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 57/2015
[2016] NZSC 122

BETWEEN	TONY GORDON BEST Appellant
AND	THE QUEEN Respondent

Hearing:	11 February 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A J Bailey and E Huda for Appellant M D Downs and K A Courteney for Respondent
Judgment:	8 September 2016

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by Glazebrook J)

Introduction

[1] Mr Best was found guilty of one count of sexual violation by rape and two counts of sexual violation by unlawful sexual connection after a jury trial in the District Court at Christchurch on 7 March 2014. The main issue in this appeal[1] is whether Mr Best's trial counsel should have been permitted:

(a) to cross-examine the complainant on what Mr Best alleges may have been a false complaint made by her on another occasion against a different alleged perpetrator; and

(b) to lead evidence in support of the contention that the earlier allegation was false.

Allegations against Mr Best

[2] On the evening of 10 May 2012 the complainant was with a group of her friends at Mr Best's house. She was at the time 18 and Mr Best was 43. Mr Best was the stepfather of one of the complainant's friends (A) but the complainant had

[1] Leave to appeal to this Court was granted on 3 November 2015: *Best v R* [2015] NZSC 167 (William Young, Arnold and O'Regan JJ).

not previously met him. The complainant said that she and A were in a sexual relationship but were not "dating".

[3] At some stage during the evening, Mr Best and A's mother went to visit a family member in hospital for a few hours. When they returned, the pair spoke with the young people for a while before Mr Best went to work on his motorbike outside. The complainant greeted Mr Best when they first met but claims that they did not have any further conversation or interaction.[2] Between 10 and 10.30 pm the complainant was put to bed on a mattress on the floor in the spare room. According to one witness the complainant was so intoxicated[3] she "couldn't walk straight".

[4] After all of the others present had either left or were asleep,[4] Mr Best suggested to A at least twice that they should have a threesome with the complainant. A declined. He said that Mr Best was persistent and that the suggestion came as a bit of a shock to him, as it was not something that he would expect from his mother's partner. It was suggested in cross-examination that the upshot of the last conversation A had with Mr Best that night was that, if A did not come out of the room, Mr Best would take that as an indication that the complainant wanted sexual activity. A replied "not that I'm aware of". Counsel for Mr Best then asked if he thought that this was perhaps something Mr Best said and because Mr Best had been talking about it for a "little bit", A had not listened. A replied that he "couldn't answer". In closing, defence counsel suggested that these answers did not conclusively rule out that A had agreed to ask the complainant if she was interested in sexual activity, and if she was not, then A would tell Mr Best.

[5] Some time after, A went to sleep next to where the complainant was sleeping.[5] Later, Mr Best also went into the room. The complainant awoke to find

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2 Other witnesses said that Mr and Mrs Best had conversations with all of the youths in the group, but no one could say with certainty that the complainant and Mr Best specifically had a conversation. One witness did say he "didn't really notice what they were talking about 'cos there was that many people around": he thought Mr Best did talk to the complainant at some stage but he did not pay much attention.

3 The complainant said in evidence that she drank 15 or more cans of pre-mixed bourbon drinks.

4 A said that everyone had left at around 11.30 pm except for the complainant, his mother and his younger siblings, who were all asleep. A had watched a bit of television before Mr Best had come in from outside.

5 A gave conflicting evidence as to whether he was sleeping on a mattress next to the complainant or on the floor.

Mr Best on top of her kissing her neck. In her examination-in-chief the complainant said that she thought he was A until she heard Mr Best asking her how old she was.[6] He called her a "slut and a bitch" in a threatening manner and said she needed to be quiet. When the complainant resisted, Mr Best held her arms and then pulled her hair so hard that "it felt like [she] was gonna get it ripped out".

[6] Mr Best removed the complainant's dress and shorts and inserted his fingers into her vagina. He then raped her but did not achieve ejaculation. After this he forced her head down onto his groin to suck his penis.[7] The complainant continued resisting and repeatedly told Mr Best to "stop". She said in cross-examination that she said no loudly enough for Mr Best to hear because he kept telling her to be quiet. Eventually, Mr Best allowed the complainant to stop and he left the room. The complainant then left the house. As she went through the living room, she saw Mr Best masturbating on the couch. The complainant said that Mr Best saw her leaving and asked where she was going and that "he wasn't finished and that it wasn't fair that he's not finished". The complainant said that she "kept making up excuses, 'cos I was real scared that if I stayed, something will happen".

[7] We note at this point that the complainant was taking medication that could have side effects such as impaired clarity of thinking, confusion and possible hallucinations. The medical evidence was that these side effects could occur with or without alcohol and that people who are on the medication for a prolonged period of time like the complainant develop a tolerance for it.

[8] At some stage during the events set out above, A was woken by movement next to him. He heard some of what occurred. A said he heard the complainant say "No. Stop it", and then "I'm trying to sleep", and Mr Best later telling the complainant "You're gonna do as you're fuckin told". A also heard Mr Best refer to the complainant as a "slut" a couple of times and say, "Nah suck my cock", and "So I can fuck you again tomorrow night too". A also said he heard what sounded like

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6 In cross-examination she said she did not know it was Mr Best until she heard his name and denied that she presumed it was A for longer than she was now saying.

7 Counsel asked whether Mr Best had said something along the lines of, "If you want sex you'll have to perform oral sex on me 'cos I'm not hard enough". After legal discussion this was rephrased as "The reason oral sex has taken place is because Mr Best wasn't hard enough, his penis that is, to have standard intercourse." The complainant denied this.

hair "snapping or getting pulled out" and what he said was Mr Best taking off his jeans as he heard "coins hitting the floor".

[9] A did not say or do anything to intervene. He left the room between fifteen to thirty minutes after being woken. In his examination-in-chief he agreed that he "panicked and then bolted". He was "shocked" and "speechless". He then went outside and lay down in the middle of the road. He said that he "couldn't be too sure" why he did this and that it was just "spur of the moment". He was moved on by the police and told those officers that Mr Best was cheating on his mother (Mr Best's wife). A agreed in cross-examination that, at that stage, he thought that was all that had happened.

[10] A returned to the room with the police to get his belongings. He asked the complainant if she was coming with him and there was no response. A said he could see raised blankets in the bedroom at this stage but could not see who was behind the blankets. A left with the police and was taken to his aunt's house. From there he went to see his cousin. A had been drinking throughout the evening, including after the complainant had been put to bed. He described himself as "in between a bit tiddly and close to drunk" having drunk around 18 cans of pre-mixed bourbon drinks.

[11] The complainant maintained that throughout the above events she did not realise A was in the room, although in cross-examination, she did say that she thought she had seen someone leave the room while the events were happening but she could not be sure. The complainant denied the suggestion put to her in cross-examination that she had fabricated the rape complaint once she found out A had been in the room.

[12] The complainant made an immediate complaint of rape to a friend when she arrived at her father's house where she was staying. The friend was also staying there. Her friend described her as having a bright red face and as being "a mess" and crying.[8] Her father had come into the room while the complainant was with her

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[8] This friend maintained in evidence that the complainant told her that when she was raped A was "in a deep sleep" beside her in bed.

friend. She said that she did not want her father knowing about the offending as she was scared about what he would do. She covered her face and her father did not enquire whether she was upset or angry.

[13] The complainant sent text messages later that morning to another friend to the effect that Mr Best had taken advantage of her.[9] This friend came to see the complainant who told her that Mr Best had forced her to "suck his dick." Her friend said that was "all I got out of her" and that the complainant then "broke down and started crying". The complainant did not want A to find out, but her friend convinced her that she should tell him.

[14] The complainant's friend sent a text message to A's cousin asking A to come and see the complainant.[10] A and some other friends came to the complainant's father's house that afternoon. A and the complainant went into another room and it was at this stage that the complainant said that she discovered that A had been in the bedroom during the alleged rape.

[15] A had told his mother that morning that he thought Mr Best had cheated on her. A said to the complainant something along the lines of "Mum wants to know if you've consented."[11] The complainant then told A what had happened. It was suggested by the defence that some form of collusion occurred between the complainant and A (and other friends) before they went to the police.[12] However in his examination-in-chief A stated that the complainant "didn't really say much about it" and another witness said that A and the complainant were only alone[13] in the

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9 She texted this friend as it appears she did not consider the first friend to be listening to her or supportive enough. The first friend said she was supportive but accepted that she may not have been listening as she was trying to "figure out for myself whether it was true or not, whether it truly happened, and then, yeah, I had many of other things on my mind at the time."

10 At 1.12 am on the morning of the alleged offending the complainant had texted A: "Take me back to Dad's please, I wanna go, I'm fucked in the head, I hate myself, please [A] take me home now, please." In her examination-in-chief she was unsure whether she sent that text before the incident with Mr Best or when walking home. She sent a further text to A at about 2.06 am to say she was at her father's. A accepted that he received these texts but in cross-examination agreed that he did not respond to them.

11 In cross-examination, Mrs Best stated that she would not have asked this question.

12 In closing, the defence suggested that the time spent together before the police complaint was laid contaminated the evidence, but that despite this "contaminated evidence" the evidence of the witnesses still lacked consistency.

