NOTE: PUBLICATION OF ANY INFORMATION THAT IDENTIFIES, OR THAT MAY LEAD TO THE IDENTIFICATION OF JUROR PROHIBITED BY S 32B OF THE JURIES ACT 1981.

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA742/2017
[2019] NZCA 150

BETWEEN	T (CA742/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	11 February 2019
Court:	Miller, Simon France and Peters JJ
Counsel:	J G Krebs for Appellant K S Grau for Respondent
Judgment:	9 May 2019 at 3.00 pm
Reissued:	10 May 2019

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed in part.

C The sentence imposed in respect of the sexual violation by rape charges is quashed and a sentence of 18 years and six months' imprisonment is substituted.

D **The sentence imposed in respect of the wilful ill-treatment charge is quashed and a sentence of one year and six months' imprisonment is substituted, to be served cumulatively.**

E **The minimum period of imprisonment imposed is also quashed and an MPI of eight years and six months is substituted.**

F **The sentences imposed on all other charges remain and are to be served concurrently.**

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, T, was convicted of 31 offences following a jury trial before Judge D G Harvey in the District Court at Whangarei in late-2017. He now appeals against conviction and his sentence of 23 years, and the imposition of a minimum period of imprisonment (MPI) of 10 years. The appeal against conviction is brought on the ground that there has been a miscarriage of justice and against sentence on the ground that it is manifestly excessive.

Offending

[2] The Crown case was that T committed the offences against his stepdaughters, J and K, and his stepson D. T and the children's mother, A, commenced a relationship in 2005 and married in 2008. They separated in early-2014. Thereafter the children remained in T's care until June 2015 when they went to live with A's sister, O. This not only brought an end to the offending, but led to the police investigation and the laying of charges against T. T denied all of the allegations against him.

[3] The trial commenced on Monday, 30 October 2017. The Crown adduced evidence from J, K and D, their evidence in chief being given by evidential video interviews. The Crown also called A, O, a psychologist who gave "counterintuitive" evidence and several police officers, including the officer in charge, Detective Bradshaw, to whom we refer below. The Crown closed its case on the

Monday of the second week, 6 November 2017, following which the defence called three witnesses, being T's parents and his daughter. Thereafter, counsel made their closing remarks, the Judge summed up and the jury returned with their verdicts on 9 November 2017.

J

[4] The offending against J, the older of the two girls, began in 2008 when she was seven, and persisted until June 2015. It comprised:

- 11 charges, six representative, of sexual violation by rape;
- two of sexual violation by unlawful sexual connection;
- two of indecent assault of a child younger than 12 years, of which one was representative; and
- two of supplying cannabis to a person younger than 18 years, both representative charges.

[5] T was alleged to have supplied cannabis to both girls to facilitate the offending.

K

[6] T was convicted of 12 charges against K. This offending began in 2013, when K was seven and likewise continued until June 2015. It comprised:

- five charges of sexual violation by rape, of which one was representative;
- two of indecent assault on a child younger than 12, one of which was representative;
- two assaults on a child, one of which was representative; and
- three of supplying cannabis to a person younger than 18 years, two of which were representative.

D

[7] The remaining two charges, one representative of assaulting a child and one of wilful ill-treatment, relate to D. D was aged eight when T first assaulted him in June 2013. The wilful-ill treatment consisted of giving alcohol to D — to the point where he was completely drunk — when he was aged seven. The jury acquitted T of a further four charges of violence relating to D, D being unable to recall the incidents described in his DVD interview.

