NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS S PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA141/2018
[2020] NZCA 10

	BETWEEN	CHRISTOPHER MARTIN BRADLEY Appellant
	AND	THE QUEEN Respondent

Hearing:	11 November 2019
Court:	Wild, Whata and Katz JJ
Counsel:	A M Toohey for Appellant P D Marshall and A R McRae for Respondent
Judgment:	7 February 2020 at 10.00 am
Recalled and Reissued:	29 October 2020
Effective date of Judgment:	7 February 2020

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Mr Bradley appeals both against conviction and sentence. He faced six representative charges of raping his step-daughters, over a period of about two and a half years, when the girls were aged between seven and nine. He was tried in the District Court at Timaru over 7 days between 11 and 20 December 2017. The jury found him guilty on five of the six charges. On 2 March 2018 Judge Maze sentenced Mr Bradley to 15 years' imprisonment.[1]

Factual background

Family living and custody arrangements

[2] Both Mr Bradley and his wife had children from previous marriages. They formed a relationship in 2010, and married in 2014. From 2011 the couple lived in Mr Bradley's home in a rural town in the South Island. They had the primary care of Mrs Bradley's three children, including the two complainants, to whom we will refer as A and R. These children stayed with their father every second weekend. Mr Bradley shared, with his former wife, custody of his own four children including his daughter S, who was two years older than A and R.

The complaints

[3] On 29 April 2016 S reported to her mother that A and R had told her Mr Bradley had been having sex with them. S's mother alerted the police and Child Youth and Family Services (CYFS).

[4] On 2 May CYFS sent two social workers to interview A and R at their school. Neither girl disclosed any sexual abuse in the course of this interview(s).[2] On 9 May R wrote a letter to her step-sister S, claiming that Mr Bradley had "been having sex

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1 *R v Bradley* [2018] NZDC 4082.

2 It is unclear to us whether A and R were interviewed separately or together on that occasion.

with me and [A]" in their beds after their mother had left for work. She also said that Mr Bradley had made them get into the spa pool naked and had also put his hand down their pants. It emerged that S had dictated the content of this letter to R, or at least had helped R write the letter. The letter was delivered to the complainants' school, which referred it to CYFS.

[5] On 10 May a social worker from CYFS interviewed R. Mrs Bradley was at this interview or arrived during the interview and, when she realised what R was saying, asked R "why didn't you tell me? When could this have happened?" The tone of those questions was disbelieving.

[6] Later that day A and R were taken to Ashburton where they stayed with Mr Bradley's parents who took them the following day, 11 May, to Timaru.

[7] At Timaru the two girls were interviewed at CYFS' offices. When dealing with the first ground of appeal, we will need to provide some further detail as to the sequence of these interviews. Both girls disclosed being raped by Mr Bradley, and the charges against Mr Bradley followed on 23 May.

The opposing cases at trial

Crown case

[8] The Crown's primary evidence was that of A and R, in their evidential interviews (EVIs). Each girl confirmed, at the start of her EVI, and also under cross-examination, that she had told the truth:

(a) R said Mr Bradley would come into her bedroom while she was asleep, get into her bed and have sex with her. He would then put the bedsheets and her pyjamas in the wash, because sperm got on them. She would have a shower because she had sperm all over her as well. R said Mr Bradley also raped her in her mother's bed, and he raped both of them in the spa pool. She said the sperm made her vagina sore. She said Mr Bradley sometimes gave her money, and told her not to tell

anyone. He had, she said, recently promised not to do it again. R also said that she sometimes woke up and saw Mr Bradley in A's bed.

(b) A's account was similar: Mr Bradley would get into her bed in the morning, after her mother had gone to work, and have sex with her. He would then put her nightie and knickers in the wash and make her have a shower. A also said that Mr Bradley had sex with her in his bedroom. She said the sex made her "sore". The last time Mr Bradley did it he said he was sorry and that she should not tell anyone because he did not want to get "told off".

[9] These accounts were supported by evidence from Mr Bradley's daughter, S. There were three parts to this:

(a) S's evidence of the recent complaints made to her by A and R.

(b) Waking up and seeing her father on or beside R's bed, telling R not to worry about "a spot" on her bed and he then taking the sheets off and leaving, coming back with $15 for R. Then R telling S that Mr Bradley had "spilt the sperm on the bed" and that the money was "for having sex with her".

(c) Seeing Mr Bradley encouraging A and R to get naked into the spa with him, where he would get them to sit on his lap "tummy to tummy". S said that she could not see what was happening under the water because of the bubbles in the spa. When she tried to sit next to her father, he would push her away and make her sit across the pool.

[10] The following forensic evidence:

(a) Mr Bradley's semen was found on the electric blanket on A's bed, in a position consistent with Mr Bradley having deposited it in the course

of sexual intercourse with a small child.[3] It was about 60 cm down from the head of the bed and 50 cm in from the side of the mattress.[3]

(b) Similarly, Mr Bradley's semen was found on R's bed, approximately 70 cm from the bedhead and 50 cm in from the side of the mattress.[4]

(c) A was found to have genital warts upon medical examination in May 2017. Testing confirmed she was infected with the Human Papilloma Virus (HPV). Dr Wendy Miller gave expert evidence that genital warts were very rare in children, and the most likely explanation for the presence of HPV was that A had had sexual contact with another person. Dr Miller did not exclude the possibility of transmission to A by other means, nor was she able to narrow down the timeframe within which the infection occurred.

Defence case

[11] Mr Bradley denied any of the alleged offending.

[12] In terms of the complaints, the defence pointed to a recent shift in child support payments from Mr Bradley to his former wife, and to S's involvement, as possible reasons why A and R had fabricated their complaints. The lack of any complaint during the initial interviews at the school on 2 May 2016 was highlighted, as was the fact that S had "dictated" the letter written by R. A further point of emphasis was that A made complaints in her EVI only when "prompted" to support her sister R.[5]

[13] Mr Bradley accepted that his semen was on the electric blankets on the two girls' beds. In evidence he explained that he and his wife had occasionally had sexual intercourse on the girls' electric blankets while the blankets were on the floor.

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3 DNA testing demonstrated that it was 600,000 million times more likely that the DNA in the semen originated from A and R and Mr Bradley, than from A and R and an unknown person chosen at random from the New Zealand population.

4 The medical examination of A by Dr Wendy Miller on 25 May 2017 records A's height as 136.5 cm. The examination of R by Dr Miller on 18 June 2017 records R's height as 138.5 cm.

5 We refer to this further in [32]–[35] below.

[14] The defence also sought to exploit the uncertainties in, or limitations of, Dr Miller's evidence: that there were other explanations for the genital warts found on A, and the fact that no timeframe for infection could be given.

