NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 88/2013
[2014] NZSC 155

BETWEEN	CT (SC 88/2013) Appellant
AND	THE QUEEN Respondent

Hearing:	8 April 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	W Lawson and T D Grimwood for Appellant M J Lillico and A R van Echten for Respondent
Judgment:	30 October 2014

JUDGMENT OF THE COURT

The appeal is allowed and the convictions of the appellant are quashed.

REASONS

ELIAS CJ, McGRATH and WILLIAM YOUNG JJ

(Given by William Young J)

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The appeal

[1] Following his trial before Judge McGuire and a jury in the District Court at Rotorua, the appellant was found guilty on two counts: one count of indecent assault and one representative count of inducing an indecent act. His subsequent appeal to the Court of Appeal was dismissed.[1]

[2] The case against the appellant related to events in the early 1970s. The complainant complained to the police in August 2007 and the appellant was charged in March 2012, around 40 years after the alleged offending.

[3] In the District Court, the appellant twice sought a stay of proceedings on the basis of forensic prejudice caused by delay. These applications required the trial Judge to determine whether the appellant could receive a fair trial despite the delay. Even though the second of the applications was made during the trial, the issue for the Judge was still essentially forward looking in nature, that is, whether the appellant could receive a fair trial. There is no right of appeal against the refusal of a stay. Instead, in both the Court of Appeal and this Court, counsel for the appellant maintained that there was a miscarriage of justice within the meaning of s 385(1)(c) of the Crimes Act 1961. This argument requires an assessment whether the

[1] *CT (CA188/2013) v R* [2013] NZCA 383 (Harrison, Venning and Courtney JJ) [*CT v R* (CA)].

appellant's trial, as it turned out, was unfair. Such assessment is thus backwards looking and must take into account the way the trial was conducted, including the directions that were given by the Judge to the jury.

[4] Although the question for the Judge on the pre-verdict stay applications was not precisely the same as the question we must determine for the purpose of the appeal, it is convenient, for ease of discussion, to refer to both of them as turning on delay and prejudice. Unless the context otherwise requires, we will use the expression "delay and prejudice" as applicable to both stay and post-conviction arguments.

[5] The results of the stay applications can be regarded as subsumed in the verdicts of guilty and, for the reasons given in [3] above, the ultimate question for this Court is whether there was a miscarriage of justice. That said, we consider it will be helpful for trial judges if we confront directly the correctness of the stay decisions. For this reason, we will address the appeal broadly by reference to the questions whether:

(a) the delay between the alleged offending and prosecution, and any associated prejudice, meant that the appellant could not receive a fair trial; and

(b) the Judge summed up adequately in relation to that delay.

Background

[6] In 1970, the complainant, then aged 10, was living with her family in a small North Island town. The appellant was 23 and was, as he still is, married to the complainant's oldest sister. During that year, the appellant, his wife and their two children came to New Zealand from Australia. They stayed in New Zealand for a number of years. For some of this time, they were based at the complainant's family home. They also lived in other places, including Rotorua and Taupo.

[7] In August 2007, the complainant complained to the police that the appellant had sexually abused her at and near her family home and also in Rotorua and Taupo.

She made a detailed statement to the police about what had happened. The police investigation took some years to complete. The appellant was interviewed by the New Zealand Police in Brisbane in August 2011 and was finally charged on 7 March 2012. The delay between the complaint and the charge appears to have been partly due to the appellant living in Australia at the time. In the arguments before us, no point was made as to this component of the delay between the alleged offending and prosecution.

[8] The complainant's August 2007 statement to the police formed the basis of both her committal statement and, in turn, the indictment, which alleged:

(a) offending at or near the family home, involving an indecent assault (count one), a representative count of rape (count two) and a representative count of inducement of an indecent act (count three);

(b) offending at Taupo, involving a representative count of rape (count four); and

(c) offending at Rotorua, involving representative counts of rape (count five) and indecent assaults (counts six and seven).[2]

[9] The appellant applied for a stay of the proceedings before his trial commenced. He complained of the pre-charge delay and contended that it would be impossible for him to have a fair trial which met the requirements of s 25(a) of the New Zealand Bill of Rights Act 1990. This application was dismissed.[3] We will review later the basis upon which the application was advanced and the reasons given by the Judge for dismissing it.

[10] When she gave her evidence at trial, the complainant did not mention the Rotorua allegations which formed the basis of counts five to seven. As well, when she came to the incident in Taupo – which was the basis of the count four allegation of rape – she described offending which was confined to the appellant inducing her

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[2] There were two counts to accommodate the age-specific nature of the offences because the complainant had attained the age of 12 during the period covered by the charges.

[3] *R v [CT]* DC Rotorua CRI-2012-063-916, 4 March 2013 [Ruling on first stay application].

to do an indecent act. She did, however, say that the appellant had raped her near her family home at a location – the gravel bank – which she had not previously mentioned.

[11] The Judge permitted the Crown to amend the indictment by dropping counts four to seven and substituting, for the representative count alleging rape, two non-representative counts alleging rape, one "in the dredging pond" and the other "on the gravel bank". The appellant renewed his application for stay, which was again dismissed.[4]

[12] The jury found the appellant guilty of indecent assault and inducing an indecent act. He was, however, acquitted on the two counts of rape.

Prosecutions for historical sexual abuse and the problem of delay

[13] The present case has a number of features which are common to many prosecutions for historical sexual abuse: a complainant who at the time of the offending was comparatively young, an alleged offender who was older, a broader relationship between them (in this case familial) providing the context for the alleged offending and a delay of decades between the alleged offending and prosecution. Cases of this sort pose significant problems for the courts. The rules and procedures which have grown up around criminal trials, particularly as to reliance on oral evidence based on memory, were developed in the context of cases in which the delay between offending and trial is usually comparatively short and where at least some aspects of the narratives of prosecution witnesses can be checked by reference to independent evidence. Compared to that norm, prosecutions for historical sexual abuse give rise to particular forensic problems which were identified in an Australian case as involving:[5]

> - the reliability or the accuracy of the complainant's recollections … so many years after the events;
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> - the difficulty confronting a trier of fact when assessing the veracity and reliability of a person, not by hearing and observing their evidence given when young, soon after the events are said to have

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4 *R v [CT]* DC Rotorua CRI-2012-063-916, 6 March 2013 [Ruling on second stay application].

5 *R v Jacobi* [2012] SASCFC 115, [2012] 114 SASR 227 at [104].

> taken place and with the child's contemporary language and understanding but after hearing and observing evidence given in the language of an experienced adult with all of the possibilities of reconstruction and re-interpretation that this entails;
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> - the difficulty confronting the [defendant in] having to go well back in time to recall, check and verify the accuracy of events about which evidence is given; and
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> - the difficulty confronting the [defendant] in endeavouring to obtain and produce documentary evidence or oral evidence from other witnesses which might put in question the evidence of a complainant as to events, times and places.

