IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 114/2025

BETWEEN	**BRIAN TIMOTHY MAHONEY**
	Appellant
AND	**THE KING**
	Respondent

Appellant's submissions on appeal against conviction
2 February 2026

Counsel certifies that, to the best of his knowledge, these submissions contain no suppressed information and are suitable for publication: 5 March 2026

Counsel:
James Carruthers
Barrister, Mills Lane Chambers
james.carruthers@millslane.co.nz
0273226153

Introduction

1. Mr Mahoney stood trial on 11 charges alleging historic sexual offending against a teenage girl. The charges encompassed four incidents across six weeks and ranged from indecent assault to rape. The complainant essentially said Mr Mahoney took advantage of her during a vulnerable period in her life after meeting her online. Mr Mahoney did not deny meeting and trying to help the complainant but said her allegations of sexual offending were completely unfounded. The jury found him guilty on all charges.

2. Mr Mahoney appealed his convictions on several grounds, two of which are relevant here. First, it was argued that the prosecutor had misused counter-intuitive evidence when cross-examining him and when closing to the jury and that the Judge had failed to correct those errors. Second, it was argued that the prosecutor had unnecessarily and unfairly led the complainant back through each of her allegations after playing her ERI to the jury. While critical of some aspects of the prosecutor's conduct, the Court of Appeal dismissed the appeal.[1]

3. Mr Mahoney sought, and was granted, leave to appeal to this Court on both grounds.[2]

Summary

4. The prosecutor misused the counter-intuitive evidence in both his cross-examination of Mr Mahoney and his closing address. He repeatedly drew similarities between that evidence and the complainant's evidence about what Mr Mahoney had done to her and how she had responded to it. In doing so, he normalised linkage and employed the evidence in a diagnostic fashion. Without clear directions as to how they must not use that evidence, there was a real risk the jury would do likewise. No such directions were given. Mr Mahoney's trial therefore miscarried.

5. In taking the complainant back through each of the damaging allegations she had quite clearly made in her ERI, the prosecutor's supplementary questioning of her was impermissibly leading, needlessly repetitive, and unfair. It effectively afforded her the opportunity to give her evidence-in-chief twice: once via her

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1 *Mahoney v* R [2025] NZCA 490, SC Casebook p 9 (CA judgment).

2 *Mahoney v* R [2025] NZSC 187, SC Casebook p 7.

ERI and then again in response to his leading questions. In a trial where the complainant's credibility and reliability were key issues, her consistency was promoted as a reason to believe her, and prejudice and sympathy were likely to loom large, that was unfair.

Background[3]

6. The complainant met Mr Mahoney online back in the first half of 2000. She was 15 years of age and going through a tough period in her life; he was in his mid-30s, in a relationship, and working full-time as a truck driver.

7. They arranged to meet and did so twice. The complainant said they met in Mr Mahoney's car out by her school during school hours. She said she was in uniform and that, after offering her alcohol and marijuana and chatting generally, Mr Mahoney made sexual advances to her.[4] Mr Mahoney denied that. He said they met in the weekend at a park and spoke about her troubles while sitting on a bench.[5] He agreed to the meetings because he had previously lost close friends to suicide.[6]

8. That was not the end of their contact. The complainant said Mr Mahoney picked her up on another occasion, gave her a prescription drug of sorts, and took her to a motel.[7] There he photographed and filmed her as he subjected her to various sexual indignities.[8] Afterwards, he dropped her home, gave her one of the photographs he had taken, and warned her against saying anything to anyone.[9] Mr Mahoney denied any of this ever took place.[10]

9. The last contact between the two occurred after the complainant ran away from home and ended up staying at an apartment owned by Mr Mahoney's partner (and later wife).[11] After helping her move in, Mr Mahoney gave the complainant some money for groceries and tried to help her obtain

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3 See generally: *R v Mahoney* [2023] NZDC 29046 at [3]-[7], CA Casebook pp 160-161; the prosecutor's opening address, CA Casebook pp 49-53; and the prosecutor's supplementary questioning of the complainant, NoE pp 14-28.

4 NoE pp 14-19; Exhibits pp 14-28.

5 NoE pp 182-187.

6 NoE p 183.

7 NoE pp 20-22; Exhibits pp 31-44.

8 NoE pp 20-22; Exhibits pp 31-44.

9 NoE pp 22-23, 66; Exhibits pp 32-33.

10 NoE p 198.

11 NoE pp 71-79, 189-193, 247; Exhibits p 9.

employment.[12] That much was common ground. The complainant, however, said he also offended against her numerous times when visiting the apartment,[13] something Mr Mahoney denied.[14]

10. After her parents reported her missing, the police managed to trace the complainant to the apartment.[15] They collected her and took her to the station and then a friend's house.[16] She did not make any allegations against Mr Mahoney at the time.[17] The first person she spoke to in that respect was her boyfriend, who made vague threats to Mr Mahoney over the phone in 2002.[18] The proceedings were set in motion when the complainant phoned the Crime Stoppers line in August 2020.[19]

11. At trial, as well as calling the complainant, the Crown called her parents, who spoke of troubles she had been through and behavioural difficulties she had experienced, her boyfriend from the time, to whom she had made a disclosure, and various police witnesses. Mr Mahoney gave evidence in his defence and called his wife to corroborate aspects of what he had said, including his work hours and tendency to want to help people.[20]

Counter-intuitive evidence

Background

The trial

12. As is common in cases of this nature, evidence about the circumstances in which sexual abuse can occur and the varying ways in which victims of such abuse can respond to it ("counter-intuitive evidence") was given by way of a memorandum of agreed facts ("s 9").[21] The s 9 covered such topics as delayed reporting, non-reporting, continued contact with abusers, grooming and

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12 NoE pp 71-79, 81, 189-193, 200-201.