Approach on appeal

[15] Ms Toomey readily accepted that Mr Bradley's appeal against conviction can only succeed if he established a miscarriage of justice. In terms of s 232(4) of the Criminal Procedure Act 2011, that required Mr Bradley to identify one or more things relating to the trial that had created a real risk that the outcome of the trial was affected, or had resulted in an unfair trial.

[16] As this Court has explained, the logical approach is first to determine whether something(s) has affected the trial and then, if yes, to decide whether there is a real possibility that it may have affected the outcome or whether the trial was unfair.[6]

[17] The benchmarks when assessing the fairness of a trial are the minimum standards of criminal procedure and the right to natural justice guaranteed by ss 25 and 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) respectively.

The credibility of Mr Bradley and of his trial counsel, Mr Ruane

[18] Mr Bradley supported his appeal with affidavits he affirmed on 16 August and 24 October 2019. In those affidavits he made numerous criticisms of his trial counsel, Mr Ruane. Mr Ruane responded to those criticisms in affidavits he swore on 9 October and 5 November 2019. Both Mr Bradley and Mr Ruane were cross-examined before us.

[19] There are sharp conflicts between the evidence of Mr Bradley and that of Mr Ruane relating to many of Mr Bradley's grounds of appeal. The success of those grounds hinges on our accepting Mr Bradley's evidence, and rejecting that of Mr Ruane. Accordingly, before we deal with the grounds of appeal, we need to deal with Mr Bradley's credibility and that of Mr Ruane.

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6 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [24]–[26].

[20] We do not find Mr Bradley credible. On the other hand, we do find Mr Ruane to be an honest witness. Accordingly, wherever there is a conflict between the evidence of Mr Bradley and that of Mr Ruane, we accept Mr Ruane's evidence and discredit that of Mr Bradley.

[21] Why have we made these assessments of credibility? The first and perhaps most telling point relates to Mr Bradley's explanations for his semen located on the electric blankets on the beds of A and R. Consistently up to the trial, Mr Bradley had explained to Mr Ruane that he and his wife on occasions "had sex on the children's beds". He did that in the 'Possible Situations' document he sent Mr Ruane shortly after retaining him in May 2016. He confirmed it in an email to Mr Ruane on 30 August 2016:

> Yes, I can confirm [Mrs Bradley] and I have had sexual activities on both those beds.
>
> …
>
> [Mrs Bradley] and I have had sexual encounters on those beds …

[22] Then, in his evidence at trial, Mr Bradley said the sex with his wife had been on the bedclothes while they were on the floor. Before us Mr McRae cross-examined Mr Bradley about that:

> Q. … And yet your story changed at trial – didn't it – to on the bed clothes on the ground.
>
> A. I put it out there at the trial. It is what it is.

[23] That was the response of a man who had been exposed as a liar. We surmise that at some point Mr Bradley and/or his wife realised that the explanation Mr Bradley had given to Mr Ruane was inconsistent with the location of Mr Bradley's semen stains on the electric blankets. So Mr Bradley changed his story. Further, in support of this appeal, Mrs Bradley swore an affidavit recalling one occasion on which "Chris and I ended up having sex on an electric blanket on the bedroom floor". We revert to Mrs Bradley's version in [69]–[70] below.

[24] Second, one of Mr Bradley's submissions on appeal is that Mr Ruane was not properly prepared for the trial, and had not properly briefed Mr Bradley should he

elect to give evidence. In his first affidavit Mr Bradley sought to minimise his pre-trial attendances on Mr Ruane. Amongst other things, he stated:

> A meeting was scheduled for 1 December 2017 but it was cancelled by Mr Ruane. I recall that I had a broken achilles at the time and my leg was in plaster. I instead met with him on a Friday prior to the trial at his office in Riccarton.

[25] Mr Ruane answered this by putting his time records in evidence. Those records include 1½ hours for a meeting at Mr Ruane's office in Riccarton on Friday, 1 December 2017. Mr Ruane described in some detail what he had covered with Mr Bradley in that meeting: we refer to some of that in [77] below in dealing with Mr Bradley's election to be tried by a jury. Thus, we find that Mr Bradley's assertion that the 1 December 2017 meeting was cancelled by Mr Ruane is untrue.

[26] Third, and also in support of his assertion that Mr Ruane was ill-prepared for the trial, Mr Bradley deposed:

> 12. … Part way through the trial Mr Ruane was so late that the trial was almost called off.
>
> 13. In my view, Mr Ruane was underprepared and lacked focus during the trial, the latter due to him juggling other cases during the trial. He was always late and flustered.

[27] In response, Mr Ruane exhibited the Court taker's log of the trial. The log shows the court starting promptly each morning. Mr Ruane deposed that he was staying in motel accommodation in Timaru. He travelled down to Timaru on the Sunday before the trial started on Monday 11 December 2017 and remained there for the rest of that week. The following week he returned to Timaru on the morning of Monday, 18 December. The log for that morning shows the jury coming into court at 10.08 am.

[28] Mr Ruane explains that the trial was adjourned over Tuesday, 19 December to enable him to travel to Nelson for a sentencing in the District Court there that day. He was back at court in Timaru in time for the court to start at 9.04 am on Wednesday 20 December (a 9 am start had been arranged). It follows that there is no truth in Mr Bradley's statement.

[29] In dealing with the points on appeal we will refer to other instances in which we have been unable to accept Mr Bradley's evidence.

[30] By contrast Mr Ruane's evidence was generally supported by the letters he wrote, or the notes he made, at the time, or by his time records. Where he had made an error, or overlooked something, Mr Ruane readily accepted it. Examples of that are his overlooking Mr Bradley's instruction that he wished to change his election to a judge alone trial, and also a separate instruction to seek a transfer of the trial venue to Christchurch. Mr Ruane also allowed that, with the benefit of hindsight, he might have done some things differently. For example, he accepted that, with the benefit of hindsight, he might have applied for a ruling as to the admissibility of Dr Miller's evidence.

The grounds of appeal

Ground 1: The EVIs of A and R should have been excluded

[31] We set out in [3]–[7] above the sequence of events that led to A and R being interviewed at the CYFS office in Timaru on 11 May 2016. When the two girls arrived they were met by Constable Liggett who led what was described as a "meet and greet" session with them. The Constable did not take notes of this initial meeting. She said she explained to the two girls why they were there and the general nature of the allegations. Under cross-examination, Constable Liggett seemed to accept that interviewing the two girls together in that way was not best practice, but explained she had done it that way because of time pressure. The evidential interviews then began. R was interviewed first and made detailed disclosures about the sexual offending of which Mr Bradley has now been convicted.