As well, those facing prosecution may be well-advanced in years and sometimes subject to age-related cognitive impairment or other serious health issues.

[14] Loss of evidence arguments can cut both ways. For instance, a defendant facing charges of historical sexual abuse may be better placed than if prosecuted soon after the offending, as evidence which might have supported the prosecution may have been lost. But, given that juries can – and often do – convict on the basis of only the evidence of a complainant, it is realistic to accept that delay will almost always[6] carry some risk of prejudice to a defendant resulting from the loss or diminution of what would, in the case of a prompt prosecution, be the opportunity to come up with evidence which contradicts aspects of the Crown case or provides some support for the defence case.

[15] Delay and prejudice arguments engage s 25 of the New Zealand Bill of Rights Act which provides:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
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> …
>
> (e) the right to be present at the trial and to present a defence:
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> …

[6] Sometimes the case against the defendant is so overwhelming as to practically exclude the risk of prejudice.

If delay and prejudice arguments are in play, judges can give effect to the s 25 rights in two ways: (a) where a fair trial is impossible, by staying the prosecution, and (b) where a fair trial is possible, by taking appropriate measures to mitigate, as far as possible, the risk of prejudice to the defendant. In deciding whether a fair trial is impossible, the assumption should be that all such measures will in fact be taken.

[16] There is strong public interest in the courts facilitating and not frustrating prosecutions for historical sexual abuse. As well, there is no general limitation period for prosecutions for sexual offending. When prosecutions for historical sexual abuse became common, the response of Parliament (albeit not very prompt) was to legislate away the time limit for prosecution in respect of offending against girls between the ages of 12 and 16.[7] The corollary of these two interconnected considerations is that prejudice of a kind which is commonplace in cases of historical sexual abuse does not warrant a stay. This is reconcilable with the fair trial guarantees in s 25 of the New Zealand Bill of Rights Act if, but only if, such prejudice is appropriately mitigated. Such mitigation is largely achieved by the general rules of criminal procedure (particularly as to the onus and standard of proof) and careful evaluation by the trier of fact of the evidence which is adduced. But it also usually requires the judge to take particular measures to reduce, as far as possible, the risk of delay-related prejudice.

The stay decisions of the District Court Judge

The first decision refusing a stay

[17] In dismissing the first application, Judge McGuire relied primarily on the judgments of Randerson J in *W v R (T2/98)*[8] and Tipping J in *R v The Queen*.[9] He adopted the two stage test proposed in the latter case:[10]

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7 Prosecution for offending involving sexual conduct with a girl aged between 12 and 16 under s 134 of the Crimes Act (as it then was) was required to be commenced within 12 months from the time the offence was committed. The prosecution time limit was repealed in 2005 by the Crimes Amendment Act 2005.

8 *W v R (T2/98)* (1998) 16 CRNZ 33 (HC).

9 *R v The Queen* [1996] 2 NZLR 111 (HC).

10 Ruling on first stay application, above n 3, at [5].

1. The accused is entitled to a stay if he can show that the delay has caused specific prejudice jeopardising a fair trial to the extent that there is a serious risk of a miscarriage of justice if the trial proceeds.

2. Even if he cannot show that, the accused is entitled to a stay if, in all the particular circumstances, the delay is so long and unjustified that it would be an abuse of process to put him on trial at all.

[18] The Judge addressed the reasons for the complainant's delay in reporting the offending to the police and concluded that the complainant's reasons for not earlier complaining to the police "seem relatively understandable".[11] He then reviewed the case for the Crown and the responses given by the appellant at interview and noted that, as is "by no means unusual", there was no corroboration from outside sources of the complainant's allegations.[12]

[19] The Judge then turned to the appellant's complaints as to specific prejudice. They were as follows:[13]

(a) The family home no longer existed and the physical characteristics of the surrounding area had changed.

(b) The complainant's parents were dead. This was said to be material to the physical layout at and around the family home and sight lines and also as to the complainant's demeanour around the time of the alleged offending.

(c) Some of the offending in Rotorua was said to have been associated with occasions when the appellant had been engaged in a sporting activity and he claimed to have lost contact with the people he was then associating with.

(d) There was an issue whether the Taupo house had a basement. A basement featured in the complainant's narrative of the rape which was alleged to have occurred at Taupo. It was no longer possible to determine with confidence whether there had been such a basement.

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11 At [10].
12 At [24].
13 At [26]–[29].

[20] In relation to the alleged offending around the family home, the Judge considered that the appellant and his wife were available to give evidence, as were other siblings of the complainant.[14] It was not particularly likely that the complainant's parents would have been able to give material evidence as to the relationship between the appellant and complainant and the latter's demeanour at the time.[15] The Judge rejected as implausible the assertion that the appellant was unable to make contact with his former sporting friends and he considered that the complainant, the appellant and his wife should be able to give "straightforward evidence" about the relevant layout of the house at Taupo.[16] Accordingly, the Judge found that there was no specific prejudice warranting a stay.[17]

[21] As to general prejudice, the Judge, following the approach of Randerson J in *W v R (T2/98)*, proceeded on the basis that, in the absence of a statutory limitation as to time, a stay based on general prejudice should only be granted in a case which is "truly extreme".[18] He then said:

> [33] And that is the position I find myself in. It is to be said that in *W v R (T2/98)*, there were in fact three complainants and to some extents, they corroborated each other. But it seems to me that as I am balancing a number of interests here; the accused's interests, the interests of the public and those of the complainant, I ask myself should this complainant's evidence have less value because she is a sole complainant compared with … *W v R (T2/98)* where there are three complainants and I am bound in all honesty and conscience to say no, it should not have lesser value on that account.
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> [34] Accordingly therefore, I am bound to decline the application.

The refusal of the second stay application

[22] As we have noted, the complainant's evidence at trial differed significantly from the narrative recorded in her statement to the police and the committal statement. This resulted in the amendments to the indictment to which we have referred and it also prompted a second application for a stay, this time at the end of the Crown case.

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14 At [26].
15 At [26].
16 At [29].
17 At [31].
18 At [32].