13 NoE pp 24-28; Exhibits pp 10-11, 52-75.

14 NoE p 200.

15 NoE pp 76, 86-87; Exhibits p 11.

16 NoE pp 89, 103.

17 NoE pp 87-88.

18 NoE pp 132-134.

19 NoE p 96.

20 NoE pp 240, 248. Mr Mahoney said his work hours meant he could not have met the complainant during school hours, a point he said he could have corroborated with documentation had it still been available: NoE pp 173-174, 182, 229.

21 CoA Agreed Facts.

normalisation of abuse, levers by which abusers can exert control, and so on.[22] The introduction noted that the contents reflected a "comprehensive body of research developed over nearly forty years."[23]

13. That agreed evidence was read to the jury towards the end of the Crown's case.[24] The prosecutor then made use of it when cross-examining Mr Mahoney. After directing him to the section which dealt with grooming and normalisation, they had the following exchange:[25]

> Q. It says: "Grooming can be defined as follows. The use of (inaudible) manipulative and controlling techniques." I'm going to suggest that you were using such techniques to gain K's trust and then look to make her dependent upon you?
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> A. That's definitely not the case.
>
> Q. So the second one is with a vulnerable subject, I think we can both agree that she was a vulnerable person?
>
> A. I think, I think she was a vulnerable person, yes, I totally agree with you there. She was vulnerable, you know, she was looking to commit suicide so that puts her in a very vulnerable situation.
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> Q. Through a range of interpersonal and social settings and you guys met up both in the car, you took her to hotels and then to an apartment?
>
> A. No I don't agree with that at all.
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> Q. Four, in order to establish trust normalise sexual behaviour. You started off with touching and then you ended up raping her?
>
> A. I did not.
>
> Q. With the aim of facilitating exploitation and that is ultimately what you were doing with K wasn't it?
>
> A. No, it is not.
>
> Q. If you turn over to page 1.15 and this is obviously general but I want a comment on it in relation to the facts here. Offenders may try and manipulate a child or adolescent by using bribery or incentives and we know that you were both making an apartment available to her, you were providing her with drugs and alcohol, don't we?
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> A. I didn't make the apartment available to her. My wife did.

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22 CoA Agreed Facts pp 2-5.

23 CoA Agreed Facts, p 2 para 1.3

24 NoE p 156.

25 NoE pp 235-236.

> Q. Or threats or acts of intimidation and we know that you threatened both her family and in terms of you know where she lives and you also threaten that you've got these photos of her, don't you?
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> A. How the hell are you going to threaten a [occupation] and a [occupation]? My lord.
>
> Q. By making their child feel like they can't talk to them and that she has to continue engaging in sexual conduct with you.
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> A. That is absolutely absurd.

14. The prosecutor returned to the counter-intuitive evidence in his closing address. After identifying the complainant's credibility as the key issue at trial and making some general remarks,[26] he suggested the jury begin their deliberations with the counter-intuitive evidence.[27] Although he noted that the evidence "doesn't tell them anything about this case in particular",[28] he worked his way through some of the topics and related them to the complainant's evidence about what Mr Mahoney allegedly did to her and how she reacted to it. He said, for example:[29]

> 7.1, we know that despite being presented with the opportunity to report sexual abuse (inaudible 10:41:20) as a child, adolescent, may be reluctant to tell someone about the offending, may not report it. You might say: "Well, police show up to the … apartments. Why didn't you tell them straight away?" and K talked to us in her evidence about how at that particular point in time she didn't feel like she could, for the reasons that she explained.
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> 1.12 talks about grooming, which the Crown says the definition, as I spoke to Mr Mahoney about yesterday, that fits with what it is that took place here. 1.13, many sexual offenders identify vulnerable children and use that vulnerability to initiate a friendship as an avenue to eventually sexually abuse the child or adolescent, often with increased physical contact over time.
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> The general facts about sexual abuse; the Crown says that sadly, it has taken place here … 1.13, an offender may employ a range of controlling or manipulative strategies to gain their compliance and maintain secrecy or avoid disclosure. They may try and manipulate or threaten someone by using bribery or incentive or threats, acts of intimidation, and obviously the Crown says, as I put to Mr Mahoney, that some of those were at play here. There's alcohol and drugs that are provided and there's an apartment that's provided, that there's threats of what's going to happen with these photos if there's not ongoing compliance.
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> A consistent finding in research studies is that a child or adolescent's expectations of the likely reaction from a person to whom they report the sexual abuse is central, and we know in this particular place, as [the complainant's] talked to us,

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26 CA Casebook pp 66-68.

27 CA Casebook p 68.

28 CA Casebook p 68.

29 CA Casebook pp 69-70.

> that she wasn't close with her parents. That means that for whatever reason, that relationship had broken down. For whatever reason she didn't feel like she could talk to them, and we know, for instance, in terms of the sexual offending that happened with [a relative]…, it seems like she doesn't tell her parents about that at all, and then the way in which it comes out is over the family dinner table when he's potentially, the wider family's making arrangements for him to come back and stay in the family home and study … That's the trigger point for her, when she says: "No, I don't want him in the house." That's the context of the disclosure to the parents.
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> 1.12, a child or adolescent may experience different ranges of emotions as a result of sexual abuse; shame, embarrassment, the fear they will not be believed, and we heard the evidence from [the complainant] about saying: "Well, it was just my word versus his."

15. The prosecutor concluded this part of his address by reminding the jury that the s 9 "is not able to speak to this case but is an educative document"[30] and suggesting again that it might be "helpful to start with."[31] He then moved immediately into case-specific reasons as to why the jury should accept the complainant's evidence.