[32] The interview with A then began. The interviewer was Ms Hartemink, a social worker, with Constable Liggett monitoring. During the first part of this interview A did not say anything about sexual abuse by Mr Bradley. Ms Hartemink then broke the interview to confer with Constable Liggett. When she returned to the interview room the following exchange took place:

> DH Okay… [A], you know [R] came in earlier?

A Mm.

DH Sat there where you are today?

A Yeah

DH And she talked with Christine before.

A Mm hmm.

DH And she talked about some stuff that happens, that Chris does when he comes into your bedroom.

A Yes, that is exactly the same.

DH Mm.

A To me.

DH Mm. Tell me more about that.

A I don't want to.

[33] Following that exchange, A began talking about being sexually abused by Mr Bradley. Under cross-examination, A accepted that she had discussed with R what R was going to say, and accepted also that if she did not support R she was "letting her down". She denied that what she and R had said was untrue.

[34] During the trial, after A, R and Constable Liggett had given their evidence, the Judge held a voir dire as to the admissibility of the EVIs. The following captures the gist of the Judge's ruling:[7]

> In the end, although one could criticise aspects of one stage or another, there is no actual evidence of tainting to the point where it affects admissibility and a mistrial should be declared because the jury is seized of evidence which is not capable of being relied upon whether on grounds of fairness or reliability.

[35] Ms Toohey essentially repeated to us the submissions Mr Ruane had made to the Judge in the voir dire. She argued that the Judge erred in not excluding the EVIs as evidence that had been unfairly obtained and was unreliable. The unfairness resulted from the interview protocols not being followed. Ms Toohey focussed particularly on the fact that A had not disclosed any sexual abuse until she was told that R had.

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7 *R v Bradley* [2017] NZDC 28556 at [6].

[36] However, Ms Toohey made it clear to us that Mr Bradley's primary submission was that the Judge, in giving her ruling, did not have the assistance of evidence from Dr Sarah Calvert. Dr Calvert is a clinical psychologist practising in Auckland. She completed a report dated 13 November 2017 for Mr Ruane about the efficacy of the EVIs, and provided Mr Ruane with information to assist him, should the admissibility of those interviews be challenged. We revert to Dr Calvert in [39] below.

[37] We take the view that there was no proper basis to exclude the EVIs. This Court rejected similar challenges in *K (CA26/2014) v R* and, earlier, in *Blagojevich v R*.[8] The threshold for admissibility under the Evidence Act is relevance: s 7. As this Court acknowledged in *K (CA26/2014) v R*, it is conceivable that evidence could be so unreliable as to be irrelevant.[9] But, if that very high threshold for exclusion is not met, then the submission that the evidence should be ruled inadmissible becomes "not sustainable".[10]

[38] We agree with the Judge that the EVIs were admissible. Assessing the reliability and credibility of what A and R said then became a matter for the jury. It is fundamentally, indeed constitutionally, wrong for a trial Judge to usurp the jury's province of assessing the reliability and credibility of admissible evidence.[11]

[39] Mr Ruane gave careful consideration to the report of Dr Calvert. He set out his advice in a memorandum dated 13 December 2017 addressed to Mr Bradley. These are the first and last paragraphs in that part of the memorandum:

> **Dr Calvert**
>
> 11. I have reviewed Dr Calvert's report several times. It is not as helpful as it might be. She makes some very general comments about the interviewing process and about what lead [sic] up to the interviews being conducted.
>
> …

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8 *K (CA26/2014) v R* [2014] NZCA 229; and *Blagojevich v R* [2011] NZCA 217.
9 *Blagojevich v R*, above n 8, at [9].
10 At [14].
11 *K (CA26/2014) v R*, above n 8, at [17]. Also *R v S* CA201/1995, 22 September 1995 at 3–4 applying the decision of the House of Lords in *R v H* [1995] 2 AC 596 (HL) at 613 per Lord Griffiths.

> 15. Again, based on a reading of Dr Calvert's report, I do not think there is anything to be gained by calling her to give evidence. I say this also having regard to what seems to me to be something of a cut and paste report. I note that Dr Calvert has referred to one of the girls by an incorrect name.

[40] Having ourselves read Dr Calvert's report, we consider Mr Ruane's assessment was a reasonable one. We cannot accept Ms Toohey's submissions that Mr Ruane erred in not calling Dr Calvert and that the trial Judge's ruling may have been different, had she had the benefit of evidence from Dr Calvert.

Ground 2: The expert evidence of Dr Miller as to genital warts should have been excluded

[41] Dr Miller gave evidence for the Crown in the trial. She is a paediatrician who examined A and R on 20 May 2016. She found both girls had vulvo vaginitis. Dr Miller described this as effectively a "neutral finding", since it is common in young girls. A little over a year later, on 26 May 2017, A was examined again and found to have genital warts, an HPV infection. The doctor gave evidence that the severity of the warts was such as to require their surgical removal under general anaesthetic, and described their removal by "diathermy (removed with a hot blade which both cuts through the mucosa and seals bleeding vessels)".

[42] Ms Toohey submitted that it was "astounding" that the Judge let this evidence in, particularly the graphic detail of the surgical removal of the warts. She argued that the prejudicial value of this evidence outweighed its probative value, which at most was that A had been sexually abused at some point before she was examined in May 2017. Accordingly, the Judge should have ruled the evidence out under s 8 of the Evidence Act.

[43] Ms Toohey supported this submission with two further points. First, she submitted that the Judge had not directed the jury as to the proper use of this evidence, although she conceded that the Crown and defence cases on the evidence had been properly summed up. Second, when sentencing Mr Bradley, the Judge had held that the evidence in relation to the genital warts on A was not an aggravating factor the Judge could take into account. That led Ms Toohey to pose the question: how then could the evidence be admissible in the trial?

[44] We do not accept Ms Toohey's argument. We consider the evidence was properly admissible because it was substantially helpful on the issue of whether A had been sexually abused. The evidence established that it was likely she had been. As the Crown accepted in closing to the jury, the evidence did not implicate Mr Bradley as the abuser, but it was one strand in the circumstantial case against him.

[45] When sentencing Mr Bradley, Judge Maze explained that she could not take into account the genital warts because the Crown could not prove beyond reasonable doubt that A had contracted them from Mr Bradley.[12] That correctly stated the position.

[46] We accept that it would have been preferable for Dr Miller's evidence about the removal of the warts to have been excised, because it was not relevant to any trial issue. And perhaps the Judge could have been more helpful in directing the jury as to the use of Dr Miller's evidence, although the Judge was entitled to the view that no direction was needed. But these matters fall far short of establishing a miscarriage of justice.