13 A said that another friend remained in the room the whole time but the complainant (and another witness) said that he and the complainant were alone.

room for "about five minutes, not even that." In cross-examination A maintained that the complainant did not go into detail about the events.

[16] The complainant made a formal police complaint at 4.10 pm on 11 May 2012, the same day as the alleged offending. A and the other friends present at the complainant's father's house went to the police station with her. A medical examination that evening revealed a bruise to the complainant's neck consistent with suction or force of a shearing nature.[14]

[17] The police obtained a search warrant in relation to Mr Best's cellphone. This was executed on 14 May. They found apparently incriminating text messages sent by Mr Best on 12 May in the wake of the offending, including that he was "not happy dun some thing i should not hve now in ShiT big time"; and that he "tryed 2 get in 2 an 18 yer old it no go good now she sayin i rape her so yer i am fck".

[18] The search warrant also showed texts sent between Mr Best and his wife after A had told his mother about the incident. The first of these were sent on 11 May at around 1.30 pm. She asks if he slept with the complainant. Mr Best replies "no, not really babe, I did start but stopped." He asks what has been said. She says that A told her about the incident and that the police had come into the house last night and seen Mr Best on top of the complainant. Mr Best replies that he is "fucked den" and asks what the police were there for. His wife explains that it was to get A's belongings as the police would not let him into the house alone as he was "so angry and upset." Mr Best says that he does not remember the police coming in and that he "fucked up big time."

[19] At around 4.30 pm, his wife texts Mr Best saying that she has just found out that the complainant has gone to the police and made a complaint of rape. Mr Best replies "fuck off, it is as if she was telling me what she wanted me to fucking do." Mr Best also texted "Not only that, I no get my dick in as it could not get hard to go

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[14] There was no medical evidence of any other injury (internal or external) to the complainant. A doctor called to present this evidence stated that injuries do not necessarily result from sexual assault and that any absence of injury is a neutral finding. A's DNA and an unidentified male's DNA was found in the complainant's underwear. A's DNA was also found in the complainant's vagina. The fact that Mr Best's DNA was not located in the complainant's vagina was viewed as a neutral factor by the forensic scientist.

in love". Mr Best also says "but I did rape her. Ask [A]." In cross-examination, A's mother said that she took this to mean that Mr Best had raped the complainant.[15] She tells him that "all [A] knows is that you grabbed her by the hair and that's when he got up and walked out" to which Mr Best replies "for fuck's sake, I so fucked then."

[20] After the Police had executed a search warrant to search Mr Best's house on 13 May, Mr Best's text messages somewhat change their tone. For example, he says "so far it looks like I'm gonna be done for rape of that chick, but I'm telling you as I live and breathe I did not rape her I swear you know I could"; and "the cops took my stuff from the house but I didn't fuck her."

[21] Mr Best declined to speak to the police after conferring with a lawyer. He did not testify at trial. Through counsel Mr Best accepted that the complainant had performed oral sex upon him but he said it was consensual and contended that he did not penetrate the complainant with his fingers or penis.[16]

Prior allegation

[22] As indicated above, the main issue in the appeal is whether Mr Best should have been permitted to cross-examine the complainant and to call evidence about a complaint of sexual offending against her made on an earlier occasion against another alleged offender.

The complainant's account

[23] The complainant (then aged 17) had met the alleged perpetrator, M (aged 20), at her cousin T's house on the night of 19 May 2011. The complainant said that M was also a cousin of T (but unrelated to her). Around midnight, M and another friend walked the complainant home to her father's house, where she was living at the time with her child. The other friend then left.

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15 We suspect, however, that Mr Best left the "not" out of the text and so would not treat this as an admission.

16 *Best v R* [2015] NZCA 159 (Randerson, Wild and French JJ) [*Best* (CA)] at [14].

[24] M and the complainant took her son for a walk because he was unsettled. They then watched DVDs on the television into the early hours of the morning of 20 May.[17] She said that M "wouldn't stop asking if he could have sex with me and lick me and stuff". She kept refusing but "he just didn't want to listen". She said that "he put his hand down my pants and just started poking me". She asked him to stop and "smacked him". He withdrew his hand every time she did that but "he just kept going back." After that "he started to lick me downstairs". She did not like that and told him to stop.

[25] He said he would have sex with her. She said that she did not want to. He kept on asking and she kept saying no. She said that, when she said no, he would move closer and hug her so she was not able to move. She was "getting real scared" and she "kind of just lied there and froze." She was scared as he was a "big guy". He started having sex with her. She did not like it but "couldn't say stop or anything cos I was scared that he might hurt me if I told him to stop again." M asked her to be his girlfriend and she said that she did not want to because she was not ready for a relationship. Eventually she told him to wait until after her camp[18] and then she would give him a proper answer.

M's account

[26] In his police interview, M accepted that there had been intercourse but said it was consensual. He said "like she took her pants off you know I fuck like I've she's not the greatest but I've then got into her". He said that afterwards he fell asleep on the couch but she put him in the baby's room and she then slept with him "you know kissing and hugging and stuff". M said that he did not understand why the complainant had made a complaint if she wanted a boyfriend.

[27] Later in his interview he said that, while they were on the couch, he had been "kissing her" and that they had been "hooking up an stuff". The complainant had

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[17] There were conflicting accounts as to whether the complainant's father was at home or not during these events. The complainant had been texting her father about her son from 11 pm to midnight. The complainant also texted her father early in the morning by which stage he seems to have been at work. Whether the father was at home at the time of the alleged offending, however, is not relevant for the purposes of this appeal.

[18] The complainant was leaving the next day for a youth camp.

also apparently been talking about one of her ex-boyfriends. She then pulled her pants down and said "do you want a lick?". He said "I don't get down like that an then ah said just fuck me … I was in there like 20 minutes yeah fucken slammed her out like it was nothing but intercourse mate it I was on top of her an she wanted me to eat her out and shit". He continued "Yeah that's exactly what happened mate there was nothing no kissing no hugging just me on top of her rooting her." M ended his interview by saying that "she should just be honoured that I even took interest in her, but she's not."

[28] In a statement of 1 October 2015, M confirmed his statement in 2011 that the pair had consensual sex and that the allegation of rape was false. He said he would be happy to testify as to this in Court.

Text messages

[29] The complainant sent a large number of texts after the alleged rape.[19] The first relevant texts were sent on 20 May at around 6 am (the morning of the alleged rape) to a number attributed to "E" and to another unattributed number. She has a very similar conversation with each. She apologises if she wakes them up and asks them to text her back when they read the message. The conversations then both involve the text:[20]

> Umm ive dne a deal wiv diz guy, il b hs 4 2weks c hw I go an if i cary n we stay getha. Umm yeah so iv gotta bf.

[30] The complainant tells both E and the unidentified recipient that she does not know the man's name. E's reply to the complainant says that he is a "rebound". The complainant agrees as she and M both know that she has feelings for her ex-boyfriend. To the unidentified recipient, the complainant states that she is "goin owt wiv ayee gangsta kuz."[21]

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19 As the complaint was not fully investigated, not all cell phone numbers were traced to individuals and it seems that, as a result, not all possible witnesses were spoken to.

20 This can be roughly translated as: Umm I've done a deal with this guy, I'll be his for two weeks, see how I go and if I cary [care?] then we stay together. Umm yea so I've got a boyfriend.

21 Later text messages indicate that she thinks that M is part of the "Crips" gang.

[31] Around 10.30 am, the complainant texts the unidentified recipient stating that she does not want to be "wiv dat guy" and that she does not know what to do. She says "I told hym il b wiv hym 4 2 wekz an c hw i feel bt iknw i cnt."[22] She later texts E a similar message. E asks why the complainant agreed to it, to which the complainant replies that she thought she could do it.[23] Around 12 pm, the complainant texts the unidentified recipient saying that she is trying to "ditch" (get rid of) M and that she wants him to leave. When the unidentified recipient asks who M is, the complainant replies that he is the "Dude im uknow =<" and finally states he is "Da boifrnd.=<".[24]

[32] Around this time the complainant texts T, the cousin whose house she was at the night before, saying that she needs to talk to him when they are by themselves. It appears from her police statement that she went to T's house and told him about the alleged rape and asked his advice as to what she should do.[25] He said to report it to the police.

[33] The next day (21 May), after sending a number of texts to various numbers, (but with no specific mention of the alleged rape), at around 11.30 pm the complainant texts another unknown recipient and for the first time in the series of text messages uses the word rape. The complainant told two others about the alleged rape on 23 May[26] and eventually went to the police to make a formal complaint on 24 May.

Decision not to prosecute

[34] After investigation, the police decided not to prosecute. According to a job sheet of 30 June this was "due to the content of the text messaging that was located." This was discussed with the complainant who "seemed to be happy with what was happening." It was said that plans were put in place with a friend of the complainant "to keep her safe."

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22 This can be roughly translated as: I told him that I would be with him for two weeks and then see how I feel, but I know I can't.

23 There are a number of other similar messages to other recipients.

24 =< indicates the complainant is upset.