16. When summing up, the Judge gave the following direction on the counter-intuitive evidence:[32]

> [40] There are often in the Court's experience … good reasons why a victim of the type of alleged offending delays making a complaint or even fails to make a complaint in respect of the offending. Some people make a complaint straightaway. That does not necessarily make it any more true than it is untrue. You have to look at whether you accept the complaint. Others delay making a complaint. Again, the delay does not mean it is anymore untrue than it is true. People have different reasons for not making an immediate complaint and the counterintuitive evidence, which effectively is the distillation of evidence compiled by psychologists and psychiatrists who practice in these fields, and it is accepted by the parties and is accepted by the courts these days, tells you why it is that people delay making complaints.
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> …
>
> [43] None of the experts who might have assisted in the compilation of that agreed evidence gave evidence here because … they have not seen either the defendant or the complainant. What that evidence is there for is to help you so that you are not misled by any common misconception that can arise in sexual cases such as delayed reporting of sexual abuse or the way in which persons who have been alleging sexual abuse can be expected to behave. There are topics on coercion and control as you can see in the report and other issues and they are all topics that are set out in that agreed summary of facts, but remember, even though this effectively is evidence brought about by experts, this is a trial by jury. The

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30 CA Casebook p 70.

31 CA Casebook p 70.

32 CA Casebook pp 131-132.

> parties accept this evidence and agree on it but it is still a matter for you as to whether you accept it, as with any other evidence.

The Court of Appeal

17. The Court of Appeal thought the prosecutor's use of the counter-intuitive evidence in his closing address was orthodox and designed to address misconceptions on which the defence had relied.[33] It was more troubled by his use of that evidence when cross-examining Mr Mahoney, but ultimately characterised it as an "unwise" way of conducting an otherwise legitimate line of questioning – i.e. putting to Mr Mahoney that in treating the complainant as he did, he was trying to "groom" her.[34] As for the Judge's directions, the Court held that they were sufficient when read in light of the s 9 and the prosecutor's observations as to its purpose and limitations.[35]

Legal principles

Counter-intuitive evidence up to DH(SC9/2014)

18. Counter-intuitive evidence is routinely adduced in cases of sexual offending, usually by way of a memorandum of agreed facts. The point of such evidence is to correct misunderstandings jurors might have as to the circumstances in which sexual abuse can occur and the ways in which victims of such abuse can respond to it. As has long been recognised, though, it comes with risks, the primary one being that juries will erroneously use it in a diagnostic fashion: the more a complainant's allegations and behaviour align with the research, the more likely the complainant is telling the truth.[36]

19. To counter this risk, the Permanent Court of Appeal established, in *M(CA23/2009) v R*,[37] certain rules to govern the use of counter-intuitive evidence. At the conclusion of a lengthy discussion,[38] it emphasised two points:[39]

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33 CA judgment at [39]-[45], SC Casebook pp 23-26.

34 CA judgment at [46]-[54], SC Casebook pp 26-28

35 CA judgment at [55]-[61], SC Casebook pp 28-30.

36 *M(CA23/2009) v R* [2011] NZCA 191 at [32](e) and [49]: **Appellant's bundle Tab 1**; *DH(SC9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625, (2015) 27 CRNZ 460 at [30](b) and (e), (2015) 27 CRNZ 460: **Appellant's bundle Tab 2**.

37 *M(CA23/2009)* above note 36.

38 *M(CA23/2009)* at [24]-[48].

39 *M(CA23/2009)* at [49].

> First, where counter-intuitive evidence is given, prosecuting counsel must be careful in the way that he or she uses the evidence ... [and] should not attempt to link the evidence to the circumstances of the particular complainant as this may create a risk that the jury will use the evidence illegitimately, in a diagnostic or predictive way. Second ... the judge should explain to the jury what the purpose of the evidence is and should caution them against improper use of it. The judge should instruct the jury that if they accept the expert evidence, they should not reason that the fact that the complainant behaved in one or more of the relevant ways ... is, of itself, indicative that the alleged abuse did, or did not, occur.

20. This Court endorsed those rules several years later in *DH(SC9/2014) v R*.[40] Indeed it strengthened them in parts, promoting recommendations to requirements:[41]

> ... The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. ... [T]he judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

21. These were straightforward and logical rules which directly addressed the risk that accompanies counter-intuitive evidence. Prosecutors were discouraged from linking the research encapsulated in such evidence to the circumstances of the case because, however innocent their motives, doing so heightened the risk that juries would do likewise and erroneously slip into using it diagnostically. And to further mitigate that risk, judges were required to tell juries why the evidence had been adduced and how they could and must not use it.

*Counter-intuitive evidence post-*DH(SC9/2014)

22. In the ten years since *DH(SC9/2014)*, however, divergent views have emerged in the Court of Appeal as to the use prosecutors may make of counter-intuitive evidence and the directions – if any – judges are required to give when it is adduced.[42] Some courts have upheld *DH(SC9/2014)*'s clear prohibition on linkage and equally clear requirement for directions;[43] others have considered

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40 *DH(SC9/2014)* above note 36.

41 *DH(SC9/2014)* at [30](b) and (e).

42 *Wanden v R* [2024] NZCA 425 at [20]-[22]: **Appellant's bundle Tab 3**; *Moore v R* [2025] NZCA 132 at [9]: **Appellant's bundle Tab 4**.

43 *Jane v R* [2019] NZCA 384: **Appellant's bundle Tab 5**; *Bruce v R* [2023] NZCA 159: **Appellant's bundle Tab 6**; *Wanden* above note 42; *H(CA337/2021) v R* [2021] NZCA 547: **Appellant's bundle Tab 7**; *Goundar v R* [2021]

linkage permissible provided it stops short of diagnostic misuse and excused a lack of directions provided the prosecutor or the agreed facts notes the evidence is general and says nothing about the complainant's allegations (or something similar).[44] Such a divergence is fertile ground for confusion, inconsistency, and miscarriages of justice.

Going forwards

23. In terms of the use prosecutors can make of counter-intuitive evidence, the prohibition on linkage should be confirmed. Prohibiting linkage properly focuses on meeting the *risk* posed by such evidence[45] and is a simple and effective means of doing so. The alternative approach of allowing linkage to a point erroneously shifts the focus to whether the prosecutor used the evidence diagnostically. This ignores the fact that the risk of the *jury* using it in that way (a) exists irrespective of whether the prosecutor did so and (b) will increase with the extent of any linkage made by the prosecutor.[46] That is why prohibiting linkage is sensible and effective.