[47] A subsidiary aspect of this ground is Mr Bradley's criticism of Mr Ruane for not advising him that the admissibility of Dr Miller's evidence could be challenged. Mr Bradley deposes that he would have instructed Mr Ruane to challenge that evidence had he known that he could.

[48] Mr Ruane responds to this criticism in a very detailed way in his second affidavit, annexing his correspondence with Mr Bradley and with Dr Min Lo, from whom Mr Ruane obtained a report about Dr Miller's findings. Dr Lo is a forensic physician practising in Auckland and, like Dr Miller, a SAATS practitioner. We need not go further into Mr Bradley's criticism. Suffice to say that we do not accept it. It is clear that Mr Bradley has forgotten about the endeavours Mr Ruane undertook to see whether there were avenues to challenge the relevance or force of Dr Miller's evidence in the trial.

[49] This second ground of appeal also fails.

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12 *R v Bradley*, above n 1, at [9].

Ground 3: Real risk jury had been tainted; Judge erred in not declaring a mistrial

[50] Late on 14 December 2017, the fourth day of the trial, the Judge was told that a juror (Juror H) had brought some newspaper articles into the jury room. The following morning, after discussion with counsel in court for chambers (in Mr Bradley's presence), the Judge made inquiries. She spoke first to the foreman of the jury, who confirmed there had been no discussion about the newspaper clippings in her presence. The Judge then spoke to the juror who had alerted the court attendant. This juror told the Judge he had become aware of the newspaper clippings in the jury room the previous day, but had not read them and the juror who had brought them in had not talked to any other juror about them. This juror had assumed the clippings were about the trial. The Judge next spoke to Juror H, who said he had not shown the two clippings he had brought into the jury room to any other juror, nor discussed them with other jurors. At Mr Ruane's request, the Judge asked Juror H whether he had done any other research. Juror H said he had: he had looked at several websites in relation to genital warts. Again, he confirmed to the Judge that he had not discussed this research with other jurors.

[51] The Judge then decided she must discharge juror H. She brought the remaining jurors into court. After reminding them of the importance of their not making their own inquiries or discussing the trial with other people, she asked each juror to indicate on a separate piece of paper whether they had been reading the local newspaper or any other media, or had looked at any "internet" related outlet for any reference to the case. One juror responded that he had read media reports, most said they had seen headlines in the newspaper, but none said they had conducted any independent research or discussed the case outside the jury room.

[52] After the jury had gone out, the Judge indicated a tentative view that the remaining jurors had not been tainted. Neither counsel asked the Judge to declare a mistrial. The Judge then discharged juror H and the trial continued with 11 jurors.

[53] Ms Toohey advances two submissions based on these events. First, she submits the Judge erred in not directly asking the remaining 9 jurors whether they had discussed juror H's research about the genital warts. She likens the position here to

that in *Guy v R* and *R (CA679/2015) v R*.[13] In those cases it was not known whether the jury had seen the extraneous material, and the court considered it necessary to proceed on the basis that they had. The position here was different. The Judge asked juror H whether he had discussed his research with other members of the jury, and he said he had not. The Judge also had no reason to disbelieve what juror H had told her: he had been candid about what he had done, and what he had not done. Certainly, the Judge did not direct the same inquiry to the other 11 members of the jury. But we accept the Crown's submission that the Judge was wise not to do that, because it risked highlighting the genital warts issue, and perhaps conveying to the jury that there was information about genital warts that they should not see.

[54] We do not consider that a fair-minded member of the public, sitting at the back of the court throughout the discussions and inquiries on the afternoon of 14 December and the morning of 15 December, would have had any reasonable concern that the remaining 11 jurors could discharge their task impartially.[14] Accordingly we do not accept that a miscarriage of justice occurred.

[55] Ms Toohey's second point was based on Mr Bradley's evidence that, by the time the jury issue arose, he was "feeling very unhappy with Mr Ruane's representation, and I wanted him to seek a mistrial so that I could engage a different lawyer". At the end of Court on 14 December, Mr Ruane's view was that it was too dangerous to proceed, and he should seek a mistrial. He conveyed that to Mr Bradley who agreed, signing Mr Ruane's note to that effect.

[56] In the light of the Judge's inquiries of the jury on the morning of 15 December, Mr Ruane changed his mind. Mr Ruane dictated a file note that reads:

> FILE NOTE
>
> 15/12/17 at 10:50am
>
> Spoke to Bradley regarding the Judge's indication that there had been no tainting of the Jury and that [Juror H] had already been discharged. Bradley accepted that there was no basis on which I could responsibly argue that

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13 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315; and *R (CA679/2015) v R* [2016] NZCA 444 at [45].

14 *R v C (CA395/2008)* [2009] NZCA 272, [2010] 2 NZLR 289 at [35].

> the activities of [Juror H] had been such as to be "capable of affecting the verdict". He instructed me he wanted to carry on 11 Jurors.
>
> CMR

[57] Questioned about that Mr Ruane said:

> … And, again with the benefit of hindsight, it would be good to write out and have Mr Bradley sign off on that typed file note at page 79. But I am quite sure in my mind that Mr Bradley had changed his mind by that stage of things, perhaps in light of Judge Maze's clear view that, in her view, the jury pool had not been tainted and that we should press on with the trial. I was a little surprised with that, to be frank, but those were his instructions and I had a dictaphone with me and I dictated those at the first opportunity I had …

[58] Mr Bradley did not accept that. There was the following exchange in Mr McRae's cross-examination of Mr Bradley before us:

> Q. Mr Ruane says that he spoke to you regarding the Judge's indication that there had been no tainting of the jury and that [Juror H] had already been discharged and he's noted Bradley accepted that there was no basis on which I could responsibly argue that the activities of [Juror H] had been such as to be capable of affecting the verdict. He instructed me he wanted to carry on with 11 jurors.
>
> A. Mr Ruane is after the fact. The Judge had already made the decision. The actions had occurred by the time I was presented with it in the cell. It did not matter whether I said a monkey hangs from a tree. It had happened.
>
> Q. So what did you say to him?
>
> A. I wanted a mistrial.
>
> Q. And he hasn't recorded that in his file note then.
>
> A. That is entirely up to him.

[59] For the reasons we have explained, we accept Mr Ruane's evidence that the position was as recorded in his file note, and we disbelieve Mr Bradley's account.

[60] This ground of appeal also fails.

Ground 4: Further evidence available not called

[61] In support of his appeal, Mr Bradley has filed affidavits from his wife, Mrs Bradley and five other family members. In his first affidavit Mr Bradley deposed

that he gave Mr Ruane a list of 13 witnesses he wanted Mr Ruane to speak to, and potentially call at trial. He states that he remembers writing out a list for Mr Ruane. The five people who have now sworn affidavits were on this list.