Summary of offending

[8] In total, T was convicted of the following charges:

- 16 of sexual violation by rape, seven of which were representative;[1]
- two of sexual violation by unlawful sexual connection;[2]
- three of indecent assault on a child under 12 years, two of which were representative;[3]
- five of supplying cannabis to a person younger than 18 years, four of which were representative;[4]
- four of assault on a child, two of which were representative;[5] and
- one of wilful ill-treatment of a child.[6]

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1 Crimes Act 1961, s 128(1)(a): maximum penalty 20 years' imprisonment.
2 Section 128(1)(b): maximum penalty 20 years' imprisonment.
3 Section 132(3): maximum penalty 10 years' imprisonment.
4 Misuse of Drugs Act 1975, s 6(1)(d): maximum penalty eight years' imprisonment.
5 Crimes Act, s 194(a): maximum penalty two years' imprisonment.
6 Section 195: maximum penalty 10 years' imprisonment.

Sentencing

[9] The Judge sentenced T on 18 December 2017. He put the offending against J and K within band four of *R v AM*, for which a starting point of 16 to 20 years will generally be appropriate.[7] The sentence of 23 years comprised:

(a) 18 years' imprisonment in respect of the offending against J;

(b) an uplift of two years for the offending against K. Judge Harvey considered this offending would have warranted a sentence of 16 years' imprisonment if tried separately; and

(c) three years' imprisonment for the offending against D.

Appeal against conviction

[10] The appeal against conviction is brought on the ground that a miscarriage of justice has occurred for two reasons. The first is that the trial was unfair because a former police officer was a member, and indeed foreperson, of the jury giving rise to the risk of juror bias. The second ground is alleged error by T's trial counsel, Mr Fairley, in several respects, including failing to challenge the juror's presence on the jury.

[11] A miscarriage of justice will have occurred if any error, irregularity, or occurrence in or in relation to or affecting the trial has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.[8] A "real risk" arises if "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".[9]

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7 *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.
8 Criminal Procedure Act 2011, s 232(4).
9 *Swain v R* [2018] NZCA 259 at [22], citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110]; and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [29].

G

[12] After trial, Mr Fairley received three letters, signed "G". G claims to have been a juror at the trial and makes a number of allegations as to events that transpired in the course of trial and after verdicts were taken. There is no evidence as to who G is, or that he or she was a member of the jury as claimed. Mr Krebs does not place any reliance on the letters and we disregard them accordingly.

First ground of appeal — juror issue

[13] The submission for T as regards the juror is that the risk that they could not and did not bring an open mind to her task is so great that this Court cannot be sure that T had a fair trial.

[14] The background to this ground of appeal, set out in the next few paragraphs, derives from a report from the Judge; affidavits from Detective Bradshaw and her supervisor, Detective Senior Sergeant (DSS) Clayton; and parts of Mr Fairley and T's affidavits on appeal.

Judge's report

[15] The juror spoke to the Judge when her name was drawn in the balloting process. She told the Judge that she was a former police officer and that, although she knew the officer in charge (Detective Bradshaw), their relationship "was purely professional in nature and that she did not know her well". The Judge asked the juror whether the fact that she was a former police officer or her prior association with the officer in charge:

> … would in any way affect the way in which she dealt with the evidence. [The juror]'s answer was a very positive "Of course not".

[16] The juror did not ask to be excused, the Judge did not consider there were grounds on which to disqualify her and he allowed her to take her place on the jury accordingly. The Judge did not inform counsel of his discussion with the juror.

Affidavits of DSS Clayton and Detective Bradshaw

[17] Detective Bradshaw and the juror would seldom have encountered each other even though both worked at the Whangarei station. The juror was uniformed staff, transferred to Whangarei in 1997, thereafter was promoted to senior sergeant and was the station senior sergeant for approximately five years before leaving the police. As such, her role was to "run the front counter and watchhouse areas".

[18] Detective Bradshaw was a member of the station's CIB staff. As such she was required to investigate allegations of serious crime. Detective Bradshaw joined the CIB staff at the Whangarei station in May 2008.

[19] Uniformed and CIB staff rarely work together, are situated on different floors of the station and any social events for the two groups are conducted separately for logistical reasons. Detective Bradshaw's evidence, consistent with the juror's advice to the Judge, is that she had never socialised with the juror, and that she had no relationship with her, professional or otherwise, beyond serving at the same police station.