24. This should not hamstring prosecutors in presenting their cases, nor will it prevent them from referring to counter-intuitive evidence when closing. They will still be able to remind juries of the counter-intuitive evidence, the reason it was adduced, and the sorts of myths it seeks to combat. But in line with limitations placed on the content of expert evidence and agreed facts, they should refrain from weaving into their discussion examples taken from the evidence adduced at trial. That would normalise linkage, which in turn would increase the risk of misuse. Instead, having 'levelled the playing field',[47]

NZCA 544: **Appellant's bundle Tab 8**; *Radich v R* [2025] NZCA 210: **Appellant's bundle Tab 9**; *Tollemache v R* [2025] NZCA 256: **Appellant's bundle Tab 10**; *Chapman v R* [2024] NZCA 569: **Appellant's bundle Tab 11**; *Tovey v R* [2025] NZCA 685: **Appellant's bundle Tab 12**.

44 In addition to the judgment under appeal, see: *Nancarrow v R* [2020] NZCA 636: **Appellant's bundle Tab 13**; *Heke v R* [2021] NZCA 34: **Appellant's bundle Tab 14**; *Nevin v R* [2025] NZCA 378: **Appellant's bundle Tab 15**; *Moore* above note 42; *T(CA449/2023) v R* [2025] NZCA 136, **Appellant's bundle Tab 16**.

45 Addressing the risk of misuse by the jury was the point of the rules established in *M(CA23/2009)* and *DH(SC9/2014)*.

46 The more a prosecutor links the counter-intuitive evidence to the circumstances of the case, the more likely a jury will think such linkage is legitimate, proceed to engage in it, and slip into diagnostic misuse. It cannot be assumed a jury will pick up on the nuance between legitimate and illegitimate use, which the Court of Appeal recently described as "fine in practice": *Wright v R* [2025] NZCA 502 at [51]: **Appellant's bundle Tab 17**.

47 Which is the point of counter-intuitive evidence: *DH(SC9/2014)* at [2].

prosecutors should separately address the merits of their case on the evidence adduced.[48]

25. As for directions, judges should be required to direct juries on how they must not use counter-intuitive evidence – in particular, that they must not reason that a complainant's allegations are more likely to be true because the features of the alleged offending and his or her reaction to it align with what research has revealed about the circumstances in which sexual offending can occur and how victims can react to it. The benefit of such a direction – which was recommended in *M(CA23/2009)* and made mandatory in *DH(SC9/2014)*, but is seldom given – is that it directly and unequivocally addresses the risk posed by counter-intuitive evidence.[49]

26. Simply telling juries that counter-intuitive evidence is educative or general and says nothing about the particular allegations tells them nothing about how they may and must not use it. Having received their education, jurors may well ask themselves how they are to apply it. The natural temptation will be to apply it to the case before them. Absent directions, how are they to ascertain the acceptable limits when doing so? Being told the evidence says nothing about the particular allegations does not assist. On a plain reading, that simply means that the particular allegations were not part of the research that produced the evidence. More is required to make the position clear – especially if linkage is to be permitted.[50]

27. In short, prohibiting linkage and requiring directions about how counter-intuitive evidence must not be used is a simple and effective way of reducing the scope for confusion and ensuring the evidence is properly employed.

This case

28. The prosecutor misused the counter-intuitive evidence when cross-examining Mr Mahoney and in his closing address, normalising rather than avoiding linkage and employing the evidence as a diagnostic tool. Without clear directions as to how that evidence must not be used, there was a real risk the jury would misuse it, too. No such directions were given.

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48 The same applies to defence counsel.

49 This is especially important if linkage is to be allowed. See above note 46.

The prosecutor's cross-examination of Mr Mahoney

29. After ensuring Mr Mahoney had a copy of the s 9, the prosecutor took him through the sections on grooming, normalisation, and control, comparing what the "comprehensive body of research" carried out "over nearly forty years" has established about the behaviour of "many"[51] sexual offenders with what the complainant alleged he had done.[52] Halfway through this exercise, the prosecutor paused to note the evidence "is obviously general" but said he "want[ed] to comment on it in relation to the facts here"[53] – precisely what case law forbids. He then continued putting similarities to Mr Mahoney.

30. By putting to Mr Mahoney similarities between that evidence and the complainant's allegations, the prosecutor was directly linking the evidence to the circumstances of the case – normalising what is meant to be avoided. This in itself gave rise to a significant risk that the jury would use it diagnostically.[54] But the prosecutor went further. By pointing out similarities one by one, he was essentially using what the research had established as a check list to diagnose Mr Mahoney as a sexual offender. Whether that was his intention is irrelevant;[55] what matters is the impression he may have left on the jury.[56]

31. There is another way to view the effect of the prosecutor's actions, and it is equally problematic. The prosecutor was, in effect, using as propensity evidence against Mr Mahoney what "forty years" of "comprehensive research" into "many" sexual offenders says about how such offenders behave – i.e. sexual offenders studied in that research had a tendency to act in certain ways; the complainant said Mr Mahoney acted in those same ways; Mr Mahoney was therefore likely a sexual offender, too.[57] This underscores the risks that come with permitting prosecutors to link counter-intuitive evidence to the

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50 See above note 46.

51 This is how the s 9 pitched the evidence: CoA Agreed Facts, pp 2-3 paras 1.3 and 1.13.

52 CA judgment at [23], SC Casebook p 17; NoE pp 235-236.

53 NoE pp 235-236.

54 *M(CA23/2009)* at [49]; *DH(SC9/2014)* at [30](b).