25 In her police statement she says she told "them" but it is unclear who the others were.

26 The unidentified recipient discussed at [29] on 25 May, and another unknown recipient on 26 May.

[35] A later police report of 24 August said that text messaging obtained from the complainant's cell phone "showed her telling a friend that she had a new boyfriend at the time of the offence." There is also a note stating that there is "insufficient evidence to prosecute, due to offender believing it was consensual".

Legislative provisions

[36] Section 37 of the Evidence Act 2006 provides that a party may not offer evidence about a person's veracity unless it is substantially helpful. The section reads:

> **37 Veracity rules**
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> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
>
> (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
>
> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
>
> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
>
> (c) any previous inconsistent statements made by the person:
>
> (d) bias on the part of the person:
>
> (e) a motive on the part of the person to be untruthful.
>
> (4) A party who calls a witness—
>
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
>
> (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

[37] Sections 40 to 43 of the Act cover propensity evidence. Section 40(1) defines propensity evidence. Section 40(3)(b) makes it clear that propensity evidence about a complainant in a sexual case regarding their sexual experience requires permission under s 44. Section 40(4) provides that the propensity rules do not apply to evidence that is solely or mainly relevant to veracity. Section 40 provides:

> **40 Propensity rule**
>
> (1) In this section and sections 41 to 43, **propensity evidence—**
>
> (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
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> (b) does not include evidence of an act or omission that is—
>
> (i) 1 of the elements of the offence for which the person is being tried; or
>
> (ii) the cause of action in the proceeding in question.
>
> (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
>
> (3) However, propensity evidence about—
>
> (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
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> (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
>
> (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

[38] Section 44 of the Act deals with evidence of sexual experience of complainants in sexual cases. In relevant part, it provides:

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

(2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.

(3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

…

(6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

[39] Finally, s 8(1) of the Evidence Act provides:

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceedings; or

(b) needlessly prolong the proceeding.

Decisions of the courts below

Ruling of Judge Neave

[40] Whether Mr Best could cross-examine the complainant and call evidence on the prior complaint was dealt with by Judge Neave in a pre-trial ruling.[27] He held that questioning the complainant about the previous complaint necessarily engaged s 44 of the Evidence Act because, even on M's account, sexual activity did occur.[28] He considered that defence counsel should be able to question the complainant about her knowledge of the processes that are followed in the event of a rape complaint and in particular her knowledge of the investigation of text messages.[29] He held that it was not in the interests of justice to allow questioning of the complainant to any other extent.[30]

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27 *R v Best* DC Christchurch CRI-2012-009-5420, 21 June 2013 [*Best* (DC)].
28 At [19].
29 At [24].
30 At [25].

Trial ruling

[41] The application was revisited in chambers on the morning of the trial. The trial Judge, Judge Garland, endorsed Judge Neave's ruling. He ruled that counsel for Mr Best could question the complainant about her knowledge of investigatory techniques (including the review of text messages and certain medical procedures) but without reference to the prior complaint. Judge Garland directed the Crown prosecutor to advise the complainant that she would be asked questions about these topics.[31]

[42] At trial, the complainant was cross-examined on her knowledge of the police procedures that would take place upon making a complaint, such as the medical examination and the taking of swabs, and also her knowledge that the police would look at her text messages as part of their investigation. The complainant accepted that she knew both of these would occur. She was asked why in that case she had delayed until the afternoon to make her complaint to the police and also whether she gave any consideration as to whether she should have showered after the alleged rape. She answered that she was scared Mr Best would harm her if she went to the police. She denied that she had showered as she said she felt too unwell to get out of bed. In the defence's closing address, it was suggested that the complainant's texts were self-serving in light of the fact that she knew that the police would review her text messages.

Court of Appeal decision

[43] The Court of Appeal considered the two District Court Judges were correct in their rulings.[32] The Court of Appeal held that the admissibility of the evidence fell to be determined under s 44 of the Act, not the veracity provisions.[33] The Court of Appeal agreed with the lower courts that there was no clear evidence that the prior complaint was false.[34] This meant that the primary focus of the evidence was the

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31 There is no formal record of Judge Garland's ruling but the parties generally agreed on its content.

32 *Best* (CA), above n 16, at [19].

33 At [20].

34 At [19].

complainant's sexual experience and not on her veracity.[35] This meant that it was inadmissible.

[44] The Court also considered s 8(1) and concluded that admission of the evidence "would have necessitated the jury hearing disputed evidence on a matter collateral to the essential issues in the trial and could have amounted to a needless distraction." In summary, the Court considered that the potential of significant unfair prejudice and prolongation outweighed the limited probative value of the evidence.[36]

[45] The Court did not accept that Mr Best had been prejudiced by being unable to cross-examine the complainant about the text messages she had sent.[37] Mr Best was able to cross-examine the complainant about post-complaint procedures and her knowledge that her text messages would be reviewed by the police. Mr Best's counsel, in closing, was able to refer to the allegedly "self-serving" text messages sent by the complainant, thus supporting the defence theory of the case that the complainant had the requisite "knowledge of investigative procedures to shore up her false complaint."[38] This was the only evidence relevant to Mr Best's defence.[39]

Submissions of the parties

Mr Best's submissions

[46] On behalf of Mr Best, it is submitted that the English approach should be adopted when considering whether questioning regarding a prior complaint should be permitted under s 44, which simply requires a proper evidential foundation for asserting that a prior complaint was false. A strong factual foundation is not needed. The only requirement is that there is some material from which it could properly be concluded that the complaint was false.[40]

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35 At [22]–[26].
36 At [27].
37 At [28].
38 At [31].
39 At [28].
40 *R v All-Hilly* [2014] EWCA Crim 1614, [2014] 2 Cr App R 33 at [12]. See also *R v Davarifar* [2009] EWCA Crim 2294 at [9]; *R v AM* [2009] EWCA Crim 618 at [2]; *R v Garaxo* [2005] EWCA Crim 1170, [2005] Crim LR 833 at [14]; and *R v T*, *R v H* [2001] EWCA Crim 1877, [2002] 1 WLR 632 at [41].

[47] It is accepted by counsel for Mr Best that the fact that the police had decided not to prosecute or that the alleged perpetrator denied the offending would not in themselves be sufficient to provide the required evidential foundation. In this case, however, it is submitted that the text messages sent by the complainant after the alleged offending by M provide a proper evidential foundation. Mr Best therefore should have been allowed to cross-examine the complainant about the previous complaint of rape against M and call evidence to show the falsity of that complaint.

[48] It is submitted further that the unfairness was amplified by the manner in which the trial Judge permitted the complainant to be questioned as to her prior knowledge of rape complaint procedures because the jury would not have appreciated that the complainant had first-hand knowledge of those procedures. Had the jury known that the complainant's prior complaint was not prosecuted because of the text messages then, in Mr Best's submission, it is likely that the jury would not have attached much weight to the messages she sent about Mr Best. Further, it is submitted that the jury would not have appreciated that the complainant would have known the importance of making a timely complaint and not showering.[41]

Crown's submissions

[49] The Crown submits that questioning the complainant in relation to a previous sexual complaint falls under s 44 of the Evidence Act. This means that mere relevance does not suffice. In the Crown's submission, to satisfy the test under s 44 a court must be satisfied that an unrelated complaint was false (or likely so).

[50] The Crown submits that in this case the lower courts were correct in not allowing questioning on the prior complaint. The Crown argues that the prior complaint was likely true and, in any event, that the circumstances underlying the prior complaint were markedly different to the current complaint. The unrelated complaint therefore fell short of the high standard for admission under s 44.

[51] The Crown supports the Court of Appeal's conclusion that the questioning permitted by the lower courts enabled Mr Best to put evidence of the complainant's

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[41] The complainant maintained in cross-examination that she did not shower, above at [42].

knowledge of procedures before the jury and further remind the jury of this in closing. The Crown submits that the jury did not need to know how the complainant had this knowledge.

The issues

[52] There are two issues arising from the submissions: (a) the treatment of the allegedly false prior complaint and (b) the knowledge of investigation techniques of the police. We will deal with them in that order.

[53] The approach taken in other jurisdictions to the first issue depends on the particular statutory context in those jurisdictions which differs in significant respects from our legislation. For that reason, we have not found the overseas caselaw to be of assistance. Our concentration will be on the New Zealand statutory framework.

The provisions that apply

[54] The first question on the first issue is whether the treatment of the allegedly false complaint is governed by the propensity rules, those relating to veracity or by s 44 (or a combination of those provisions).

[55] In our view, because the evidence of the allegedly false prior complaint would be primarily relevant to whether or not the complainant has a tendency to be mendacious, s 40(4) requires the evidence to be considered under s 37 rather than under the propensity rules as the evidence is wholly or mainly directed at the complainant's veracity. This conclusion is supported by s 37(3)(a) which refers to a lack of veracity when under a legal obligation to tell the truth as a factor in deciding whether any proposed veracity evidence is substantially helpful.[42]

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[42] Under the previous law, there were questions as to whether a prior false complaint was related to a fact in issue or whether it went to credit: see, for example the discussion in *R v Accused (CA 92/92)* [1993] 1 NZLR 553 (CA); and *R v Young* (1990) 6 CRNZ 520 (HC). However, given the structure of the Evidence Act 2006 and the new rules relating to veracity evidence, there is now no need for such fine distinctions. The evidence would be categorised as veracity evidence.