Mr Fairley

[20] Mr Fairley had already used T's four challenges without cause before the juror's name was called and, in any event, he only recognised her as a former police officer after the jury had been empanelled. Mr Fairley spoke to T regarding the juror during the lunch adjournment on the first day of trial. He told T that he understood the juror had left the police after her partner, also in the police, had apparently been involved in a drink-driving incident, and thus it should not be assumed she would favour the Crown. Mr Fairley also advised that there might not be grounds to challenge the juror's presence on the jury, as presumably she had informed the Judge of her former occupation when she spoke to him, and that occupation on its own would not preclude her serving on the jury. Mr Fairley is correct that the juror was not automatically disqualified from serving by reason of her former employment.[10]

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[10] Juries Act 1981, s 25(3).

[21] Mr Fairley's evidence was that, after this discussion, T agreed that she should be left to serve as a juror and he signed Mr Fairley's contemporaneous note to this effect. Accordingly, no challenge was made.

T

[22] T's evidence on this point is that he learned that the juror was a former police officer after the trial commenced, by which time it was impossible to "do anything about it". However, this evidence from T does not refer to Mr Fairley's evidence that the two made a tactical decision not to challenge the juror's presence on the jury.

Submissions

[23] Mr Krebs does not contend that the juror was biased in fact but rather that, as a former police officer, she cannot be seen to have brought an open and impartial mind to her task as a juror, such that this Court cannot be satisfied that T received a fair trial.[11] Mr Krebs submitted that the juror's own actions in disclosing her former occupation to the Judge are evidence of this.

[24] Mr Krebs also submitted that, as the forewoman, the juror would have had influence in the jury room; that in all likelihood the jury came to know that she had been a police officer and an experienced one at that; that the jury would have looked to her to "fill in the gaps"; and that the Judge failed to give counsel an opportunity to make submissions on whether the juror should be excused.

[25] Ms Grau, Crown counsel, acknowledged that the Judge ought to have informed counsel of his discussion with the juror and given them an opportunity to respond — we agree — but she rejects this submission overall. First, she makes the point that the juror was not disqualified from serving as a juror by reason of her former employment.[12] Secondly, there is no suggestion that the juror had any personal connection to the case or to any party or witness.[13]

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11 New Zealand Bill of Rights Act 1990, s 25(a) "the right to a fair and public hearing by an independent and impartial court".

12 Juries Act 1981, s 8.

13 Section 16(3)(b).

Discussion

[26] As a former police officer, the juror was not disqualified from serving on the jury. Although s 8 of the Juries Act 1981 disqualifies a person engaged in a particular occupation, such as a Member of Parliament, a Judge, and a police officer from serving, that disqualification continues only whilst the person is so engaged, quite possibly because thereafter there is no longer any reason to assume, without more, a lack of independence from, or partiality to, the prosecution.[14]

[27] That said, any jury must be impartial and be seen to be so. The jury in this case will not be seen to be impartial if a fair-minded and informed member of the public would have a reasonable apprehension or suspicion that the juror would not have discharged her task impartially.[15]

[28] In this case, that member of the public would know that the juror had resigned from the police some three years before the trial, that she had no past or present connection with the case or with Detective Bradshaw, and that she had given the Judge an assurance she was capable of performing her obligations.

[29] Aside from the authorities to which counsel referred us, we have also considered relevant English authority. The automatic disqualification provision that was previously included in the criminal procedure legislation in that jurisdiction has been repealed, so that a serving police officer (amongst others) may serve on a jury.[16] This has given rise to a number of appeals in which allegations of apparent bias have been made on the ground that the appellant's jury included a police officer and that the fairness of the trial was therefore in doubt. In resolving those appeals, the courts have considered all the circumstances of the trial such as the juror's connection to the case or to an officer involved in the trial, or the extent to which the jury's verdict might have depended on whether or not it accepted contentious evidence given by a police officer at trial.[17] In the latter case, apparent bias is more likely to be found.