[23] In the course of dismissing this application, the Judge noted that in the complainant's evidence there was reference to a previously unmentioned allegation of rape and that the allegations of rape at Taupo and other offending at Rotorua had fallen away.[19] On the other hand, he considered that her statement to the police and her evidence at trial were consistent as to how sexual interactions between her and the appellant started and as to the circumstances in which they stopped. He then went on to say:[20]

> Throughout her evidence she was otherwise, in my view, trying to say what she fairly could and could not remember when in the witness box, and it needs to be borne in mind that it is now four years since she gave her complaint to the police and, of course, memory degrades over time.
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> …
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> To my mind, there are sufficient continuing consistencies in her evidence for this matter to go to the jury. This is not a case where there has been such departures, changes, confusion, backtracking, that would in the quintessential sense render the case so unreliable that fairness to the accused would demand that the Judge step in at this stage and take the case away from the jury.
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> There will, of course, be directions to the jury in summing up on issues of unreliability and warnings about evidence given on historic matters, but for the reasons articulated, I must again refuse the stay and the application to discharge the remaining counts under s 347 Crimes Act 1961.

The approach of the Court of Appeal to delay and prejudice

[24] The Court of Appeal was not persuaded that the delay between the alleged offending and trial was sufficient in itself to render the trial unfair.[21] It noted that the complainant's evidence was quite detailed as to the places and circumstances of the offending of which the appellant was found guilty.[22] The Court also rejected the complaints as to specific prejudice caused by the death of witnesses:[23]

> [The complainant's] evidence was that the offending occurred in circumstances where no-one would have seen what was happening. It is notorious that offending such as that alleged in this case can occur in the family home even when others are present. This is not a case where witnesses could have confirmed that [the appellant] had no ability or chance to offend in the way [the complainant] alleged. Mr Lawson did not go so far

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19 Ruling on second stay application, above n 4, at [2]–[5].
20 At [7]–[10].
21 *CT v R* (CA), above n 1, at [18].
22 At [11].
23 At [13].

> as to suggest the witnesses could have given specific evidence such as times and dates for example, but rather suggested they could have given evidence of a general nature about the houses and locations.

The Court considered that the appellant's contention that he could not answer the case against him properly was "answered by the fact he was found not guilty on counts two and three, the two rape counts".[24]

[25] The Court also rejected the appellant's arguments as to the absence of conclusive evidence one way or another as to whether the Taupo house had a basement:

> [16] As matters turned out, when giving evidence [the complainant] did not disclose the rape in the Taupo house. [The appellant] was discharged on that count. However, Mr Lawson submitted that the fact the house did not have a basement would have affected [the complainant's] credibility to the extent [the appellant] would have been found not guilty on all counts. We consider that to be speculative. At most there was a difference in the evidence about whether or not the Taupo house had a basement.
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> [17] We are satisfied that determination of the basement issue against [the complainant] could not have undermined her evidence to the extent suggested by Mr Lawson. There was conflicting evidence before the jury about the existence of a basement at the Taupo house. [The appellant's] wife had given a statement in which she had said there was a basement at the Taupo address. She then gave different evidence at trial. She said that she was mistaken when she referred to the Taupo house having a basement. To the extent the issue had any force, Mr Lawson was able to make the point to the jury in his closing submissions when he submitted there was a real question mark over [the complainant's] credibility generally.

Was the appellant's trial necessarily unfair by reason of delay and prejudice?

The principles to be applied

[26] As will be apparent, the trial Judge referred to and relied on first instance High Court decisions. He did not refer to the leading case on the point, the judgment of the Court of Appeal in *R v O*, where the principles as to the granting of stays were explained in this way:[25]

> Some prejudice to an accused is always likely when a prosecution is brought long after the event. There is an obvious inherent problem of memory for witnesses and accused alike. There will be very occasional cases where the

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[24] At [14].

[25] *R v O* [1999] 1 NZLR 347 (CA) at 350–351.

> lapse of time is so exceptionally long that it will clearly be impossible to have a fair trial. But ordinarily passage of time alone will not be sufficient to found a successful application to have a prosecution stopped. Avoidance of prosecution for a period does not diminish the criminal nature of the act alleged against an accused, though the advanced age of a defendant may have to be taken into account in sentencing if there is a conviction. … [T]here is no limitation period and no presumption that after a particular time memories will be too unreliable for the purposes of a criminal trial. Whatever the length and cause of delay, the central question is whether a fair trial can still take place in the particular circumstances. Are important defence witnesses no longer available? Have relevant documents been lost or disposed of? Has the accused's physical or mental condition deteriorated to a point where it would be unfair to expect him to defend himself? Is the complainant's evidence so fraught with memory problems that the accused is unfairly faced with trying to defend himself against accusations which are insufficiently specific in relation to place or circumstances? Concerns about pinpointing the exact time and place at which an incident has occurred may be greater when an isolated act of offending is alleged than they will be if a representative charge has been laid.
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> An absence of adequate explanation for lengthy complainant delay will not be good reason for stopping a prosecution if a fair trial is possible, except perhaps where the alleged offending is minor. Serious crime should normally be the subject of prosecution notwithstanding that a victim has chosen to delay making a complaint. That dilatoriness may, of course, assume significance as a matter of weight of evidence but, if there is a proper basis for a prosecution and a trial can be conducted fairly, mere absence of justification for the delay will not be a sound basis for a stay.

[27] In determining a stay application, a judge should always bear in mind that the burden and standard of proof provide substantial protection for a defendant as does the obligation of a trial judge to take all appropriate measures to mitigate the risk of prejudice.[26]

[28] There are some authorities which indicate that a defendant or appellant is required to prove, on the balance of probabilities, that a fair trial is not (in the case of a stay) or was not (in the case of an appeal) possible.[27] As well, it has been said that where the complaint relates to evidence lost by reason of the delay, the defendant or

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[26] See above at [16].

[27] See, for instance, *P (CA314/10) v R* [2010] NZCA 478 at [16]; *R v James* HC Hamilton CRI-2005-073-249, 15 November 2006 at [11]; and *R v Rickards* HC Auckland CRI-2005-063-1122, 28 November 2005 at [22].

appellant "needs to show it would have been of real assistance to the defence".[28] The leading New Zealand case as to all of this is *R v Harmer*,[29] which was not a case involving historical sexual offending.[30] The same is true of the leading cases from other jurisdictions which support the balance of probabilities approach, namely the judgments of the English Court of Appeal in *Attorney-General's Reference (No 1 of 1990)*[31] and of the Privy Council in *Tan v Cameron*.[32]

[29] As to this, we prefer the approach taken more recently by the English Court of Appeal in *R v S(P)*[33] in the context of allegations of historical sexual offending. There the Court, after a full review of the provenance of the requirement for a defendant to show prejudice on the balance of probabilities, went on to say:[34]

> In our judgment, the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process.

We agree. The decision whether or not to stay a prosecution on grounds of prejudice depends on a judicial assessment as to whether the risk of prejudice is such as to render a trial unfair and this requires an evaluative judgment based on all relevant circumstances.