[56] The next question is the interplay between ss 37 and 44. Both Mr Best and the Crown treated s 44 as the operative provision in their submissions before us.[43] It has been suggested by some commentators that this is not correct where s 40(4) applies because that subsection provides that s 37 is the operative provision whenever evidence solely or mainly relevant to veracity is involved. They point out that s 40(3)(b) explicitly provides that propensity evidence about a complainant's sexual history is governed by s 44, while s 40(4) does not refer to s 44 and instead gives priority to the veracity rules.[44]

[57] We do not agree. While s 40(4) provides that evidence primarily related to veracity is dealt with under s 37 and not under the propensity rules, there is nothing in s 37 or in s 40(4) to exclude the operation of s 44 in cases where it applies. We do not consider that such a limitation (which is not explicitly provided for) somehow arises by implication from the fact that s 40(3)(b) makes it clear that evidence of a complainant's sexual experience, where it is not primarily related to veracity, is dealt with under s 44 and not the propensity rules. That provision is necessary because otherwise there would be an issue as to whether the propensity rules or s 44 applied. The issue as to whether the propensity rules or the veracity rules apply is dealt with by s 40(4). That subsection says nothing, however, about the relationship between ss 37 and 44.

[58] We accept that s 44 is engaged in this case. On the complainant's account of the earlier incident, there was sexual activity. M accepts that sexual intercourse took place. He says that the complainant asked for oral sex but says that it did not take place.[45] Even if his account is accepted, we would see the oral sex and the

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[43] Mr Best took a different approach in the courts below, arguing in the Court of Appeal that the issue was governed by s 37: see *Best* (CA), above n 16, at [14]. This was rejected by the Court of Appeal at [26]. In the District Court Mr Best argued that the previous complaint was relevant in considering whether Mr Best had a reasonable belief that the complainant was consenting: see *Best* (DC), above n 27, at [20]. This was rejected at [21]. This argument was not renewed in the Court of Appeal.

[44] See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at 214.

[45] We leave open the issue of whether s 44 should be interpreted from the perspective of the complainant so that it would have applied even if M had maintained that there had been no sexual activity at all.

intercourse as part of the same incident and therefore both covered by s 44. Asking for oral sex would in any event likely be included in the term sexual experience.[46]

[59] This means that, even if the complaint against M was false (in the sense that the complainant made the complaint despite knowing she had actually consented to intercourse and/or despite the fact that there had been no oral sex) s 44 is engaged. This, however, does not exclude the operation of s 37 and we intend to deal with both sections. We consider s 44 first.

Section 44

[60] The Crown submits that, before evidence of a prior complaint can be put to the complainant, the judge has to be satisfied that the complaint was false (or likely to have been false). The difficulty with that approach is that it potentially means that, in the absence of an admitted or previously proved false complaint, the judge would be required to hear evidence on falsehood (including cross-examination of the complainant). Then, in the event the judge was satisfied as to falsehood, this evidence would need to be repeated again before the jury. Such a 'trial within a trial' is not in accordance with the policy of s 44, which at least in part was to encourage the reporting of sexual offences by making giving evidence in trials for sexual crimes less of an ordeal for complainants.[47]

[61] It is argued for Mr Best that all that is required is an evidential basis suggesting falsehood for the evidence to be admissible under s 44. We do not accept this submission either.[48] Accepting Mr Best's approach would risk introducing evidence of sexual experience which, if the complaint is not false, is clearly governed by s 44 and which would (usually) be of no relevance to the trial at all.

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[46] Obviously, however, if a complainant accepts that a prior complaint was false in the sense that there had been no sexual activity at all, then s 44 would not apply.

[47] See, for example, Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) [Law Commission PP27] at [311]–[351]; *R v McClintock* [1986] 2 NZLR 99 (CA) at 103; and *R v Clode* [2007] NZCA 447 at [24].

[48] Counsel for Mr Best also submitted that the English approach was implicitly adopted in New Zealand by *R v MacDonald* CA166/04, 8 April 2005. We do not agree with this submission. In that case, there was no evidential foundation that the complaint was false. It does not follow that the complaint would have been admissible automatically had there been such an evidential foundation.

The approach suggested by Mr Best also takes no account of the heightened relevance test in s 37 for evidence related to veracity.

[62] Before we discuss s 37, we make three points. The first is that it is important to be clear as to what constitutes a false complaint. A complaint of rape can be "false" in the sense that a conviction could not result because, although a complainant did not consent, there is a reasonable possibility that the alleged perpetrator believed on reasonable grounds that she was consenting. That the complaint was "false" in this sense would not logically be relevant to impugning a complainant's veracity. This is because the complainant was telling the truth about her lack of consent. Even if a complainant might recognise that an alleged perpetrator (the subject of a prior complaint) may have thought she was consenting on reasonable grounds, this is not relevant to her veracity. She would still have been telling the truth from her perspective.

[63] Further, there can be degrees of "falsehood", starting with proved deliberate malicious falsification ranging through to confusion on the part of a complainant as to whether she had in the end reluctantly consented or whether there had been mere passive acceptance of the inevitable but without true consent. The latter may not even be evidence relating to veracity as defined in s 37. If a complainant's confusion as to whether she was consenting or not arose subsequently, rather than at the time the complaint was made, it almost certainly would not. It would then be evidence of a propensity to be confused about consent and, under s 40(3)(b), dealt with under s 44.

[64] The second point is that, where s 44 is engaged, before the matter can be raised before the judge to rule on admissibility under s 37, there would need to be an evidential foundation suggesting possible falsehood. We consider that in this case Mr Best was right to concede that the fact an alleged perpetrator denies the offending or that the police had decided not to prosecute would not in themselves usually provide such an evidential foundation. An alleged perpetrator could be lying but could also have an honest (but mistaken) belief in consent. As to the police deciding not to prosecute, this can be for a variety of reasons unrelated to any view of the

falsity or otherwise of a complaint.[49] Even if the police had formed a view on falsity, this would in any event only be an opinion and not determinative as to whether prior allegations should be admitted.

[65] If there is a proper evidential basis for considering a complaint may have been false, then it will likely be in the interests of justice, in terms of s 44(3), for the complainant to be asked (in the absence of the jury)[50] to confirm whether or not the prior complaint was false.[51] There would be no examination or cross-examination, either before the jury or on any voir dire, unless and until the judge has made a ruling on ss 37 and 44.

[66] The third point is that, where evidence is held to be admissible under the heightened relevance test under s 37, this would not automatically mean that it would be of "such direct relevance to the facts in issue" that it would be "contrary to the interests of justice to exclude it" in terms of s 44(3). Section 37 has a heightened relevance test but the "substantial helpfulness" is assessed in relation to a person's veracity. The s 44 test is conversely broadly directed to the trial as a whole and in stronger terms. Whether the s 44 test is met will have to be separately considered in the context of the case as a whole and in light of the policy behind s 44.

[67] Further, even if evidence is substantially helpful and also admissible under s 44, the policy behind s 44 could limit the way that the evidence could be called. For example, s 44 could operate to limit the extent of cross-examination relating to the actual sexual experience, requiring concentration only on questioning showing the falsehood of the prior complaint.

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49 For reasons as to why a complaint may not proceed to prosecution, see Yvette Tinsley "The current process for prosecuting sexual offences" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 85. See also Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women's Affairs, September 2009).

50 This could be done informally by the officer in charge and the answer conveyed to the court or by affidavit from the complainant.