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14 *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 502 at [3].
15 *R v C (CA395/2008)* [2009] NZCA 272, [2010] 2 NZLR 289.
16 Criminal Justice Act 2003 (UK), sch 33.
17 *R v Khan*, above n 14. See also *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679.

[30] In the present case, the critical issue for the jury was whether it accepted the complainants' evidence. The police evidence was uncontroversial. The evidence of the child interviewers was read by consent and Detective Bradshaw's evidence concerned her arrest of T and of his two prior convictions for assault on K. Informed of these matters, we consider a member of the public even less likely to apprehend any possibility of bias on the part of the juror.

[31] We mention three other points. The first is that we do not agree with Mr Krebs that the juror's approach to the Judge should be construed as recognition by her of a "problem". It was the responsible thing to do. The second is that Mr Krebs' submission as to the juror's standing and influence with the jury is entirely speculative. The third is Ms Grau's submission to the effect that T made an informed decision to proceed with the trial with her on the jury. A similar situation arose in *Turner v R*,[18] in which the defendant's trial counsel decided to take no action when he became aware that the foreman on the jury had, until comparatively recently, been a senior police officer and in charge of prosecutions at a local police station. This Court said that, by allowing the trial to proceed, the defendant in that case had waived any right to contend that there was a risk of injustice.

[32] Mr Krebs expressed reservations about *Turner* given the failure to refer to s 25(a) of the New Zealand Bill of Rights Act 1990 and to other important authority.[19] We decline to revisit *Turner*. In this case, T made an informed decision to proceed and we are not persuaded it was wrong.

[33] Lastly on this point, we agree with both counsel that the Judge ought to have given counsel the opportunity to make submissions as to whether she should sit on the jury. Although nothing has come to light which suggests the juror should have been excluded, a future case may be different.

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[18] *R v Turner* CA 439/95, 25 July 1996. The pertinent test being whether the juror's irregular, or purportedly irregular, conduct or status would "give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially": *Webb v The Queen* (1994) 181 CLR 41; *R v Tainui* [2008] NZCA 119; *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495; *Cavanagh v R* [2010] NZCA 36; and *Fraser v R* [2010] NZCA 313.

[19] *Webb v The Queen*, above n 18.

Alleged counsel error

[34] Mr Krebs submitted that Mr Fairley erred in his conduct of the trial and in his advice to T in several respects. The errors alleged concern matters of judgment of the type that will generally only give rise to a miscarriage of justice if the decision was not one competent counsel would have made and if what occurred may have affected the outcome.[20]

[35] The most significant failure alleged is Mr Fairley's advice to T that neither he nor his wife, M, should give evidence. Mr Krebs advised this is T's principal complaint, so we shall address it first.

Mr Fairley's advice to T that he should not give evidence

[36] Up to the fifth day of trial, Friday 3 November 2017, both Mr Fairley and T expected that the latter would give evidence, denying all offending. T was willing to give evidence and Mr Fairley thought that he would be a good witness in his own defence. Mr Fairley had a comprehensive brief of evidence, and had had many discussions with T.

[37] On 3 November the Crown prosecutor, Ms O'Connor, provided Mr Fairley with several still photographs taken from what is referred to as the "waxing" video. It was these photos, and the video itself, which caused Mr Fairley to reconsider whether T and M should in fact give evidence.

Video

[38] Although the prosecution had disclosed the video in April 2017, Mr Fairley did not watch it prior to trial.

[39] We watched most of this nine-minute video during the hearing of the appeal. It had been taken on J's cell phone, and it showed M waxing around T's anus whilst he was lying face down on a bed, naked but for a pair of underpants which he pulled up and down as required. J and K were both present and can be heard giggling in the

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[20] *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [77].

background. We add that it was seeing this video on J's cell phone that caused the children's mother, A, and aunt, T, to make immediate contact with the police.