[30] The jurisdiction to order a stay is sometimes seen as dependent on the delay between the alleged offending and prosecution being unreasonable or not satisfactorily explained. *R v O* does not offer much encouragement for a close analysis of the reasons for the delay or a search for justification. The ultimate question is whether a fair trial is possible. The reasons why the delay occurred are of

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28 *Hazlewood v R* [2013] NZCA 406 at [19].

29 *R v Harmer* CA324/02, 26 June 2003 at [91]: "The emphasis, we consider, should be upon the need for a showing by the accused or convicted person that it is more probable than not that the lost evidence would have been of real benefit to the defence because it would have created or contributed to creating a reasonable doubt." In that case, a stay had been refused by the trial Judge and the issue was revisited on a post-conviction appeal.

30 The complaint was that the police, in the course of investigating what was thought to be an accidental death, lost evidence which would have been material to the appellant's later trial for murder.

31 *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630 (CA) at 644.

32 *Tan v Cameron* [1992] 2 AC 205 (PC) at 225.

33 *R v S(P)* [2006] EWCA Crim 756, [2006] 2 Cr App R 23.

34 At 346.

no obvious materiality to that question. In this respect, we adopt the remarks of Lord Judge CJ in *R v F(S)*:[35]

> In the overwhelming majority of historic sex allegations the reasons for the delayed complaint, and whether and how the delay is explained or justified, bear directly on the credibility of the complainant. They therefore form an essential part of the factual matrix on which the jury must make its decision. That is the principal, and, in the overwhelming majority of cases, the only relevance of the evidence on these issues. When, in the authorities to which we have referred, it is clearly stated than an abuse of process argument cannot succeed unless prejudice has been caused to the defendant, the principles do not normally encompass the explanation for the delay, nor do they extend to the explanation or explanations which the judge himself or herself may regard as inadequate or unsatisfactory or inconsistent. Indeed features like these are revealed by and become apparent through the ordinary processes of trial, and these questions remain pre-eminently for the jury. Although therefore they may be relevant to submissions that there is no case to answer … it is difficult to conceive of circumstances in which they have any relevance to an abuse of process argument, unless in some manner they impact on the question whether there can be a fair trial. The explanations for delay are relevant to an application to stay only if they bear on how readily the fact of prejudice may be shown.

[31] The policy considerations in favour of permitting trial despite delay are most cogent in the case of serious offending and are less so in the case of comparatively minor offending, particularly where the defendant was very young at the time.[36] Also material is the strength of the Crown case. The stronger the case, the less likely it is that delay actually caused prejudice to the defendant. But if the case is weak, the risk of prejudice is likely to be more substantial. Where the Crown case is weak, very lengthy delay may justify a stay despite the defendant not being able to identify tangible specific prejudice.

[32] We consider that the approach expressed in *R v O* remains appropriate subject to the supplementation provided above in [27] to [31]. These principles are broadly consistent with the approaches taken in other similar jurisdictions, including England

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35 *R v F(S)* [2011] EWCA Crim 1844, [2011] 2 Cr App R 28 at [40].

36 There have been prosecutions in relation to offending alleged to have occurred decades before, which, if brought at the time, would have been dealt with in what was the Children's Court.

and Wales,[37] Australia[38] and Canada.[39] For ease of reference we summarise them as follows:

(a) Delay between offending and prosecution does not erase criminal liability and the adoption of limitation periods is for Parliament and not the courts. There is no scope for a presumption that after a particular time memories are too unreliable for the purposes of a criminal trial.

(b) The adequacy or otherwise of the explanation for delay may be relevant to credibility but perceived inadequacy of such explanation of itself is not a ground for a stay, at least in the case of serious crime.

(c) A judge should grant a stay if persuaded that, despite the operation of the burden and standard of proof and the steps which a trial judge must take to mitigate the risk of prejudice, there cannot be a fair trial.

(d) The exercise does not turn on whether the Judge is satisfied on the balance of probabilities as to any particular item of alleged prejudice (for instance, that but for the delay there would have been identifiable evidence which would have assisted the defendant). Rather what is required is a judicial evaluation based on assessments of the circumstances as they are at the time of trial and of the likely prejudicial effects of the delay.

(e) Material to such assessments will be the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the

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37 The leading cases are those already referred to: *Attorney-General's Reference (No 1 of 1990)*, above n 31; *R v S(P)*, above n 33; and *R v F(S)*, above n 35.

38 The leading case is *Jago v The District Court of New South Wales* (1989) 168 CLR 23. For a recent survey of the jurisprudence, see *R v Jacobi*, above n 5.

39 *R v L(WK)* [1991] 1 SCR 1091.

alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the Crown case.

(f) While a defendant facing serious charges will usually have to be able to point to tangible delay-related prejudice, a combination of a very lengthy delay and a weak Crown case may justify a stay.

(g) Judges must approach stay applications on the basis that an evaluative assessment is required of the facts of the case at hand without any presupposition as to what the result should be.

Did delay and prejudice preclude a fair trial in this case?

[33] It is right to recognise that the case for the Crown, as it stood immediately before the trial, could not be regarded as weak:

(a) The complainant had a reasonable (and obvious) explanation for the her delay in going to police, namely that she did not wish to upset the family. She also had an explanation as to why she complained when she did, which was because she had become aware of highly sexualised conduct by the appellant to another young female member of the family. At interview, the appellant acknowledged what must have been this incident and explained that it had resulted in him being ostracised by his wife's family. We assume that what the appellant said as to this incident was excised from the material given to the jury and it was not otherwise referred to in evidence at trial.

(b) The availability to the complainant of a good explanation for going to the police when she did, which, if given, would have been very damaging to the appellant, practically precluded any cross-examination as to her motive for making the complaint. In this context, there were obvious constraints on the ability of the defence to challenge her credibility in relation to the delay.

(c) There was no suggested motive as to why the complainant might have made a false complaint. While there are limits to a "why would she lie" argument, this consideration was not irrelevant to the way in which the jury were likely to assess her evidence.

(d) The complainant said that when she was in Taupo, the appellant had shown her a nude photograph of his wife with a piece of fruit in her mouth. It had been conceded by the appellant at interview that he had taken nude photographs of his wife albeit that he said that this was after they left Taupo and he denied that there were any photographs featuring fruit and having shown the complainant nude photographs. The appellant thus had to maintain that it was just a coincidence that the complainant had dishonestly claimed to have seen photographs of the same general kind as he acknowledged that he had taken.[40]

[34] The suggested prejudice was speculative at best. There was no substantial likelihood that the complainant's parents, if alive, would have been able to give evidence which supported the appellant's case. The inability to recreate with precision the exact position of the complainant's family house and adjacent features of the surrounding area was likewise of no obvious significance to the credibility assessment which the case required. Whether the Taupo house had a basement was perhaps of slightly more potential significance. But the appellant's position as to this was weakened by equivocal answers which he had given at interview as to whether there was such a basement, a statement by his wife to the police suggesting that there had been a basement and the absence of full inquiry, at that stage, as to whether there might be other conclusive evidence on the point. The appellant's unsubstantiated claim to be unable to make contact with his sporting associates was understandably not accorded much weight by the Judge. More generally, the prejudice asserted by the appellant did not go beyond what is commonplace in prosecutions for historical sexual offending.