[62] Questioned by Ms Toohey, Mr Ruane said that he had not found on his file any list of witnesses given to him by Mr Bradley and has no recollection of such a list being provided to him. He said that only "in the most very general terms" had Mr Bradley suggested to him that members of the family could potentially give evidence. Mr Ruane accepted that Mr Bradley's son, J, had attended the trial but not, as he recalled, with a view to giving evidence.

[63] We have already referred to the 1½ hour long meeting Mr Ruane had with Mr Bradley on 1 December 2017, a little under two weeks before the trial. With the exception of Mrs Bradley, none of the other potential witnesses mentioned by Mr Bradley feature in Mr Ruane's notes of this meeting.

[64] Again, we accept Mr Ruane's evidence that he was not instructed to brief these witnesses, with a view to calling them, and we disbelieve Mr Bradley's evidence.

[65] Quite apart from that, we have read the affidavits of the potential witnesses and do not consider their evidence, if called, could have had any impact on the outcome of the trial. The key point is the one identified by Mr Ruane under cross-examination: none of these witnesses, nor all of them in combination, "could close off the opportunity" Mr Bradley had to offend. Mr Bradley himself accepted that he was often left alone in the house with the two girls.

[66] Mrs Bradley was a potential witness. Mr Ruane's notes of the 1 December 2017 meeting record that she and Mr Bradley were still together (although he has added a question mark in parenthesis after that), and that she was prepared to give evidence. As we have mentioned, she attended the trial with a view to doing that (she sat out of court).

[67] In the end, Mr Ruane decided not to call Mrs Bradley. His contemporary note records:

> On reflection I do not think that anything will be gained by calling [Mrs Bradley] to give evidence. She was not present when these events are alleged to have occurred, nor can she give evidence about what was said at the [complainants'] household once the allegations emerged.

[68] What evidence might Mrs Bradley have given? Ms Toohey focussed on two aspects. First, she put it to Mr Ruane in cross-examination that Mrs Bradley's evidence would have provided grounds to attack the evidence of the school teachers in relation to A and R arriving late at school. Mr Ruane responded:

> Well, I don't think so because, in particular, [Mrs Bradley] had left the house before the children went to school, almost inevitably [invariably?] as I understand it. So, Ms Bradley couldn't give any evidence about when the children actually arrived at school …

[69] Second, and more importantly, Ms Toohey put to Mr Ruane that Mrs Bradley's evidence would have corroborated Mr Bradley's explanation as to how his semen came to be deposited on the electric blankets. Mr Ruane accepted "it's a possibility". That answer reflects the concern Mr Ruane had already expressed about Mrs Bradley giving evidence about the semen stains on the electric blankets. The concern arises from Mr Bradley changing his explanation, in the way we have outlined in [22]–[23] above. Although Mr Ruane did not articulate his concern this directly, we think it was that Mrs Bradley was going to give untrue evidence about the semen stains, and that this might be exposed under cross-examination. The explanation Mrs Bradley offers in her affidavit serves only to underline Mr Ruane's concern. She states:

> *Sperm on electric blanket*
>
> 48. I recall on one occasion on a Saturday afternoon and Chris had worked in the morning and I had gone in with him. It was one of the weekends that we had no children. It was a beautiful day and we stripped the beds and rotated the mattresses etc. It was howling nor'west so everything was going to get dry, so we washed blankets and everything off the beds. It was an unseasonably warm winter's day because of the nor'wester.
>
> 49. Some of the bedding was strewn on the bedroom floors, Chris and I ended up having sex on an electric blanket on the bedroom floor. I didn't realise that it had gotten fluid on it but I wouldn't have washed it anyway, but it was one of the items of bedding that wouldn't get washed as it was electrical. It looked really clean and might have been 3–4 years old but had hardly been used.
>
> 50. Also, [J] has been in that bed with his girlfriend and [M] has slept in there on it too.

[70] This account refers to sex "on one occasion" on "an electric blanket on the bedroom floor". It does not explain how the semen stains were on two electric blankets. Nor does it explain how those semen stains came to be at the location on each of the two electric blankets that we have detailed in [10](a) and (b)] above. Her reference to Mr Bradley's son J and his girlfriend sleeping on "that bed" similarly does not explain how the stains came to be on both beds, and it ignores the DNA results we have detailed in footnote 2 above. This was not J's semen.

[71] For those reasons, we consider Mr Ruane's decision not to call Mrs Bradley was a reasonable, if not prudent, one. In no way can it be said to be an error that led to justice miscarrying for Mr Bradley.

[72] This ground of appeal also fails.

Ground 5: Trial counsel errors

[73] Ms Toohey submitted that seven errors by Mr Ruane, at least in combination, had deprived Mr Bradley of a fair trial and resulted in a miscarriage of justice.

(a) Instructions to change election

[74] By email on 11 June 2016, Mr Bradley confirmed to Mr Ruane that he elected trial by jury.

[75] On 17 July 2017 Mr Bradley wrote to Mr Ruane about various matters relating to his trial, which at that stage was scheduled to commence on 31 July. Toward the end of that letter Mr Bradley said:

> It is at this point of time that I request a trial by judge instead of trial by jury, as the trial by jury can take for ever and presents without the professionalism of a judge.

[76] Mr Ruane readily acknowledged that he had "overlooked" this instruction. He sent an email to Mr Bradley on 21 July, mainly about Dr Miller's proposed evidence for the Crown. There was no acknowledgment in this letter of Mr Bradley's instruction to change his election.

[77] Mr Ruane's position is that Mr Bradley did not again raise his wish to change his election. In particular, at the 1½ hour long meeting at Mr Ruane's offices on 1 December 2017 (a little over a week before the rescheduled trial began), he said he took Mr Bradley through the trial process. He discussed the jury list, the process of selecting the jury and of challenging potential jurors. Mr Ruane says he gave Mr Bradley a copy of the jury list, which he went through out in the waiting room at Mr Ruane's offices. Mr Ruane said Mr Bradley made no mention of his wish to switch to a judge alone trial, nor did he mention that Mr Ruane had not responded to his earlier instruction about that. Ms Toohey cross-examined Mr Ruane about this:

> Q. [Mr Bradley] says he also discussed that [change of election] with you at the meeting of 1 December.
>
> A. No, and had he done so I would certainly have given him advice about that because there still would have been time to make the appropriate application and I think with the way juries are summonsed there would probably have been enough time to turn off the jury panel.

[78] Under cross-examination Mr Bradley claimed he had raised his wish to change his election with Mr Ruane at the 1 December meeting:

> Q. So in that 1st of December meeting, you didn't tell him either of those things [change of venue; change of election]?
>
> A. I did tell him such. I brought it very clearly to his attention. He dismissed it.