[40] Mr Fairley's evidence, denied by T but borne out by Mr Fairley's contemporaneous notes, is that he and T had a conversation on the Friday to the effect T would consider the implications of the video over the weekend. T of course knew what was in the video. Mr Fairley's note of this discussion, signed by T, also recorded that T knew the Crown might seek to cross-examine him on the video and show it to the jury if he gave evidence. Another note Mr Fairley made later that day confirmed that over the weekend T was to think about the issue, and about whether M should be called.

[41] T and Mr Fairley watched the video together prior to Court on Monday, 6 November 2017. Mr Fairley's notes record that T thought "the … video was not as bad as thought, not ideal but agree not a reason not to give evidence". T then went to Court.

[42] On viewing the video, Mr Fairley was concerned that it would be highly prejudicial to the defence if the jury saw it. We agree. Mr Fairley considered, again correctly in our view, that the video showed J and K, both still very young girls, had been sexualised, and that T did not observe appropriate boundaries as to what was and was not suitable for young children. Mr Fairley also thought the video admissible, as do we (and Mr Krebs did not disagree); that the Crown was almost certain to play the video if T gave evidence denying sexual contact with the children; and that this would severely damage, if not destroy, his credibility. Likewise with M, who was present throughout the event.

[43] To double check his assessment, before going to Court himself, Mr Fairley showed the video to several members of his firm, including two secretaries and two former prosecutors. All confirmed that it would be highly damaging to the defence case if the jury saw the video.

[44] The Crown closed its case without having produced the video or the photographs, something that Mr Fairley (and apparently T) considered a very lucky

break. The two continued their discussions about whether T and M should give evidence, but with no final decision needing to be made until the Crown closed its case. They had a final discussion after the Crown closed its case and, again, this is recorded in a note Mr Fairley made and which T signed. This note records that Mr Fairley made it clear the decision to give evidence was T's alone; recorded that the juror had a teenage daughter and might particularly dislike the video; linked the video to counterintuitive evidence that had just been given; recorded that T had decided not to give evidence because it was dangerous to do so and that M should not be called; and that Mr Fairley should call T's parents and daughter to give evidence. Mr Fairley had asked Mr Aaron Harvey, who is at Mr Fairley's firm and about whom a separate point arises, to be present to ensure that T's instructions were correctly recorded and Mr Harvey's note is in similar terms.

[45] In his evidence to us, T did not agree that he saw the still photographs or that he had any discussion with Mr Fairley about the ramifications of the video before the Monday morning. To the extent he accepted Mr Fairley's advice not to give evidence, T did so reluctantly and under pressure. T acknowledged that he would have been subject to a forceful cross-examination but said he wished to give evidence to defend himself and to express his innocence.

Submissions

[46] Mr Krebs submitted that Mr Fairley's failure to watch the video well before he did put T under time pressure to make the critical decision of whether or not he should give evidence. That decision was, obviously, very important because if T gave evidence, he was likely to be confronted with the video but if he did not the jury would not hear him denying the offending. T had not made a statement to the police.

[47] Mr Krebs also submitted that, much as the video might appear very damaging on first watching, its impact could have been alleviated by emphasising certain matters to the jury. These included that the video did not disclose any offending, that T did not expose his genitals at any time, that he and M did not engage in any sexual behaviour in front of the girls, and that he was always careful to pull up his underpants when he was turning over on the bed. Mr Krebs also submitted that Mr Fairley could

have asked the Judge to direct the jury as to the proper use of the video in their deliberations.

[48] Having seen the video, we doubt these proposed "damage limitation" measures would have been of much help to T.

[49] Mr Krebs also submitted that Mr Fairley might have proceeded differently at trial had he and T discussed the video earlier, and that the expectation of calling T might have affected Mr Fairley's conduct of the case. Mr Fairley denied this and Mr Krebs could not identify anything in the record to support his submission. We say no more about it accordingly.