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[40] The situation got rather worse for the appellant during trial. In his evidence he adhered to what he had said at interview. His wife, however, denied that she had ever been photographed nude – thus contradicting his evidence. She was also cross-examined on what she had said at interview when she had acknowledged the possibility that she may have been photographed nude with a piece of fruit in her mouth.

[35] For these reasons, we are of the view that the decision of the Judge to refuse the first stay application was correct.

[36] We have formed a different view in respect of the second stay application. As will be recalled, this application was dealt with at the end of the Crown case. By this stage, aspects of the prejudice asserted by the appellant had fallen away because he no longer faced charges in relation to the previously alleged rape at Taupo and other offending in Rotorua. On the other hand, the divergences between the complainant's committal statement and her evidence at trial were significant, particularly as what in a sense was a new allegation of rape (in that it related to a location not previously mentioned) had come up in the course of her evidence.

[37] We appreciate that the way in which the complainant's narrative was developed would appear not to have been ideal. She gave a full statement to the police in 2007. This statement formed the basis of her committal statement and the committal statement in turn was used by the prosecutor in leading her evidence. Although she did have a discussion with the prosecutor before giving evidence, it seems that she was never re-interviewed. In those circumstances, some deviation between her evidence (in 2013) and her 2007 police statement is hardly surprising, particularly since she was describing events which had occurred more than 40 years previously.

[38] Other than in respect of the new charge of rape, the approach of the Judge was to focus on what was common to the committal statement and evidence at trial. The Court of Appeal also focussed on those commonalities and, as well, was able to dismiss the appellant's contention that he had been prejudiced in his defence as answered by the acquittals on the rape charges. We do not regard the latter point as convincing. The fact that the appellant was able to secure an acquittal on two charges does not show – indeed is neutral as to – an absence of prejudice in relation to the other charges. There is, however, more substance in the point that there were significant consistencies between aspects of the complainant's committal statement and evidence at trial and these consistencies were reflected in the pattern of verdicts.

[39] On the other hand, it is of real concern that some 40 years after the events in question, a new charge of rape should be proffered on the basis of evidence given by a complainant for the first time at trial. As well, although there remained a substantial basis for concluding that the appellant had engaged in illegitimate sexual activity of some kind with the complainant, the uncertainties as to the specifics of what had happened at the various locations are troubling. We are of the view that, given the variances between the complainant's committal statement and evidence at trial, the resulting need for a re-writing of the indictment and, most particularly, the difficulty in being confident as to what offending happened in which locations, a stay should have been granted.

Was the trial in fact fair?

[40] Even if we had been persuaded that the Judge had been correct to dismiss the second stay application, we consider that the directions given to the jury were inadequate to overcome the risk of unfairness in the trial arising from the effect of delay on the reliability of the evidence.

[41] Potential unreliability of evidence, including for lapse of time, is treated by s 122 of the Evidence Act as something the judge should identify and address by a warning to the jury. Section 122(2)(e) constitutes legislative recognition that evidence about the conduct of a defendant may be unreliable where the conduct in issue occurred more than 10 years before trial. If of the opinion that the evidence, although admissible, may be unreliable, the judge is required to consider warning the jury of the need for caution both in accepting the evidence and deciding what weight it is to be given.[41] Such a warning may be requested by a party, although the judge is not obliged to act on the request if of the view that a warning might emphasise the evidence "unnecessarily" or there is other good reason not to accede to the request.[42] A warning given under s 122 need not follow any particular form of words.[43] What is to be said is thus left by the statute to the judge and should be tailored to the circumstances of the case.

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41 Evidence Act 2006, s 122(1).
42 Section 122(3).
43 Section 122(4).

[42] Section 122 of the Evidence Act provides:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> (a) hearsay evidence:
>
> (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
>
> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
>
> (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
>
> (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
>
> (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
>
> (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
>
> (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
>
> (4) It is not necessary for a Judge to use a particular form of words in giving the warning.
>
> …

[43] Section 122(2)(e) is not confined in application to trials in which historical sexual abuse is alleged, although it commonly arises in that context. In such cases, s 122(2)(e) will often apply to the evidence given by the complainant. A requirement to give a warning under s 122 is not inconsistent with s 121 (which makes it clear

that there is no requirement to give a warning against accepting the uncorroborated evidence of a complainant[44]) or the direction given to a trial judge that, where evidence is given or comment is made suggesting delay by the complainant in making a complaint, the judge "may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence".[45] Section 122 is not concerned with the policies which formerly led to requirements of corroboration or scepticism about delayed complaint in sexual cases, both of which are rejected in contemporary law. Section 122 addresses, rather, the different concern, equally relevant to sexual cases as it is in relation to other allegations of criminal offending, that a lengthy lapse of time between the conduct in issue and the evidence at trial may raise issues of reliability that bear on the fairness of the trial. Where the judge considers the evidence may be unreliable for that reason (or for the other reasons identified in s 122(2)), consideration of a warning is required and its absence may lead to unfairness in the trial.

[44] The distinction between a corroboration warning and the obligation of a judge to warn the jury of the risk of miscarriage of justice in cases where the gap in time between the conduct and the giving of evidence gives rise to concerns about the reliability of the evidence was made by the High Court of Australia in *Longman v R*.[46] The elaborate directions required following *Longman* in Australia have not been adopted in New Zealand either in case-law[47] or now in s 122 itself (which makes it clear that it is not mandatory to give such direction in all cases and that no particular form of words is required in those cases where the context is such that a direction is appropriate). But the scheme of the Evidence Act provisions in subpt 6 of pt 3 (in which ss 121, 122 and 127 are located) is consistent with the view taken in *Longman* that lapse of time may create conditions of risk for the reliability of evidence which need to be addressed in cases concerning sexual offending as in other criminal offences and that directions to meet such concerns do not reintroduce the corroboration or delay in complaint warnings in sexual cases. Emphasis on

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44 See also its predecessor, s 23AB of the Evidence Act 1908.

45 Evidence Act, s 127.

46 *Longman v R* (1989) 168 CLR 79.