51 In the sense of a complaint known by the complainant to be untrue at the time it was made.

Section 37

History

[68] The Law Commission, in a preliminary paper on character and credibility, noted the difficulties that had arisen from the very technical rules dealing with the way in which evidence regarding the character or disposition of a party or witness could be used in proceedings.[52] The Commission proposed replacing those rules with a test of substantial helpfulness as the basis upon which evidence of truthfulness (later termed veracity) could be admitted.[53] This proposal was carried through into the draft Code.[54] The requirement for heightened relevance was designed to prohibit evidence that was of limited value and therefore not of real assistance to the fact finder.[55]

[69] The Commission, in its preliminary paper, discussed the collateral evidence rule, which treated (subject to exceptions) any answers in cross-examination to matters not relating to a fact in issue as final.[56] The Commission accepted that the rule operated to reduce distractions but acknowledged that, if too rigidly applied, there was a risk of excluding evidence that could assist the fact finder.[57] The Commission did not consider that merely widening exceptions to the collateral evidence rule would suffice, as had occurred in Australia following recommendations by the Australian Law Reform Commission.[58] It considered that the requirement that evidence be relevant and of substantial helpfulness would perform the same function as the collateral evidence rule by excluding evidence of little value.[59]

[70] This means that the test of substantial helpfulness incorporates the policy behind the old collateral evidence rule as well as ensuring that evidence of only

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52 Law Commission PP27, above n 47, at [37].
53 At [73].
54 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at 108.
55 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) [R55 Volume 1] at [157].
56 See Mahoney and others, above n 44, at 189–190.
57 Law Commission PP27, above n 47, at [159].
58 Australian Law Reform Commission *Evidence* (ALRC 26 (Interim) vol 1, 1985).
59 Law Commission PP27, above n 47, at [160].

limited relevance to the assessment of veracity is excluded.[60] Further, s 8(1)(b) may also deny the admissibility of tangential evidence that would needlessly prolong the proceeding.[61]

Analysis

[71] Section 37, as enacted, contains the substantial helpfulness test. This test must be met before an allegedly false complaint can be canvassed before the fact finder. This includes any questions being put to a complainant in the course of the trial about such prior allegedly false complaints. This is a change from the previous law where questions could be put at trial but, subject to exceptions, the collateral issues rule would have applied to treat any answers as final.[62] This suggests that, except in very clear cases, a ruling should be sought before any questions are put (and, in cases where s 44 was engaged, that section would require the judge to rule in any event).[63]

[72] Section 37(3) also sets out a number of matters[64] to be considered in assessing substantial helpfulness, including whether there has been a lack of veracity when under a legal obligation to tell the truth.[65] It is, however, not necessarily the case that evidence of a type set out in s 37(3) will always be substantially helpful. That will depend on the content of the evidence and the particular circumstances of the case.

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60 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA37.3(a)].

61 These points are made by Mahoney and others, above n 44, at 189–190.

62 See *Cross on Evidence*, above n 60, at [EVA37.3(a)]; and Mahoney and others, above n 44, at 189–190.

63 But note that the complainant should be asked whether the complaint was false – see above at [65].

64 A list of similar matters was included in the preliminary paper, but removed in the draft Code following feedback from commentators that such codification did not clarify or improve the provision: R55 Volume 1, above n 55, at [154]. The list of relevant factors was reinstated in the Evidence Bill 2005 (256–1), cl 33(3) as introduced.

65 It has been suggested that evidence of lying where there was no legal obligation to tell the truth will not be substantially helpful in assessing veracity under s 37(3): Mahoney and others, above n 44, at 190–191. We would not have thought that this was necessarily the case, given that s 37(3) expressly recognises that the judge may consider other matters but we do not need to determine this issue as in this case there was a complaint made to the police. A false police complaint could lead to prosecution under s 111 of the Crimes Act 1961 or under s 24 of the Summary Offences Act 1981.

[73] Factors to be considered in the assessment of substantial helpfulness may include any remoteness in time, similarity (or lack thereof) between allegations, the number of allegedly false prior complaints, the reason a complaint did not proceed or was withdrawn, whether the complaint was taken to a person of authority and whether the prior complaint was fraudulent or malicious.

[74] In line with the policy behind s 37 (including that behind the old collateral evidence rule), the substantial helpfulness of a previous allegedly false complaint will also depend on how clear it is that the previous complaint is false, how much evidence would need to be canvassed to decide on whether the complaint is false and the likely outcome of the assessment of that evidence. The more evidence that would need to be called on the unrelated prior allegation and thus the extent of any 'trial within a trial' and the more uncertain the outcome of the deliberations on that evidence, the less likely the evidence is to be substantially helpful in terms of s 37.

Summary of our approach

[75] A ruling on whether evidence of a prior allegedly false complaint is substantially helpful under s 37 will usually be required before it can be raised in evidence.[66]

[76] Where s 44 is potentially engaged, the judge's permission will always be required[67] and there must be some evidential foundation that the prior complaint was in fact false before it can even be raised before the judge.[68] If there is such an evidential foundation, the complainant should be asked (in the absence of the jury) to confirm whether or not the prior complaint was false.[69] There would be no further examination and no cross-examination unless and until the judge has made a ruling on ss 37 and 44.[70]

[77] The judge will need to consider whether the evidence of the prior allegedly false complaint is substantially helpful under s 37 in the particular circumstances of

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66 See above at [71].
67 See above at [71].
68 See above at [64].
69 This can be either informally through the officer in charge or by affidavit.
70 See above at [65].

the case. This will include consideration of all relevant factors, including the policy behind the old collateral evidence rule.[71] The more evidence that would need to be called on the unrelated prior allegation and the more uncertain the outcome of the deliberations on that evidence, the less likely the evidence is to be substantially helpful to assessing a person's veracity.[72]

[78] If the substantial helpfulness test under s 37 is met, there will need to be a separate assessment of whether it would be contrary to the interests of justice to exclude the evidence. Even if that test is met[73] s 44 (if it applies) may well limit the way the evidence is led so that the concentration is on the falsehood of the complaint and not on the prior sexual experience.[74]

Application to this case

[79] The first issue is whether there was a sufficient evidential foundation of possible falsehood of the prior complaint so that the trial Judge should have ruled on substantial helpfulness. We consider that the sequence of text messages do provide such an evidential foundation.

[80] It is not the fact that the complainant refers to M as possibly being her new boyfriend.[75] A boyfriend (or indeed husband) can rape. It is the fact that it seems to be only after the complainant has expressed her ambivalence about M and some disapproval is voiced by the recipients of the text messages about her possible new boyfriend that she contacts her cousin, T, and tells him about the alleged rape. There could well be some explanation of this (other than that the complaint was false) but it does provide a sufficient evidential foundation for an inquiry into substantial helpfulness.

[81] The complainant therefore should have been asked whether or not the prior complaint against M was false in the sense of a deliberate falsehood about the extent of sexual activity and her consent to what occurred. She was not asked and this

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71 See above at [74].
72 See above at [74].
73 See above at [66].
74 See above at [67].
75 See above at [29] and n 20 for discussion on this point.

means that the Court does not in fact know whether or not the complainant maintains that the complaint was true.

[82] At the hearing in this Court, counsel for the Crown was asked why no evidence was led on appeal from the complainant about whether her prior complaint was false or not. Counsel argued that this would not have been admissible as it would not have been fresh evidence. Whether or not the complaint against M was in fact false is clearly key to whether the allegedly false complaint should have been allowed to be raised at trial.[76] Even if the evidence as to whether or not the complainant accepted the falsity of the complaint was not fresh, it would therefore have been in the interests of justice to admit it on appeal.[77]

[83] It is apparent that the Court of Appeal decided the case on the assumption that the complainant would not accept that the prior complaint against M was false given that it assumed that any cross-examination would have "necessitated the jury hearing disputed evidence".[78] We agree that this is the likely outcome. We do not take much from the police observation at the time of the original investigation when she was told that the complaint would not proceed that "she seemed to be happy with what was happening". In context we take that as meaning that the complainant was not unhappy that charges were not being proceeded with. There could be many reasons for this other than that the complaint was a deliberate fabrication.

[84] We cannot, however, say with certainty that the complainant would maintain that the complaint against M was not fabricated, in the absence of evidence from the complainant. We therefore propose first to examine the issue of substantial helpfulness on the basis that the complainant would maintain that the prior complaint was true. We will then consider the issue on the basis that she would accept the complaint against M was false.

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[76] This would be the case even under the Crown's proposed test (see above at [60]), as if the complainant accepted the complaint was false, the judge would usually be satisfied it was.

[77] *R v Bain* [2004] 1 NZLR 638 (CA) at [22]–[26]; approved by *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 (PC); and by this Court by *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25].

[78] *Best* (CA), above n 16, at [27].

Assuming the prior complaint was true

[85] Assuming the complainant would not accept that the prior complaint was false, other evidence would need to be called, including from M. The extensive text messages sent and received would need to be in evidence and presumably some of the recipients would also be called. There could well be other witnesses. This would mean a lengthy 'trial within a trial'.

[86] M has recently affirmed his version of events and confirmed he would give evidence if required in line with his police statement. Given the clearly high opinion of himself relative to the complainant evidenced in his statement ("she's not the greatest" and "she should just be honoured that I even took interest in her"),[79] the jury may conclude that M had an honest belief in consent.[80] However, neither this, nor any assessment as to whether M's belief was reasonable, says anything about whether the complainant consented. M's highly disrespectful attitude to the complainant and his description of the act of intercourse ("fucken slammed her out" and "no kissing no hugging") would make it more difficult to accept his version of events as to the complainant actually consenting. We thus consider that the outcome of a jury's deliberations on whether or not the prior complaint is false to be highly uncertain.

[87] We do not consider that the issue of a 'trial within a trial' could be avoided by the defence merely putting the allegation of the prior false complaint to the complainant but not calling evidence to demonstrate falsity in the event that the complainant maintained that the complaint was true. There would be a concern that a jury would harbour a suspicion that the prior complaint was false (despite the denial) and be left without the means of assessing whether that were the case through a full examination of the evidence. This position would not be substantially helpful for a jury.

[88] Looking at other relevant factors, the complaints were one year apart and therefore there is no remoteness in time. The existence of one prior complaint is not,

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[79] Above at [27].