55 It is, however, difficult to see what else he might have been trying to achieve.

56 Again, the more direct comparisons a prosecutor draws, the more linkage is normalised, and the more likely the jury will slip into misuse. Having watched the prosecutor draw one comparison after another without criticism, the jury likely would have thought that was a perfectly legitimate use of the evidence.

57 The cross-examination the prosecutor engaged in is the sort of cross-examination a prosecutor might engage in having successfully applied to adduce propensity evidence against a defendant. Similarities between past offending and present allegations would legitimately be put to the defendant for comment. Here, though, the similarities

circumstances of the case: they simply cannot control the impression they might convey.

The prosecutor's closing address

32. The prosecutor continued to employ linkage in his closing address. After identifying the complainant's credibility as the crucial issue,[58] he suggested the jury begin their deliberations with the counter-intuitive evidence.[59] Although he noted the evidence "doesn't tell [them] anything about this case in particular",[60] he proceeded to draw on it to explain various aspects of the case, from Mr Mahoney's alleged conduct to the complainant's reaction to it.[61] Intentionally or otherwise, the message he conveyed was that Mr Mahoney's alleged conduct was consistent with how sexual offenders are known to conduct themselves and the complainant's reaction to it was consistent with how victims are known to react. It is a short step from there to reasoning that the complainant must therefore be telling the truth.[62]

33. Taking a few examples, the prosecutor referred the jury to the section about grooming and normalisation, reminded them of his cross-examination of Mr Mahoney, and said "that fits with what it is that took place here."[63] Contrary to what the Court of Appeal held,[64] this was not an attempt to address delay. By invoking his cross-examination of Mr Mahoney, which had nothing to do with delay, the prosecutor was drawing attention back to the similarities he had identified between Mr Mahoney's alleged behaviour and that of known sexual offenders.[65] He reinforced his point moments later by taking the jury to "the

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were between past offending by unknown sexual offenders in unknown circumstances and present allegations. The difference is striking, as is the unfairness.

58 CA Casebook pp 66-67.

59 CA Casebook p 68.

60 CA Casebook p 68.

61 CA Casebook pp 68-69.

62 See *Wright* above note 46 at [51].

63 CA Casebook p 69.

64 CA judgment at [41] and [53], SC Casebook pp 24 and 27.

65 The Court of Appeal appears to have read the cross-examination in light of the closing, instead of reading the closing in light of the cross-examination.

general facts about sexual abuse",[66] noting it had "sadly … taken place here",[67] and then itemising various similarities that "were at play".[68]

34. This went well beyond a neutral reminder to the jury not to be influenced by misconceptions. It was an express invitation to commence deliberations with a close analysis of the similarities between the complainant's alleged experience and the experiences of known victims of sexual abuse. If the jury accepted the invitation (which cannot be discounted), they would have set off on the wrong foot. Moreover, by taking the jury through those similarities immediately before offering them case-specific arguments as to why they should accept the complainant's evidence, the prosecutor unfairly primed the jury to accept those arguments. This was illegitimately prejudicial to Mr Mahoney.

Directions about proper use

35. The prosecutor's conduct amounted to diagnostic misuse of counter-intuitive evidence; and if not, given the extent to which he employed linkage and comparison throughout the trial, it at least carried a real risk of inviting such misuse by the jury.[69] The Judge therefore needed to give the jury clear directions on how that evidence must not be used. He needed to caution the jury against engaging in the sort of comparative exercise the prosecutor had engaged in and against reasoning that, because Mr Mahoney's alleged conduct and the complainant's response to it married to an extent with the counter-intuitive evidence, the complainant was likely telling the truth. But he did not.[70]

36. The only guidance the jury received was acknowledgments by the prosecutor that the evidence "is general" and "doesn't tell us anything about this case in particular",[71] and statements in the s 9 to the effect that the evidence is

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66 CA Casebook p 69.

67 CA Casebook p 69.

68 CA Casebook p 69. The prosecutor's comparisons between the complainant's allegations and the counter-intuitive evidence, his remarks that the definition of grooming "fits with what took place here", and his remarks that the "general facts about sexual abuse" had "sadly taken place here" are similar to (and much worse than) the "and we have that here" remark which factored into the Court of Appeal's decision to overturn convictions in *Wanden*. See *Wanden* above note 42 at [28].

69 It must be acknowledged that defence counsel also employed the counter-intuitive evidence in a questionable way, suggesting delayed complaints – such as the complainant's – were common when the offender was a family member but less so when the offender was a stranger (as Mr Mahoney was to the complainant): CA Casebook pp 95-96, 119. This is perhaps unsurprising given the use the prosecutor had made of the evidence, and it reinforces the importance of clear directions to the jury about how that evidence can and must not be used.

70 CA Casebook pp 131-132.

71 NoE pp 235-236; CA Casebook p 68.

"educative", intended to "correct any misunderstandings", and "does not prove or disprove that sexual offending has occurred in this case."[72] These are of scant assistance. The prosecutor's acknowledgments were undercut by the extensive use he made of the evidence; saying the evidence is general and educative says nothing about how it can and cannot be used; and saying the evidence does not prove or disprove the offending is not the same as saying it *cannot be used* to prove or disprove the offending.[73]

Miscarriage

37. Standing back, what occurred at Mr Mahoney's trial is the antithesis of what this Court envisaged in *DH(SC9/2014)*. Instead of avoiding linkage, the prosecutor embraced it – and in novel ways; and instead of directing the jury about how not to use the counter-intuitive evidence, the Judge largely left them to their own devices. Applying *DH(SC9/2014)*, there is a real risk the jury misused that evidence when reaching verdicts. Mr Mahoney's trial accordingly miscarried.

Supplementary questioning

Background

38. The complainant detailed her allegations in a lengthy ERI which was played at trial. As always, she did so via both free recall and in response to targeted questions. Given the circumstances she had described and Mr Mahoney's denial of any sexual activity, there was nothing of any significance to address by way of supplementary questioning.[74] Nonetheless, and as set out below, after playing the complainant's ERI, the prosecutor took her back through each of her allegations – often by way of leading questions – and asked her to repeat or confirm what she had said.[75]

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72 CoA Agreed Facts, pp 2-3 and 5 paras 1.1-1.3, 1.25.