47 See *R v Meaclem* CA187/95, 13 November 1995 at 7; *R v M* [2007] NZCA 217 at [28]–[31]; *R v Davis* [2007] NZCA 577 at [71]–[77]; and *R v Stewart* [2008] NZCA 429, [2010] 1 NZLR 197 at [95].

corroboration and prompt complaint treated complainants in cases of sexual offending with more suspicion than other witnesses or complainants in different types of cases. Section 122 is instead concerned with trial fairness in all cases and in respect of all witnesses in circumstances identified in the legislation where experience indicates that there are risks of unreliability.

[45] In addition to evidence about the conduct of the defendant that occurred more than ten years previously, those identified risk areas include hearsay (where evidence may not be able to be properly tested), confessions (of concern because false confessions have given rise to miscarriages of justice), evidence where the witness has a motive to give false evidence prejudicial to the defendant or where both defendant and witness are detained (where false evidence is of principal concern). The scheme of s 122(2), which identifies types of evidence for particular attention, makes it clear that "unreliability" is not a narrow or technical term. In such circumstances, it may be unwise to attempt refinement or classification of when evidence may be unreliable. Nor, given the high threshold of ten years before the lapse of time prompts consideration of a warning, is a restrictive approach to directions under s 122 warranted.

[46] The Court of Appeal has tended to discourage the giving of warnings. It has been said, for instance, that a s 122(2)(e) warning is not necessary in cases where the defence case is that the complainant is lying, on the basis that lapse of time is irrelevant to fabrication.[48] It has also been said that where a challenge to credibility and reliability is clearly before the jury (on the basis of the addresses of counsel), a s 122(2)(e) direction may be distracting where the evidence is not "so inherently unreliable" as to require judicial intervention.[49] The concern is that a warning might be seen to be "an invitation to reject the complainant's evidence in its entirety".[50] The approach of the Court of Appeal has been that, for the purposes of ss 122(1) and (2)(e), reliability concerns arise only where, by reason of delay, the evidence of a complainant can be said to be inherently unreliable because of the effect on memory. That is why s 122 warnings have been held not to be required where fabrication is

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48 *S (CA514/08) v R* [2009] NZCA 622 at [63]–[65]. Another case to the same effect is *N (CA298/2012) v R* [2013] NZCA 17 at [24]–[26].

49 *L (CA707/2012) v R* [2013] NZCA 191 at [42].

50 At [42].

alleged. The approach also explains the lack of focus on the disadvantage to a defendant associated with delay-caused difficulties in checking or answering the allegations of the complainant.

[47] In part, the approach may be a reaction to some of the directions required by the case-law in Australia, which have been criticised as suggesting scepticism about the evidence of complainants in sexual offending cases.[51] Any such scepticism has been rejected in New Zealand law. It is clearly established that there is no basis to suggest that delay in reporting in sexual offending cases necessarily reflects on the credibility of the complainant.[52] That does not mean, however, that the concern that s 122 addresses more generally should be viewed with lack of favour in cases of sexual offending or that there should be a requirement that the evidence itself should be "inherently" unreliable by reason of the effect of delay on memory.[53]

[48] Section 122(2)(e) was not in the Evidence Code as proposed by the Law Commission.[54] This is because the Commission did not consider that the evidence of historical offending should be listed as a category of potentially unreliable evidence in the draft Code precursor to s 122(2).[55] What became s 122(2)(e) was added to the Bill by the Select Committee.[56] It explained why in these terms:

> We recommend that clause 118(2) be amended to provide that the Judge must consider giving a warning to the jury regarding the reliability of … any evidence about the conduct of the defendant that is alleged to have occurred more than 10 years previously. We are concerned about the reliability of evidence provided in these situations, and think that the Judge should have the discretion to warn the jury on the question of reliability.

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51 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victoria Law Reform Commission *Uniform Evidence Law* (ALRC R102, 2002) at [18.72]–[18.99]; Victorian Law Reform Commission *Sexual Offences* (Final Report, 2004) at [7.64]–[7.133]; Tasmania Law Reform Institute *Warnings in Sexual Offences Cases Relating to Delay in Complaint* (Final Report No 8, 2005); and Queensland Law Reform Commission *A Review of Jury Directions: Report* (Report 66, 2009) vol 1, ch 15.

52 See Annie Cossins "Time Out for *Longman*: Myths, Science and the Common Law" (2010) 34 Melbourne U L Rev 69 at 70–83 for a review of the literature on disclosure in sexual abuse cases.

53 See above at [46].

54 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at 242.

55 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [476]. The Commission's view was that the position was adequately covered by its proposed general discretion to give a warning along the lines now provided for by s 122(1).

56 Evidence Bill 2005 (256-2) (select committee report) at 12.

We think it clear that the Committee's view of the reliability of evidence of historical offending was more sceptical than that of the Law Commission. As well, it does not seem very likely that the Committee's concerns were confined to the effect of time (and intervening events) on memory.

[49] For these reasons, we are of the view that in a case which is within s 122(2)(e), a judge may conclude that the ability or otherwise of a defendant to check and challenge the evidence of a complainant is material to the judge's assessment whether that evidence may be "unreliable". In other words, a judge may conclude that evidence may be unreliable for the purposes of s 122(2)(e) for reasons other than the effect of delay on the memory of the complainant.

More general comments

[50] Judges should also bear in mind that the whole premise of the section is that it is not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence. For instance, in a case which is subject to s 122(2)(d), it could hardly be suggested that it is appropriate for the judge to simply leave it to counsel to point out the risks associated with such evidence. In such circumstances, the warning should have the imprimatur of the judge. As well, although s 122 does not mandate the giving of a warning, the language of s 122(3) also warrants careful attention. Section 122(3)(a) has no application to cases of the present kind (because the evidence in question is so central to the case) and s 122(3)(b) shows that in the absence of good reason to the contrary such a warning should be given. A general view that such warnings are generally unnecessary or inappropriate is thus inconsistent with the premise of the section and cannot constitute a good reason not to give a warning for the purposes of s 122(3)(b).

[51] The reality, as recognised in *R v O*, is that in cases of long-delayed prosecution there will almost always be a risk of prejudice.[57] That this is so will be more apparent to the trial judge than to the jury. Unless the judge takes personal responsibility for pointing out that risk and adds the imprimatur of the bench to the

[57] See the discussion above at [26].

need for caution, the jury will be left with competing contentions from counsel and without any real assistance in addressing them.