[80] Indeed, that M believed the encounter was consensual was one of the reasons the police recorded as relevant to the decision not to prosecute: above at [35].

however, equivalent to a 'habit' of making false complaints and there is a marked lack of similarity between the complaints.

[89] The first complaint regarded a male only three years her senior. It followed an evening spent together, first with friends and then alone together watching television when the offending allegedly took place. On the account of both the complainant and M, there was talk of M becoming her boyfriend. There is no allegation of physical violence, apart from that inherent in the sexual acts alleged. No threats were involved.

[90] By contrast Mr Best was 25 years her senior. The complainant was heavily intoxicated and asleep at the time the alleged rape began. Beyond an initial greeting, the complainant stated that they did not interact over the course of the evening. On the complainant's account there were threats, insults and physical violence involved, in part at least corroborated by the evidence of A.

[91] For all of the above reasons, and in particular the fact that introduction of the evidence would involve a lengthy trial within a trial with an uncertain outcome, we are of the view that evidence regarding the prior complaint would not be substantially helpful in assessing the complainant's veracity. It would thus be inadmissible under s 37, assuming that the complainant maintains that the prior complaint was true.

[92] As this is the case, we do not need to consider s 44 separately. However, given the outcome of the jury's deliberations as to falsity would be highly uncertain, to allow evidence of the complainant's prior sexual history would run counter to the policy behind s 44. If the complaint was not false there would be unnecessary trauma for the complainant in being questioned about the encounter with M. Further, if the complaint was true, the evidence is totally irrelevant and, if adduced, there would be a risk of improper use by the jury.

Assuming the prior complaint was false

[93] In the event that the complainant did acknowledge that the complaint was false (that is, she acknowledged that she lied and did consent to the sexual

intercourse with M and/or that the oral sex did not occur) then it is difficult to see why such a false prior complaint about sexual activity only a year before could not be substantially helpful in assessing her veracity.

[94] Despite there being no competing narrative from Mr Best[81] and some corroboration of the complainant's account from A, the jury had to be satisfied that the complainant's account was true. Therefore her veracity was a major issue in the trial. In such circumstances we consider that the s 44(3) test is met although that section would have operated to restrict the way in which the evidence was led (to concentrate on the falsity rather than the details of the sexual activity). Thus, if the complainant had accepted that the complaint was false, the rulings of Judge Neave and Judge Garland would have been in error.

[95] Due to the date these proceedings commenced, s 385 of the Crimes Act 1961 applies to this case.[82] Section 385 in relevant part reads:

> (1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
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> …
>
> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or …
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[96] The issue therefore is whether, despite the error of law in not allowing evidence of the false complaint against M to be raised (assuming the complainant accepted it to be a deliberate falsehood), the proviso to s 385 should be applied. In

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81 See above at [21] and below at [105].

82 This provision was repealed and replaced with s 232 of the Criminal Procedure Act 2011, which commenced 1 July 2013 (Criminal Procedure Act Commencement Order 2013). However, as informations were laid against Mr Best 17 May 2012, as per s 397 of the Criminal Procedure Act, the proceedings had commenced prior to the commencement date and therefore the former provision applies.

order to apply the proviso, the Court must be satisfied that, despite the error, a guilty verdict was inevitable in the sense of being the only reasonably possible verdict on the basis of the whole of the admissible evidence. The Court must itself feel sure of the guilt of the accused.[83]

[97] In this case we must analyse the evidence assuming that the prior complaint was false. That the complainant had been prepared to make a false complaint to the police on another occasion means that there is a heightened possibility she has made a false complaint on this occasion. On the other hand, there is only one prior false complaint and therefore no evidence of a pattern of lying about sexual activity.

[98] In addition, as we have outlined above, the prior complaint is very different to the circumstances of the complaint against Mr Best. The differences in circumstance include the age difference between the complainant and Mr Best, the violence involved in the current complaint, the lack of any evidence of prior contact between the complainant and Mr Best during the evening and the state of intoxication of the complainant.[84]

[99] Further, the actions and evidence of the demeanour of the complainant after the alleged offending by Mr Best are consistent with her account of events,[85] even discounted by the fact that, by virtue of her prior complaint, she knew that her text messages would be examined. Unlike in relation to the complaint against M, there was no delay in making her allegation of rape. There was also no suggestion of any possible ongoing relationship with Mr Best (unlike in the case of M).

[100] We accept that we must take full account of the disadvantage we may have in making an assessment of the honesty and reliability of witnesses based only on the transcript and we acknowledge considerable caution is necessary when ultimate

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83 *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]. We note that this test was applied by the Privy Council in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [149]–[150]. It has recently been suggested that the fact an appellate court is satisfied of guilt is not sufficient. The court, it is said, must also be satisfied that any jury acting properly must inevitably have convicted the defendant if the flaw in the proceedings had not occurred: *Cassell v R* [2016] UKPC 19 at [28]. That is not the position in New Zealand. If an appellate court is satisfied of guilt, then the conclusion that conviction was inevitable necessarily follows: (see *Matenga* at [28]).

84 See above at [89]–[90].

85 See above at [12]–[16].

issues depend on the assessment of the witnesses.[86] This is particularly the case here, given uncertainty over the effect of the complainant's medication on her perception.[87]

[101] The Crown case against Mr Best was, however, very strong.[88] It included medical evidence of bruising to the complainant's neck,[89] the evidence that the complainant made an immediate complaint to a friend and was upset,[90] the evidence of the threesome comments[91] indicating a desire to have sex with the complainant and the largely incriminating initial text messages[92] sent from Mr Best to his wife[93] and others. There is a marked (and suspicious) change in tone and content after the police executed the search warrant of his home.[94] The complainant's account of the events is detailed and cogent.[95]

[102] Significantly, important parts of the complainant's evidence were corroborated by A.[96] A gave evidence that he heard the complainant telling Mr Best to stop, that he heard a sound like hair being pulled out, that he heard Mr Best call the complainant a slut and that she was told to "suck [his] cock". He also heard Mr Best say that he could "fuck [her] again tomorrow night" indicating intercourse had already taken place as asserted by the complainant. The command "You're gonna do as you're fuckin told" is also highly indicative of non-consensual sexual activity.

[103] It was submitted on behalf of Mr Best that A was not at first sure the activity was non-consensual. He did not intervene at the time and said straight after the events that he thought that Mr Best was "cheating on" his wife. We accept this to be the case but it is significant that A was lying in the middle of the road at the time he

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86 *Matenga v R*, above n 83, at [29] and [31].
87 See above at [7].
88 See above at [4]–[8] and [16]–[20].
89 See above at [16].
90 See above at [12].
91 See above at [4].
92 See above at [17]–[19].
93 These texts are not being taken as including explicit admission of guilt: above n 15.
94 See above at [20].
95 There is a conflict of evidence as to whether she knew A was in the room – see above at [11] and n 8. We would be inclined to accept the complainant's evidence on the point but whether she knew at the time of the offending that A was in the room or not seems of little significance.
96 See above at [8].

made that remark to the police.[97] This indicates that he was not thinking logically. A had also been drinking throughout the evening, including after the complainant had been put to bed.[98]

[104] Looked at objectively, it is difficult to see (absent any explanation or alternative account of events by Mr Best or any other witness) A's narrative as consistent with anything other than non-consensual sexual activity and therefore as strongly corroborative of the complainant's account of events. As to the alleged collusion, there is nothing to suggest that the complainant gave A the full details of her account of events, or in fact much at all beyond that the sexual activity was non-consensual.[99] Further, there are differences in detail between the complainant's account and that of A, which also points against collusion. In addition, there does not appear to be any apparent motive for A to lie.

[105] There is no narrative from Mr Best as to what occurred or what was said between him and the complainant. Although Mr Best was not obliged to say anything, it has meant there is only effectively (through counsel) a bare assertion of consent to oral sex and a denial of the rest of the sexual activity. There is no indication of how this consent was allegedly conveyed by the heavily intoxicated complainant when she was woken by Mr Best. There is no explanation of the hair pulling, the name calling ("slut") and the indications the complainant was not consenting ("No", "stop it" and "I'm trying to sleep"), all corroborated by A.

[106] There was no suggestion put to the complainant of consent being obtained earlier in the evening and there was little evidence suggesting any meaningful interaction at all between Mr Best and the complainant apart from an initial greeting.[100] A denied that he and Mr Best had an arrangement whereby if A did not come out of the room this was an indication the complainant wanted sexual activity.[101] Even if Mr Best thought this had been agreed, it could not form the basis for a reasonable belief in consent.

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97 See above at [9].
98 See above at [10].
99 See above at [15].
100 See above at [3].
101 See above at [4].

[107] Even assuming that the prior complaint was false and thus that evidence of the falsity of the prior complaint ought to have been admitted, we are satisfied that the guilty verdict was inevitable and are sure of Mr Best's guilt. This means that there has been no substantial miscarriage of justice.

Knowledge of investigation processes

[108] The trial Judge permitted cross-examination on the complainant's knowledge of police investigative procedures but counsel was not allowed to raise the fact that this knowledge had arisen from her personal experience. It is submitted on behalf of Mr Best that this prevented him from receiving a fair trial and being able to offer an effective defence.