73 When considering the effectiveness of this guidance, it is important to bear in mind the jury had seen the prosecutor employ linkage extensively and without criticism, so would likely have thought that such comparative exercises were perfectly legitimate.

74 Mr Mahoney never raised a lack of indecency or consent as an issue, and when cross-examining him the prosecutor confidently suggested (and Mr Mahoney agreed) the circumstances as described by the complainant were not conducive to defences along those lines: NoE pp 226-228. Had it been necessary to address those issues, it could have been done in a single question: "Did you initiate or consent to any of the sexual activity you described in your ERI?"

75 NoE pp 10-28.

The first incident

39. After some introductory questions, the prosecutor turned to the first of the complainant's allegations. He began by reading out what she had said about Mr Mahoney's initial advance during their first encounter and asked whether that is what happened.[76] Obviously, the complainant confirmed it was.[77] He then asked her whether there had been any discussion about such touching or whether she had encouraged it.[78] Unsurprisingly, given how she had described the encounter in her ERI,[79] the complainant said "no" to both questions.[80]

40. A few pages later, the prosecutor referred the complainant to a portion of her ERI where she described a certain indecent assault that occurred during that first encounter. The prosecutor read it out for her – "So he got under my bra and grabbed my breasts" – and asked her to clarify whether his skin was touching her skin.[81] The complainant answered as follows:[82]

> From what I recall he definitely grabbed at my breasts. His hand may have gone partially under my bra. He wasn't under both hands under my bra, my school uniform buttons were undone and he had gone grabbing at my breasts but not necessarily full hands over this you know, right underneath my breasts.

41. The prosecutor kept at this topic for a few more questions:[83]

> Q. Did his hands touch your skin?
>
> A. Yes they did.
>
> Q. Did one of his hands or part of his hands touch at least one of your breasts?
>
> A. One of his hands would have touched one of my breasts.

42. This line of questioning was unnecessary. The complainant had made it perfectly clear at several points in her ERI that Mr Mahoney's hand had gone under her bra and onto the skin of her breast. As she put it then:[84]

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76 NoE p 10.

77 NoE p 10.

78 NoE p 10.

79 Exhibits pp 7, 15, 19-20. The complainant described Mr Mahoney's advance as sudden, unexpected, aggressive and frightening, and there was no suggestion they had discussed sexual activity or that she had encouraged it.

80 NoE p 10.

81 NoE p 14.

82 NoE p 14.

83 NoE pp 14-15.

84 Exhibits pp 22-23.

> Q. So he's touched your breasts and grabbed you between the legs over your clothing?
>
> A. Under my clothing, under my bra but over my skirt. … So he got under my bra and grabbed at my breasts. …
>
> Q. And grabbed your breasts over your bra?
>
> A. Under my bra. He's gone underneath but I still had my bra on.

43. The prosecutor then asked the complainant a question he had already asked her, namely whether she and Mr Mahoney had discussed touching prior to it taking place. Again, the complainant said they had not.[85] He followed that up with another question he had already asked, namely whether the complainant had encouraged that touching, and received the same answer.[86] He then rounded off his coverage of this incident by asking the complainant how she felt when Mr Mahoney was touching her.[87] Unsurprisingly, she gave the same answer she had quite clearly given during her ERI,

Second incident

44. Moving on to the second incident, the prosecutor referred the complainant at length to what she had said in her ERI and had her confirm it:[89]

> Q. And in terms of the touching that takes place there, page 23 of your book, of the transcript, line 19, rather than page 16 you say: "So we parked up, he moved his seat back. We got stoned and talked briefly about recreational drugs he likes to use." You then say: "It didn't take long before a similar sort of thing, grabbing at my breasts and kissing me and this time he pulled down, my underwear partly down, not completely off, put his fingers inside my vagina quite forcefully, again very firm, it wasn't a graduated thing." Is that what took place?
>
> A. Yes, that's correct.

45. mplainant to a further aspect of that encounter and had the following exchange with her:[90]

> Q. At the bottom of page 23: "I remember him having a belt, unbuckling his belt. He had blue jeans, unzipping his pants. He didn't take his penis out of his

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85 NoE p 15.

86 NoE p 15.

87 NoE p 16.

88 NoE p 16; Exhibits p 20.

89 NoE pp 18-19.

90 NoE p 19.

> underwear but he took my hand, put my hand on his penis over his underwear." Can you describe to us what it was that he did with your hand?
>
> A. He put his hand over my hand and rubbed his genitals with my hand in between.
>
> Q. Can you help us with how long that went for?
>
> A. Maybe three minutes, three to five minutes. It felt like a long time but probably minutes.
>
> Q. Was he saying anything while that was happening?
>
> A. He was groaning…

46. Again, this was needless repetition. The complainant had been quite clear in her ERI about what Mr Mahoney did and said in this respect. As she had put it then:[91]

> He took my hand and he put my hand on his penis over his underwear … and forced my rubbing action … So he was holding my hand touching his penis, so he was holding my hand onto his penis … and with his other hand I think he was touching my breasts and he was making grunting, groaning noises.

Third incident

47. The third incident occurred at a motel. As he did with the first two, the prosecutor covered it with the complainant at length. He began by reading to her what she had said about the state she was in on arrival – groggy and unsteady on her feet – and then asked her what state she was in on arrival.[92] Naturally the complainant repeated what the prosecutor had just read to her.[93] He then covered with her what happened in the motel room:[94]

> Q. On that same page just slightly up you say: "I still had my school uniform on. I had an unbuttoned shirt, my skirt pulled up. He videoed me touching myself, touching my genital area. He proceeded to put his penis inside my vagina." Do you recall saying that?
>
> A. Yes, I do.
>
> Q. Were you being videoed while that took place?
>
> A. Yes, I was.
>
> Q. Did you want that sexual activity to take place?

