute was about whether he had repeatedly violated her, and it could hardly be suggested the complainant's recollection was a drug-fuelled hallucination.

83. Third, not one internal inconsistency emerged in the complainant's account at trial.

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215 CA COA at 121.

216 CA COA at 133.

217 CA COA at 134.

218 CA COA at 129.

219 CA COA at 131-132.

220 CA COA at 54, 71, 82.

221 CA COA at 54, 61.

84. Fourth, any external inconsistencies with other Crown witnesses begged the question whose evidence was more reliable. D's recollection about where he parked the car cannot be compared to CCTV contradicting her account.[222] There was no objective reason for the trial judge to infer that, among a group of intoxicated people, it was the *complainant's* evidence that demanded caution.

85. In short, there were no objective indicia that intoxication had undermined the reliability of her evidence.

86. Fifth, there were other good reasons not to give a warning. There was nothing "lurking" about the impact of the complainant's intoxication. Trial counsel canvassed the complainant's intoxication during cross-examination. The prosecutor repeatedly acknowledged her intoxication when closing, linking it to her ability to recall events.[223] The judge explained the concept of reliability – even an honest witness could be mistaken[224] – and noted Mr Tamati challenged the complainant's reliability as well as her credibility.[225]

87. Sixth, Mr Tamati's counsel preferred to attribute any inconsistencies to fabrication, given the limits of a reliability-based denial on these facts. The Crown said any inconsistencies were the result of intoxication. A s 122 direction would not have promoted Mr Tamati's defence.

88. Nor did justice miscarry. Telling the jury that intoxication may affect reliability would not have led the jury to acquit Mr Tamati. His defence was denial – not reasonable belief in consent or unreliable identification, where memory loss or imperfect recollection might gain greater traction. There was no basis to think the complainant's detailed recollection of being

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222 *R,* above n 111 at [49](e) ("statements inconsistent in some material way with *known* wider factual context") – emphasis added. **Tab 43**.

223 CA COA at 210 ("does it have the sort of detail that you might expect from a true account where someone's doing their best to recollect despite being intoxicated at the time") and 214 (she was "trying her best to recollect a traumatic event" and gave "a truthful account interrupted, I accept, by issues in relation to memory caused by drug and alcohol intake but not on the essential issues").

224 CA COA at 238 (at [6]).

225 CA COA at 246 (at [37]) ("unreliable and made up"); CA COA at 255 (at [81]) (evidence about location of car undermined her credibility and reliability).

repeatedly violated had been a drug-fuelled hallucination. The Crown made exactly this point in closing[226] and trial counsel was conscious of it too.[227]

*Did justice miscarry because no reliability warning was given for C?*

89. C, too, agreed she was "quite wasted"[228] and that she and the complainant were "drinking excessive amounts of alcohol and taking excessive drugs".[229] In evidence she repeated what she had told police in June 2018: "It's all a bit of a blur. I just remember bits and pieces. I can't really tell you much more than I already have."[230]

90. But the issues regarding C's reliability were obvious. C's intoxication and limited recall had been explored in cross-examination, with trial counsel suggesting whatever she had added to her police statement was of suspect reliability. The trial judge reminded the jury of her "confusing and contradictory" evidence. It was unnecessary to add that her intoxication may have contributed: the point was utterly obvious.

91. And if C's level of intoxication warranted a s 122 caution, Mr Tamati's police interview also qualified. He, too, was drinking and using cannabis and methamphetamine that night.[231] Asked how long he had been drinking that day, he replied: "I dunno how long I'd been drinking for, probably weeks."[232] It was "all vague";[233] he was "lost with dates" and didn't know what time of year it had happened.[234] He didn't remember much of what they'd done that night[235] or the next day either.[236] A caution about the impact of intoxication would not necessarily have been limited to C's reliability.

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226 CA COA at 207.

227 SCCOA at 50 paragraph 3.

228 NOE at 41.

229 NOE at 50.

230 NOE at 52.

231 NOE at 40-41 and 57. He denied using methamphetamine: CA COA at 63.

232 CA COA at 59.

233 CA COA at 55.

234 CA COA at 57.

235 CA COA at 62 lns 12-14.

236 "Far out, I couldn't know": CA COA at 67.

92. For similar reasons, a direction could not have altered the outcome for Mr Tamati. That C's "confusing and contradictory" account stemmed from her intoxication was in context obvious. Mr Tamati's real difficulty was not C's evidence, but the complainant's compelling account.[237]

**Conclusion**

93. Trial counsel's closing address reasonably focused on the core of Mr Tamati's defence of fabrication. The couch incident evidence was not essential to that defence: it was at best equivocal, and risked highlighting Mr Tamati's attempts to "get into" the complainant. It would not have produced an acquittal and the jury could hardly have forgotten it: they had heard the evidence the day prior, and the judge reminded them of it.

94. Nor did justice miscarry because the trial judge did not point out the obvious – that everyone present had been intoxicated and that drink and drugs can affect recall. The jury realised this and any warning would have applied equally to all the participants, including Mr Tamati. A reliability-based defence had its limits, so the defence preferred any frailties to be attributed to fabrication. And the complainant's clear, detailed and consistent account did not demand any special caution.

95. The appeal should be dismissed.

22 November 2024

M Laracy | A J Ewing
Counsel for the respondent

**TO**: The Registrar of the Supreme Court of New Zealand.

**AND TO**: The appellant.

237 SCCOA at 23 (at [32]).