[79] Again, we reject Mr Bradley's evidence on this aspect, and accept that of Mr Ruane. There is no documentary record after 17 July 2017 of Mr Bradley again raising his wish to be tried by a Judge alone. If that was still his wish, it is inconceivable that Mr Bradley would not have raised it with Mr Ruane at the 1 December 2017 meeting, when they discussed the way the jury trial would proceed and when Mr Ruane was given the jury list to look at. Unavoidable is the conclusion that Mr Bradley did not renew his instructions as the jury trial approached. In any event, we do not accept that any unfairness or injustice resulted to Mr Bradley as a result of being tried by a jury, and Ms Toohey did not articulate how this might have arisen.

(b) Instruction to seek change of trial venue

[80] Much the same applies to this criticism of Mr Ruane. He accepts that he overlooked Mr Bradley's instruction, in an email of 20 June 2016, to seek "that the trial is held in the Christchurch High Court". The trial was subsequently scheduled for the District Court in Timaru in July 2017, and then postponed to December 2017. In the face of this, Mr Bradley was asked in cross-examination why he had not raised the change of venue with Mr Ruane at the 1½ hour briefing session on 1 December 2017:

> Q. You did not say to Mr Ruane I want the venue changed of my trial?
>
> A. The venue had already been made comment of previous and follow up to that there was a lot of things that were brought to Mr Ruane's point. It got to a stage where I'd literally thrown up my hands. This man was not listening to me whatsoever.

[81] Mr Ruane's evidence was that, following his 20 June 2016 email, Mr Bradley never again raised his request that the trial venue be transferred to Christchurch, even after the trial had been set down for hearing in the District Court at Timaru.

[82] Just a few days after Mr Bradley's request for a change of trial venue, Mr Ruane met with Mr Bradley and his father at the latter's home in Ashburton on 24 June 2016. Mr Ruane had appeared that morning in the High Court at Timaru and called in on his way back to Christchurch. On 27 June Mr Ruane wrote to Mr Bradley following up on "various outstanding matters … following our meeting last Friday 24 June …". Although this letter made no mention of Mr Bradley's earlier request for a change of trial venue, there was no follow up by Mr Bradley, or at least there is nothing in writing. Again, we accept Mr Ruane's evidence that there was no follow up by Mr Bradley on his 20 June 2016 request that Mr Ruane seek a transfer of the trial to Christchurch. We do not accept Mr Bradley's contrary evidence.

[83] There is the further point, made by Mr Ruane, that, had he been aware of Mr Bradley's request, he would have advised that there was no basis to seek a transfer. Mr Ruane had not provided him with any material suggesting that it would not be possible to empanel an impartial jury in Timaru.

[84] Before leaving this point, we note that we have not overlooked what Mr Bradley's father, Mr David Bradley, stated in paragraphs [26]–[27] of the affidavit he swore on 6 September 2019 in support of this appeal. What Mr Bradley senior states there is demonstrably untrue or inherently unlikely. We make four points:

(a) Mr Bradley senior estimated the meeting at his home was "about six months" before the Court case. The meeting was on 24 June 2016 and the trial started on 11 December 2017, so he is well out.

(b) He cannot be correct in saying that Mr Ruane told his son the trial date, because it would not have been fixed as of June 2016.

(c) He said that his son indicated he wanted a judge alone trial, but Mr Ruane told him he "will have a jury and that's that". The meeting was over a year before Mr Bradley requested, on 17 July 2017, a trial by judge alone. So this cannot be correct either.

(d) It is inherently unlikely that Mr Ruane would have told his son "you're guilty". We prefer Mr Ruane's evidence that he certainly did not say that — that it is not his role as counsel to pronounce on guilt or innocence.

(c) Instructions to brief potential defence witnesses

[85] We have dealt with this, in [61]–[72] above. Briefly, to recap, we consider Mr Ruane's decision not to call Mrs Bradley was a reasonable, if not prudent, one. We agree with Mr Ruane's assessment that none of the other witnesses, even in combination, would have advanced the defence case, indeed that calling them may have reinforced the Crown case. And, in respect of his recollection of the meeting with Mr Ruane at his home on 24 June 2016, we have queried the accuracy of what Mr Bradley senior states.

(d) Failure to brief Mr Bradley fully before he gave evidence

[86] Mr Bradley accepts that Mr Ruane prepared and gave him a four page outline of his proposed evidence. This took the form of a series of topic headings, with points to be covered under each. There is perhaps some disagreement as to when Mr Ruane gave this to Mr Bradley. Mr Ruane recalls that he discussed it with, and gave it to, Mr Bradley at the briefing session at his office on 1 December 2017, and that Mr Bradley took it away to think about it. Mr Bradley is equivocal about that.

[87] Mr Bradley then accepts that Mr Ruane spoke to him on the Friday afternoon at the end of the first week of the trial because, if Mr Bradley was to give evidence, then it would be on the following Monday. Mr Ruane agrees and states that Mr Bradley "certainly got another copy of [the brief] on the Friday before he gave evidence".

[88] There is agreement also that on Monday 18 December 2017 Mr Ruane again spoke to Mr Bradley, who elected to give evidence and signed a written instruction to that effect.

[89] Ms Toohey's submission under this head really came down to a criticism of the form of the brief of evidence Mr Ruane had prepared. She categorised the brief Mr Ruane had prepared as "wholly inadequate" in terms of the length and substance of the trial.

[90] The difficulty with this head of complaint is that Mr Bradley does not point to any item of relevant evidence that Mr Ruane failed to lead from him, nor does he suggest that any relevant topic was not adequately covered by Mr Ruane. The result is that this criticism comes to nothing.

(e) Failure to obtain Mr Bradley's consent to the statement of admitted facts

[91] The statement of admitted facts was dated 15 December 2017 and was signed by Mr Ruane as counsel. Amongst the matters admitted were the school attendance records for A and R, listing the number of days in each of 2014, 2015, and 2016 when each of A and R had arrived at school late.

[92] The genesis of this statement was a ruling the Judge gave on the first day of the trial, 11 December 2017.[15] The ruling related to the intended evidence of several teachers at the girls' school. Amongst other things, those teachers were to produce the school's attendance records for A and R. Referring to those records, the Judge stated:[16]

> Provided counsel can agree on the format for presentation of that material, not one witness will be required to give that evidence; it can be produced by consent.

[93] In his affidavit Mr Bradley deposed that he "did not see or consent to the statement of admitted facts". He says that he wanted to challenge the way in which the records were kept, because he "did not accept that the girls were late on all of the dates represented in the statement of admitted facts".