The warning given by the Judge

[52] It will be recalled that when the Judge dismissed the second stay application, he indicated that, "There will, of course, be directions to the jury in summing up on issues of unreliability and warnings about evidence given on historic matters".[58] And when summing up to the jury, the Judge said:[59]

> [38] Now in this case, ladies and gentlemen, there has been a very very long delay from the time of these alleged incidents to the time when [the complainant] complained to the police. There has been comment that the complainant said nothing about these events until long after, she says, they occurred. The suggestion is that if they had really occurred, she would have complained to somebody very soon afterwards. That is something that you will consider and give such weight to as you think fit. But the law allows me to tell you that experience has shown that there may be good reasons, often deeply buried and personal, why people do not complain about such things for long periods of time.
>
> [39] Equally, I am bound to give you this general caution about the evidence in this case in deciding what weight you give to all evidence about the conduct of the defendant that was alleged to have occurred over 10 years ago. You see, our Evidence Act obliges me, in most cases, to give that warning to juries where the alleged acts of the defendant occurred 10 years previously. You see, it is about the care that you need to give to weighing up all the evidence when it relates to incidents that allegedly happened a long time ago.
>
> [40] So take particular care in weighing up the evidence, ladies and gentlemen, as I know you will.

[53] The appellant's counsel did not take issue with this direction in the application for leave to appeal. In the course of the hearing, the very limited nature of the direction gave rise to some concern and the Court invited further submissions in writing as to whether what was said was adequate.

Was the warning adequate?

[54] The Judge said that he was going to give a warning ("I am bound to give you this general caution") and referred to being required "to give that warning". He then

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[58] Ruling on second stay application, above n 4, at [10].
[59] *R v [CT]* DC Rotorua CRI-2012-063-916, 8 March 2013.

said the warning was about the "care that [the jury needs] to give". But the closest he came to giving a warning was that the jury should "take particular care in weighing up the evidence". This, however, was no more than a statement of the obvious. Why would the jury not take "particular care" given the seriousness of their task? What was required was a warning of the "need for caution", an explanation as to why such "caution" was necessary and thus identification of the relevant risks.

[55] The direction did not mention at all the effect of time on memory; this despite the deviation between the complainant's evidence on the one hand and her earlier statements on the other. There was no indication of a need for particular concern about the new count of rape despite it (a) having been added to the indictment only at the end of the prosecution case, and (b) being based on an allegation never previously made prior to the complainant's evidence in chief. There was no acknowledgement that the appellant's own memory, and thus his ability to mount an effective defence, may have been compromised by the effluxion of time. And, as well, the Judge did not point out to the jury the other respects in which there may have been prejudice to the defendant relating to changed physical characteristics and dead witnesses. That those risks were seen as insufficiently specific and cogent to warrant a stay did not mean that they were entirely negligible. Depending on the tone of the Judge's voice, the references to being "bound" and obliged by the Evidence Act to give a warning may have conveyed to the jury an impression that the Judge was distancing himself from the substance of the warning. Judges should take personal responsibility for the warning and should thus be careful to avoid giving such an impression.

[56] As the Australian and English cases make clear, the willingness of the courts to permit prosecutions for offending said to have occurred decades before is predicated on the assumption that trial judges will ensure that the sort of prejudice to defendants which is the concomitant of such delays will be fully addressed by the trial judge.[60] In this case, we are satisfied that the s 122 warning, if such it was, failed to address that prejudice.

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[60] See, for example, *R v Jacobi*, above n 5; and *R v TBF* [2011] EWCA Crim 726.

[57] The statutory direction that "a particular form of words" is not required must be respected. What is important is the substance of what the judge says which, of course, must reflect the circumstances of the case at hand. Judges would be well-advised to seek submissions from defence counsel as to the particular risks of prejudice in respect of which a direction is sought. The judge may see a particular risk as insufficiently substantial to warrant direction. But in deciding not to give a direction, a judge must remember that the risk need not be of a kind which might warrant a stay and that there will almost always be some risk of prejudice in cases in which decades pass between alleged offending and trial. And s 122(3) should not be overlooked. Where requested, the judge must give a warning unless s 122(3)(a) applies or there is other good reason not to do so.

Disposition

[58] For the reasons given, the appeal is allowed and the convictions of the appellant are quashed. Given our conclusion that the second stay application should have been granted, it is not appropriate to direct a retrial.

GLAZEBROOK and ARNOLD JJ

(Given by Glazebrook J)

The stay applications

[59] We agree, for the reasons given by the majority, that the Judge was correct not to grant a stay after the first stay application but that a stay should have been granted after the second stay application. We also agree with the discussion of the principles relating to stay applications in the context of allegations of historical sexual abuse. In particular, we agree that, where a stay is not granted, the trial judge must take particular measures to reduce as far as possible the risk of delay-related prejudice.

[60] In this regard, it will often be necessary, in order to ensure a fair trial, to draw the jury's (or in judge alone trials, his or her own) attention to the risk of the possible loss of the opportunity to adduce evidence that could have contradicted aspects of the Crown case or provided some support for the defence case and to any other

prejudice allegedly arising through the lapse of time, even where such prejudice was not sufficient to warrant a stay. We also consider that it may also be appropriate, for fair trial reasons, to refer to the possible detrimental effects of time on memory even where a warning under s 122 of the Evidence Act 2006 is not considered appropriate.

The scope of s 122

[61] We do not agree with the majority that the need to draw the jury's attention to delay-related prejudice (including any reduced opportunity to test the reliability of evidence) arises out of s 122(2)(e) of the Evidence Act.[61] Section 122 is directed at the reliability of the evidence itself and not with any difficulties, whether arising through the lapse of time or otherwise, in testing that evidence.

[62] Section 122(1) allows a judge to give a warning to the jury suggesting caution in accepting or giving weight to evidence that the judge considers may be unreliable. Section 122(2) sets out particular circumstances where a judge must consider whether or not to give a warning. One of those circumstances, set out in s 122(2)(e), is where evidence is given about "… the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously".

[63] There are a number of points to be made. The first is that s 122(1) requires the judge to come to a view as to whether or not the evidence may be unreliable. Evidence is either reliable or it is not. The ability to test the evidence may enable a fact finder to decide whether or not the evidence is reliable. It does not, however, change the underlying reliability or otherwise of the evidence.

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[61] See the majority's reasons at [41] and [49].

[64] This view of reliability is consistent with how the term is used in other parts of the Act: for example, in the sections dealing with what is often called the "threshold reliability" test[62] for statements made by a defendant,[63] hearsay statements,[64] identification evidence[65] and previous consistent statements of a witness.[66] These sections require a consideration of whether the circumstances in which the evidence arose affect reliability and are not concerned with the ability to test the evidence.

[65] The second point is that the section's focus is a particularised one. The concentration is on the potential unreliability of the particular evidence in issue.[67] Concerns about possible unreliability may be allayed by other evidence in the case but the emphasis is on the reliability of the evidence itself. This means that, even in cases where possibly unreliable evidence is supported by other evidence, a warning may still be required, particularly as to the weight to be attached to that possibly unreliable evidence.