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91 Exhibits pp 27-28.

92 NoE p 22.

93 NoE p 22.

94 NoE p 22.

A. No, I didn't.

Q. Have you done anything to encourage or initiate that taking place on that day?

A. No, I didn't.

Q. How long would you say that his penis was inside you for?

A. Probably five minutes.

48. Again, there was no need for most of these questions as the complainant had been quite clear in her ERI. She said then that she had felt groggy, unsteady, wasted, and scared throughout, and had just done as Mr Mahoney had asked.[95] She also said he had taken pictures of her and video-taped her while having her touch herself and while raping her, and gave an estimate of how long the ordeal and certain aspects of it had lasted.[96] There was no lack of clarity about any of that and no need to go back over it.

49. The prosecutor finished his questioning on that incident by asking the complainant how she felt when Mr Mahoney dropped her home and how he reacted to a message she claimed to have sent him in which she said she did not want any further contact with him.[97] As with the above topics, the complainant had already addressed these at length in her ERI.[98] Having been invited by the prosecutor, though, she took the opportunity to do so again – this time in front of the jury:[99]

> I was very, very groggy. I was very, yeah, very upset, very anxious, very shaky. I was terrified. I didn't, I was frustrated with myself I guess because I didn't understand and I still don't understand why I continued to meet with this person. All I can think is I was extremely vulnerable and, and don't know and I was scared and I felt really, really horrific, really ashamed that that had taken place and it wasn't something I wanted but I didn't know how to get out of it. I felt like it, it was a slippery slope and now I knew that there was videos and photographs…
>
> Um, he had responded [to my message], I can't recall the exact words, um, but along the lines of that he had photos of me and knew my parents' contact details and that he was a man in a position of power and at that time it dawned on me 'cos this is going a long time back if a photo was online everybody saw it, um, it wasn't, the internet wasn't saturated with that sort of thing, um, and that petrified me. Um, I came from you know a strict law-abiding family and having photos of me being published or having my family at risk was very, very, very scary. I didn't

95 Exhibits pp 32, 35-37, 39, 41-42, 44.

96 Exhibits pp 39-44.

97 NoE pp 22-23.

98 Exhibits pp 32-33.

99 NoE pp 22-23.

> know what he meant and what his capabilities were. I just felt that I was weak and vulnerable I guess and it had gone this far down the track, I didn't know how to turn back, I didn't know how. As a sane adult I can look back on that and think that was ridiculous and I should have stopped, I should have never made contact from the first time. I should have told the police, I should have stopped everything but looking at my 14-year-old self I was already broken and that wasn't anything I felt powerful enough to do. I felt like I was very weak and I was already very vulnerable and I didn't have, didn't feel strong enough to stop it and I didn't feel strong enough to report it or tell anybody about it. I was mortified and ashamed and embarrassed, this is an old man, this is – I didn't know, I didn't know what to do, I felt it was too far gone and I just – I can look back on it now and think I should at all these different points put an end to it but me then, I was – that wasn't something I could do. It took me 20 years to do it.

The incidents at the apartment

50. Lastly the prosecutor took the complainant through what occurred at the apartment that Mr Mahoney and his partner had allowed her to use. In her ERI the complainant detailed how Mr Mahoney had sexually offended against her in various ways a few days apart.[100] Despite that, the prosecutor basically read the allegations out one by one and had the complainant confirm them:[101]

> Q. At page 53 of your interview you talk about: "He bought my bag up at the same time, lay down beside me on the bed, touched my breasts, put his penis in my vagina" did that take place?
>
> A. Yes, it did.
>
> Q. Were you consenting to that happening?
>
> A. No, I wasn't.
>
> Q. You go and say: "He sat at the end of the bed. I was on the floor. He made me give him a blow job to suck his penis and he ejaculated into my mouth and I spat it out."
>
> A. That's correct.
>
> Q. Did you want that to take place?
>
> A. No, I didn't.
>
> Q. On page 57 you talk about a further incident happening on the Tuesday, page 59 you say: "He was touching me on the kitchen bench as well as recording him touching me and putting his fingers into my vagina." Did that happen on the Tuesday?
>
> A. Yes, it did.

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100 Exhibits pp 52-75.

101 NoE pp 27-28.

> Q. At page 61 you were asked to talk about the intercourse that took place, you say it took place on the bed, "I think it started on the kitchen bench 30 and then took place on the bed," so he put his penis into your vagina in those places?
>
> A. Yes.
>
> Q. Page 62 you talk about him making you give him a blow job, holding down your head, did that take place?
>
> A. Yes, it did.
>
> Q. Were you consenting to any of that happening?
>
> A. No.
>
> Q. I just want to ask you about the Thursday now if that's okay?
>
> A. Yes.
>
> Q. At the top of page 66 you talk about him setting up his cameras, videoing you and him penetrating your vagina with his penis having sex with you, coming inside of you, did he do that to you on that day?
>
> A. Yes he did.
>
> Q. Were you consenting to that happening?
>
> A. No.

The Court of Appeal

51. While the Court of Appeal agreed that much of the questioning was undesirably repetitive, it held that it was not impermissible or unduly prejudicial as "nothing new or surprising came out of it" and neither defence counsel nor the Judge intervened.[102]

Legal principles

52. Various sections of the Evidence Act 2006 are engaged here. Beginning with ss 103 and 105, which govern alternative ways of giving evidence, prosecutors can apply for complainants to give their evidence-in-chief by way of an ERI.[103] They often do this in cases of alleged sexual offending, and when such applications are successful the ERI becomes the complainant's evidence-in-chief. Unless it is necessary to plug gaps or clarify ambiguities, there is generally little need to revisit the specifics of allegations in supplementary questioning.

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[102] CA judgment at [64].