[109] We do not accept this submission. We agree with the Court of Appeal that the only reason that this evidence was relevant for Mr Best's defence was to show that the complainant knew about post-rape investigative procedures and therefore, for example, could have sent self-serving text messages to support her allegation.[102] For this purpose it was enough that the jury knew the knowledge existed. It would add nothing of substance for the jury to know why she had that knowledge.

Result

[110] The appeal is dismissed.

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[102] *Best* (CA), above n 16, at [30]–[31].

WILLIAM YOUNG J

A preliminary comment

[111] In these reasons I will:

(a) discuss the legal framework in which the case must be resolved;

(b) engage in counter-factual analysis as to what might have happened if evidence about the incident with M had been allowed; and

(c) address whether there has been a miscarriage of justice associated with the absence of inquiry of the complainant as to whether the previous complaint was false.

[112] I will use the expression "false complaint" as denoting a complaint which was known by the complainant to be untrue at the time it was made. I will refer to the cross-examination of the complainant about the prior complaint and the evidence which M might have given as "the disputed evidence". References to leading the disputed evidence therefore encompass cross-examination of the complainant about the incident with M. In discussing the general application of ss 37, 40 and 44 of the Evidence Act 2006 (the Act), I assume a trial before a jury.

The legal framework

Section 44(1) and (3)

[113] Of paramount importance in the case are s 44(1) and (3):

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
>
> …
>
> (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the

> issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
>
> …

[114] Section 44(1) and (3) are to substantially the same effect as s 23A(2)(a) and (3) of the Evidence Act 1908 as introduced in 1977. In *R v McClintock* Cooke P, observed of s 23A:[103]

> The section is a New Zealand manifestation of a legislative wave in the latter 1970s, which arrived at much the same time in England and all the Australian jurisdictions also, designed to make the giving of evidence in trials for sexual crimes less of an ordeal and less embarrassing for complainants, usually but of course not invariably women. …
>
> While having the same broad purpose the enactments in the different countries and States differ considerably in their terms. The New Zealand provisions are not exactly the same, as far as we are aware, as those enacted anywhere else. Some help can still be had from overseas decisions, but they could only be applied under the New Zealand section with due caution. In its terms the New Zealand section appears to be possibly more restrictive of the latitude of the defence than any of the sections in force elsewhere, although quite often the differences may prove to be more in words than in practical effect. …
>
> … Parliament has left it to the Courts to work out practical solutions within a general framework, and this must be done with full sensitivity to the philosophy of the statute. A phrase used in s 23A(3) is "the interests of justice", which is wider than but certainly includes fairness to the defendant (the corresponding phrase in the English section). It has to be recognised that the section does cut down the common law rights of the defendant — there would be no point in it otherwise — and that inevitably trial Judges will have to strive to strike a just balance between protecting the complainant from undue harassment and unduly hampering the defence.
>
> …

[115] In applying the provisions of English legislation corresponding to s 44(1),[104] the English courts have held that evidence addressed to prior allegedly false complaints of sexual offending previously made by a complainant is not relevantly "about any sexual behaviour of the complainant" but rather about the complainant's truthfulness. Accordingly, leave is not required for such evidence to be lead albeit that the courts will insist on a proper basis for alleging that a prior complaint was false.[105]

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103 *R v McClintock* [1986] 2 NZLR 99 (CA) at 103–104.

104 Now s 41 of the Youth Justice and Criminal Evidence Act 1999 (UK).

105 See for instance *R v All-Hilly* [2014] EWCA Crim 1614, [2014] 2 Cr App Rep 530.

[116] If the English approach was applied to s 44, the disputed evidence could have been lead without leave under s 44(3).[106] I, however, do not accept that such an approach is available in New Zealand at least in cases in which it is clear that there was sexual activity on the earlier occasion. Cross-examination of the complainant as to the extent of that activity and as to whether it was consensual fall squarely within the language of s 44(1). I am prepared to accept that the thinking on which the English approach is premised may be applicable if the sexual activity which was the subject of the prior complaint had not occurred.[107] That, however, is not this case.

[117] This means that s 44(1) is engaged with the result that the disputed evidence could have been lead only with the permission of the Judge under s 44(3). Section 44(6) requires, as a necessary precondition to a grant of permission under s 44(3), that the disputed evidence is otherwise admissible. I will return to s 44(3) shortly, but before I do so, I will discuss the other relevant provisions of the Act which bear on admissibility.

Other relevant provisions of the Act

[118] The general admissibility of propensity evidence is addressed by s 40 of the Act:

> **40 Propensity rule**
>
> (1) In this section and sections 41 to 43, **propensity evidence**—
>
> (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; …
>
> …
>
> (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
>
> (3) However, propensity evidence about—

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106 The evidence as to falsity in the present case would meet the English requirement for a proper basis: see *R v M* [2009] EWCA Crim 618, [2010] Crim LR 792 at [22]. Also relevant to admissibility would be s 100 of the Criminal Justice Act 2003 (UK), which limits the admissibility of evidence related to "bad character" and embodies, to some extent, the old collateral issues rule.

107 See for instance *R v MacDonald* CA166/04, 8 April 2005 at [33].

…

(b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.

(4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

"Veracity" is defined by s 37(5) in this way:

> For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

[119] The disputed evidence is said to indicate a tendency (or propensity) on the part of the complainant to claim falsely that consensual sexual activity had been non-consensual. A tendency to go to the police with false complaints of sexual offending goes rather beyond a tendency not "to refrain from lying" and for this reason it might be argued that the disputed evidence is not within s 37(5). This point warrants some discussion.

[120] In most criminal cases in which the prosecution relies on propensity evidence of a similar fact character, that evidence usually correlates generally with the evidence of the alleged offending. In that sense there will be a pattern of events, in part directly related to the offending and in part based on the incidents which are the subject of the propensity evidence. Such a pattern of events may enable a jury to draw an inference as to the defendant's tendency to behave in a particular way.

[121] I see the present case as very different from that paradigm. The appellant had not given an account of events to the police. Nor did he give evidence at trial. The remarks made by him in the aftermath of the event were generally, although not exclusively, inculpatory.[108] There was no narrative of events advanced at the appellant's trial to suggest that the complainant's allegations against him were false. Absent such a narrative, there was no parallel to be drawn between the previous complaint and the complaint against the appellant. The disputed evidence related to a single incident and I see it as providing no more than insubstantial support for the view that the complainant may have had a tendency to make false rape complaints.

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[108] See above at [19]–[21].

[122] It follows that if the disputed evidence had been allowed, the jury could not legitimately have concluded that the complainant was prone to making false complaints of rape. Accordingly, I see the disputed evidence as mainly directed to the complainant's credit and thus veracity.

[123] The veracity rules are relevantly provided for by s 37 in this way:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
>
> …
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
>
> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
>
> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
>
> (c) any previous inconsistent statements made by the person:
>
> (d) bias on the part of the person:
>
> (e) a motive on the part of the person to be untruthful.
>
> …

[124] The policies which underpin s 37 were formerly addressed by the collateral issues rule, a primary purpose of which was to avoid distracting inquiry into issues bearing on the credibility of witnesses but not directly relevant, and thus "collateral" to the issues in dispute in a case. Also relevant in this respect is s 8:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.

> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[125] Thus the admissibility of the disputed evidence under s 37 turns on a judicial assessment that the disputed evidence is "substantially helpful" in evaluating the complainant's veracity.[109]

The truth of proposed propensity/veracity evidence

[126] In criminal cases, the truth of propensity evidence relied on by the prosecution is often in dispute. A preliminary determination by the Judge as to its truth is plainly not a precondition of admissibility. Indeed in many cases, the relevance of propensity evidence to the fact-finding task of the jury will not depend on the jury being satisfied that it is true. This is particularly so where the prosecution relies on propensity evidence as part of a circumstantial case or invokes reasoning associated with coincidences.

[127] There is nothing specific in s 37 to suggest that veracity evidence is only substantially helpful if it is true. I do not see the relevance of a challenge to a witness's veracity as depending necessarily upon the jury being satisfied that the challenge is well-founded. For instance if there is a challenge to the narrative of a witness which raises a question mark as to the truthfulness of other parts of the narrative, the jury may take that question mark into account in assessing the overall veracity or credibility of the witness. I think it follows that a conclusion by the Judge that the challenge is true (that is that the witness lied on another occasion) is not a necessary pre-condition to admissibility. If permission to mount such a challenge is given under s 37, the associated evidence may still be relevant to the jury's assessment of the witness irrespective of whether the jury is satisfied it is true.

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[109] In some cases there may be an issue whether the veracity of the witness is of sufficient significance to warrant inquiry, see for instance *Chown v R* [2011] NZCA 453 at [41]–[42]; and Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 182.

[128] All of that said, as a matter of practicality, a Judge is likely to exclude veracity evidence if the underlying premise of the evidence – say, that the witness had lied on another occasion – is substantially in dispute. In such a situation allowing the disputed veracity evidence will result in the jury being confronted with a collateral dispute as to who is telling the truth about events which are unrelated to the issues which they must determine. It may be different if the evidence establishes a particular pattern of events, but, again, this is not that case.