[94] In his affidavit Mr Ruane deposed that he "certainly did discuss … the statement of agreed facts" with Mr Bradley who did not indicate that he objected to it. Nor did he provide Mr Ruane with any material basis on which he could question the teachers as to the way in which they had kept the records.

[95] In cross-examination, there was this exchange between Ms Toohey and Mr Ruane in relation to the s 9 Evidence Act admission:

> A. … I explained to Mr Bradley what that was. It would mean that the teachers would not be called and indicated to him that this was an appropriate way of dealing with evidence that was not contested and he raised no objection. And, on that basis, I went ahead and accepted the s 9 admissions which I think Mr McRae had drafted, rather than me, and they were presented. It was on the basis that Mr Bradley's own evidence was going to be that the girls would be late from time to time. There was no suggestion from Mr Bradley that the girls were not late.
>
> Q. No, but you knew that he challenged the accuracy of the school records as to lateness?
>
> A. I think it's fair to say that my understanding of his position was that the records were potentially a little inaccurate but that he acknowledged that the girls were late from time to time and there could be no challenge to that.

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15 *R v Bradley* [2017] NZDC 28140.
16 At [18].

[96] Once again, we accept Mr Ruane's evidence and reject that of Mr Bradley. But this is also a criticism that could not sound in unfairness or injustice. That is for the reason explained by Mr Ruane in the passage we set out in [95] above.

(f) Mr Bradley took sleeping pills on the morning he gave evidence

[97] In his affidavit Mr Bradley deposed that he had mistakenly taken two Zopiclone sleeping tablets before arriving at Court on Monday 18 December, the day he gave evidence. He said that he told Mr Ruane this, but Mr Ruane took no action. Under cross-examination, Mr McRae asked Mr Bradley about this:

> Q. Well the starting point would have been to actually have told Mr Ruane – wouldn't it?
>
> A. I told him. He chose to dismiss it.
>
> Q. If nothing happened with Mr Ruane then you'd tell the court.
>
> A. Why would I do that if I did not know to do that? He's supposed to be representing me why didn't he do it?

[98] In his affidavit Mr Ruane said that Mr Bradley had not told him he had taken any medication, let alone an incorrect medication, and said he would have taken appropriate steps had he been told. Under cross-examination, he was asked again about this:

> Q. Just a last point in relation to the sleeping tablets, [Mrs Bradley] has deposed that she was also present when Mr Bradley told you that he'd taken sleeping tablets by accident?
>
> A. No. I have no recollection at all of being told during the course of the trial that he had over-prescribed himself and had he done so, there's no doubt at all that I would have made some enquiries and if there was a nurse available or a medic available at the Court, would have got someone to look at him. Because, given that he was about to give evidence, there's no way in the world I would have permitted him to give evidence unless it was clear that he was in a fit state to do so. Now, it's clear that he was nervous and anxious about giving evidence but that's not unusual when a defendant comes to give evidence.

[99] Yet again we prefer Mr Ruane's evidence, and do not accept Mr Bradley's account. We of course have no way of knowing whether Mr Bradley had mistakenly taken two Zopiclone on the morning of 18 December, as he described. However, if he

did, and if he told Mr Ruane about that, we have not the slightest doubt that Mr Ruane would have taken appropriate steps, including seeking an adjournment if required. It is inconceivable that any competent counsel, in that situation, would simply dismiss such a report from a client. It is equally inconceivable that a Judge, if she noticed any witness struggling with sleepiness or otherwise in the witness box, would not respond appropriately.

[100] Further, there was no indication that Mr Bradley experienced any sleeping pill related difficulties while giving evidence. He accepted that he had given evidence for a lengthy period of time, without falling asleep. Mr Bradley did not identify any part or parts of his evidence that were affected by the sleeping pills he said he had taken. Ms Toohey did not submit to us that this had happened. Her submission was simply that Mr Ruane had done nothing when Mr Bradley told him about the sleeping pills.

[101] This criticism of Mr Ruane also fails.

(g) Pressure from trial judge to "fast track" the trial

[102] The Judge was undoubtedly — and understandably — concerned to conclude the trial before the Christmas vacation. But, only in one respect, did Ms Toohey put it to Mr Ruane, and submit to us, that time pressures on the Court translated into error on Mr Ruane's part. That single aspect was Mr Ruane's decision not to call Mrs Bradley. We have already, in [66]–[71] above, held that Mr Ruane's decision not to call Mrs Bradley was reasonable, if not wise.

[103] Relevant to whether there would have been sufficient trial time to call Mrs Bradley and/or further defence witnesses is this exchange in Ms Toohey's cross-examination of Mr Ruane:

> Q. Mr Bradley says that he never instructed you not to call Mrs Bradley. That appears to be a decision that you made, Mr Ruane.
>
> A. Well, there was never a decision to call her, I think is the better way of putting it. She was only ever potentially a witness and he was going to give evidence which would have explained the presence of the semen on the bedding by sex on the bed. The implication is that – and, I think, the phrase he's used is that this was "fast-tracked" and that's not the case. If I had come to the view that Mrs Bradley's evidence was likely to be helpful and that the raft of other witnesses

> who he wanted to call were likely to be helpful, then part of my job was to stand up to the judge and say, "We don't have enough time".

[104] Mr Ruane was a senior and very experienced criminal barrister well capable of ensuring that Mr Bradley received a fair trial including, in particular, that all witnesses whose evidence might have advanced the defence were called. The consequence is that this last criticism of Mr Ruane also fails.

Conclusion on the appeal against conviction

[105] None of the five grounds of appeal against conviction has succeeded. We are satisfied that Mr Bradley's trial was fair, and that justice was done. As Mr Ruane readily accepted, he overlooked Mr Bradley's instructions that he wished to change the election he had made to be tried by a jury, and also Mr Bradley's instruction to seek a transfer of the trial from Timaru to Christchurch. Fortunately, no unfairness or injustice resulted.

[106] Apart from those two oversights, we have not found any substance in the many criticisms Mr Bradley levelled at Mr Ruane. In the course of dealing with this appeal, we have had to look thoroughly through the trial documentation, and through Mr Ruane's correspondence, memorandums and notes leading up to and during the trial. Having done that, and given Mr Bradley's wide-ranging criticisms of Mr Ruane, we wish to record our view that Mr Ruane discharged his task in a competent and thoroughly professional way. He did everything that could reasonably be done to defend Mr Bradley in the face of a very strong Crown case.

Appeal against sentence

[107] The Crown submitted to the Judge that Mr Bradley's offending was within rape band four as described in this Court's decision in *R v AM*, and should attract a sentencing starting point of 16 to 17 years' imprisonment.[17] The Crown relied on the High Court's sentencing decision in *R v Swann* in support.[18]

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17 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [109].
18 *R v Swann* [2014] NZHC 2310.