[50] In response, Ms Grau submitted that T had sufficient time in which to make his decision. The issue of the video had been raised with him on the Friday morning and he knew what was in it. She also submitted that T had several discussions with Mr Fairley about the issue and, ultimately, made his own decision on whether or not he would give evidence.

Discussion

[51] We are satisfied that T had sufficient time to decide whether or not he should give evidence, that is from the Friday to the Monday. He was not asked to decide "on the spot" and he knew what was in the video.

[52] Mr Krebs submitted that Mr Fairley might have sought an adjournment or mistrial to give T more time. He did not explain, however, how more time might have affected the decision. Moreover, we consider it highly improbable that any Judge would have allowed such an application in the prevailing circumstances.

[53] When T made his decision not to give evidence, he had Mr Fairley's considered view, reinforced by others in Mr Fairley's office, that he was very likely to be convicted if the jury saw the video, but that he had some prospect of acquittal if they did not. Having had that advice, T elected not to give evidence. The fact that T was convicted does not mean the advice or the decision was wrong.

[54] Given the above, we are not persuaded that there was any error on the part of counsel giving rise to a miscarriage of justice.

The juror

[55] Mr Fairley's failure to advise T to challenge the juror is also submitted to be counsel error. For the reasons given above we are satisfied there was no error.

Failure to call certain witnesses

[56] T's next point is that Mr Fairley erred in not calling several witnesses whose evidence could have demonstrated that A was or is a habitual liar who fabricated the complaints and put the children up to testifying.

[57] There is nothing in this point. Mr Fairley's evidence is that he called such witnesses as T instructed, being T's parents and his daughter. M was not called for the reasons given above. Mr Fairley says that he had no instructions to call the witnesses now identified by T and that he had no briefs of evidence for them; that he had a positive instruction that he should not call one of them; and that, to the extent their evidence might have been material, it was adduced in any event, through the complainants and A.

Alleged inadequacies in cross-examination

[58] T also submitted that Mr Fairley was insufficiently aggressive in cross-examining D.

[59] Under cross-examination, D retreated from many of the very serious allegations he had made against T, usually by saying that there had been a "mistake" or he could not "remember" the incident alleged. The point made for T is that this presented an opportunity to demonstrate that A had engineered the allegations and that Mr Fairley failed to capitalise on it.

[60] Mr Fairley's assessment was that T's case would not be assisted by him "sledgehammering" D and his retractions. D was young, the jury would not have been

impressed by Mr Fairley attacking him, and Mr Fairley was confident the jury had "got the message" in any event.

[61] We do not consider there is anything in this point. It was for Mr Fairley to decide how best to cross-examine D, and this Court will not second-guess such decisions, as there is no prospect of their affecting the outcome of the trial.

Apparent counsel bias

[62] Mr Harvey, to whom we referred above, is Judge Harvey's son and employed at Mr Fairley's firm. T's evidence is that he would have instructed other lawyers had he known this. Again, there is nothing in this objection. Mr Fairley did not tell T of Mr Harvey's relationship with Judge Harvey because he considered it irrelevant. Mr Harvey had no involvement in the trial, save in the respect referred to above, and giving Mr Fairley his views on the video, which were the same as Mr Fairley's own.

Adequacy of preparation

[63] Mr Krebs elected not to pursue an earlier suggestion that Mr Fairley's preparation for trial had been inadequate.

Result on appeal against conviction

[64] It follows from the above that we dismiss the appeal against conviction.

Appeal against sentence

District Court

[65] As we said at the outset, the Judge adopted a starting point of 18 years for the offending against J, with an uplift of two years for the offending against K. The Judge considered that, on its own, the offending against K would have warranted a starting point of 16 years. The Judge imposed a three year, cumulative, sentence for the offending against D. He did not uplift for T's prior convictions which were of no particular relevance but equally made no allowance for any personal mitigating factors, so the end sentence remained unchanged. The Judge considered that all of the

purposes for which an MPI might be imposed were present, and that the maximum of 10 years would be appropriate.