[66] The third point is that, even if a judge considers the evidence to be possibly unreliable, a warning is not compulsory.[68] This suggests that judicial judgment must be brought to bear as to the need for a warning in any particular case. For example, where there has been expert evidence on the point from both parties, a judge may legitimately consider that it is best not to give a s 122 warning.

[67] The fourth point is that s 122(2) sets out a list of circumstances which have particular risks of unreliability. Even in this context, the obligation is only to

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62 That being whether the circumstances relating to the evidence provide a reasonable assurance of its reliability: see for example Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV18.02].

63 Evidence Act 2006, s 28.

64 Section 18(1)(a). See also s 34 with regards to the admission of hearsay statements in civil proceedings.

65 Sections 45(1) and (2), and 46.

66 Section 35(3)(a).

67 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at [C385].

68 The Law Commission had in fact required a warning if the judge came to the view that particular evidence may be unreliable: Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [470]. This was changed at the select committee stage. The Select Committee added cellmate confessions and evidence about the conduct of a defendant that occurred more than 10 years previously to what is now s 122(2), at the same time as removing the mandatory nature of the warning in what is now s 122(1): Evidence Bill 2005 (256-2) (select committee report) at 12 and 95–96.

"consider" giving a warning, consistently with the word "may" in s 122(1). This means that, even in situations covered by s 122(2), there is a requirement for a consideration of the evidence and for the judge to consider that that particular evidence may be unreliable, before considering whether to give a warning.[69]

[68] We agree with the majority that reliability in the context of s 122 can also encompass credibility and that the risk of false evidence would be the main risk in the situations set out in s 122(2)(c) (motive to lie) and (2)(d) (confessions to cellmates).[70] In terms of s 122(2)(e), the lapse of time would not generally have any bearing on whether or not a witness was deliberately giving false evidence. However, the lapse of time may be relevant to the possibility of false memories, including where these memories are recovered memories.[71]

[69] The sixth point is that the subsection is not limited to possibly unreliable evidence given on behalf of the Crown.[72] It is thus directed at ensuring that the jury does not rely on possibly unreliable evidence, without considering very carefully whether or not to do so and, if so, the weight that should be accorded that evidence. The section is therefore only in the broadest sense concerned with trial fairness[73] and in that sense covers fairness both from the perspective of the defence and the Crown.

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69 With regards to hearsay, the Law Commission mentioned, as factors possibly affecting reliability, that such a statement is not made in court (and therefore is not made on oath) and that the statement is not able to be tested under cross-examination: Law Commission *Evidence: Evidence Code and Commentary,* above n 67, at [C386]. See also the comments in Mahoney and others, above n 62, at [EV16.03.04]. In the current case, however, the complainant gave evidence in court and was subject to cross-examination.

70 See the majority's reasons at [45].

71 See Cara Laney and Elizabeth Loftus "Recent advances in false memory research" (2013) 43(2) South African Journal of Psychology 137–146. The issues surrounding memory, reliability of recall, false memories and recovered memories were discussed by the Law Commission in *Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999). See also Law Commission *Evidence: Reform of the Law*, above n 68, at [477]–[479]. The Law Commission also considered whether testimony based on recovered memories should be included in what is now s 122(2), but ultimately decided that it should not. The Law Commission recommended that, in cases where the issue arises, any warning should be tailored to the facts of the case and the expert evidence that may have been called: at [479].

72 This also applies to s 122(2)(e), which is wide enough to include a defendant's evidence about his or her own conduct and clearly includes a defence witness' evidence about the defendant's conduct.

73 See the majority's reasons at [43].

[70] The seventh point is that, except in specific situations, corroboration of evidence is not required for a conviction.[74] The majority's judgment suggests that evidence could be considered possibly unreliable under s 122(2)(e) solely because of delay-related prejudice and even where there is nothing about the particular circumstances that would suggest that the evidence may be unreliable.[75]

[71] Contrary to the majority's view,[76] we consider that this amounts to suggesting that it is dangerous to convict without corroboration in cases where the offending occurred more than 10 years previously. It is difficult to see why this should be confined to situations where there has been a long delay between the offending and the trial. In the case of sexual offending, it would not be unusual for there to be no corroboration of the evidence of the actual sexual offending, even in cases where the offending occurred more recently. The fact that a complainant may have given reliable or unreliable evidence on peripheral matters may not normally greatly assist a jury in assessing the reliability of the evidence of the actual offence.

[72] Finally, the warning given under s 122 is a very strong warning and, if given in relation to a complainant's evidence, is likely to be interpreted by the jury effectively as a judicial instruction to reject the evidence or to give it little weight.[77] This would be unfair to the complainant where the judge, based on an examination of the particular evidence considered in light of the case as a whole, does not consider that the evidence may be unreliable but merely has concerns about delay-related prejudice to the accused. Contrary to the view of the majority set out at [48], if the Select Committee had in mind general fairness and prejudice issues for s 122(2)(e) as well as reliability issues, then we consider it would have made that clear (and it did not).[78]

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74 Evidence Act, s 121(1).

75 See the majority's reasons at [51].

76 See the majority's reasons at [43].

77 We refer to the comments in the Court of Appeal cases discussed at [46] of the majority's reasons.

78 See Evidence Bill (select committee report), above n 68, at 12.

Was the warning adequate in this case?

[73] In this case, there were issues of reliability with the complainant's evidence, given the inconsistencies between what she said at trial and her committal statement. In particular, there were uncertainties as to the specifics of what had happened at the various locations. In these circumstances, we consider that the Judge was right to give a s 122 warning.

[74] We agree with the majority that the warning actually given was not adequate. A warning given under s 122 should (at least briefly) explain the reasons why particular evidence may be unreliable.[79] In this case the direction given by the trial Judge did not refer to the deviations between the complainant's evidence and her earlier statements and it did not indicate the need for particular concern about the new count of rape. We also agree that the form of the warning could, depending on the tone of voice, have indicated that the Judge was distancing himself from the substance of the warning.

[75] While we agree that it would also have been appropriate to refer to the possible delay-related prejudice that may have been suffered by the appellant, this would not be because of s 122 but in order to ensure that the appellant had a fair trial.

Result

[76] Because we agree that a stay should have been granted and that the warning given was not adequate, we agree that the appeal should be allowed, the convictions quashed and that there should be no order for a retrial.

Solicitors:
Lance Lawson, Rotorua for Appellant
Crown Law Office, Wellington for Respondent

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[79] See the comments of the Court of Appeal in *R v Ngarino* [2009] NZCA 200 at [46]; and *Taylor v R* [2010] NZCA 69 at [63].