[108] In his submissions, Mr Ruane submitted the offending was at the top of band two or the lower end of band three warranting a starting point of 12 to 13 years imprisonment.

[109] In considering the aggravating factors, the Judge acknowledged that she "must not double count" and that "the exercise is not mathematical".[19] She identified the aggravating factors as:

(a) The fact that there were two victims.[20]

(b) The fact that both victims were vulnerable because they were young.[21]

(c) The extent of the harm done to both girls.[22] Both had suffered post-traumatic stress disorder and both were, by then, experiencing anxiety, distress, mistrust of adults, and anger. In relation to the harm to the two girls, the Judge noted they were sisters who were emotionally close one to the other, and very supportive of each other. The Judge said to Mr Bradley:[23]

> By abusing both, you had, in effect, deprived each of them of the ability to seek help from the other. They were both helpless in that situation.

(d) The breach of trust — Mr Bradley was in the position of a parent.[24]

[110] The Judge then said this:

> [12] Balancing the aggravating features, taking the case in relation to each victim separately, then increasing to reflect the fact that there were two victims, and contemplating totality, the starting point still has to be to identify this as mid-range band 3. I do take [*Swann*] into account but there are some different aspects. I adopt a starting point of 15 years' imprisonment on each of the charges concurrently to reflect the fact of the two victims. There is no basis for reduction. I acknowledge you have no relevant previous convictions but neither can I give a credit for your previous blameless history. The end

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19 *R v Bradley*, above n 1, at [4].
20 At [9].
21 At [5].
22 At [5].
23 At [6].
24 At [7].

> result then is the starting point and the term will be one of 15 years' imprisonment.

[111] The Judge declined the Crown's request that she impose a minimum period of imprisonment.[25]

[112] Ms Toohey argued that the Judge should have imposed a sentence in the range 13–14 years' imprisonment. That would place Mr Bradley's offending at the lower end of *R v AM* rape band three: 12–18 years imprisonment.

[113] Ms Toohey had two supporting submissions. The first was that the Judge had adopted a mechanistic approach to sentencing, and had not made a proper evaluation of all the relevant aspects of Mr Bradley's offending. We do not accept that. Indeed, as we have pointed out, the Judge specifically reminded herself that "the exercise is not mathematical". Ms Toohey did not identify any mitigating circumstance which the Judge had overlooked, or had not adequately factored in.

[114] Ms Toohey's second criticism was that the Judge, in assessing the seriousness of Mr Bradley's offending, had failed to analyse comparative case law, apart from *R v Swann*. In support of a submission that the sentence was excessive, Ms Toohey referred to four cases.[26] Given that *R v AM* was the appropriate guidance for the Judge, we are not assisted by reference to sentencing decisions of the High Court — *R v Smith* and *Savage v R* are in that category. This Court's decision in *R v N* was decided several years before the Court issued its guideline judgment in *R v AM*. Over a period of about 2½ years the appellant in *R v N* subjected his stepdaughter, who was aged between seven and nine, to rape, sodomy, digital penetration and oral sexual connection. Only when the young girl attempted to take her life, did the offending come to light. *R v N* is listed in *R v AM* as an example of a case at the lower end of rape band four (16–20 years' imprisonment), although the Court went on to say the case "could possibly be treated as falling within rape band three because there is one complainant but given the offending occurred over a period of years and the effect on the victim was severe it is better dealt with in this band".[27]

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25 At [13].

26 *R v Smith* [2015] NZHC 1992; *Savage v R* [2016] NZHC 1330; *D (CA801/2013) v R* [2014] NZCA 369; and *R v N* CA88/205, 23 November 2005.

27 *R v AM*, above n 23, at [109]–[110].

[115] In *R v N* this Court upheld the sentence of 15 years' imprisonment and the minimum period of imprisonment of 8 years. Although the offending in *R v N* against the single complainant was more serious, there are two complainants here. For that reason, we are unable to accept Ms Toohey's submission that *R v N* "was plainly more serious".

[116] The other decision of this Court relied on by Ms Toohey is *D (CA801/2013) v R*. There, the appellant had raped his stepdaughter repeatedly over a period of about eight years, starting when the girl was five years old. He had also forced the girl to perform oral sex on him, to touch his penis, and on occasions he had tied her hands or gagged her using insulation tape. The second victim was the appellant's stepson who was sodomised, forced to perform oral sex on him and masturbate the appellant. Both victims were shown child pornography. Ms Toohey was correct in submitting that the sentence of 15 years' imprisonment was upheld (that was both the sentencing starting point, and the end sentence imposed). But this Court added this observation:[28]

> … we accept [the Crown's] submission that the appellant's offending fell within rape band four, and could well have attracted a higher starting point. Further, we do not accept that the combined sentences resulted in a total sentence that was manifestly excessive. An end sentence of 16 and a half years' imprisonment could well have been imposed in respect of the offending against [the two complainants].

[117] So, *D (CA801/2013) v R* provides no support for this appeal.

[118] Mr Marshall referred us to a third decision of this Court, *B (CA58/2016) v R*.[29] The appellant had been convicted of six charges of sexually abusing one of his children, including a representative charge of rape resulting from repeated offending over two years. This Court considered the positioning of the offending at the top of band three or the bottom of band four of *R v AM*, and the sentence of 16 years' imprisonment, as "clearly appropriate" for offending that involved, in particular, "multiple rapes of a very vulnerable victim involving a significant breach of trust in a familial context where the offending could only have been executed with planning

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28 *D (CA801/2013) v R*, above n 32, at [43].
29 *B (CA58/2016) v R* [2016] NZCA 432.

and premeditation".[30] The Crown is justified in submitting that that description is equally true of Mr Bradley's offending, save that he repeatedly raped two vulnerable children who were in his care.

[119] In *R v AM*, in describing rape band four: 16–20 years, this Court said:

> [109] Perhaps the paradigm case of offending within this band is that of repeated rapes of one or more family members over a period of years as is illustrated by the present case. Offending of this nature, especially that involving children and teenagers will attract starting points at the higher end of this band …

[120] In the light of that observation, Mr Bradley might consider himself exceedingly lucky that the Judge placed his offending in the middle of band three. That is particularly so given that there were two child victims. Nor do any of the cases that we have reviewed in the preceding paragraphs provide any support for Mr Bradley's appeal against sentence. Quite the contrary.

[121] Accordingly, the appeal against sentence is also dismissed.

Result

[122] The appeal against conviction is dismissed.

[123] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[30] At [71] and [78]. The final sentence was 17 years 9 months' imprisonment, but that included a cumulative sentence imposed on a domestic violence charge of injuring with intent to injure.