Submissions

[66] There was no dispute in the District Court, or in this Court, that the starting point for the offending against J and K fell to be determined by reference to *R v AM*.[21]

[67] The Crown, and the Judge, placed this offending squarely within band four, meaning a starting point of 16 to 20 years' imprisonment. Contrary to this, Mr Fairley submitted in the District Court, and Mr Krebs in this Court, that the offending was on the cusp of bands three and four. Mr Krebs submitted the offending against J should attract a starting point of no more than 16 years' imprisonment, with an uplift of 12 to 18 months for K. He submitted the offending against D should have been dealt with by an uplift of one year. This gives a total starting point and, in this case, end sentence of no more than 18 years, six months.

[68] Mr Krebs also submitted that there was no need for an MPI on a sentence of such length. The minimum of six years that T would inevitably serve was sufficiently long to meet all requisite purposes, and an MPI, let alone one of 10 years, was crushing.

[69] The Crown submitted that the end sentence was within range. The combined starting point of 20 years for the offending against the two girls could not be considered manifestly excessive; a cumulative sentence for the offending against D was required, although three years might be at the upper end; and overall the end sentence of 23 years was not excessive because the starting point for the offending against the girls might have been higher. As to the MPI, Crown counsel submitted this was routine, and she supported the Judge's determination that an MPI was required in this particular case.

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[21] *R v AM*, above n 7.

Discussion

[70] The offending against J and K, consisting of the repeated rape of one or more family members, requires a starting point within band four. Indeed, this case is on all fours with what the Court of Appeal in *R v AM* described as the "paradigm" case, warranting a starting point at the higher-end of the 16 to 20-year range.[22] The aggravating features are obvious: sustained offending over a lengthy period against young, vulnerable victims; breach of trust given that T stood in the place of the girls' father; planned and pre-meditated offending; and causing incalculable harm. It was facilitated by T plying the girls with cannabis so they were incapable of resistance and, in K's case, by violence. The Judge was satisfied both girls would have been terrified of T.

[71] Although different in kind, the offending against D occurred within the same time period. In our view, the most this offending warranted was one year to 18 months, so three years was manifestly excessive. We also consider another Judge might have considered a concurrent sentence should be imposed.

[72] Standing back, we agree with Mr Krebs that the overall sentence of 23 years was manifestly excessive and that an end sentence of 20 years was appropriate. We consider 18 years, six months' is the proper sentence for the offending against J and K, and 18 months, on a cumulative basis, warranted for the offending against D.

[73] There are no mitigating circumstances that call for a reduction in the sentence. T was able to produce references attesting to his work ethic and some positive characteristics. But he cannot claim prior good character. He has a substantial list of convictions for offences of dishonesty and male assaults female, and the offending in this case occurred over a long period.

[74] We agree that the circumstances were such that an MPI was warranted. Serious and sustained intra-family offending of this kind calls for accountability and denunciation. That said, the maximum MPI of 10 years was not required and, taking

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22 *R v AM*, above n 7, at [109].

into account our reduction to the end sentence, we reduce the MPI to eight years, six months.

Result

[75] The appeal against conviction is dismissed.

[76] The appeal against sentence is allowed in part.

[77] We quash the sentence of 20 years' imprisonment on all charges of sexual violation by rape and substitute a sentence of 18 years and six months' imprisonment.

[78] We quash the sentence of three years' imprisonment on the charge of wilful ill-treatment and substitute a sentence of one year and six months' imprisonment, cumulative on the sentence imposed in [77].

[79] We reduce the minimum period of imprisonment from 10 years to eight years and six months.

[80] The sentences imposed on all other charges remain and are to be served concurrently.

Solicitors:
Crown Law Office, Wellington for Respondent