[129] More generally, the more plausible and thus the more likely to be true veracity or propensity evidence is, the more willing judges will be to admit it.

Section 44(3) of the Act

[130] It being clear that s 44(1) was engaged, the disputed evidence could only be lead with the permission of the Judge. The law requires the judge to withhold permission unless satisfied that the disputed evidence was "of such direct relevance to facts in issue in the proceeding … that it would be contrary to the interests of justice to exclude it".

[131] As to this threshold, I regard the remarks of Cooke P in *McClintock* as helpful:[110]

> Questions or evidence doing no more than indicating or suggesting a general disposition or propensity of the complainant in sexual matters are barred. That is straightforward enough. But often it will be said that they go further: that they are relevant, for instance, as going to credit or showing a course of conduct or giving grounds for a defendant's belief in consent.
>
> As to such contentions, it is implicit in the section that a question or evidence is not to be permitted merely because it is in some way relevant. At a trial it must have such direct relevance to facts in issue that to exclude it would be contrary to justice. This is a strong test. *For example, many questions going only to credit will be excluded because only of indirect relevance to facts in issue*: … But, … there will always be exceptions; and we do not altogether exclude the possibility of such a major impact on a complainant's credit that the matter could be said to be directly relevant to facts in issue.

[132] In company with Cooke P, I would not read into the words "direct relevance to facts in issue" a complete exclusion in respect of evidence directed to the credit, or

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[110] *McClintock*, above n 103, at 104 (emphasis added; original emphasis removed).

as we would now put it, the veracity, of the complainant. Indeed, there may be cases where it would be unjust to so construe it. An example of this is provided by the English case *R v Blackwell*.[111] On the other hand, I think that the circumstances in which permission will be granted under s 44(3) in respect of veracity evidence will be very limited.

[133] One of the policies underpinning s 37 is the desirability of limiting the circumstances in which witnesses may be subjected to offensive cross-examination. This policy applies even more strongly in respect of s 44. So in carrying out the assessment required by s 44(3) the factors against granting permission will encompass not merely inconvenience associated with the trial, including its prolongation and the risk of the jury being distracted, but also the interests of the complainant. As well, and to anticipate a point to which I will return shortly, the Judge has to have regard not just to the disputed evidence but also the case as a whole, in determining whether permissions should be granted.

What would have happened if permission to call the disputed evidence had been given?

[134] Let us assume that the Judge had given defence counsel leave to pursue the false complaint issue by way of cross-examination of the complainant and, if necessary, calling evidence from M and the police officers who dealt with the complainant in relation to the complaint against M.

[135] Recognising the limits of counter-factual analysis of this kind, I am inclined to think that such a course of action is likely to have resulted in one of four possible outcomes:

(a) The complainant might have acknowledged falsity, although probably only after careful cross-examination on her statement to the police in relation to M and her subsequent texts. If this were so and the acknowledgement was unequivocal, the defence would be able to rely on that acknowledgment as bearing adversely on her veracity. There would be no need for evidence from M.

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[111] *R v Blackwell (Warren)* [2006] EWCA Crim 2185, (2006) All ER (D) 51.

(b) The complainant might have exercised her privilege against self-incrimination. The evidence which the appellant would presumably then have called as to the making of the complaint (from the police) as to its falsity (from M and by production of the texts) would be unchallenged.

(c) Cross-examination on the texts may have been inconclusive in the sense that the complainant either explained the texts away and maintained that her complaint was true or gave equivocal answers in relation to the texts. If so defence counsel could either:

(i) have not called evidence from M, but in closing invited the jury to compare the complainant's account (probably rather abbreviated) of her interactions with M and her later complaint with the texts she wrote in the immediate aftermath of the incident; or

(ii) called M to give evidence to challenge the account of events given by the complainant, thus creating a full trial within a trial.

[136] Each of these outcomes would have been of considerable assistance to the appellant. His position with the jury would have been best served with an acknowledgement or proof of falsity – that is outcomes [135](a) and [135](b). But the outcomes outlined in [135](c) would also have been forensically valuable. The case against him, as Glazebrook J points out, was formidable. It would have been very much to his advantage to shift the focus away from his own conduct with the complainant to that of the complainant and M. Even if only one or two jurors out of 12 thought that the complainant had lied in relation to the earlier complaint, that would have been likely to have affected the deliberations of the jury in a way which favoured the appellant. Moreover, even jurors who thought that the complainant had not lied in relation to the earlier complaint might have seen disputed evidence as raising at least a question mark as to her veracity.

[137] If events developed as indicated in [135](c)(i) (which I think is the most likely of the outcome scenarios), defence counsel would have been able to strike and not wound and in this way to cast doubt on the veracity of the complainant without her or the prosecution being able to make a complete response. If, instead, events took the course outlined in [135](c)(ii), the duration of the trial would have been appreciably extended in a way which would not have been very consistent with s 8.

[138] More generally, and in relation to all outcomes, the appellant would have managed to put the credibility of the complainant seriously in issue indirectly despite no narrative being offered (whether by statement to the police or evidence from the appellant) inconsistent with her evidence.

Has there been a miscarriage of justice associated with the absence of inquiry of the complainant as to whether the complaint was false?

Should the complainant have been asked if the complaint was false?

[139] When Judge Neave and later Judge Garland gave their rulings,[112] they had to address admissibility on the basis of the material before them. This did not include evidence one way or the other as to whether the complainant acknowledged that the earlier complaint was false. To be fair to those involved, I imagine that the reason no-one suggested that such inquiry be made is that it did not occur to anyone that she might acknowledge that the complaint was false. The fact remains, however, that in the absence of such inquiry, the possibility that the complainant might have acknowledged that the complaint was false has not been excluded. In the course of argument I was troubled by the absence of such an inquiry.

[140] If the case is approached on the basis that the complainant's position had to be ascertained, this would have required either a voir dire at which the complainant gave evidence or less formal mechanisms to which the parties consented. My sense is that it is not particularly likely that the complainant would have acknowledged that the earlier complaint was false; and this irrespective of the nature of the inquiry made. I am prepared to concede, however, that if a voir dire had been conducted, careful questioning by counsel designed to obtain an acknowledgement and focusing

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[112] *R v Best* DC Christchurch CRI-2012-009-005420, 21 June 2013; see also above at [41] and n 31.

very much on the texts, might have induced an acknowledgement of falsity. Because such an acknowledgement would probably only have emerged in response to closed questions, its quality would have been open to question. More generally and perhaps importantly, the process, if carried out on a voir dire, would not be consistent with the policy and perhaps the letter of s 44. I say this because there is nothing in s 44 to suggest that it is not applicable to evidence on a voir dire and I have reservations whether it would be appropriate to give permission under s 44(3) for the purposes of the voir dire with a view to seeing whether permission should be given in respect of trial. As well, such a process might require the complainant to give evidence twice about the incident with M.

[141] In these circumstances, I think that practicalities dictated that the decision whether the appellant should be able to go into the earlier complaint should be based on the evidential material which was to hand. In any event, I think it was open to the Judges concerned to take this approach. So in deciding whether to grant permission the Judge had to take into account the possibility (I would say overwhelming probability) that the complainant would deny that the complaint was false alongside the possibility that she might concede falsity.

Was the disputed evidence "of such direct relevance to facts in issue … that it [was] contrary to the interests of justice to exclude it"?

[142] I see the statutory test as requiring an analysis of the disputed evidence in the context of the case as a whole. Material to this is the strength of the case against the appellant and the absence of an evidentially supported narrative suggesting that the complainant's account of what happened with the appellant was untrue.

[143] For the reasons explained, the disputed evidence, if able to be adduced, would have been of considerable forensic assistance to the appellant. There are, however, a number of factors which would have limited the legitimate materiality of the evidence. It was always extremely likely that the complainant would deny that the complaint was false. If M was not called, the issue would be left hanging whereas if M did give evidence, there would be a problematic trial within a trial. In the absence of any evidence suggesting that the complainant's complaint against the appellant was false, it would not have been open to the jury to conclude that the

complainant had a propensity to make false complaints. The very most which the jury might have legitimately derived from the disputed evidence is a conclusion that on an earlier and not very similar occasion, she had made, or may have made, a false complaint.

[144] The evidence adduced as part of this exercise would have (a) suggested to the jury that the complainant was prepared to engage in sexual activity with men on first acquaintance and (b) raised a question mark as to her credibility. The first of these effects would have been entirely illegitimate. Indeed, one of the purposes of s 44 is to limit as far as possible scope for thinking of this kind. The second involves a rather general challenge to the credibility of the complainant, the making of which would require close examination of what happened between her and M. In the context of a case where there was nothing in the evidential material before the jury to suggest that the complainant was not telling the truth about the appellant, I see such a challenge as gratuitous and its value, if any, as insufficient to satisfy the s 44(3) test.

My conclusion

[145] I consider that Judges Neave and Garland were correct to refuse to grant counsel for the appellant permission to lead the disputed evidence.

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