[103] Evidence Act 2006, ss 103(1) and 105(1)(a)(iii): **Appellant M's bundle Tab 25**.

53. Also relevant are ss 85 and 89.[104] Section 85(1) prohibits both unfair and needlessly repetitive questioning, concepts which must extend to outright repetition of allegations clearly made in an ERI, while s 89(1) places restrictions on the use of leading questions in examination-in-chief. Parties cannot ask leading questions on substantial or disputed matters without the consent of the other party or the permission of the Judge (in the exercise of his or her discretion).[105]

54. These sections largely reflect the principles applied by the Court of Appeal in the pre-Evidence Act case of *R v E(CA308/06)*.[106] Writing for the Court there, in a judgment allowing the appeal, Glazebrook J observed:

> [66] Where a videotape of a child's interview is played, that becomes the child's evidence-in-chief. It is certainly acceptable to ask the child if he or she confirms what was said in the interview, if he or she has anything to add or change and to ask supplementary questions on topics not covered in the interview. It is not the occasion for a wholesale repetition of what was said in the interview and certainly not, as was done here, elicited by leading questions.
>
> [67] It is unacceptable to ask leading questions in examination-in-chief or re-examination, except by consent or on non-controversial matters … These questions went to the heart of the prosecution's case ... The questions are in quite a different category from the questions in the course of the interview. The purpose of the interview questions was to give the opportunity for clarification. The purpose of the questions asked by the prosecutor was simply to provide a repetition of the child's evidence.
>
> [68] This would have been sufficient in itself in the circumstances of this case for us to have allowed the appeal. The repetition was unnecessary and eliciting it through leading questions unacceptable, particularly in light of the obvious difficulties with the interview…

55. The Court of Appeal has since endorsed the general tenor of these remarks,[107] and has been consistently critical of prosecutors treating the ability to ask supplementary questions after an ERI has been played as an opportunity to have a complainant repeat, or lead a complainant back through, allegations made in that ERI.[108]

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104 **Appellant M's bundle Tabs 26 and 27.**

105 Evidence Act 2006, s 89(1)(a)-(c).

106 *R v E(CA308/06)* [2007] NZCA 404: **Appellant's bundle Tab 18**.

107 *Paul v R* [2019] NZCA 390 at [36]-[40]: **Appellant's bundle Tab 19**; *Smith v R* [2022] NZCA 448 at [23]-[30]: **Appellant's bundle Tab 20**; *N v R* [2023] NZCA 313: **Appellant's bundle Tab 21**. None of these cases resulted in convictions being quashed on this basis.

108 See the cases cited in the above footnote.

This case

56. The prosecutor's supplementary questioning was in breach of ss 85 and 89 and in breach of the spirit of ss 103 and 105. Having secured an order for the complainant to give her evidence-in-chief by way of her ERI, it was inappropriate of the prosecutor to lead her back through each of her allegations after playing that ERI. His doing so effectively meant the complainant gave her evidence-in-chief twice: once via ERI and then again in response to his leading questions. This afforded her an opportunity to repeat before the jury "damaging allegations"[109] she had quite clearly made in her ERI. The questioning was therefore needlessly repetitive and unfair.[110]

57. There is more to the issue, though. The prosecutor's approach added an illusory layer of consistency to the complainant's evidence. Having just heard herself speak at length in her ERI, there was little risk she would say anything materially different – especially in response to leading questions. And, as it often is, consistency was a topic the prosecutor later advanced in closing as a reason to accept the complainant's evidence. He drew a thread through the various statements she had made, from what she told her boyfriend years ago through to the evidence she gave in court.[111] The Judge then endorsed these submissions when summing up.[112]

58. In the light of this, the Court of Appeal's suggestion that no harm could have been done by the prosecutor's questioning is unsustainable. The rules against needlessly repetitive and leading questioning are there for a reason. In these circumstances, they engaged the prejudicial impact of having a complainant needlessly repeat damaging allegations in person, and the forensic advantage

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109 As the Court of Appeal observed in *R v K(CA531/2007)* [2009] NZCA 97, **Appellant's bundle Tab 22**, at [15], albeit in the context of defence trial tactics, repetition of this sort is something defence counsel generally seek to avoid: "Where the defence is that allegations of abuse have been fabricated, there is little to be gained and much to be lost by a detailed exploration of the allegations [in cross-examination]. Often such an approach would serve only to give the complainant an opportunity to repeat damaging allegations…"

110 The Judge should therefore have put a stop to it pursuant to s 85(1). This does away with any suggestion the questioning was legitimate due to a lack of objection from defence counsel. That, in any event, should not carry great weight: *P v R* CA300/04, 13 December 2004, **Appellant's bundle Tab 23**, at [20]: "… the absence of complaint by counsel does not alleviate the concern. Presumably counsel were paying too little attention as the Judge delivered his summing up. There was certainly no tactical advantage to the appellant in not having a "recent complaint" direction." *P(CA738/10) v R* [2011] NZCA 321, **Appellant's bundle Tab 24**, at [26]: "Although the evidence about the safety plan was adduced by the defence and neither counsel sought a direction, the Judge has a general duty to ensure a fair trial and that the issues for the consideration of the jury are clearly identified. This was not done…"

111 CA Casebook pp 73-76.

112 CA Casebook pp 130 at [36] and 134 at [51].

prosecutors often attempt to draw from consistency over time. In trials which hinge on the complainant's credibility and reliability and in which prejudice and sympathy can loom large, factors like those can make all the difference.[113] The Judge should have intervened.

Conclusion

59. Mr Mahoney's convictions should be quashed and a retrial ordered.

2 February 2026

J E L Carruthers, counsel for Mr Mahoney

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The Respondent.
The Appellant in *T(SC51/2025) v R*.

[113] These factors come under the "nature of the proceeding", which a Judge may have regard to when deciding whether to disallow a line of questioning: Evidence Act 2006, s 85(2)(d).